**Agenda Item II.B.**

# Society of American Archivists
# Council Meeting
# December 3-5, 2019
# Chicago, Illinois

## Consent Agenda: Ratify Executive Committee Interim Actions

**(Prepared by Governance Manager Felicia Owens)**

### BACKGROUND

Current parliamentary policy agrees on validating board decisions made remotely, and ratifying the Council's online and conference-call decisions via the Consent Agenda does not conflict with any existing SAA policy.

### DISCUSSION

Given the Executive Committee's use of an e-mail discussion list to function as a group and make decisions remotely, approving interim Executive Committee actions via the Consent Agenda contributes to streamlining the group's work and improves access to the interim decisions of SAA's elected decision makers.

### RECOMMENDATION

**THAT the following interim actions taken by the Executive Committee between August 20, 2019, and November 25, 2019, be ratified:**

- Signed on to an amicus brief to support the principle that district counts have the authority to order unsealing, in alignment with previous amici briefs that SAA has supported. (Appendix A) (August 20, 2019)

- Approved a Call for Applicants for SAA Publications Editor. (August 22, 2019)

- Approved revisions to the CoSA/NAGARA/SAA Joint Statement on Conducting Public Business in Non-Government Email Accounts, first published in June 2015. The minor revisions included adding "other commercial electronic messaging apps and services." (September 6, 2019)

- Signed on with the American Library Association, Association of College and Research Libraries, Association of Research Libraries, and Software Preservation Network to a September 27 *amicus* brief to the U.S. Supreme Court in *Allen v. Cooper*, recognizing and celebrating the special role that state-owned archives and libraries have in preserving culture. (October 1, 2019)

- At the request of SAA representative to the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) William Maher, sent a letter to the National Archives of Columbia to request their support for the SCCR to work toward an international instrument to provide copyright extensions that enable archives preservation. (October 23, 2019)

- Issued a statement in support of the National Archives and Records Administration (NARA) inquiry into Wilbur Ross' alleged misuse of private email to conduct government business. (October 29, 2019)
- Approved a request from the SAA Technical Subcommittee on Encoded Archival Standards to create patch releases when necessary to address bug fixes for SAA standards (and most readily for EAD3). (Appendix B) (November 25, 2019)

2019 WL 512157
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

Anthony S. PITCH, Plaintiff - Appellee,
v.
UNITED STATES of America,
Defendant - Appellant.

No. 17-15016
|
(February 11, 2019)

**Synopsis**
**Background:** Historian petitioned court for order unsealing federal grand jury records concerning the murder of four African-Americans in an incident commonly known as the "Moore's Ford lynching." The United States District Court for the Middle District of Georgia, Marc T. Treadwell, J., 275 F.Supp.3d 1373, No. 5:14-mc-00002-MTT, granted the petition. Government appealed.

**[Holding:]** The Court of Appeals, Wilson, Circuit Judge, held that district court did not abuse its discretion in finding disclosure under court's inherent authority of grand jury records was warranted due to historical significance.

Affirmed.

Jordan, Circuit Judge, filed a concurring opinion.

James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation, filed a dissenting opinion.

West Headnotes (26)

**[1] Grand Jury**

Appellate courts review a district court's disclosure of grand jury transcripts for abuse of discretion.

Cases that cite this headnote

**[2] Federal Courts**

A court abuses its discretion when it commits an error of law.

Cases that cite this headnote

**[3] Grand Jury**

Grand jury secrecy is an integral part of the criminal justice system.

Cases that cite this headnote

**[4] Grand Jury**

Even after an investigation has ended, grand jury proceedings generally remain secret.

Cases that cite this headnote

**[5] Grand Jury**

The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow.

Cases that cite this headnote

**[6] Grand Jury**

A party invoking the grand jury secrecy exception for records sought in connection with a judicial proceeding must prove that the material they seek is needed to avoid a possible injustice in another court proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. Fed. R. Crim. P. 6(e)(3)(E)(i).

Cases that cite this headnote


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**[7] Grand Jury**

District courts retain inherent power beyond the literal wording of Rule of Criminal Procedure governing disclosure of grand jury records to disclose grand jury material not otherwise covered by the exceptions. Fed. R. Crim. P. 6(e).

Cases that cite this headnote

**[8] Federal Courts**

Courts are not at liberty to disregard binding case law that is closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.

Cases that cite this headnote

**[9] Grand Jury**

The exceptions to the general rule of secrecy for grand jury records permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance with the rule's general rule of secrecy. Fed. R. Crim. P. 6(e).

Cases that cite this headnote

**[10] Grand Jury**

Petitioners and district courts cannot rely on inherent authority to circumvent a plainly applicable and unambiguous enumerated exception in Rule of Criminal Procedure governing disclosure of grand jury records. Fed. R. Crim. P. 6(e).

Cases that cite this headnote

**[11] Grand Jury**

A district court may only invoke its inherent authority to disclose grand jury records when an enumerated exception in the Rule of Criminal Procedure governing disclosure of grand jury records does not directly govern the requested disclosure. Fed. R. Crim. P. 6(e).

Cases that cite this headnote

**[12] Grand Jury**

A petitioner has the burden of proving that exceptional circumstances exist for a district court to disclose grand jury records under its inherent authority.

Cases that cite this headnote

**[13] Grand Jury**

While district courts have inherent authority to act outside Rule of Criminal Procedure governing disclosure of grand jury records, any inherent disclosure authority is exceedingly narrow. Fed. R. Crim. P. 6(e).

