

# BEHIND THE LOCKED DOOR OF AN AMERICAN GRAND JURY: ITS HISTORY, ITS SECRECY, AND ITS PROCESS

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## I. INTRODUCTION

The purpose of our Constitution is to create a government that protects people from each other.<sup>1</sup> The purpose of our Bill of Rights is to protect each of us from our government.<sup>2</sup> Fundamental in any ordered system of government is an understanding that the people have the right to be free from crime. But, even more important, the people have a right to be free from a government that takes life, liberty, and property without due process of law.

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1. See generally THOMAS HOBBS, *LEVIATHAN* (Cambridge Univ. Press 1991) (1651) (asserting that freedom requires relinquishment of power to avoid pitting each person against the other).

2. See e.g., Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 870-73 (1960); Loren A. Smith, *Introduction To Symposium On Regulatory Takings*, 46 S.C. L. REV. 525, 526 (1995) (stating that the very purpose of the Bill of Rights is to protect citizens from government).

This Article focuses on whether the development, interpretation, and administration of federal grand jury secrecy provisions has adhered to due process strictures. It suggests that due process concerns have yielded to goals of government efficiency in federal law enforcement. The Article offers a solution that protects historical grand jury secrecy while encompassing the concerns of efficient and effective federal law enforcement. This easily executed solution has eluded the U.S. Supreme Court, Congress, and commentators over the last fifty years. Only one U.S. Court of Appeals decision, *Maryland & Virginia Milk Producers Ass'n v. United States*,<sup>3</sup> has recognized the simplicity and fairness of this solution to both the people and the government. The Supreme Court, however, has never even discussed this critical 1957 D.C. Circuit decision, propounded by the Secretary to the 1946 Advisory Committee on the Federal Rules of Criminal Procedure,<sup>4</sup> in its later, seminal decisions on grand jury secrecy.<sup>5</sup> This simple, unnoticed, one-page panel order balanced the interest of the government in efficient and cost-effective civil regulatory investigations against the interests in grand jury secrecy by allowing disclosure of grand jury materials for subsequent civil proceedings only to the extent that they would have been discoverable by government civil investigative devices. To implement this solution, the Supreme Court and Congress should revisit the federal grand jury secrecy rule.

Part II of this Article is an historical analysis. It examines the grand jury system as it originated in England and developed in colonial America. Part II also focuses on the evolution of the grand jury's function from a powerful tool for the monarch to a shield protecting citizens from the king's abuses.

Part III addresses the critical role secrecy has played in the evolution of the grand jury system in America. It examines secrecy interests in the context of the purpose for disclosure, suggesting that when disclosure is sought by the government for use in civil regulatory actions, the courts must consider the defendant's interest in a fair civil trial process.

Part IV focuses on the 1946 codification of the common law rule of grand jury secrecy into Federal Rule of Criminal Proce-

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3. 250 F.2d 425 (D.C. Cir. 1957).

4. See *Maryland & Virginia Milk Producers Ass'n v. United States*, 151 F. Supp. 438, 440 (D.D.C. 1956). U.S. District Judge Alexander Holtzoff, the author of the lower court opinion that proposed the approach, was also Secretary to the 1946 Advisory Committee on the Federal Rules of Criminal Procedure.

5. See *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *United States v. Baggot*, 463 U.S. 476 (1983); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983).

dures 6(e).<sup>6</sup> A detailed analysis of the rule's drafting history reveals congressional concerns over illegal or unauthorized use of grand jury information in government civil proceedings and a legislative intent that grand jury materials only be disclosed to government attorneys handling criminal prosecutions.

Part V discusses the different approaches taken by the lower courts in permitting disclosure of grand jury materials in government civil litigation after the codification of Rule 6(e). The most significant of these is the fair process approach taken by *Maryland & Virginia Milk Producers Ass'n.* This rather simple, common-sense concept forms the bedrock for the thesis of this article.

Part VI discusses the Supreme Court's decision in *United States v. Procter & Gamble Co.*,<sup>7</sup> the Court's first opportunity to address grand jury secrecy in terms of civil disclosure. Analysis of *Procter & Gamble* exposes the problems inherent in parallel civil and criminal investigations. Part VI also examines the nine-year discovery battle between the United States and *Procter & Gamble*, revealing that disclosure of grand jury material to government civil attorneys provides an incentive for abuse of the grand jury system and can create a substantial imbalance in civil discovery.

Part VII discusses the emerging concern over civil use of grand jury materials in the context of federal administrative agency access to such information. Enabling legislation that created agencies with substantial civil and criminal enforcement powers presented significant grand jury secrecy issues parallel to those examined in *Procter & Gamble*. Questions also arose concerning the extent to which agency personnel could gain access to grand jury materials by assisting the prosecutor with the grand jury investigation. Part VII also traces case law that eventually prompted legislative action amending Rule 6(e).

Part VIII analyzes the legislative history of the 1977 amendment to Rule 6(e),<sup>8</sup> which demonstrates congressional efforts to limit civil regulatory use of grand jury material,<sup>9</sup> and the 1981 proposed amendment that clarified Congress's intent.<sup>10</sup> The 1977 amendment expanded Rule 6(e) disclosure exceptions and

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6. FED. R. CRIM. P. 6(e); see also *infra* text accompanying note 160-62.

7. 356 U.S. 677 (1958).

8. Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319 (1977) (codified as amended at 18 U.S.C. app. (1994)).

9. See *infra* note 300.

10. See Preliminary Draft of Proposed Amendments to The Federal Rules of Criminal Procedure, 91 F.R.D. 289, 301-05 (1981).

authorized disclosure of grand jury materials to government personnel to assist prosecutors in their duties.<sup>11</sup> The 1981 proposed amendment, ultimately tabled in committee, would have expressly limited the term “attorney for the government” to permit automatic disclosure of grand jury materials only to government prosecutors conducting criminal investigations.<sup>12</sup>

Part IX reviews *United States v. Sells Engineering Corp.*<sup>13</sup> and *United States v. Baggot*,<sup>14</sup> the seminal Supreme Court decisions that interpreted the 1977 amendment to Rule 6(e). *Sells* and *Baggot* clearly held that government civil attorneys are not permitted automatic access to grand jury materials to aid in civil proceedings. Part IX also focuses on the Court’s concerns over grand jury abuse and the disparity in civil discovery when government attorneys use grand jury materials in subsequent civil proceedings.<sup>15</sup> Although these cases provided a prophylactic bright-line rule that protects the individual, they failed to adequately balance that interest against the cost to the government of duplicate investigations. As in *Procter & Gamble*, the Supreme Court failed to consider the fair approach taken in *Maryland & Virginia Milk Producers Ass’n*.

Parts X, XI, and XII trace the evolution of the grand jury secrecy rule since *Sells* and *Baggot*, pointing out the ever-competing interests in efficient civil investigations and the need for grand jury secrecy. These sections reveal that grand jury secrecy is being eroded to avoid the extensive costs and delays that occur when governmental agencies must duplicate grand jury investigations for subsequent civil proceedings.

This Article is also a response to Professor Graham Hughes’ recent *Vanderbilt Law Review* article,<sup>16</sup> which proposed coordinating federal compulsory process and modifying the federal grand jury secrecy rule.<sup>17</sup> Professor Hughes thoroughly explored the difficulties and inefficiencies inherent in parallel criminal and civil investigations in light of modern practice and suggested that separation of the two processes is artificial.<sup>18</sup> Professor Hughes

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11. S. REP. NO. 354, 95th Cong., 1st Sess. 7 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 531.

