I, Jill Lepore, hereby declare as follows:

1. I am a historian and journalist with a particular interest in American political and legal history. I submit this declaration in support of the above-captioned petition to unseal the records of the federal grand juries convened in Boston in April of 1971 and in August of 1971 to investigate the copying and release of the Pentagon Papers. In this declaration, I explain my interest in the grand jury investigation at issue; why this significant event in U.S. history continues to interest historians, the media, and the public; and why unsealing this material would be of significant value to scholars, reporters, and the public.

2. I am the David Woods Kemper ’41 Professor of American History at Harvard University, where I have been teaching since 2003. I am the author of eleven books, including *These Truths: A History of the United States* (2018), a best-selling, single-volume history of the nation. I am a past president of the Society of American Historians. In 2014, I was named the American Historian Laureate. I am also a staff writer at the *New Yorker*, a national magazine to which I have been contributing essays in American history, politics, and the law since 2005. I have a B.A. from Tufts (1987), an M.A. in American Culture from the University of Michigan (1990) and a Ph.D. in American Studies from Yale (1995). I am the recipient of a number of
honorary degrees. I am an elected member of the American Academy of Arts and Sciences and of the American Philosophical Society.

3. I am an expert in the history of evidence and, in particular, in the tension between the competing claims and needs of archival preservation and publicity, on the one hand, and of secrecy and privacy, on the other. Since 2014, I have been affiliated with Harvard Law School, where I teach History of Evidence, which considers the rules of evidence in law, history, journalism, and science, from the Middle Ages to the present.

4. I have published a number of essays, both scholarly and popular, and delivered a number of lectures on the history of privacy, secrecy, and evidence.

5. My journal articles include *Asymmetry in the Archives*¹ on the consequences of asymmetrical acquisition policies; and *On Evidence: Proving Frye as a Matter of Law, Science, and History*,² a deep archival investigation into the 1922 criminal trial that lies behind the Frye rule, which deals with the admissibility of scientific evidence.

6. My magazine essays include *The Prism: Privacy in an Age of Publicity*,³ an investigation into the history of the tension between the assertion of a right to privacy and government surveillance on private citizens, establishing the long backstory to the National Security Administration’s Prism program; and *The Great Paper Caper*,⁴ an investigation into the 1971 theft from the Library of Congress of several hundred items from the papers of Supreme Court Justice Felix Frankfurter. My work on the Frankfurter theft is closely related to my interest in the 1971 Boston grand jury records, as my research into the Frankfurter Papers affair sets that crime within the scandals associated with the Nixon administration, and the resulting attempts to

---

³ The New Yorker, June 24, 2013.
preserve presidential, if not judicial, records. (Two scholars have argued that the theft was perpetrated by the Nixon administration, to protect his nomination of William Rehnquist to the Supreme Court, since the Frankfurter papers may have contained records incriminating to Rehnquist.)

7. As part of a commitment to bringing investigative scholarship before a public audience and fostering public debate on matters of evidence, I have delivered many public lectures on the history of the relationship between evidence and secrecy. These include “Hidden,” a three-part lecture series delivered at the New York Public Library in 2013 as the Joanna Jackson Goldman Memorial Lectures; “Unseen: From Mystery to Privacy” and “Unknown: From Facts to Data,” delivered as the Patten Lectures at the University of Indiana in 2016; and “The End of Knowledge,” a three-part lecture series delivered in 2017 at the University of Toronto as the F.E.I. Priestley Lectures in the History of Ideas.

8. I am currently working on an article about the 1971 Boston grand jury investigation as well as on a book called If/Then: How Simulmatics Corporation Invented the Future, to be published by W.W. Norton. Simulmatics, one of the first data-science firms, was founded in 1959 and, with multiple contracts from the Advanced Research Projects Agency of the Department of Defense, undertook significant research in Vietnam, some of it conducted by a young political scientist named Samuel Popkin. My research into Simulmatics requires understanding the relationship of the firm and its personnel to the Pentagon Papers controversy, which led me to the Boston grand jury convened in 1971, which subpoenaed Popkin. Popkin’s struggles with the grand jury lie at the heart of the story. Many of the people subpoenaed refused to speak to the grand jury, citing First, Fourth, and Fifth Amendment protections. When Popkin
refused to answer certain questions, citing a “scholar’s privilege,” akin to a “reporter’s privilege,” he was sent to jail.

9. I have been trying to gain access to the records relating to the whole of the investigation, including FBI surveillance and interviews, grand jury subpoenas and testimony, and briefs and other legal documents relating to the investigation and to the grand jury proceedings. I would like to see the records of this grand jury because it constitutes a landmark in the history of the federal government’s willingness to investigate and prosecute dissidents, scholars, journalists, and anyone else suspected of involvement with the release and publication of classified government material. The investigation ended almost as suddenly as it began, and without explanation, leading to widespread concern about the use of grand jury proceedings as a cover for executive overreach. Why and when was the investigation opened? Why was it closed? To what lengths did the government go in conducting the investigation? Did those lengths include illegal wiretapping, as critics alleged at the time? On what evidence was Popkin so relentlessly pressed? Unsealing the records is the only way to answer these questions.