Cases that cite this headnote

**[14] Grand Jury**

Courts are not empowered to act outside Rule of Criminal Procedure governing disclosure of grand jury records in other than exceptional circumstances consonant with the rule's policy and spirit. Fed. R. Crim. P. 6(e).

Cases that cite this headnote

**[15] Grand Jury**

Exceptional circumstances exist for a court to disclose grand jury records under its inherent authority when the need for disclosure outweighs the public interest in continued secrecy.

Cases that cite this headnote

**[16] Grand Jury**

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Nondisclosure of grand jury records prevents the escape of those whose indictment may be contemplated, ensures the utmost freedom to the grand jury in its deliberations, prevents tampering with the witnesses who may testify before the grand jury, encourages free and untrammeled disclosures by persons who have information about the commission of crimes, and protects the innocent accused who is exonerated from public disclosure that he had been under investigation.

Cases that cite this headnote

**[17] Grand Jury**

Given the importance of grand jury secrecy, the burden on a petitioner seeking disclosure is high.

Cases that cite this headnote

**[18] Grand Jury**

The need for disclosure for grand jury records requires a fact intensive analysis that depends on the competing interests in a particular case.

Cases that cite this headnote

**[19] Grand Jury**

Under the proper circumstances, grand jury records on a matter of exceptional historical significance may trigger a district court's inherent authority to disclose them.

Cases that cite this headnote

**[20] Grand Jury**

District court did not abuse its discretion in finding disclosure under court's inherent authority of grand jury records concerning the murder of four African-Americans in an incident commonly known as the "Moore's Ford lynching" was warranted due to historical significance; party seeking disclosure was accomplished author and historian, who had previously published a book about the incident, no defendant in the grand jury proceedings had objected to disclosure, author sought disclosure to write about the incident in connection to civil rights movement, incident was subject to continued national media attention, court gave parties opportunity to object to specific portions of the records, details of event were sparse despite occurring in front of crowd, no one was prosecuted, and over 70 years had passed. Fed. R. Crim. P. 6(e).

Cases that cite this headnote

**[21] Grand Jury**

In determining whether to disclose grand jury records on a matter of exceptional historical significance, historical importance is objective; it must be distinguished from journalistic intrigue, public curiosity, or even a subjective importance to family and friends.

Cases that cite this headnote

**[22] Grand Jury**

Courts should give any party opposing disclosure of grand jury records the opportunity to object to specific portions of the records; the district court should engage in the a balancing test to determine whether, and how much, those portions should be redacted or omitted.

Cases that cite this headnote

**[23] Grand Jury**

In determining whether to disclose grand jury records as a matter of exceptional historical significance, the interest in continued secrecy of the records is undercut if details in the records have been publicized.

Cases that cite this headnote


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**[24] Grand Jury**

The passage of time will often be the touchstone of an inquiry in determining whether to disclose grand jury records as a matter of exceptional historical significance.

Cases that cite this headnote

**[25] Grand Jury**

Even if other factors weigh strongly in favor of disclosure of grand jury records as a matter of exceptional historical significance, an insufficient passage of time since the grand jury proceedings took place is fatal to the petitioner's request for disclosure; the passage of time erodes many of the justifications for continued secrecy.

Cases that cite this headnote

**[26] Grand Jury**

In determining whether to disclose grand jury records as a matter of exceptional historical significance, the sufficiency of the passage of time must be viewed in light of the policy underlying grand jury secrecy, that is, to protect the important truth-seeking function of grand juries; as a result, the passage of time generally must be long enough that the principal parties to the investigation, that is, the suspects and witnesses, and their immediate family members have likely died, and that there is no reasonable probability that the government would make arrests based on the disclosed information.

Cases that cite this headnote

**Attorneys and Law Firms**

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Bradley Hinshelwood, Mark R. Freeman, U.S. Department of Justice, Civil Division, Appellate Staff, Mark R. Freeman, Michael Raab, U.S. Attorney General's Office, Washington, DC, William Taylor McNeill, U.S. Attorney's Office, U.S. Attorney Service - Middle District of Georgia, U.S. Attorney's Office, Macon, GA, for Defendant - Appellant.

Appeal from the United States District Court for the Middle District of Georgia, D.C. Docket No. 5:14-mc-00002-MTT

Before WILSON and JORDAN, Circuit Judges, and GRAHAM, * District Judge.

**Opinion**

WILSON, Circuit Judge:

***1** In 1946, a crowd of people in Walton County, Georgia gathered as two African American couples were dragged from a car and shot multiple times. [1] Many consider this event, known as the Moore's Ford Lynching, to be the last mass lynching in American history. Racial tensions in Georgia were high. African American citizens were allowed to vote in a Georgia Democratic Party primary for the first time that year. [2] The murders occurred shortly after the primary and immediately garnered national media attention. National outrage, including condemnation from then Special Counsel to the NAACP Thurgood Marshall, ultimately led President Harry Truman to order an FBI investigation. In late 1946, a district court judge in Georgia convened a grand jury. But after sixteen days of witness testimony, no one was ever charged. The case remains unsolved.

Over seven decades later, Anthony Pitch, an author and historian, petitioned the Middle District of Georgia for an order unsealing the grand jury transcripts. The district court granted his request. The government now appeals, arguing the district court abused its discretion in unsealing the transcripts. After careful review and with the benefit of oral argument, we affirm.