12. Preliminary Draft of Proposed Amendments, 91 F.R.D. at 302.

13. 463 U.S. 418 (1983).

14. 463 U.S. 476 (1983).

15. See *Sells*, 463 U.S. at 434.

16. Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573 (1994).

17. See generally *id.*

18. *Id.* at 610-11.

recommended eliminating the requirement that disclosure of grand jury materials to the government be made only “preliminarily to a ‘judicial proceeding,’” thus allowing disclosure for civil regulatory investigations.<sup>19</sup> He also proposed lowering the standard required for federal civil attorneys to gain access to grand jury materials from a “particularized need” to a “substantial need.”<sup>20</sup> While this Article acknowledges the difficulties surrounding parallel investigations, and agrees modification of Rule 6(e) is necessary, it rejects Professor Hughes’ solution as not affording citizens the requisite fair process.

Finally, part XIV concludes that the all-or-nothing approach taken by the courts, Congress, and commentators can be avoided by adopting the solution proposed in *Maryland & Virginia Milk Producers Ass’n*, which equitably balanced the interest in cost-effective civil regulatory investigations against the interest in protecting the secrecy of the grand jury process, thus providing fair process to the individual.

## II. THE HISTORY OF THE ENGLISH AND COLONIAL GRAND JURIES

The U.S. Supreme Court has stated that “our constitutional grand jury was intended to operate substantially like its English progenitor.”<sup>21</sup> An historical analysis of the grand jury thus helps to assess the role secrecy plays in the modern American grand jury system. This analysis reveals that grand jury secrecy serves two competing functions, which courts should enforce in a manner that equitably balances both roles.

### A. The Grand Jury in England

The earliest progenitor of our grand jury had two main functions: to accuse criminals<sup>22</sup> and to extend the central government throughout England.<sup>23</sup> In twelfth-century England, criminal

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19. *Id.* at 657-63.

20. *Id.*

21. *Costello v. United States*, 350 U.S. 359, 362 (1956).

22. SARA SUN BEALE & WILLIAM C. BRYSON, *GRAND JURY L. & PRAC.* § 1:02 (1986): Although the English grand jury was praised in later years as an important safeguard of individual liberty, its original purposes were to increase the number of criminal prosecutions, to enhance the king’s authority, and indirectly to raise revenue for the Crown, which received the property forfeited by persons convicted of crimes.

23. See Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 *AM. CRIM. L. REV.* 701, 703 (1972) (“[T]he ancestor of our modern grand jury is generally conceded to be the body which was formally made part of the English judicial machinery

charges were prosecuted essentially by individuals,<sup>24</sup> with the king acting as “a super-privileged individual.”<sup>25</sup> The king was thus personally involved in the medieval criminal justice system. With the promulgation of the Assize of Clarendon in 1166,<sup>26</sup> King Henry II established a system of local informers<sup>27</sup> (twelve men from every hundred<sup>28</sup> or four men from every vill<sup>29</sup>) to tell him who was suspected of “murder, robbery, larceny, or harbouring criminals.”<sup>30</sup> The king’s system, which superseded baronial and ecclesiastical jurisdiction,<sup>31</sup> made the king the beneficiary of the fines and forfeitures that attended the accusations.<sup>32</sup> The system required the twelve men to report all suspects<sup>33</sup> and fined them if they failed to indict any suspect<sup>34</sup> or even if they failed to indict an acceptable number of suspects.<sup>35</sup> The twelve men secretly named violators to give the sheriff a chance to seize those who were indicted.<sup>36</sup> Those whom the twelve men accused were tried

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during the reign of Henry II, as a direct result of that monarch’s attempt to assert his dominance over the ecclesiastical and feudal realms.”).

24. Susan M. Schiappa, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 CATH. U. L. REV. 311, 324 (1993).

25. Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 560 (1938).

26. Helene Schwartz identifies the Constitutions of Clarendon, announced in 1164, as an earlier documented forerunner. See Schwartz, *supra* note 23, at 705-07.

27. Presenting evidence against wrongdoers seems to have been recognized before the twelfth century. The Saxon method of bringing offenders to justice included a semi-annual tour by the sheriff through all the towns to punish offenders. GEORGE J. EDWARDS, JR., *THE GRAND JURY* 5 (1906). In the interim, all citizens were made sureties for the good behavior of each other through the system of frank-pledge. *Id.* When the sheriff arrived, the people were required to tell him whom to punish. *Id.* at 5, 8. The Norman kings of England required answers from representatives of local government and also enforced communal responsibility for criminal acts. *United States v. Smyth*, 104 F. Supp. 283, 288 (N.D. Cal. 1952).

28. A hundred is a subdivision of the shire. BEALE & BRYSON, *supra* note 22, § 1:02. Each hundred had a court; and, in 1234, by ordinance of Henry II, these courts met every three weeks, and were visited by the king’s sheriff twice a year to enforce the frank-pledge system and obtain accusations. SIR FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW* 557-59 (2d ed. 1952).

29. POLLOCK & MAITLAND, *supra* note 28, at 560. The vill of the thirteenth century was the civil parish of the nineteenth century, which was originally a purely ecclesiastical district. *Id.*

30. *Id.* at 152. Ten years later, forgery and arson were added to this list of crimes. *Id.*

31. Schiappa, *supra* note 24, at 326 nn.74 & 76; Schwartz, *supra* note 23, at 708-09; EDWARDS, *supra* note 27, at 7.

32. Schiappa, *supra* note 24, at 326 n.76; Schwartz, *supra* note 23 at 709.

33. BEALE & BRYSON, *supra* note 22, § 1:02.

34. Although fining of jurors ended in 1667, Schwartz, *supra* note 23, at 709 n.41., the practice continued for at least another 100 years in the State of Connecticut. EDWARDS, *supra* note 27, at 12 n.62. See also BEALE & BRYSON, *supra* note 22, § 1:02 n.29 (noting that earliest imposition of fines may have been in 1194).

35. Schiappa, *supra* note 24, at 326 n.76; Schwartz, *supra* note 23, at 709.

36. EDWARDS, *supra* note 27, at 20-21. The initial secrecy provisions were thus not for the protection of any interest other than that of bringing the accused to trial.

by ordeal, which forced the suspects to prove their innocence by overcoming the laws of nature.<sup>37</sup> Since the “trial” was punishing, if not actually fatal, the accusation by the king’s twelve men was the beginning and end of fundamental fairness in the twelfth-century.