10. In 1971, when the federal government determined to prosecute leakers, Popkin and other scholars, as well as a bevy of reporters, tested the limits of the government’s willingness to prosecute scholars for conducting scholarship and journalists for conducting reporting. A fuller understanding of what happened in 1971 is crucial to my own scholarship, as it will inform my research into Simulmatics Corporation and Popkin’s role within it, and is the subject of the lengthy article I intend to prepare while working from the records of this case. But it is also vital to any consideration of the history of federal government surveillance of and interference with the freedoms of journalists and academics—a history with troubling resonance in our own day.
BACKGROUND CONCERNING THE PENTAGON PAPERS

11. In 1967, Robert McNamara, President Lyndon Johnson’s secretary of defense, commissioned an inquiry into the entire history of U.S. involvement in Vietnam that resulted in a confidential, 7,000-page, 47-volume study, a chronicle of the lies and blunders of one administration after another in pursuing an ill-considered, cruel, and wanton campaign in Vietnam. The report weighed sixty pounds, which is significant because the subsequent investigation focused on the number of people whose assistance was required to copy and transport the document. The report, leaked to the press in 1971, became popularly known as the Pentagon Papers.

12. The publication of the Pentagon Papers changed the course of American history by contributing to both the end of the Vietnam War and Nixon’s resignation. The Pentagon Papers are commonly identified by scholars as “the single most important documentary source on U.S. policy-making during the Vietnam War”; reporters consider their publication to be “one of the greatest journalistic ‘scoops’” in American history; and legal scholars agree that “the court case that followed posed, as few others have, the fundamental issue of governmental secrecy against the people’s right to know.”

13. Daniel Ellsberg, an economist, former Marine officer, and analyst with the RAND Corporation, who had worked on the report, photocopied portions of McNamara’s report with the idea of leaking it, in hopes that its exposure would bring an end to the war. Beginning in 1969, Ellsberg tried to gain the interest of members of Nixon’s administration, including Kissinger, to no avail. He had tried to get a member of Congress to leak the report, without success.

---

Ellsberg first approached *New York Times* reporter Neil Sheehan with the Pentagon Papers in February of 1971. That spring, Nixon’s Justice Department pursued a strategy to halt the publication and, simultaneously, began two criminal investigations—one in Los Angeles and one in Boston—in an attempt to prosecute Ellsberg and to identify and prosecute any co-conspirators. The attempt to halt the publication of the papers is today by far the best known part of this story, followed by the Los Angeles investigation. The Boston investigation, which is the subject of my petition, is the least well-known because so few records are available to scholars. And yet it is of equal significance.

The *Times* began printing excerpts from the papers on June 13, 1971.

On June 14, 1971, the U.S. Department of Justice filed suit against the *Times* in the U.S. District Court for the Southern District of New York seeking a temporary restraining order to halt publication until a court hearing could be held to hear evidence. The next day, Judge Murray Gurfein granted the temporary restraining order but denied the Justice Department’s application for a preliminary injunction.6

On June 18, the *Washington Post* began publishing excerpts from the Pentagon Papers. The next day, the U.S. Department of Justice filed suit in the U.S. District Court for the District of Columbia for a temporary restraining order and a preliminary injunction to stop publication. Judge Gerhard Gesell denied the temporary restraining order. His decision was upheld on June 19 by the U.S. Court of Appeals for the D.C. Circuit.7

On June 23, the U.S. Court of Appeals for the Second Circuit reversed Judge Gurfein’s decision to deny the preliminary injunction and remanded the case for further review.8

---

19. The U.S. Supreme Court heard oral arguments on June 26 and on June 30 ruled, 6-3, that the Papers could be published.\(^9\)

**THE LOS ANGELES GRAND JURY AND TRIAL**

20. On June 28, 1971, a grand jury in Los Angeles indicted Daniel Ellsberg and Anthony Russo on charges of theft and espionage. Russo, a friend and former co-worker of Ellsberg’s at the RAND Corporation, had helped take the Pentagon Papers, copy them at his girlfriend’s advertising agency, and release them to newspapers. Russo, subpoenaed in August, refused to testify before the grand jury, citing the Fifth Amendment. Russo was sent to jail for contempt.


22. Ellsberg’s trial began in Los Angeles in January of 1972. Nearly a year later, on December 12, 1972, the judge declared a mistrial and ordered the selection of a new jury.

23. A new trial began on January 17, 1973, but on May 11, 1973, the judge dismissed all charges against both Ellsberg and Russo. The case had unraveled when it emerged that men working for the White House had sought to gain information about Ellsberg by breaking into his psychiatrist’s office. This revelation was tied to the exposure of the range of activities known today as the Watergate scandal. The unraveling of the Ellsberg trial in Los Angeles contributed to the end of Nixon’s presidency.