**I. Factual and Procedural Background**

Anthony Pitch wrote a book about the Moore's Ford Lynching. In 2014, while researching the event for the


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book, Pitch petitioned the Middle District of Georgia to unseal the federal grand jury records related to the incident. Initially, the district court denied the petition without prejudice because Pitch did not present evidence that the records even existed. Three years later, Pitch renewed his petition, arguing that his investigation revealed that the records were at the National Archives in Washington, D.C. The district court ordered the government to produce the records for in camera inspection. The government filed the transcripts under seal. And against the objections of the government, the district court ordered the transcripts be unsealed. To do so, the district court relied on its inherent authority under *In re Petition to Inspect & Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261 (11th Cir. 1984).

On appeal, the government argues first, that the district court lacked inherent authority to disclose the transcripts, and second, even assuming the district court had inherent authority, the court exceeded that authority by permitting disclosure based solely on the historical significance of the Moore's Ford Lynching. Because we are bound by our decision in *Hastings*, we affirm. *See Kondrat'yev v. City of Pensacola, Fla.*, 903 F.3d 1169, 1174 (11th Cir. 2018) (per curiam) ("[O]ur precedent—in particular, our precedent about precedent—is clear: '[W]e are not at liberty to disregard binding case law that is ... closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.' " (quoting *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) ) ).

## II. Power of District Courts to Disclose Grand Jury Records

***2** **[1]** **[2]** The government argues that the district court erred in invoking its inherent authority to disclose the grand jury records. We review a district court's disclosure of grand jury transcripts for abuse of discretion. *United States v. Aisenberg*, 358 F.3d 1327, 1338 (11th Cir. 2004). A court abuses its discretion when it commits an error of law. *United States v. Brown*, 332 F.3d 1341, 1343 (11th Cir. 2003).

### *A. Statutory Authority to Disclose Grand Jury Records*

**[3]** **[4]** **[5]** Grand jury secrecy is "an integral part of our criminal justice system." *Blalock v. United States*, 844 F.2d 1546, 1555 (11th Cir. 1988) (per curiam). Even after an investigation has ended, grand jury proceedings generally remain secret. "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958). Federal Rule of Criminal Procedure 6(e) codifies the general rule prohibiting the disclosure of grand jury records. Rule 6(e) requires that "[r]ecords, orders, and subpoenas relating to grand-jury proceedings ... be kept under seal ... to prevent the unauthorized disclosure of a matter occurring before a grand jury." FED. R. CRIM. P. 6(e)(6).

**[6]** Rule 6(e) also codifies a list of exceptions to its general rule of secrecy. The only enumerated exception available to a party other than the government or a party in the grand jury proceeding is Rule 6(e)(3)(E)(i), which allows a court to authorize disclosure of grand jury records "preliminarily to or in connection with a judicial proceeding." A party invoking this exception must prove that "the material they seek is needed to avoid a possible injustice in another court proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Douglas Oil Co. of Ca. v. Petrol Stops NW*, 441 U.S. 211, 222, 99 S.Ct. 1667, 1674, 60 L.Ed.2d 156 (1979). Pitch agrees that he cannot benefit from this exception because the grand jury records he sought were not necessary in "another court proceeding."

### *B. Inherent Authority to Disclose Grand Jury Records*

**[7]** **[8]** **[9]** We have recognized that district courts retain "inherent power beyond the literal wording of Rule 6(e)" to disclose grand jury material not otherwise covered by the exceptions. *Hastings*, 735 F.2d at 1268.[3] "[T]he exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance with the Rule's general rule of secrecy." *Id.* at 1269; *accord United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004) ("Although Rule 6(e)(3) enumerates the exceptions to the traditional rule of grand jury secrecy, the Supreme Court and this Court have recognized that the district courts have inherent power


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beyond the literal wording of Rule 6(e)(3) to disclose grand jury material and that Rule 6(e)(3) is but declaratory of that authority."); *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997) ("[P]ermitting 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."); *Carlson v. United States*, 837 F.3d 753, 763 (7th Cir. 2016) ("Rule 6(e) is but declaratory of the long-standing principle that disclosure of grand jury materials is committed to the discretion of the trial court.") (internal quotation marks omitted).

***3** **[10]** **[11]** "This is not to say [Rule 6(e) ] is not normally controlling. It is." *Hastings*, 735 F.2d at 1268. Petitioners and district courts cannot rely on inherent authority to circumvent a plainly applicable and unambiguous enumerated Rule 6(e) exception. *See Aisenberg*, 358 F.3d 1327 (declining to allow petitioners to rely on inherent authority because petitioners' request was "preliminarily to or in connection with a judicial proceeding" under the Rule 6(e)(3)(E)(i) exception); *cf. Carlisle v. United States*, 517 U.S. 416, 426, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996) (holding that a district court could not use inherent authority to extend a plain and unambiguous Rule of Criminal Procedure that limited district court's authority to enter a judgment of acquittal to seven days). The upshot, then, is a district court may only invoke its inherent authority to disclose grand jury records when an enumerated Rule 6(e) exception does not directly govern the requested disclosure.[4] Both the government and Pitch agree that none of the exceptions in Rule 6(e) apply, which allows Pitch to survive this threshold inquiry.

## III. The District Court's Exercise of Discretion in the Present Case

**[12]** We must now decide whether the facts presented here constitute "exceptional circumstances" that allow a district court to employ its inherent authority to disclose grand jury records outside the confines of Rule 6(e). The petitioner has the burden of proving that "exceptional circumstances" exist. *See Hastings*, 735 F.2d at 1272–73.