The twelve men were also empowered to conduct other business of the monarchy.<sup>38</sup> For example, in 1188, the twelve men became tax assessors for the Saladin Tithe.<sup>39</sup> Shortly after the reign of Henry III ended in 1272, the twelve men were looking into the condition and maintenance of public works, including highways, bridges, and jails.<sup>40</sup> During this same time period, the twelve men were sworn to secrecy.<sup>41</sup> Nevertheless, the twelve men turned the information gathered from their inquiries over to itinerant justices sent by the monarchy.<sup>42</sup> These justices had the power to interrogate each of the twelve men to determine how they arrived at their findings.<sup>43</sup>

Significantly, in 1215, King John was forced by his barons to sign the Magna Carta, which delineated individual protections of life, liberty, and property by order of law.<sup>44</sup> This revered document did not specifically address the issue of grand jury secrecy. It did, however, introduce the concept of due process against which any procedural practice must be measured.<sup>45</sup>

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37. Schwartz, *supra* note 23, at 708. For example, the ordeal of the boiling water required the accused to grab a rock out of a cauldron of boiling water without getting burned; or if burned, by healing within three days. Another ordeal proved innocence if the accused sank in a pool of water with both hands tied together under the knees; but if the accused sank, the accused usually drowned to death. See generally THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 113-15 (5th ed. 1956); H. LEA, *SUPERSTITION AND FORCE*, 222-61 (2d ed. 1958); ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* (1986).

38. Schwartz, *supra* note 23, at 709.

39. *Id.* The Saladin Tithe was a levy for financing the Third Crusade against the Moslem general Saladin. The tithe fell particularly heavily upon the Jewish community, who were forced to contribute 60,000 pounds (which represented one quarter of all the property they owned in England and which was held, ultimately, on the king’s behalf). See Judith A. Shapiro, Note, *The Shetar’s Effect on English Law—A Law of the Jews Becomes the Law of the Land*, 71 *GEO. L.J.* 1179, 1188 n.82 (1983).

40. EDWARDS, *supra* note 27, at 25.

41. The oath stated “that they will lawful presentment make of such chapters as shall be delivered to them in writing and in this they will not fail for any love, hatred, fear, reward, or promise, and that they will conceal the secrets, so help them God and the Saints.” *Id.* (citation omitted) (emphasis added).

42. *Id.* at 24-25.

43. *Id.* at 27.

44. “The ancestry of the due process clause is universally traced to chapter 39 of the Magna Carta . . .” Robert E. Riggs, *Substantive Due Process in 1791*, 1990 *WIS. L. REV.* 941, 948. Chapters 39 and 40 were combined and renumbered as chapter 29 in the Magna Carta published in 1225. *Id.* at 949 n.30.

45. *Id.* at 951.

During the reign of Edward III (1312-1377), the twelve men were superseded by twenty-four knights chosen by the county sheriff, who had authority for beginning a prosecution.<sup>46</sup> The knights were called “le grande inquest.”<sup>47</sup> Their jurisdiction over the indictment process had no statutory authorization, but rather developed as part of the common law.<sup>48</sup> Meanwhile, the twelve men, having lost their original inquisitorial jurisdiction, became known as the petit jury,<sup>49</sup> which had responsibility for rendering a verdict of innocent or guilty in capital crimes. Therefore, by the fourteenth century, the developing criminal common law included two salient procedural devices: an indicting grand jury and an adjudicating petit jury.

In 1642, the English legal philosopher Edward Coke<sup>50</sup> interpreted the Magna Carta provision “Nullus liber homo capiatur, aut imprisonetur” as preserving life, liberty, and property subject to the “law of the land.”<sup>51</sup> William Blackstone interpreted Coke’s “law of the land” to require a two-tier process before a person could be deprived of (at least) life.<sup>52</sup> The vote by the grand jury in the first proceeding determined whether there was probable cause to believe that the individual accused was guilty of the crime charged; the vote by the petit jury in the second proceeding determined whether there was enough evidence to convict.<sup>53</sup> The petit jury provided little protection to the innocent accused, however, because the king often fined or imprisoned jurors who re-

46. EDWARDS, *supra* note 27, at 26.

47. *Id.*

48. *Id.*

49. *Id.*

50. Edward Coke, author of the *Institutes*, was widely recognized as an authority on law by both the English and Americans during the eighteenth century. See, e.g., Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 *IND. L.J.* 759, 800 (1994) (observing that Coke, along with William Blackstone and John Locke, was called a legal philosopher).

51. 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* \*46.

52. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*132-39. The Supreme Court later stated that Coke’s interpretation of the Magna Carta was misunderstood:

It was not intended to assert that an indictment or presentment of a grand jury was essential to the idea of due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration of due process of law as it actually existed in cases in which it was customarily used.

*Hurtado v. California*, 110 U.S. 516, 552 (1984). A process that afforded additional due process safeguards beyond those provided by the grand jury, such as the probable cause hearing, in which the defendant had an opportunity to present exculpatory evidence and cross examine prosecution witnesses, was considered a constitutionally acceptable method instigating a prosecution. See *id.*

53. 4 BLACKSTONE, *supra* note 52, at \*306. The two-trial procedure was in place 40 years before Bracton published his legal treatise in the period 1220-1257. See EDWARDS, *supra* note 27, at 25.

fused to convict.<sup>54</sup> Reacting to this monarchical abuse, the grand juries began to shift their focus away from mere accusation to considerations of fairness for the individual accused.<sup>55</sup>

Two celebrated cases became the catalyst for writers to define the rights and powers of English grand juries.<sup>56</sup> When pro-Protestant grand juries in London refused to indict Catholic King Charles II's enemies, Lord Shaftesbury and Stephen Colledge,<sup>57</sup> the grand jury became an institution "capable of being a real safeguard for the liberties of the subject."<sup>58</sup> For the first time, grand juries were positively identified as something other than enforcement agencies of central government; they also existed for the protection of the accused.<sup>59</sup>

### B. The Grand Jury in Colonial America

The American colonies were slow to import the grand jury from England. It was not until 1635 that the first regular grand jury was established.<sup>60</sup> Before grand juries, the colonies used

54. See Lisa H. Wallach, Note, Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power, 56 *FORDHAM L. REV.* 129, 131 n.15 (1987).

55. *Id.*

56. The writings of Sir John Hawles (*The Englishman's Rights* (1680)), John Somers (Lord Chancellor of England, *The Security of English-Mens Lives, or the Trust, Power, and Duty of the Grand Jurys of England* (1682)), and Henry Care (*English Liberties or Free Born Subject's Inheritance* (1698)) were printed several times in the colonies. See RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* 21 (1963): "When the American colonists clashed with absentee trustees or with representatives of royal authority, they too began to see the grand jury in a different light. Instead of a routine, burdensome institution it became the bulwark of their rights and privileges." *Id.* For a similar conclusion, see BEALE & BRYSON, *supra* note 22, § 1:02.

57. For a detailed narrative of the Shaftesbury and Colledge cases, see Schwartz, *supra* note 23, at 710-20.

58. LESTER B. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 141 (1947) (quoting Letter from Professor William S. Holdsworth (July 13, 1933) (defending English grand jury shortly before it was drastically curtailed and finally abandoned in England)).

59. JOHN SOMERS, *THE SECURITY OF ENGLISH-MENS LIVES, OR THE TRUST, POWER, AND DUTY OF THE GRAND JURYS OF ENGLAND* 12 (London, Benjamin Alsop 1682):

It was absolutely necessary for the support of the Government, and the safety of every Mans life and interest, that some should be trusted to inquire after all such as by Treasons, Felonies, or lesser Crimes, disturbed the peace, that they might be prosecuted, and brought to condign punishment; and it was no less needful for every mans quiet and safety, that the truth of such inquisitions should be put into the hands of Persons of understanding, and integrity, indifferent, and impartial, that might suffer no man to be falsely accused, or defamed, nor the lives of any to be put in jeopardy, by the malicious conspiracies of great or small, or the Perjuries of any profligate wretches: For these necessary honest ends was the institution of Grand Juries.