**THE BOSTON GRAND JURIES**

24. While many details of the Los Angeles investigation emerged because it led to two public trials, the Boston grand juries remain cloaked in secrecy.

25. In the spring of 1971, leading up to the *New York Times*’ publication of the Pentagon Papers, the Justice Department opened an investigation in the Boston area—chiefly in Cambridge, where Ellsberg had lived. Grand juries were convened in Boston, apparently first in April of 1971, and then again in August of 1971. It is those grand jury investigations whose records I would like unsealed.

26. In 1971 and 1972, the Boston and Los Angeles investigations were discussed by reporters as two arms of the same inquiry and very often roundly condemned on constitutional grounds. Wrote one observer in September 1971:

> The grand jury probe, which continues at high speed in Boston and in Los Angeles, is a direct threat to the anti-war movement and to the constitutional rights which have traditionally allowed such movements to exist. Even if it were being conducted under more restrained and strictly legal circumstances, the investigation would appear repugnant to the many who feel that Daniel Ellsberg’s action was fully justified. As it is, the grand jury’s activity has amounted to an uncalled for inquisition of Ellsberg’s friends and associates. These events are not occurring in a vacuum. For the past two and a half years, the Administration’s cavalier views of civil liberties have combined with recent decisions by the federal judiciary to turn the grand jury system into a powerful political weapon in the government’s battle with the American left.\(^{10}\)

27. Almost nothing is known about the first Boston grand jury, impaneled in April 1971. At the time, close observers of the court speculated that the first jury was discharged because jurors leaked the proceedings to the press. *The Harvard Crimson* reported in September 1971:

> Initial press reports of the Boston grand jury indicated that the newspaper sources were none other than members of the jury itself. These reports stated that the jury conducting the probe had been impaneled in April; subsequent stories disclosed that the investigation was being undertaken by a grand jury sworn in last July. Court observers speculated that the government, in order to

avoid leaks, had switched the case from one jury to the next—a move so legally questionable that it may invalidate any indictments the jury produces, yet a move which government prosecutors apparently thought necessary.11

28. The second Boston grand jury was impaneled in August 1971. Three U.S. attorneys—David R. Nissen, Warren P. Reese, and Richard J. Barry—led the investigation conducted by the second grand jury. They wanted to identify people who had assisted Ellsberg in securing, photocopying, and releasing the papers. In particular, they sought knowledge of who, in Massachusetts, helped get the papers from Ellsberg to New York Times reporter Neil Sheehan.

29. Yet, to some degree, the Justice Department’s motivation in conducting the Boston investigation is unclear. As was observed during congressional hearings held in 1976:

> During the life of the Los Angeles and Boston grand juries it was widely believed that the evidence developed at the Boston grand jury was to be used in prosecution of Ellsberg who had been indicted by the Los Angeles grand jury. The Justice Department vigorously denied such use of the grand jury.12

30. The investigation included wiretapping. The Watergate hearings revealed an August 11, 1971, memo to John Ehrlichman—counsel and assistant to Nixon—from David Young and Egil Krogh, co-chairmen of the Special Investigations Unit. That unit was formed, at Nixon’s direction, immediately after the release of the Pentagon Papers. The memo, titled, “PENTAGON PAPERS PROJECT—STATUS REPORT AS OF AUGUST 11, 1971,” indicated that “[t]he Boston Grand Jury will meet next week” (emphasis in original). It went on, “Justice has not made a final decision but is considering subpoenaing the following individuals,” followed by a list of eight people: Idella Marx, Samuel Popkin, Richard Falk, Ralph Stavins,

11 Id.
Richard Barnet, Marcus Raskin, K. Dun Gifford, and Richard Steadman.\textsuperscript{13} The memo added that “[i]t seems unlikely that Barnet, Raskin and Gifford will be called because they have been overheard.”\textsuperscript{14}

31. The grand jury is known to have issued subpoenas to at least thirteen people, beginning in early October 1971: Samuel Popkin, an acquaintance of Ellsberg’s who had conducted research in Vietnam; Ralph Stavins and Richard Falk, both of whom were affiliated with the Institute for Policy Research; United States Senator Mike Gravel of Alaska; Leonard Rodberg, who worked for Gravel and was also affiliated with the Institute for Policy Research; Howard Webber of the MIT Press; Stewart E. Perry, Ellsberg’s downstairs neighbor; the reporter David Halberstam; MIT linguist and antiwar activist Noam Chomsky; K. Dun Gifford, a former legislative aide to Senator Edward M. Kennedy; N. Carter de Paul Jr., a former U.S. Operations Mission Director in Laos; Idella Marx, Ellsberg’s mother-in-law; and Steven Parkhurst, vice president at the New England Merchants Bank, which held the account of Beacon Press.