### *A. The "Exceptional Circumstances" Test*

**[13]** **[14]** **[15]** "[W]hile district courts have inherent authority to act outside Rule 6(e)(3), any inherent disclosure authority is exceedingly narrow ...." *Aisenberg*, 358 F.3d at 1347. "[C]ourts are not empowered to act outside Rule 6(e) in other than exceptional circumstances consonant with the rule's policy and spirit." *Hastings*, 735 F.2d at 1269. Exceptional circumstances exist when the need for disclosure outweighs the public interest in continued secrecy. *Id.* at 1272, 1275; *see also Douglas Oil*, 441 U.S. at 223, 99 S.Ct. at 1275 ("[T]he court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and standards announced by this Court.").

**[16]** **[17]** On one side of the scale is the well-established public interest in secrecy of grand jury records. Nondisclosure of grand jury records "prevent[s] the escape of those whose indictment may be contemplated," ensures "the utmost freedom to the grand jury in its deliberations," prevents "tampering with the witnesses who may testify before the grand jury," encourages "free and untrammeled disclosures by persons who have information" about the commission of crimes, and protects the "innocent accused who is exonerated" from public disclosure that he had been under investigation. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n.6, 78 S.Ct. 983, 986 n.6, 2 L.Ed.2d 1077 (1958). Given the importance of grand jury secrecy, the burden on the petitioner is high.

**[18]** The weight on the other side of the scale—the need for disclosure—requires a fact intensive analysis that depends on the competing interests in a particular case. In *Hastings*, for example, we held that "the petition of a judicial investigating committee is the kind of request which, in proper circumstances, can trigger a district court's inherent power to release grand jury minutes." *Hastings*, 735 F.2d at 1269. In *Hastings*, we stated that "courts must adhere to Rule 6(e) in 'garden variety' petitions for grand jury disclosure," recognizing that the Rule "would be rendered meaningless if departures were freely sanctioned." *Id.* We emphasized there, as we do here, that "courts are not empowered to act outside Rule 6(e) in other than *exceptional circumstances*." *Id.* (emphasis added). In *Hastings*, it was "highly significant that the grand jury materials in question were sought ... pursuant to express statutory authority" of the judicial investigating committee. *Id.* at 1269–70. The court also considered that "a matter of great societal importance"—


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namely, "the important public interest in the integrity and independence of the judiciary"—was implicated. *Id.* Finally, while no enumerated Rule 6(e) exception governed the disclosure, the requested disclosure was analogous to those permitted by the Rule. *Id.* at 1271–72.

*B. The Exception for Matters of Exceptional Historical Significance*

***4 [19]** Under the proper circumstances, grand jury records on a matter of exceptional historical significance may trigger a district court's inherent authority to disclose them. Our sister circuits have developed a multi-factor inquiry for applying the balancing test set forth in *Hastings* to the disclosure of historically significant grand jury records.[5] In *In re Petition of Craig*, the Second Circuit outlined a "non-exhaustive list of factors that a trial court might want to consider when confronted with these highly discretionary and fact-sensitive" petitions:

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

131 F.3d 99, 106 (2d Cir. 1997). But "there is no talismanic formula or rigid set of prerequisites," and the specific circumstances of a case may lead to additional relevant factors. *Id.*

**[20]** The first two *Craig* factors ask us to consider the interests of the parties: the petitioner, the government, and the defendant in the grand jury proceeding. First, the petitioner, Pitch, is an accomplished author and historian. He has published many historical works, including a book about the Moore's Ford Lynching. As we discussed, while not dispositive, the government has a significant and well-established interest in grand jury secrecy that will always weigh against disclosure. *See Procter & Gamble*, 356 U.S. at 682 n.6, 78 S.Ct. at 986 n.6. Finally, no defendant in the Moore's Ford grand jury proceeding has objected to disclosure. *See Craig*, 131 F.3d at 106 ("And if a third-party stranger wishes to obtain release of data about secret meetings over the objection of the defendant, who, perhaps, was never indicted by the grand jury, then the trial judge should be extremely hesitant to grant release of the grand jury material.").

The third, fourth, and seventh *Craig* factors concern the historical importance of the information being sought. Pitch seeks disclosure for a legitimate, scholarly purpose: to research, write, and educate the public about a significant event in the civil rights movement. *Cf. Globe Newspaper Co. v. Sup. Ct. for Norfolk Cty.*, 457 U.S. 596, 604, 102 S.Ct. 2613, 2619, 73 L.Ed.2d 248 (1982) (discussing the constitutional right of the public to access records from criminal trials and reasoning that this right "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government" by protecting "the free discussion of governmental affairs"); *In re Petition of Kutler*, 800 F.Supp.2d 42, 48 (D.D.C. 2011) (reasoning that "[t]he disclosure of President Nixon's grand jury testimony would likely enhance the existing historical record, foster further scholarly discussion, and improve the public's understanding of a significant historical event.").