See also *Costello v. United States*, 350 U.S. 359, 362 (1956) ("The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes.").

60. YOUNGER, *supra* note 56, at 6.

“assistants,” whom the English monarchy authorized to make the laws, accuse suspects, and sit in judgment of criminals.<sup>61</sup> Having no checks or balances, the assistants were too powerful and abusive. In response to this abuse, one of the first American grand juries charged several of the assistants themselves with violations of the criminal law.<sup>62</sup> Thus, decidedly unlike its English progenitor, the American grand jury originally began, not as an arm of the executive, but as a defense against monarchy. It established a screen between accusations and convictions and initiated prosecutions of corrupt agents of the government. Therefore, the English progenitor upon which the American grand jury was modeled was the more enlightened protective grand jury of the 1600s.

In the early American experience, the grand jury also became more a part of local government than it had apparently been in England.<sup>63</sup> For example, in the early development of the Massachusetts grand jury, town officials were presented<sup>64</sup> for neglecting to repair the stocks<sup>65</sup> and for failing to repair the highway.<sup>66</sup> The Virginia grand juries became part of the county court system in 1662 and met twice a year to levy taxes, oversee spending, supervise public works, appoint local officials, and consider criminal accusations.<sup>67</sup> By the middle of the 1700s, the Connecticut grand jury was helping to levy taxes and conduct other local government work while a public prosecutor took primary responsibility for investigating crime.<sup>68</sup> In the Carolinas,<sup>69</sup> Georgia,<sup>70</sup> Maryland,<sup>71</sup> New Jersey,<sup>72</sup> and Pennsylvania,<sup>73</sup> the pattern was similar: in addition to screening criminal accusations, American grand

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61. *Id.*

62. *Id.*

63. “In the absence of other governmental bodies, the [colonial] grand juries took over a wide range of administrative tasks and operated with a substantial degree of independence.” BEALE & BRYSON, *supra* note 22, § 1:03.

64. Presentment is “an accusation, initiated by the grand jury itself, and in effect an instruction that an indictment be drawn.” BLACK’S LAW DICTIONARY 1184 (6th ed. 1990). For a cogent argument of both the present and historical merits of grand jury presentment powers and a comment on the Rocky Flats grand jury investigation that terminated before indictment, see Renee B. Lettow, Note, Reviving Federal Grand Jury Presentments, 103 YALE L.J. 1333 (1994).

65. YOUNGER, *supra* note 56, at 7.

66. *Id.*

67. *Id.* at 10-11.

68. *Id.* at 9.

69. *Id.* at 16.

70. *Id.* at 16-17.

71. *Id.* at 12.

72. *Id.* at 13.

73. *Id.* at 15-16.

juries took an active role in local government and had sufficient independence to announce dissatisfaction with government.<sup>74</sup>

As the colonies moved closer to revolution, the grand jury took on a third role: outright resistance to the monarchy.<sup>75</sup> Three successive grand juries refused to indict John Peter Zenger, whose newspaper criticized the withdrawal of jury trials and the royal control of New York.<sup>76</sup> While the King was withdrawing the right to trial by jury<sup>77</sup> and attempting to initiate prosecutions by informations,<sup>78</sup> colonial grand juries responded by making “stinging denunciations of Great Britain and stirring defenses of their rights as Englishmen.”<sup>79</sup> Newspapers often republished these criticisms.<sup>80</sup>

After the Revolution, the centralized government was created without a federal grand jury. The Constitution created three separate branches of government and delineated the powers of each, but did not establish grand juries.<sup>81</sup> Nor were grand juries established in the Judiciary Act of 1789,<sup>82</sup> which set up the fed-

74. For a more detailed discussion of the early grand juries in America, see *id.* at 6-26.

75. *Id.* at 27.

76. Zenger was then charged by information, imprisoned for eight months under an impossibly high bond, and tried for seditious libel under a law which held that the greater the truth the greater the libel. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871-73 (1994).

77. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 14 (1993):

[The king] issued mandates to colonial governors, who then attempted to circumvent the right to trial by jury by expanding admiralty jurisdiction . . . [in which cases were tried by judges who were] appointed and removed by royal governors, who insisted on verdicts they favored in order for the judge to remain on the bench.

78. YOUNGER, *supra* note 56, at 27.

79. *Id.* at 34.

80. *Id.*

81. That omission prompted at least Massachusetts, New Hampshire, and New York to call for an amendment to the Constitution preventing federal prosecutions except by indictment before a grand jury. Schiappa, *supra* note 24, at 329-30; Lettow, *supra* note 64, at 1338 n.20 (citing 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 677, 761, 855 (Bernard Schwartz ed., 1971)); YOUNGER, *supra* note 56, at 45-46. The Fifth Amendment, ratified in 1791—only two years after the Constitution—closely tracks an amendment drafted by John Hancock and forwarded to Congress by the Massachusetts convention. BEALE & BRYSON, *supra* note 22, § 1:04. The amendment drafted by Hancock provided “[t]hat no person shall be tried for any Crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury, except in such cases as may arise in the Government & regulation of Land & Naval forces.” *Id.* The Fifth Amendment provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” U.S. CONST. amend. V.

82. 1 Stat. 73 (1789).

eral court system.<sup>83</sup> However, after passing the Judiciary Act, Congress approved twelve constitutional amendments<sup>84</sup> for ratification by the states. In 1791, the Fifth Amendment was adopted as part of the Bill of Rights, with its Grand Jury Clause insuring that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .”<sup>85</sup> The Grand Jury Clause protected the people against arbitrary and overzealous government by protecting “against hasty, malicious and oppressive prosecution.”<sup>86</sup> Secrecy in grand jury proceedings played a role in that protection.

### III. THE ROLE OF GRAND JURY SECRECY

#### A. The Beginnings of Grand Jury Secrecy

In the beginning, the grand jurors’ oath established the secrecy requirement. When grand juries were simply the monarch’s

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83. “It was decided by Chief Justice Marshall, in [United States] v. Hill [Case No. 15,364], in 1809, that neither the 29th section of the [J]udiciary [A]ct of 1789 (1 Stat. 88), nor the [A]ct of May 13th, 1800 (2 Stat. 82), applied to grand juries in the federal courts.” *United States v. Reed*, 27 F. Cas. 727 (N.D.N.Y. 1852) (No. 16,134). But see YOUNGER, *supra* note 56, at 46 (“The Judiciary Act of 1789 provided that grand juries were to attend each session of the circuit and district courts.”).