32. Most of those subpoenaed refused to cooperate. Gravel’s attorneys insisted that neither he nor Rodberg could testify due to legislative privilege. As the \textit{New York Times} reported on November 1, the grand jury had become entangled “in an almost impenetrable thicket of legal objections raised by a group of doggedly recalcitrant witnesses.”\textsuperscript{15} After a stay of thirty days, the Supreme Court eventually ruled that both Gravel and Rodberg had to testify.

33. Chomsky and Falk refused to testify, citing a First Amendment privilege. Judge Arthur W. Garrity insisted that they testify. Chomsky and Falk then suggested that they had been

\textsuperscript{13} \textit{Hearings before the Committee on the Judiciary, House of Representatives}, 93rd Cong. 1025-26 (1974).
\textsuperscript{14} \textit{Id}.
the subjects of illegal wiretapping, and Garrity relented. Neither of these men ever appeared before the grand jury.

34. Stavins appeared before the grand jury but was excused after he refused to answer questions. His subpoena was eventually quashed over allegations the government had illegally wiretapped his phone.

35. Halberstam cited his First Amendment privilege as a reporter and ultimately did not testify.

36. Popkin, Perry, and Marx all testified before the grand jury. It appears that none were forthcoming. The *New York Times* on November 1 reported: “during three days of complex legal wrangling last week, the jury of 23 mostly dour, middle-aged Bostonians heard hardly a word of testimony, apart from that of one witness, who gave little more than his name and occupation . . . .”\(^\text{16}\)

37. Carter de Paul Jr. was said to have testified before the grand jury only “for a couple minutes.”\(^\text{17}\) Gifford also testified but refused to answer certain questions on constitutional grounds.

38. The grand jury focused its attention on Chomsky, Falk, and, especially, Popkin.

39. Popkin had lived next door to Ellsberg in Cambridge. They had also spent time together in Vietnam, while Popkin was working for the Simulmatics Corporation and Ellsberg was working for RAND.

\(^\text{16}\) *Id.*
40. On August 19, 1971, Popkin appeared before the Boston grand jury. Asked, “What is the opinion as to persons you believe possessed a copy of the Pentagon Papers in Massachusetts prior to June 13, 1971,” he refused to answer.

41. On October 14, 1971, Popkin again appeared before the grand jury and refused to answer questions. Likening himself to a reporter, Popkin insisted that he could not speak because he could not be forced to violate the confidentiality of his sources—sources in Vietnam who had been the subject of his dissertation research.

42. Popkin next appeared before the grand jury in March 1972. When he again refused to answer a number of questions, Garrity charged Popkin with contempt. The United States Court of Appeals for the First Circuit upheld the conviction. Popkin appealed to the U.S. Supreme Court, which, in U.S. v. Popkin, refused to hear the case.\(^\text{18}\)

43. On November 21, 1972, Popkin again refused to speak, claiming a “scholar’s privilege,” akin to a “reporter’s privilege.” He was cited for contempt of court and spent eight days in jail.

44. On November 28, 1972, two weeks before the judge in the Ellsberg and Russo trial in Los Angeles declared a mistrial, the Boston grand jury was discharged. As with the reason it was called, the reason for the discharge of the Boston grand jury remains unknown. “Just what the closed-door inquiry is seeking is not fully clear,” the New York Times had reported at its outset.\(^\text{19}\) It was no clearer after it ended. And it is no clearer today. Efforts to find out why the grand jury was discharged have proven unavailing. James Goodale, who was chief counsel for the New York Times in 1971 and 1972, wrote:

> It is said that the reason for this action was that the grand jury interfered with Ellsberg’s trial in Los Angeles, which was about to

\(^{18}\) 460 F.2d 328 (1st Cir. 1972).

\(^{19}\) Reinhold, supra.
begin. No one knows whether this is the real reason. In April 2010 I asked one of the Boston prosecutors, David Nissen, what the real reason was and he slammed down the phone. Barry, one of the other prosecutors, could not remember what had happened. The third, Warren Reese, had died.20

THE RECORDS OF THE BOSTON GRAND JURIES

45. In my research for an article on the 1971 Boston grand jury and for a book on the Simulmatics Corporation, which includes its role in Vietnam, I interviewed Popkin, Ellsberg, Chomsky, and dozens of other people. I have also conducted research in archives across the country. I found a transcript of Popkin’s grand jury testimony in the archives at MIT. In the National Archives, I consulted all materials relating to this case that are publicly available.

46. Daniel Ellsberg, former Senator Mike Gravel, Samuel Popkin, Richard Falk, Noam Chomsky, Leonard Rodberg, Howard Webber, and Stewart Perry enthusiastically support the unsealing of these records. Ralph Stavins expressed no view on whether the records should remain sealed. David Halberstam, Idella Marx, and K. Dun Gifford, all subpoenaed by the grand jury, are deceased.