***5 [21]** Historical importance is objective. It must be distinguished from "journalistic intrigue, public curiosity, or even a subjective importance to family and friends." *Craig*, 131 F.3d at 105 n.8. The Moore's Ford Lynching is clearly an event of exceptional historical significance. Compared to the journalist or the family member of a victim that seeks access to the details of a salacious


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unsolved crime, the Moore's Ford Lynching is historically significant because it is closely tied to the national civil rights movement. Many consider it to be the last mass lynching in American history. There has been, and continues to be, national media attention and widespread public interest in the murders. According to Pitch, the Moore's Ford Lynching is credited as a catalyst to the President's Committee on Civil Rights, which President Harry Truman created by executive order the same week the Moore's Ford grand jury was convened. *See* Exec. Order No. 9808, 11 Fed. Reg. 14153 (Dec. 5, 1946). It would be difficult to deny—and the government does not attempt to do so on appeal—that the Moore's Ford Lynching is, objectively, an exceptionally significant event in American history.

**[22]** Despite considerable public interest, the details are sparse. Even with a crowd of witnesses, no one was prosecuted and no public proceedings were held.[6] For this reason, Pitch sought disclosure of the entire transcript from the grand jury proceedings. As the district court did here, courts should give any party opposing disclosure the opportunity to object to specific portions of the records. The district court should engage in the same balancing test to determine whether, and how much, those portions should be redacted or omitted. *See Douglas Oil*, 441 U.S. at 223, 99 S.Ct. at 1675 ("And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material ...."); *Hastings*, 735 F.2d at 1274–75 (approving the district court's "protective conditions").

**[23]** The interest in continued secrecy is also undercut if details in the records have been publicized. *See Craig*, 131 F.3d at 107; *cf. In re North*, 16 F.3d 1234, 1244–45 (D.C. Cir. 1994) (noting that widespread media release might undercut interest in secrecy to point where Rule 6(e) would not prohibit disclosure). Here, this factor weighs against disclosure. There is no indication that any portion of the grand jury records has been made public, permissibly or not.

**[24]** **[25]** **[26]** Finally, the passage of time will often be the touchstone of our inquiry. Even if other factors weigh strongly in favor of disclosure, an insufficient passage of time since the grand jury proceedings took place is fatal to the petitioner's request for disclosure. "[T]he passage of time erodes many of the justifications for continued secrecy." *Craig*, 131 F.3d at 107. The sufficiency of the passage of time must be viewed in light of the policy underlying grand jury secrecy: to protect the important truth-seeking function of grand juries.[7] As a result, the passage of time generally must be long enough that the principal parties to the investigation—the suspects and witnesses—and their immediate family members have likely died, and that there is no reasonable probability that the government would make arrests based on the disclosed information. *See id.*

Pitch requested the Moore's Ford grand jury transcripts seventy-one years after the grand jury proceeding took place.[8] No one has been charged, no one is currently under active investigation, and the principal parties to the investigation were adults at the time of the grand jury proceeding. Under these circumstances, seventy years is at or near the bounds of sufficient passage of time. There is no indication that any witnesses, suspects, or their immediate family members are alive to be intimidated, persecuted, or arrested. Like the court in *Craig*, we also find it significant that the historical interest in the Moore's Ford Lynching has persisted over time. *See Craig*, 131 F.3d at 107. Although it now seems nearly impossible that anyone will ever be charged, the investigation has been reopened many times, and the event has inspired annual reenactments and several books and articles spanning seven decades.

***6** Balancing these competing interests, the district court did not err in holding that the interest in disclosure outweighed the interest in continued secrecy.

## IV. Conclusion

"We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," but "a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion." *Douglas Oil*, 441 U.S. at 218, 99 S.Ct. at 1672. Given our binding decision in *Hastings*, and the truly "exceptional circumstances" presented by the Moore's Ford Lynching, we cannot say that the district court abused its substantial discretion in ordering the release of the grand jury transcripts. The judgment of the district court is affirmed.

**AFFIRMED.**


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JORDAN, Circuit Judge, concurring:
Three decades ago, we held that a federal court has inherent authority to order the disclosure of grand jury materials in situations not covered by the exceptions to secrecy set forth in Federal Rule of Criminal Procedure 6(e). *See In re Petition to Inspect & Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261, 1268 (11th Cir. 1984) (setting out an "exceptional circumstances" standard). I would have decided *Hastings* differently because allowing the use of inherent authority to go beyond the exceptions to grand jury secrecy set forth in Rule 6(e) seems too open-ended to me. *See Carlson v. United States*, 837 F.3d 753, 767-71 (7th Cir. 2016) (Sykes, J., dissenting).

Nevertheless, I join the court's opinion. Given our decision in *Hastings*, I do not see how we can say that the district court abused its discretion in relying on its inherent authority. In addition, I do not believe there is a persuasive basis to distinguish between the disclosure of grand jury materials for use by a judicial investigating committee (what was at issue in *Hastings*) and the disclosure of grand jury materials to discover the facts surrounding an event of exceptional historical significance (what is at issue here).

* * * * *

If we are going to deny disclosure here, we need to overrule *Hastings*, rather than attempt to distinguish it. My initial view, following oral argument, was that we should consider convening en banc to revisit *Hastings*. Upon further reflection, however, I have come to a different conclusion, and I'd like to explain why.

First, *Hastings* does not stand alone. Other federal courts have likewise invoked inherent authority to permit disclosure of grand jury materials in circumstances not covered by Rule 6(e). *See Carlson v. United States*, 837 F.3d 753, 763-66 (7th Cir. 2016); *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005); *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997); *In re Petition of Kutler*, 800 F.Supp.2d 42, 48 (D.C. Cir. 2011). *Cf. Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (en banc) (denying mandamus relief sought by the government to prevent the district court from disclosing to the House Judiciary Committee, post-indictment, a sealed grand jury report and accompanying evidence, while indicating "general agreement" with the district court's handling of the matter). And at least one court has left the door open to the use of inherent authority for disclosure in dicta. *See In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir. 2006).