In fact, Congress has never passed a comprehensive act establishing the scope and powers of the federal grand jury. The next act to mention grand juries, the Act for the Punishment of Certain Crimes against the United States, enacted on April 30, 1790, required the government to furnish a copy of the indictment and list of witnesses and jurors at least three days before trial to a person accused of treason and two days before trial to a person accused of other capital offenses. Ch. 9, § 29, 1 Stat. 112, 118 (1790). The Act also established a three-year statute of limitations on indictments for treason or other capital offenses, except for willful murder or forgery. *Id.* § 32, at 119. The Act does not include any definition of the grand jury to which it refers. Similarly, the Act for Regulating Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses, enacted on May 8, 1792, assumes the existence of a grand jury and pays three dollars to the United States Marshall who summons a grand jury, and fifty cents to each grand juror for attending in court plus five cents per mile for travel. Ch. 36, § 3, 1 Stat. 275, 276-77 (1792). In 1826, Congress passed an Act to Regulate the Summoning of Grand Jurors, in the District Courts, which reserved to the district judges the authority to order the impaneling of grand juries. Ch. 86, § 1, 4 Stat. 188, 188-89 (1826). In 1895, Congress first established the size of federal grand juries and the necessity for the concurrence of at least twelve grand jurors to find an indictment or presentment. Act Regulating Proceedings in Criminal Cases and for Other Purpose, ch. 86, § 1, 13 Stat. 500, 500 (1865). Congress first began considering omnibus grand jury legislation in 1973, but could not develop a strong enough consensus to enact a general bill; the last omnibus reform proposal was the ABA Bill that disappeared in the markup process in 1986. See ABA CRIMINAL JUSTICE, ABA GRAND JURY POLICY AND MODEL ACT (1977-82) (2d ed. 1982).

84. Ten amendments were ratified and adopted as the Bill of Rights in 1791.

85. U.S. CONST. amend. V.

86. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

investigatory bodies,<sup>87</sup> the grand jury oath did not include secrecy.<sup>88</sup> Secrecy was part of the grand jury process to prevent escape by suspected criminals.<sup>89</sup> By the fourteenth century, however, secrecy was a part of the grand jurors' oath.<sup>90</sup> With the shroud of secrecy came independence from the king. By 1681, the monarch's justices could no longer oversee jury deliberations,<sup>91</sup> even though some justices still claimed the authority to conduct the inquiry in public if the king so desired.<sup>92</sup> At this time, the

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87. PLUCKNETT, *A CONCISE HISTORY OF ENGLISH LAW* 112 (5th ed. 1956) (observing that inquisition established by Clarendon Assize was an effective way of getting information out of an unwilling populace).

88. Bracton, writing in the period 1220-1257, gives the oath sworn to by the twelve men who informed the king of serious crimes:

Hear this, ye justices, that I will speak the truth as to that on which you shall question me on the lord king's behalf, and I will faithfully do that which you shall command me on the lord king's behalf, and for nothing will I fail so to do to the utmost of my power, so help me God and these holy relics.

HENRY BRACTON, 2 *ON THE LAWS AND CUSTOMS OF ENGLAND* 329 (George E. Woodbine ed. & Samuel E. Thorne trans., Belknap Press 1968).

89. See EDWARDS, *supra* note 27, at 20-21. According to Bracton, the twelve men who informed the king were

told in private that if anyone in their hundred or wapentake is suspected of some crime they are to arrest him at once if they can. If they cannot, let them give his name, and the names of all those who are under suspicion, privately to the justices in a schedule and the sheriff will be ordered to arrest them at once and bring them under arrest before the justices, that the latter may do justice upon them.

BRACTON, *supra* note 88, at 329 (citations omitted).

90. Writing during the reign of Edward I, Britton stated that the grand jurors were required to swear "that they will lawful presentment make of such chapters as shall be delivered to them in writing, and that in this they will not fail for any love, hatred, fear, reward, or promise, and that they will conceal the secrets, so help them God, and the Saints." 1 BRITTON 22 (Francis M. Nichols trans., Gaunt & Sons 1983) (1865).

91. At Lord Shaftesbury's indictment hearings before the grand jury, the Lord Chief Justice Pemberton stated to the jury foreman:

I will tell you, I take the Reason of that use for Grand Juries to examine the Witnesses privately and out of Court, to comply with the Conveniencies of the Court. . . . Therefore Gentlemen, there can be no kind of Reason why this Evidence should not be given in Court. What you say concerning keeping your Counsels, that is quite of another Nature, that is, your Debates, and those things, there you shall be in private for to consider of what you hear publickly.

Proceedings against Anthony Earl of Shaftesbury, 33 Car. 2 (1681), in 2 *STATE-TRIALS* 828, 830-31 (Timothy Goodwin et al., London 1719).

92. See *id.* at 833:

At the Grand Jury called to indict Lord Shaftesbury, the Lord Chief Justice Pemberton said to one of the Grand Jurors: as to your Counsels, that is, your Debates, you are bound to conceal them: As to the King's secrets, so long as he will have them kept secret, you are bound to keep them so too; but it doth not deprive the King of the Benefit of having it publick, if he have a Desire for it; you don't break your Oath, if the King will make it publick; you do not make it publick; 'tis the King does it.

But see SOMERS, *supra* note 59, at 79 (arguing that oath of secrecy allowed jurors, "sifting out all the Circumstances which the Law requires," to prevent false accusations, especially when judges censured jurors' questions, calling them "trifles, impertinent, and unfit for the Witnesses to speak to").

grand jurors' oath<sup>93</sup> resembled the basic form administered to grand jurors in 1946, when the Federal Rules of Criminal Procedure were first established.<sup>94</sup>

The purpose of the secrecy requirement was, in the earliest days, interpolated primarily by legal scholars. Of the legal scholars writing about the grand jury in the late seventeenth century, John Somers is not only representative,<sup>95</sup> but eminent,<sup>96</sup> having been read in both England and the colonies.<sup>97</sup> In his monograph on the grand jury, Somers described how grand jurors were sworn not to disclose the subjects of the inquiry, the witnesses, or any of the evidence.<sup>98</sup> In addition, grand jurors were sworn not to reveal

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93. Compare the 1649 oath given in England, "Ye shall truly inquire, and due presentment make of all such things as you are charged withall on the Queen's behalf, the Queen's counsell, your owne, and your fellowes, you shall well and truly keep; and in all other things the truth present, so help you God, and by the contents of this Booke," EDWARDS, *supra* note 27, at 99 (quoting BOOK OF OATHS (London, 1649)) (emphasis added), and the English oath in 1682,

You shall diligently enquire, and true Presentment make of all such Articles, matters and things as shall be given you in charge: And of all other matters and things as shall come to your own knowledge, touching this present Service. The Kings Council, your Fellowes, and your own, you shall keep Secret: You shall present no person for Hatred or Malice; neither shall you leave anyone unpresented for Favour, or Affection, for Love, or Gain, or any hopes thereof; but in all things you shall present the Truth, the whole Truth, and nothing but the Truth to the best of your knowledge; so help you God,

SOMERS, *supra* note 59, at 25-26 (emphasis added), and the 1908 oath that required in part that "[t]he United States' counsel, your fellowes', and your own you shall keep secret," *Awell v. United States*, 162 F. 97, 98 (1908), with the 1945 oath given to the federal grand jury attached to the District Court for the Middle District of Pennsylvania,

You, as foreman of this inquest, for the body of the Middle District of Pennsylvania, do swear, that you will diligently inquire, and true presentment make, of such articles, matters, and things as shall be given you in charge or otherwise come to your knowledge, touching the present service; the Government's counsel, your fellowes' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unpresented for fear, favor or affection, hope of reward or gain, but shall present all things truly as they come to your knowledge, according to the best of your understanding, so help you God,

Hon. Albert Williams Johnson, Charge to Grand Jury, 4 F.R.D. 243, 245 (1945) (emphasis added).

94. See discussion *infra* part IV.

95. See *supra* note 56.

96. John Somers was appointed attorney-general in 1692, a member of the Privy Council and Lord Keeper of the Great Seal of England in 1693, Lord Chancellor in 1697, and in that same year was created Baron of Evesham. 4 LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 499, 501 (7th ed. 1885); 5 *id.* at 22.