47. Unsealing the Boston grand jury records concerning the Pentagon Papers would cast light on one of the most infamous abuses of executive power in American history, one of the most consequential leaks in the history of the Department of Defense, and a crucial turning point in the history of a free press and of freedom within the academy. As Princeton University historian and CNN analyst Julian Zelizer writes:

The value of the records is immense. The battle over the Pentagon Papers was a central moment in the struggle over executive power under President Nixon and a key moment in the political battle over a free news media. While we know about the material that was in the famous papers, we know much less of the inside story of how they were ultimately released. Having access to these records would

be an important step into filling some of the important gaps that remain in our history of the early 1970s, a transitional moment in American political history.\textsuperscript{21}

48. I am interested in seeing all documents chronicling, concerning, and relating to the 1971 Boston grand juries, including the grand jury impaneled in April of that year and the grand jury impaneled in August. The records of the Boston grand jury are held at the National Archives Boston, located at 380 Trapelo Road in Waltham. Their identification is: RG 118, US Attorney-MA, Precedent Case Files, 1928-76, Ellsberg, Daniel (Pentagon Papers), Info. File no. 31693. Joan Gearin is the Archivist at that facility. After corresponding with Gearin by e-mail in June of 2018, I visited the archives and inspected the small amount of material open to researchers. (Attached hereto as “Lepore Decl. Ex. B” is a true and correct copy of an e-mail exchange with Joan Gearin of the National Archives and Records Administration from June 2018.) These records are spread across several boxes and only a small portion is open to researchers. The unsealed portion is heavily redacted, and consists chiefly of FBI reports and motions and briefs filed by the defendants. The three boxes I consulted include many placeholders indicating the removal of pages, marked, “Access Restricted.” Some of these were FBI reports. Fifty-eight pages of documents concerning \textit{U.S. v. Popkin} had been removed; according to the withdrawal notice, this material was additional grand jury testimony. None of the grand jury material was made available.

49. On October 10, 2018, I submitted via e-mail a FOIA request, # 19-01878, for the release of this material. On October 15, 2018, Gearin responded by e-mail, refusing to provide access to the outstanding material. (Attached hereto as “Lepore Decl. Ex. C” is a true and correct

\textsuperscript{21}E-mail from Julian Zelizer to Petitioner (June 8, 2018), a true and correct copy of which is attached hereto as “Lepore Decl. Ex. A.”
copy of an e-mail exchange with Joan Gearin of the National Archives and Records Administration from October 2018.)

**PENTAGON PAPERS MEDIA COVERAGE AND CONTINUING INTEREST**

50. In 1972, the *New York Times* was awarded a Pulitzer Prize for its publication of parts of the Pentagon Papers. The story of the Pentagon Papers has been the subject of dozens of books and articles and, in 2017, of a feature-length Hollywood film, *The Post*. Ellsberg has been the subject of multiple biographies and documentary films and has published more than one memoir.

51. The Boston grand jury was the subject of close media attention in 1971 and 1972, in both local and national newspapers and magazines.  

52. The grand jury investigation into Popkin, in particular, garnered considerable attention within the academy as a landmark confrontation regarding academic freedom. On October 23, 1971, twenty members of the Harvard faculty submitted affidavits in support of Popkin.  

22 *New York Times* columnist Tom Wicker wrote a piece called “Liberty in Shackles” to call attention to Popkin’s plight, lamenting that “the Government has demonstrated no purpose of any legitimate kind in taking a teacher off to prison in handcuffs.” Similarly, columnist Anthony Lewis suggested that, “If the spirit of liberty survives in the United States, we shall be grateful to Samuel Popkin.”

53. The work done and decisions made by the Boston grand jury were matters of concern to scholars from the start and remain so. A 1972 law review article that considered grand jury subpoenas of scholars used the Popkin case as an example of how “the threat to First

---

22 *See, e.g.*, Ungar, supra note 17.
Amendment rights increase when a grand jury expands its investigative function.” According to a 2012 volume on ethical dilemmas in social research, “[t]he leading case [for First Amendment claims] for academic researchers is Popkin v. U.S.” The failure of Popkin’s appeal established that scholars cannot declare a professional First Amendment privilege. Any hope of challenging this precedent begins with unsealing the grand jury records.

54. So secret and confounding was the work of the 1971 Boston grand jury that it contributed to a movement for the reform of the grand jury system, including by an act of Congress. In 1973, Charles E. Goodell’s essay “Where Did the Grand Jury Go?” inquired about the nature of the system as a whole and of the Boston grand jury in particular. In 1977, hearings were held in the House of Representatives on the subject of grand jury reform. These hearings were followed by a proposed Grand Jury Reform Act in 1978, and the Senate Judiciary Committee hearings elicited further discussion of the Boston grand jury, which was cited three times, most notably in reproducing an exchange from the original transcript in which Popkin asked to see his lawyers, to no avail.