***7** No federal court, as far as I can tell, has come to a contrary conclusion in a published opinion. The Eighth Circuit has said that "courts will not order disclosure [of grand jury materials] absent a recognized exception to Rule 6(e) or a valid challenge to the original sealing order or its implementation," *United States v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009), but it was not faced in that case with an argument for disclosure under inherent authority for matters of exceptional historical significance. Given the current array of authority, we would likely be creating a circuit split by overruling *Hastings*, and that should not be done lightly.

Second, whatever the initial reasons for keeping grand jury matters secret, *compare* George Edwards, Jr., The Grand Jury 116 (1906) [Legal Classics Library ed. 2003] (suggesting that the "original purpose [of grand jury secrecy] was that no offender should escape"), *with* Mark Kadish, *Behind the Locked Doors of an American Grand Jury: Its History, its Secrecy, and its Process*, 24 Fl. St. U. L. Rev. 1, 14 (1996) (explaining that the reasons for grand jury secrecy were varied, and included preventing the flight of suspected criminals, finding out whether witnesses were biased, and ensuring freedom from judicial oversight), in the United States grand jury secrecy was not always seen as an absolute. In cases decided before the enactment of the Federal Rules of Criminal Procedure, some federal courts—including the Supreme Court—held (or at least said) that secrecy is not required after an indictment is returned and the accused is in custody. "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). *Accord Metzler v. United States*, 64 F.2d 203, 206 (9th Cir. 1933); *Atwell v. United States*, 162 F. 97, 99-100 (4th Cir. 1908); *In re Grand Jury Proceedings*, 4 F.Supp. 283, 284-85 (E.D. Pa. 1933).

If Rule 6(e) was meant to "continue[ ] the traditional practice of secrecy on the part of members of the grand jury except when the court permits a disclosure," Rule 6(e), 1944 Advisory Committee Notes to Subdivision (e), there is a reasonable argument that *Hastings* and its progeny are at least consistent with historical practice. As we have said: "Although Rule 6(e)(3) enumerates the


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exceptions to the traditional rule of grand jury secrecy, the Supreme Court and this Court have recognized that the district courts have inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material and that Rule 6(e)(3) is but declaratory of that authority." *United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004). *See also In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1442 (11th Cir. 1987) ("As the considerations justifying secrecy become less relevant, the burden of showing the need for disclosure is lessened.").

Third, a survey of the relevant cases indicates that federal courts have been able to apply the test set forth in *In re Craig*, 131 F.3d at 106, without too much difficulty in determining which matters of exceptional historical significance warrant the disclosure of grand jury materials. *See, e.g., In re Application to Unseal Dockets*, 308 F.Supp.3d 314, 326-35 (D.D.C. 2018); *In re Nichter*, 949 F.Supp.2d 205, 212–14 (D.D.C. 2013). These courts have explained that exceptional historical significance, though a necessary element for disclosure, is itself not enough. Even if a matter or proceeding is historically significant to an exceptional degree, a court retains discretion to deny disclosure after balancing the requisite factors. *See, e.g., In re Nichter*, 949 F.Supp.2d at 212-14.

***8** Fourth, and perhaps most importantly, a recent attempt to amend Rule 6(e) to permit the disclosure of grand jury records in cases of exceptional historical significance proved unsuccessful. The reason why this proposed amendment failed is insightful, and in my view counsels against revisiting *Hastings* at this time.

In 2011, Attorney General Eric Holder recommended that Rule 6(e) be amended to establish procedures for disclosing historically significant grand jury materials. *See* Letter from Attorney General Eric Holder to Judge Reena Raggi, Chair of the Judicial Conference's Advisory Committee on Criminal Rules, Oct. 18, 2011 (attached). The Department of Justice questioned whether federal courts had inherent authority to allow such disclosures given what it believed was Rule 6(e)'s clear prohibition of disclosure of grand jury materials absent an express exception. *See id.* at 2-5. Attorney General Holder proposed that disclosure of historically significant grand jury materials be permitted, but only under new procedures set forth in Rule 6(e) itself. The procedures suggested by the DOJ would have required anyone seeking disclosure to show, among other things, that the grand jury records in question have "exceptional" historical significance, that at least 30 years have passed since the relevant case files associated with the grand jury records were closed, that no living person would be materially prejudiced by disclosure, and that disclosure would not impede any pending government investigation or prosecution. *See id.* at 8-9.

The Judicial Conference's Advisory Committee on Criminal Rules, then chaired by Second Circuit Judge Reena Raggi, reported in 2012 to the Committee on Rules of Practice and Procedure that it believed that the DOJ's proposed amendment to Rule 6(e) was unnecessary. *See* Minutes of Meeting of June 11-12, 2012, Judicial Conference Committee on Rules of Practice and Procedure, at 44 (relevant pages attached). According to Judge Raggi, all members of a subcommittee of the Advisory Committee on Criminal Rules—with the exception of the DOJ representative—recommended that the DOJ's proposed amendment "not be pursued" because "in the rare cases where disclosure of historic materials had been sought, the district [courts] acted reasonably in referring to their inherent authority," and as a result "there [wa]s no need for a rule on the subject." *Id.*

What happened (or, more accurately, did not happen) in 2012 is not, of course, dispositive. But it is instructive. If those charged with considering amendments to the Federal Rules of Criminal Procedure believed in 2012 that federal courts had properly relied on inherent authority to order the disclosure of historically significant grand jury materials, the case for overruling *Hastings* is lessened.