97. 5 *id.* at 22

98. SOMERS, *supra* note 59, at 43:

[T]he Kings Counsel, which by the Oath of the Grand Inquest is to be kept secret, includeth all the persons offered to them to be indicted, and all the matters brought in Evidence before them, all circumstances whatsoever whereof they are informed, which may any way conduce to the discovery of Offences; all intimations given them of Abbettors and Encouragers of Treasons, Felonies, or

their own personal knowledge, the knowledge of their fellow jurors, their investigative plans, or their deliberations.<sup>99</sup> The reasons, according to Somers, were first, to prevent the flight of criminals;<sup>100</sup> second, to find out whether witnesses were biased;<sup>101</sup> third, to be free from judicial oversight;<sup>102</sup> fourth, to catch witnesses in their lies;<sup>103</sup> and fifth, to permit the full development of evidence for a possible indictment some time in the future.<sup>104</sup> According to Somers, all of these secrecy interests accrued to the king.<sup>105</sup> However, according to Somers, the interests which benefited the king protected his subjects because the grand jury existed

Perjuries and Conspiracies, or of the Receivers, Harbourers, Nourishers, and Concealers of such Criminals.

99. *Id.*:

Likewise the Oath which enjoins the Council of their Fellows, and their own to be kept, implies that they shall not reveal any of their personal knowledge concerning Offences or Offenders; nor their intentions to indict any man thereupon; nor any of the Proposals and Advices amongst them of ways to enquire into the truth of any matter before them, either about the Crimes themselves, or the accusers and Witnesses, or the party accused, nor the debates . . .

100. *Id.* at 46: “[S]o it was necessary to prevent the Flight of Criminals; if the Evidence against one that is accused should be publicly known, . . . his Confederates and Accomplices might easily have notice of their danger, and take opportunity to escape from Justice.”

101. *Id.* at 46-47:

Yet the reason will be still more manifest for keeping secret the accusations and the Evidence by the Grand Inquest, if it be well considered, how useful and necessary it is for discovering truth in the Examinations of Witnesses in many, if not in most cases that may come before them; when if by this Privacy Witnesses may be examined in such manner and Order, as prudence and occasion direct; and no one of them be suffered to know who hath been examined before him, nor what questions have been asked him, nor what answers he hath given, it may probably be found out whether a witness hath been biased in his testimony by malice or Revenge, or the fear or favour of men in Power, or the love or hopes of Lucre and gain in present or future, or Promises of impunity for some enormous Crime.

102. *Id.* at 48-49:

Yet further, their private Examinations may discover truth out of some disagreement of the Witnesses, when separately interrogated, and every of the Grand Inquest ask them Questions for his own satisfaction about the matters which have come to his particular knowledge, and this freely without Awe or Control of Judges, or distrust of his own parts, or fear to be checked for asking impertinent questions.

103. *Id.* at 52:

[S]o that the Witness could not guess what they should be asked first, or last, nor one conjecture what the other had said, . . . and then compare all their several answers together, they might possibly discern marks enough of falsehood, to show that their Testimonies ought not to be depended upon, where life is in question.

See also *supra* note 102.

104. *Id.* at 48-49:

Yet the same secrecy of Kings Council is no less necessary to reserve the guilty for punishment; when the Evidence against any party accused is not manifest and full, it may be kept without Prejudice under Secrecy until further Enquiry; and if sufficient proof can afterwards be made of the Offence, an Indictment may be found by a Grand Inquest, and the party brought to answer for it . . .

105. “From hence may certainly be concluded that Secrecy in the Examinations and Enquiries of Gr. Juries is in all respects for the Interest and advantage of the King.”*Id.* at 54.

to protect the innocent accused<sup>106</sup> just as much as the innocent victims of crime.<sup>107</sup> Secrecy made possible the discovery of truth<sup>108</sup> and protected individuals from malicious or hateful prosecution.<sup>109</sup> In sum, neither the king, the general public, nor the individual accused could benefit by making public the proceedings of a grand jury.

### B. Grand Jury Secrecy in Early American Jurisprudence

The Grand Jury Clause of the Fifth Amendment<sup>110</sup> made grand jury secrecy an implicit part of American criminal procedure. The first challenges to the rule of secrecy were made by criminal defendants seeking to set aside their indictments based upon insufficiency of evidence<sup>111</sup> or prosecutorial misconduct before the grand jury.<sup>112</sup> Secrecy, hailed as the protector against monarchical abuse, was, ironically, being challenged as a shield for that abuse.

In one of the first reported secrecy cases, *United States v. Smith*,<sup>113</sup> decided fifteen years after the Bill of Rights was ratified, a federal district court in New York indicated that an accused could attack the veil of secrecy. In *Smith*, the defendant

106. *Id.* at 63-64:

The Prosecutors themselves, notwithstanding their big words, and assuming to themselves to be for the King, if their Prosecution shall be proved to be malicious, or by Conspiracy against the Life or Fortune of the Accused, they are therein against the King . . . 'Tis esteemed in the Law one of the most odious Offences against the King, to attempt in his name to destroy the Innocent, for whose Protection he himself was ordained.

107. "[T]he King's only benefits in finding out and punishing Offenders by Courts of Justice are the preservation and support of the Government, the protection of the Innocent, revenging their wrongs, and preventing further mischiefs by the terrors of exemplary punishments." *Id.* at 57.

108. *Id.* at 48; see also *supra* note 103.

109. SOMERS, *supra* note 59, at 47-48:

And the Falseness, Malice or ill Design of another, may be justly suspected from his studiousness and difficulty in answering, his Artifice and cunning in what he relates, not agreeable to his way of breeding and parts, his reserved, indirect, and evasive Replies to easie Questions, his pretences of doubtfulness and want of remembering things of such short dates, or such Notoriety, that 'tis not credible he could be ignormant or forgetful of them.

110. U.S. CONST. amend. V.

111. See, e.g., *United States v. Smith*, 27 F. Cas. 1186 (C.C.D.N.Y. 1806) (challenging indictment based upon illegal evidence); *United States v. Farrington*, 5 F. 343 (N.D.N.Y. 1881) (motioning to quash indictment because of insufficiency of evidence); *United States v. Kilpatrick*, 16 F. 765 (W.D.N.C. 1883) (motioning to quash indictment because of illegal evidence); *United States v. Cobban*, 127 F. 713 (D. Minn. 1904) (plea in abatement challenging sufficiency of evidence upon which indictment was based).

112. See, e.g., *United States v. Wells*, 163 F. 313 (D. Idaho 1908) (plea in abatement based upon misconduct of the prosecutor before grand juror); *United States v. Rintelen*, 235 F. 787 (S.D.N.Y. 1916) (plea in abatement based upon allegation that district attorney expressed to grand jury his opinion on questions of law and fact involved).