55. The Grand Jury Reform Act of 1978 did not pass but the matter has recently assumed renewed political urgency. In 2014, as part of a larger campaign of criminal justice reform relating to police shootings of African American men, Rep. Hank Johnson of Georgia introduced a new Grand Jury Reform Act into Congress, which received considerable national

attention.\(^{31}\) In 2017, another proposal, the Grand Jury Due Reform Act, was introduced into Congress.\(^{32}\) Like the 2014 bill, this latest effort is similar in intention and scope to the 1978 act.

**IMPORTANCE OF UNSEALING GRAND JURY RECORDS**

56. A landmark in the history of the freedom of the press, the story of the Pentagon Papers is arguably the most important confrontation between the press and the government in the history of the United States. Leaks and the prosecution of leakers continue to be subjects of heated debate and public interest. The lesser known Boston end of this story, involving sealed grand jury records, also concerns the prosecution of scholars, itself a timely and even urgent topic, at a time when academic freedom and freedom of the press are both imperiled.

57. The contemporary resonance of the 1971 investigation is profound. In recent years, high-profile leaks, including those associated with Julian Assange, Edward Snowden, Chelsea Manning, and officials within the Trump Administration, have garnered considerable public attention and generated a great deal of controversy. The prosecution of leakers and, more broadly, federal government surveillance of private citizens—under, for instance, the National Security Administration’s Prism program—have also generated controversy and public debate. Equally controversial are the many investigations of journalists under both Democratic and Republican administrations.\(^{33}\) Meanwhile, other checks on the power of the federal government, especially the executive branch, have failed. As Ann Marie Lipinski, head of the Nieman

---


Foundation for Journalism at Harvard, writes, “Public interest reporting on the activities of the federal government has not been this urgent since the Pentagon Papers and Watergate era.”

58. Nearly fifty years after the Boston grand jury investigation into the Pentagon Papers, the records remained sealed.

59. The unsealing of these records, which themselves concern the question of whether grand jury proceedings ought to be secret, or to remain secret, and for how long, promises to cast new light on one of the most vital questions concerning the rule of law in the United States today.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 6, 2018, in Cambridge, Massachusetts.

/s/ Jill Lepore
Jill Lepore

---

34 E-mail from Ann Marie Lipinski (Sept. 21, 2018).
EXHIBIT A
The value of the records is immense. The battle over the Pentagon Papers was a central moment in the struggle over executive power under President Nixon and a key moment in the political battle over a free news media. While know about the material that was in the famous papers, we know much less of the inside story of how they were ultimately released. Having access to these records would be an important step into filling some of the important gaps that remain in our history of the early 1970s, a transitional moment in American political history.

Julian E. Zelizer
Malcolm Stevenson Forbes, Class of 1941 Professor of History and Public Affairs, Princeton University

CNN Political Analyst
Co-Host, Politics and Polls
EXHIBIT B
Hi,

Thursday is fine. We are open 9:00-4:30. Just let me know if your plans change.

Best,

Joanie Gearin
Archivist
National Archives at Boston
380 Trapelo Road
Waltham, MA 02452
Toll Free 866-406-2379

On Mon, Jun 25, 2018 at 3:11 PM, Lepore, Jill <jlepore@fas.harvard.edu> wrote:
Wonderful; thanks. I’d love to come in this week. Would Thursday afternoon be possible? I’m not sure of your hours but perhaps I could come at 2 PM that day?

Jill Lepore | Kemper Professor of American History | Harvard College Professor | Harvard University | scholar.harvard.edu/jlepore
Screening of the Ellsberg Precedent Case File has been completed, so please let me know when you'd like to come in, and if you have any questions.

Best,

Joanie Gearin
Archivist
National Archives at Boston
380 Trapelo Road
Waltham, MA 02452
Toll Free 866-406-2379

On Tue, Jun 12, 2018 at 3:36 PM, Joan Gearin <joan.gearin@nara.gov> wrote:
I'm sorry, I forgot to address that part of your question. The US Attorneys are responsible for maintaining the grand jury records according to the records schedule agreed upon between the National Archives and the Department of Justice. Please see the pertinent records schedule NC1-118-83-1, section 2, regarding grand jury records, "NOTE" section at the following:


I assume that the grand jury records in the precedent case file are what exists, but I can only speak to what is contained in the records in our holdings.

Please let me know if you have any questions.

Best,

Joanie Gearin
Archivist
National Archives at Boston
380 Trapelo Road
Waltham, MA 02452
Toll Free 866-406-2379
On Tue, Jun 12, 2018 at 2:35 PM, Lepore, Jill <jlepore@fas.harvard.edu> wrote:
Many thanks. Procedurally, I’m in good hands, as the petition will be prepared by attorneys who are working on this on my behalf pro bono. Before we get started, though, I’m just trying to undertake due diligence regarding discovering how much of the grand jury record actually survives, so I’m mainly just asking whether there are other materials than the ones you have already identified, and that may be housed elsewhere ....