* * * * *

With these thoughts, I join the court's opinion.

GRAHAM, District Judge, dissenting:
The court creates an exception to the rule of grand jury secrecy, doing so on the assertion that the rationale for secrecy erodes over time. The exception appears to be limited to matters fitting two main criteria: enough time has elapsed for the parties to the event to have died and enough present-day authority considers the event to be of exceptional historical significance. The court states that the test for historical significance is objective but leaves the test open-ended. The court provides little guidance


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for the analysis except to say that historical significance requires more than an interested journalist, curious public or concerned friend or family member.

***9** I disagree with the majority on several fronts. I believe that judges should not be so bold as to grant themselves the authority to decide that the historical significance exception should exist and what the criteria should be. I agree with the dissent of Judge Sykes in *Carlson v. United States*, 837 F.3d 753, 767 (7th Cir. 2016) (Sykes, J., dissenting), and would hold that Rule 6(e) of the Federal Rules of Criminal Procedure limits a district court's authority to order the disclosure of grand jury records. Rule 6(e)(3) codifies the policy choices made about which exceptions should be recognized. Nothing analogous to a historical significance exception can be found there.

The court relies on *Hastings* to sanction a broader exercise of judicial power than the decision's narrow holding supports. *Hastings* permitted an exception to grand jury secrecy for a judicial investigating committee. It found the situation to be "closely akin" to the Rule 6(e)(3)(E)(i) exception for judicial proceedings. *In re Petition to Inspect & Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261, 1272 (11th Cir. 1984). An exception for matters of historical significance bears no resemblance to an exception which applies "to assist in preparation or conduct of a judicial proceeding." *United States v. Baggot*, 463 U.S. 476, 480, 103 S.Ct. 3164, 3167, 77 L.Ed.2d 785 (1983).

But even if a district court has inherent authority to order disclosure outside of Rule 6(e), I do not believe it should be exercised in this case. The rule of grand jury secrecy serves many interests, including "assur[ing] that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219, 99 S.Ct. 1667, 1673, 60 L.Ed.2d 156 (1979). This case presses the matter further, both in time and scope. Do subsequent generations—the children, grandchildren and beyond—of not only the suspects but also the grand jury witnesses and grand jurors themselves have reputational interests that warrant protection?

Because "secrecy of the grand jury is sacrosanct," *United States v. Phillips*, 843 F.2d 438, 441 (11th Cir. 1988), and because disclosure of grand jury material is prohibited "except in the limited circumstances provided for in Rule 6(e)(3)," *United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004), the rule of secrecy, as codified in Rule 6(e)(3), has always applied to protect the interests of subsequent generations.

Disclosure of grand jury records should not be permitted without an exacting review which gives due weight to the privacy and reputational interests at stake. It is troubling that the court has authorized disclosure of the records without examining their contents. [1] It is troubling too that the government has elected not to contest the proposition that there is no interest to be served in continued secrecy.

That an event has exceptional historical significance cuts both ways. With the principal parties having passed away and the investigation gone cold, one might conclude the matter is stale and the need for secrecy over. Yet, exceptional significance suggests a continued interest in, and impact from, the event. The Moore's Ford Lynching played a part in the civil rights movement and interest remains very much alive, particularly among members of the community affected by the event. The depth of their interest is illustrated by the Moore's Ford Memorial Committee, which has advocated for racial justice and held events memorializing the victims over the past two decades. The Committee has placed grave markers for the victims and a historical marker near the site of the lynching. A member of the Committee and a granddaughter of one the victims attended oral argument in this appeal. Community members organize an annual reenactment in honor of the victims. They still search for justice.

***10** The vitality of the community's continued interest raises possible repercussions for the living descendants and relatives of those individuals whom the grand jury records will identify as being suspects, witnesses and grand jurors. The modern public rightly views the lynching and failure to indict as a horrific injustice, and many perceive it to have been the work of the Ku Klux Klan. Would knowing that grand jury records could someday be disclosed and affect the standing of a child or grandchild in the community deter a grand jury witness from fully telling the truth? Could the conduct of a witness or grand juror involved in an event that is viewed at the time as momentous or sensational be influenced by a concern for their own legacy among future generations?


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I would hold that the reputational interests protected by Rule 6(e) include those of subsequent generations. I am unable to dismiss the reputational harm that could occur to a living person if the grand jury transcripts reveal that their parent or grandparent was a suspect, a witness who equivocated or was uncooperative, a member of the grand jury which refused to indict, or a person whose name was identified as a Klan member.

Accordingly, I dissent and would reverse the district court's order. At a minimum this court should provide protections to limit the harm its newly-created exception to grand jury secrecy could cause. The court should, for example, instruct the district court on remand to examine the grand jury records, with the assistance of the government, and to protect discernible reputational interests by taking measures such as redacting names and other identifying information.

**All Citations**

--- F.3d ----, 2019 WL 512157

Footnotes

* Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

1 There are differing accounts on the number of shots and the number of people present. Estimates suggest that between thirty and one hundred people were present.

2 The Fifth Circuit had recently held that the Georgia Democratic Party's all-white primary system was unconstitutional. *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946), *cert. denied*, 327 U.S. 800, 66 S.Ct. 905, 90 L.Ed. 1025 (1946).