113. 27 F. Cas. 1186 (C.C.D.N.Y. 1806).

filed a plea in abatement challenging an indictment alleged to be based upon illegal evidence.<sup>114</sup> The prosecution argued against lifting the veil of secrecy, claiming a plea in abatement could not be made against grand jury actions because secrecy made grand juries “independent and irresponsible.”<sup>115</sup> The defense argued fair process and contended that secrecy should not shield an improper indictment.<sup>116</sup> The court concluded that a challenge to the indictment could be made,<sup>117</sup> implicitly accepting the defense argument that the rule of grand jury secrecy protected the individual accused and, consequently, could be lifted where secrecy defeated that purpose.<sup>118</sup>

As courts continued to adjudicate defendants’ motions for access to grand jury material, two interests—other than the defendant’s interest in fairness—emerged. First, there was a concern that tampering with grand jurors might occur, eroding public confidence in the grand jury institution.<sup>119</sup> Second, blocking a defendant’s access to grand jury materials would allow trials to be free from perjury.<sup>120</sup> The balance between the need for secrecy and the need for disclosure<sup>121</sup> began to tip against the defendant. The majority of these early cases determined that the interests of

114. *Id.* at 1191.

115. *Id.* at 1187. Citing Lord Hale for the classification of pleas in abatement, the prosecution argued, without authority, that the only remedy for grand jury abuse was petit jury adjudication. *Id.*

116. *Id.* at 1188.

117. *Id.* The court eventually denied the plea on the merits. *Id.* at 1191.

118. *Id.* at 1191; see also *United States v. Farrington*, 5 F. 343, 346 (N.D.N.Y. 1881): [A]uthorities . . . assert the right and duty of the court to exercise a salutary supervision over the proceedings of a grand jury. It is only practicable to do this by removing the veil of secrecy whenever evidence of what has transpired before them becomes necessary to protect public or private rights.

See also *United States v. Kilpatrick*, 16 F. 765, 768, 777 (W.D.N.C. 1883):

As the grand jury is an informing and accusing body, which makes its investigations and holds its deliberations in secret, and is irresponsible for its official action upon matters of fact, except before the tribunal of public opinion, it is very important that its powers, duties, and methods of procedure should be well understood, and be strictly confined within the conservative and salutary limits imposed by law, which experience has shown to be necessary to subserve the public good, and to accomplish a just and impartial administration of the criminal law.

119. *United States v. Terry*, 39 F. 355, 357 (N.D. Cal. 1889) (allowing inquiry into sufficiency of evidence before grand jury “would afford opportunity to tamper with the jury; and . . . lessen the respect due to the forms and solemnities of judicial proceedings”).

120. *United States v. Cobban*, 127 F. 713, 718 (D. Minn. 1904) (“A more serious objection [than one to the traditional secrecy of grand jury investigations] is that a defendant may thus learn what testimony exists against him, and be prepared to overcome it upon the trial by perjury.”).

121. *Accord In re Special 1952 Grand Jury*, 22 F.R.D. 102, 106 (E.D. Pa. 1958) (“In every case the court is called upon to balance two policies, the one requiring secrecy, the other disclosure.”).

law enforcement, which favored secrecy, outweighed the defendant's need for disclosure.<sup>122</sup> These decisions were not surprising in the context of the state of criminal law and procedure in the 150 years after the adoption of the Bill of Rights. They were in keeping with the limited rules of criminal discovery<sup>123</sup> and the recognition that a trial by jury should safeguard the defendant.<sup>124</sup>

The issue of grand jury secrecy arose later in a First Amendment context. In 1917, a Rhode Island federal district court addressed the issue of widespread public disclosure of grand jury proceedings in *United States v. Providence Tribune Co.*<sup>125</sup> The court cited the newspaper for contempt for printing an article divulging information from a grand jury probe.<sup>126</sup> Deciding that the fair administration of justice required a finding of fact that the newspaper was in contempt for making the secret grand jury sessions public,<sup>127</sup> the court held that the mere publication of the article about the continuing grand jury probe was an obstruction of justice.<sup>128</sup> The court analyzed the historical justifications for

122. See *McKinney v. United States*, 199 F. 25 (8th Cir. 1912) (and sources cited therein); *Cox v. Vaught*, 52 F.2d 562 (10th Cir. 1931) (and sources cited therein).

123. See *United States v. Garrison*, 291 F. 646, 649 (S.D.N.Y. 1923):

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

See also *In re Atwell*, 140 F. 368, 376 (W.D.N.C. 1905), rev'd on other grounds, 162 F. 97 (4th Cir. 1908):

The defendant in a criminal action is no more entitled as a matter of right to know the evidence of the prosecution until it is disclosed on the trial than is the prosecution to be put in possession of the evidence which the defendant has in mind to offer in his defense.

124. See *United States v. Bolles*, 209 F. 682 (W.D. Mo. 1913) (comparing grand jury function to function of petit jury); see also *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

125. 241 F. 524 (D.R.I. 1917).

126. The article was entitled "Prominent Physicians Involved in Federal War on Cocaine Dealers." *Id.* at 525. The story named three people who had been arrested as a result of the grand jury investigation, and reported that two of them might become prosecution witnesses and that other prominent citizens would probably be arrested in the future. *Id.*

127. *Id.*

128. *Id.* at 528: "That a person may have observed some act done by officials of the law, which he was not sworn to keep secret, does not justify him in publishing it at large. It is

grand jury secrecy and, perhaps influenced by John Somers' treatise,<sup>129</sup> listed six interests in secrecy: (1) preventing the escape of offenders; (2) preventing the destruction of evidence; (3) preventing tampering with witnesses; (4) preserving the reputations of innocent persons whose conduct comes under the grand jury's investigation; (5) encouraging witnesses to disclose their full knowledge of possible wrongdoing; and (6) preventing undue prejudice of the public jury pool.<sup>130</sup> The interests in secrecy that accrued to the government, the accused, and the grand jury were weighed against the newspaper's First Amendment interest in publishing the grand jury information.<sup>131</sup> The court found that all of the historical interests weighed in favor of secrecy for the fair administration of justice.<sup>132</sup> In this context, no one would benefit from the disclosure, except perhaps the newspaper through increased sales. Thus, the decision fairly protected both the interest in law enforcement and the individuals involved.

In the early 1930s, in *United States v. Amazon Industrial Chemical Corp.*,<sup>133</sup> a criminal case, and *In re Grand Jury Proceedings*,<sup>134</sup> a civil regulatory case, the courts addressed problems that did not involve the defendant's access to grand jury matters. In *Amazon*, the defendant challenged an indictment because a stenographer had been present during the grand jury proceedings and had transcribed the proceedings in violation of the secrecy rule.<sup>135</sup> The defendant claimed that the possibility of improper influence upon the grand jury had violated his constitutional rights.<sup>136</sup> Although it agreed that the opportunity for improper influence was a real threat, the Maryland federal district court nonetheless concluded that a defendant must prove actual prejudice to have an indictment dismissed.<sup>137</sup> The court acknowledged that the grand jury was adopted as a protection against oppressive governmental action. It stated, however, that "[i]n this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection

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the duty of a citizen to assist, and not to frustrate, the work of the administration of justice."

129. See *supra* notes 98-104 and accompanying text.

130. *Providence Tribune*, 241 F. at 526.

131. *Id.*

132. See *supra* notes 98-104 and accompanying text.

133. 55 F.2d 254 (D. Md. 1931).

134. 4 F. Supp. 283 (E.D. Pa. 1933).

135. *Amazon*, 55 F.2d at 258.

136. *Id.* at 261.