--

From: Joan Gearin <joan.gearin@nara.gov>
Date: Tuesday, June 12, 2018 at 2:33 PM
To: Jill Lepore <jlepore@fas.harvard.edu>
Cc: Alfie Paul <alfie.paul@nara.gov>
Subject: Re: 1971 federal grand jury

Sorry for the delay in getting back to you - I wanted to make sure I have all the details of how to proceed. So, you should make a request to NARA under the Freedom of Information Act (FOIA), which you can direct to me, for the grand jury records in the Ellsberg case. This request will be rejected, because grand jury records are generally sealed indefinitely. You can then appeal that denial (see Section X of NARA's FOIA Reference Guide), and so on.

We are in the process of screening the US Attorneys Precedent Case File for Ellsberg and the others, and I'll let you know when we are done with that (hopefully within a few weeks at the longest).

Please let me know if you have any questions.

Best,

Joanie Gearin
Archivist
National Archives at Boston
On Mon, Jun 11, 2018 at 9:23 AM, Lepore, Jill <jlepore@fas.harvard.edu> wrote:
Good to know, thanks. And I realize there will be a delay while you screen the non-closed materials but
I’ll look forward to hearing from you when it’s ok for me to come take a look. I am interested in the
grand jury materials as well and will be filing a petition to have them unsealed. So I therefore wonder: is
there any other archive or office where more of the grand jury material from this case might survive?
Many thanks.

On Jun 11, 2018, at 9:20 AM, Joan Gearin <joan.gearin@nara.gov> wrote:

There are files for each of the following included with Ellsberg's (and these are included in my 2.5 box
estimate of the extent of the case file):

Chomsky
Falk
Gravel
Halberstam
Marx
Popkin
Rodberg
Russo
Stavins

There do not appear to be separate files for these individuals elsewhere in the Precedent Case Files
series.

Best,

Joanie Gearin
Archivist
National Archives at Boston
380 Trapelo Road
Waltham, MA 02452
Toll Free 866-406-2379
On Mon, Jun 11, 2018 at 8:12 AM, Lepore, Jill <jlepore@fas.harvard.edu> wrote:
Yes, thanks, I would like to see these records. Might you know, do you also hold the related files for the case against Samuel Popkin, who was subpoena’d by this grand jury and refused to speak and was sent to prison?

On Jun 11, 2018, at 7:59 AM, Joan Gearin <joan.gearin@nara.gov> wrote:

Dear Professor Lepore:

Thank you for contacting the National Archives at Boston. I have located the US Attorneys' case file relating to Daniel Ellsberg and others (file # 31469) in the series entitled "Precedent Case Files, 1928-1979." The file does contain some grand jury records, which are sealed indefinitely. The case isn't large (about 1 linear foot wide, or 2.5 manuscript boxes), and the grand jury records do not make up the majority of the file. It's possible that other grand jury records were created, but were not retained by the US Attorneys' office.

You would be able to see this file if you'd like, but it would have to be screened beforehand, and the grand jury records would not be available to you. Please let me know in advance if you'd like to see the file, as the screening would take some time to complete.

Please let me know if you have any questions.

Sincerely,

Joanie Gearin
Archivist
National Archives at Boston
380 Trapelo Road
Waltham, MA 02452
Toll Free 866-406-2379
On Thu, Jun 7, 2018 at 2:57 PM, Lepore, Jill <jlepore@fas.harvard.edu> wrote:

Dear Archivist,

I would like to know whether the records from a federal grand jury called in Boston in 1971 survive. I realize that these records are sealed. I am writing to confirm that they survive, and to locate them. This federal grand jury was called in the summer of 1971 to investigate the Pentagon Papers. It was discharged in the fall of 1972. A brief, early account is here. Please let me know if you need more information.

With kind thanks,
Jill Lepore

Jill Lepore | Kemper Professor of American History | Harvard College Professor | Harvard University | scholar.harvard.edu/jlepore

From: Waltham Courts <waltham.courts@nara.gov>
Date: Thursday, June 7, 2018 at 2:56 PM
To: Waltham Courts <waltham.courts@nara.gov>
Cc: "Waltham.courts@nara.gov" <waltham.courts@nara.gov>, Jill Lepore <jlepore@fas.harvard.edu>, bostonarchives <boston.archives@nara.gov>
Subject: Re: 1971 federal grand jury

Good Afternoon,

You'll have to contact the Archives for assistance with your inquiry. The Waltham Courts inbox is operated by the Records Center, a division of NARA that has temporary records in our holdings.

The Archives can be reached at 781-663-0144 or boston.archives@nara.gov. I've copied them in this response.

Thanks,

Allan

On Thursday, June 7, 2018 at 2:44:47 PM UTC-4, Lepore, Jill wrote:
Dear Archivist,

I would like to know whether the records from a federal grand jury called in Boston in 1971 survive. I realize that these records are sealed. I am writing to confirm that they survive, and to locate them. This federal grand jury was called in the summer of 1971 to investigate the Pentagon Papers. It was discharged in the fall of 1972. A brief, early account is here. Please let me know if you need more information.