3 The government argues that we are no longer bound by *Hastings* because the Supreme Court has rejected its reasoning. In *Carlisle v. United States*, the Supreme Court held that "[w]hatever the scope of [a court's] 'inherent power,' ... it does not include the power to develop rules that *circumvent* or *conflict* with the Federal Rules of Civil Procedure." 517 U.S. 416, 426, 116 S.Ct. 1460, 1466, 134 L.Ed.2d 613 (1996) (emphasis added). This passage must be read in context. *Carlisle* held that a district court cannot directly contradict an applicable and unambiguous Federal Rule of Criminal Procedure by invoking its inherent authority. In *Carlisle*, the Supreme Court held that a district court could not rely on inherent authority to enter a judgment of acquittal after the seven-day time limit prescribed by Rule 29(c) had expired. *Id.* at 426, 116 S.Ct. 1460, 1466. The district court there "contradicted the plain language" of the Rule by "effectively annul[ing]" the seven-day time limit prescribed by Congress. *Id.* We do not read *Carlisle* to prohibit the exercise of that authority in "exceptional circumstances consonant with the rule's policy and spirit." *Hastings*, 735 F.2d at 1269; *cf. United States v. Aisenberg*, 358 F.3d 1327 (11th Cir. 2004) (holding that a petitioner cannot circumvent the plain text of an applicable rule or the *Douglas Oil* test by asserting inherent authority). "[W]e are not at liberty to disregard binding case law that is ... closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Kondrat'yev*, 903 F.3d at 1174 (internal quotation marks omitted). We are thus bound by *Hastings*.

4 This is merely derivative of the "cautionary principle" that courts will not "lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." *Carlisle*, 517 U.S. at 426, 116 S.Ct. at 1466 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47, 111 S.Ct. 2123, 2134, 115 L.Ed.2d 27 (1991) ).

5 At the time of this opinion, two circuits have addressed the issue. Both held that district courts have inherent authority to disclose historically significant grand jury records. *See In re Petition of Craig*, 131 F.3d 99, 106 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016). While not specifically addressing disclosure for historical significance, the Eighth Circuit has expressed doubt that district courts have any inherent authority to act outside the enumerated Rule 6(e) exceptions. *See United States v. McDougal*, 559 F.3d 837, 841 (8th Cir. 2009). Finally, the D.C. Circuit has acknowledged the "general agreement" that district courts have inherent authority to disclose grand jury material. *See Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974). Whether that inherent authority extends to disclosure for historical significance is pending in the D.C. Circuit. *See McKeever v. Sessions*, No. 17-5149 (D.C. Cir. filed June 14, 2017).

6 According to Pitch, the FBI interviewed over 2,700 people and subpoenaed over 100 witnesses to testify in front of the grand jury.

7 *See generally United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n.6, 78 S.Ct. 983, 986 n.6, 2 L.Ed.2d 1077 (1958).

8 Pitch first requested the records three years earlier, in 2014, which the district court denied. The government appeals from the district court's grant of Pitch's second petition, which he filed in 2017.

1 The grand jury records were not made a part of the record before the court.


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# Background Information

Following the best practices described by the Semantic Versioning scheme, https://semver.org/, TS-EAS provides updates to EAD and EAC-CPF using version numbers that match the pattern of MAJOR.MINOR.PATCH.

When EAD3 was released in 2015, it was assigned the version number **1**.0.0 to indicate that it was the first **major** release of EAD3.

In 2018, a **minor** revision[1] of EAD3 was released under the version number 1.**1**.0. This revision was classified as minor because it "add[ed] functionality [to EAD3] in a backwards compatible manner"[2].

In August, 2019, TS-EAS received a report from the Library of Congress that there was a bug in the EAD3 XSD schema. This bug results in users being unable to use the c12 element[3], and unfortunately this bug is present in both versions 1.0.0 and 1.1.0. Fixing this bug would require creating a **patch** of EAD3, which would bump the version number to 1.1.**1**.

# Proposal

TS-EAS would like to be able to create patch releases when deemed necessary by the subcommittee. A patch release would only contain backwards compatible bug fixes. The types of bugs that would warrant a patch would be any bugs that are akin to typographical errors that nevertheless impact whether or not uses can implement the standard

TS-EAS is eager to fix this c12 bug as soon as possible, especially since it is impacting the Library of Congress's implementation of EAD3. Additionally, there is no way around this particular bug if your infrastructure requires you to use the XSD schemas as well as enumerated components. Therefore, we would classify this bug -- and any bug like it that does not have a workaround -- as a severe bug[4].

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[1] For more information about TS-EAS's proposed minor revision schedule, see https://github.com/SAA-SDT/TS-EAS-subteam-notes/blob/master/rolling-revision-cycle.md
[2] See https://semver.org/spec/v2.0.0.html
[3] See https://github.com/SAA-SDT/EAD3/issues/523
[4] The initial release of EAC-CPF had another infamous bug, where the attribute named "accuracy" was misspelled as "`accuarcy`". Though not ideal, this bug would likely be classified as a mild bug, since you could still use the attribute as long as you misspelled its name correctly.

We have already released a “pre-release” of this bug fix on our GitHub site: https://github.com/SAA-SDT/EAD3/releases/tag/v.1.1.1 However, we cannot officially release this patch to the community until SAA responds to this proposal. Once approved, our TS-EAS EAD3 subteam leader will be able to take the next steps by announcing the patch on listservs and working with the Library of Congress to update the official EAD portal.