With kind thanks,

Jill Lepore

Jill Lepore | Kemper Professor of American History | Harvard College Professor | Harvard University | scholar.harvard.edu/jlepore
EXHIBIT C
From: Joan Gearin <joan.gearin@nara.gov>
Date: Monday, October 15, 2018 at 10:08 AM
To: Jill Lepore <jlepore@fas.harvard.edu>
Cc: Alfie Paul <alfie.paul@nara.gov>
Subject: Re: FOIA request

Dear Professor Lepore:

This is in response to your FOIA request # 19-01878 of 10/10/2018 for records in the custody of the National Archives at Boston.

The Ellsberg Precedent Case File (from the series RG 118 U.S. Attorneys - MA, Precedent Case Files, 1928-1976, NAID # 4477105) has been screened and the file has been redacted per the following:

- To preserve the secrecy of grand jury proceedings per 5 USC 552 (b)(3), pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure;
- To protect information exempted from disclosure by statute per 5 USC 552 (b)(3) (the relevant statute in support of the (b)(3) withholding is 50 USC 3024 (i)(1), which protects sensitive intelligence sources and methods);
- To protect the personal privacy of living individuals per 5 USC 552 (b)(6).

These withdrawn documents may not be served, but you may have access to the rest of the file. If you’re interested in copies of the withdrawn pages (either digital or paper), there are 2,134 pages x .80 per page = $1,707.20. Please contact me to place an order.

This concludes the processing of your request. If you have additional questions concerning my review of this file, please contact me directly at 781-663-0127 or joan.gearin@nara.gov.

If you are not satisfied with our action on this request, you have the right to file an administrative appeal within ninety (90) calendar days from the date of this letter. Appeals must be in writing and may be delivered by regular U.S. mail or by e-mail. By filing an appeal, you preserve your rights under the Freedom of Information Act and present the deciding agency with an opportunity to review your request and reconsider its decision. If you submit your appeal by regular mail, it should be addressed to:

Deputy Archivist of the United States (ND)
National Archives and Records Administration
8601 Adelphi Road, Room 4200
Both the letter and envelope should be clearly marked “FOIA Appeal.” If you submit your appeal by e-mail, please send it to foia@nara.gov, addressed to the Deputy Archivist, with the words “FOIA Appeal” in the subject line. Please be certain to explain why you believe this response does not meet the requirements of the Freedom of Information Act. All communications concerning this request should reference FOIA case number [19-01878].

If you would like the opportunity to discuss our response and attempt to resolve your dispute without initiating the appeals process, you may contact our FOIA Public Liaison for assistance:

FOIA Requester Service Center: 301-837-3190
FOIA Public Liaison (Acting): Britney Crawford
8601 Adelphi Road, Room 5500
College Park, MD 20740-6001
E-mail: dc.foia.liaison@nara.gov

If you are unable to resolve your dispute through our Public Liaison, the Office of Government Information Services (OGIS) is the federal FOIA ombudsman. OGIS offers mediation services to help resolve disputes between FOIA requesters and federal agencies. You may contact OGIS at the following address:

Office of Government Information Services (OGIS)
National Archives and Records Administration
8601 Adelphi Road, Room 2510
College Park, MD 20740-6001
Telephone: 202-741-5770 or 1-877-684-6448
Email: ogis@nara.gov

Sincerely,

Joanie Gearin
Archivist
National Archives at Boston
380 Trapelo Road
Waltham, MA 02452
On Wed, Oct 10, 2018 at 2:25 PM, Lepore, Jill <jlepore@fas.harvard.edu> wrote:

October 10, 2018

Joan Gearin, Archivist
National Archives at Boston
380 Trapelo Road
Waltham, MA 02452

Dear Ms. Gearin:

This is a request under the Freedom of Information Act.

I request that a copy be provided to me of all documents relating to a grand jury investigation conducted in Boston in 1971 concerning the release and publication of a set of documents that came to be known as the Pentagon Papers. It is my understanding that these documents are filed at the National Archives Boston as RG 118, US Attorney-MA, Precedent Case Files, 1928-76, Ellsberg, Daniel (Pentagon Papers), Info. File no. 31693. I request a copy of the entire file, including all documents relating to the grand jury investigation, including the records of the grand jury itself (or of multiple grand juries if more than one was impaneled); FBI records; briefs; case notes; correspondence; and any and all other matter filed with or concerning the Boston end of the investigation of the Pentagon Papers.
I am willing to pay fees for this request up to a maximum of $5,000. If you estimate that the fees will exceed this limit, please inform me first.

Thank you for your consideration of this request.

Sincerely,

Jill Lepore
History Department
Harvard University
Cambridge, MA 02138
857-998-1621

jlepore@fas.harvard.edu