137. *Id.* at 263-64.

against oppressive action of the government.”<sup>138</sup> Evaluating the reasons for grand jury secrecy set forth in *Providence Tribune*, the Amazon court concluded that these reasons were for the protection of the grand jury itself as an independent representative of the public for finding truth, and that none were based upon constitutional guarantees for the criminally accused.<sup>139</sup> The court cloaked grand jury proceedings with a presumption of regularity,<sup>140</sup> which inherently placed the fairness of the proceeding in the discretion of a prosecutor, the representative of the executive branch.<sup>141</sup>

The Amazon court’s analysis of the purposes for secrecy seemingly contradicts its conclusion that secrecy has no basis in

138. *Id.* at 263. The court’s conclusory statement that oppressive government action is too rare to require the protective procedure of a grand jury is contrary to the concerns of the founders and certainly dubious in times of crisis. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (using “pressing public necessity” to seize property of all persons of Japanese ancestry in certain West Coast areas and intern owners in concentration camps). For a discussion of the abuse of the grand jury for “political crimes” prosecutions, see generally *Federal Grand Jury: Hearings on H.R.J. Res. 46 and H.R. 1277 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976)* (investigating reform after allegations of abuse). The hearing included a report that analyzed certain cases where grand jury abuse allegedly occurred. *Id.* at 730-35. For information on abuse of the grand jury by the Federal Bureau of Investigation, see *Right to Privacy Proposals Of The Privacy Protection Study Commission: Hearings on H.R. 10076 Before Subcomm. of the House Comm. on Government Operations, 95th Cong., 2d Sess., 18-31 (1978)*. Whether the grand jury fulfills its function is beyond the scope of this Article, but for an interesting comment on that issue, see Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 *CORNELL L. REV.* 260 (1995).

139. *Amazon*, 55 F.2d at 261. See also Leipold, *supra* note 138, at 261:

It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury. Of course, these latter are intended directly to share in the benefits from this rule of secrecy, but it is to be noted that none of the reasons for it are founded upon an inherent right in the individual who is being investigated to the same constitutional safeguards that are unquestionably his when he is brought to trial for a given crime.

140. *Amazon*, 55 F.2d at 262-64; accord *United States v. Olmstead*, 7 F.2d 756, 759 (W.D. Wa. 1925) (and sources cited therein).

141. A presumption of regularity is difficult to rebut without access to the grand jury transcripts. See *United States v. American Medical Ass’n*, 26 F. Supp. 429, 431 (D.D.C. 1939). The defendants in *American Medical Ass’n* filed a plea in abatement alleging prosecutorial misconduct before the grand jury, but did not have the requisite proof. *Id.* The court, in refusing to grant the plea, stated:

[t]he defendants complain that with the lips of jurors sealed and the transcript closed to them they cannot obtain the true facts except by aid of the court. But it must be remembered that sound reasons of public policy in the administration of justice lie back of the rules which forbid free access to these channels of information.

*Id.* Not only is the presumption difficult to rebut, but one commentator concludes that jurors defer to prosecutors’ judgments on the critical issue they are asked to decide, whether or not an indictment should issue. See Leipold, *supra* note 138, at 264.

the constitutional rights protecting the criminally accused. Secrecy protects the ultimate truth-finding function of the grand jury.<sup>142</sup> This truth-finding function, however, is intended to protect the individual against unfounded prosecutions. Moreover, the Fifth Amendment guarantees that no person shall be held to answer for a crime unless on an indictment of a grand jury. This constitutional protection also was established to protect the individual against unfounded prosecutions.<sup>143</sup> Therefore, secrecy is arguably based upon the Fifth Amendment right of the individual to be free from unfounded prosecutions.

Like many early decisions, Amazon distinguished between the grand jury process and the stringent due process requirements of a criminal trial.<sup>144</sup> This analysis, when viewed in the context of the unpredictable "secrecy" jurisprudence of that era, erroneously emphasizes that the criminal trial process should serve as a screen against unfounded prosecutions caused by failure of the grand jury process. That error is compounded when the analysis is applied to the civil arena.

The issue of disclosing grand jury materials for use in a civil action was first addressed two years later, in *In re Grand Jury Proceedings*.<sup>145</sup> In that case, the government initiated regulatory proceedings to revoke Union City Brewing Company's beer license.<sup>146</sup> Prior to these proceedings, prosecutors had conducted a grand jury investigation into possible violations of the National Prohibition Act.<sup>147</sup> The grand jury elicited information relevant to the revocation hearing, and the supervising court, upon the agency's motion, allowed disclosure of the grand jury materials for use in that hearing.<sup>148</sup> The court, citing criminal cases,<sup>149</sup> claimed authority for disclosing grand jury materials to the government agency in the name of justice.<sup>150</sup> The court, almost echoing Amazon, stated:

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142. See *supra* notes 108-09 and accompanying text.

143. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

144. See sources cited *supra* note 124.

145. 4 F. Supp. 283 (E.D. Pa. 1933).

146. *Id.* at 284.

147. *Id.* at 283.

148. *Id.*

149. *Id.* at 284 (citing *United States v. Farrington*, 5 F. 343 (N.D.N.Y. 1881) (granting disclosure to the defendant to quash the indictment); *Atwell v. United States*, 162 F. 97 (4th Cir. 1908) (refusing to hold a grand juror in contempt for disclosing information to defense counsel upon which to base a Motion to Quash the indictment); *United States v. Perlman*, 247 F. 158 (S.D.N.Y. 1917) (granting disclosure for use in perjury trial against a grand jury witness); *Metzler v. United States*, 64 F.2d 203 (9th Cir. 1933) (allowing disclosure of grand jury testimony in a criminal trial)).

150. "It is sufficient to say that the rule of [grand jury] secrecy has long since been relaxed by permitting disclosure whenever the interest of justice requires. . . . It is my con-

The rule of secrecy, it will be noted, was designed for the protection of the witnesses who appear and for the purpose of allowing a wider and freer scope to the grand jury itself, and was never intended as a safeguard for the interests of the accused or of any third person.<sup>151</sup>

Therefore, the court refused to accept the contention that a fundamental purpose in protecting the grand jury's "wider and freer scope" of investigation was ultimately to protect the accused against oppressive prosecutions.<sup>152</sup>

The early case law thus began to point out different secrecy considerations in criminal and civil cases, as well as the competing interests of law enforcement and the protection of the individual. When a government attorney seeks access to grand jury materials for use in a civil regulatory proceeding, the central interest from a defendant's point of view is not protection of the investigative role of the grand jury; rather, the interest is whether grand jury information may be used against an individual to initiate a civil enforcement action, where the burden of proof on the government is a preponderance of the evidence rather than proof beyond a reasonable doubt.<sup>153</sup> An examination of this important question presents due process considerations relating to the fundamental fairness of disclosure of grand jury materials for use in civil proceedings.<sup>154</sup> Congress first began to address these secrecy issues in 1946.

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sidered judgment that the ends of justice can be furthered by permitting the disclosure of this testimony." *Id.*

151. *Id.* at 284-85.

152. *Id.* at 284: "The inquisitorial power of the grand jury is the most valuable function which it possesses to-day and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution."

153. In John Somers' seventeenth-century explanation of the grand jury, secrecy protected the grand jury's capacity for finding the truth. See SOMERS, *supra* note 59, at 46-47; see also *supra* note 101. Each enumerated secrecy interest served that purpose regardless of whether the particular interested party was the monarch, the institution, or the people called before the grand jury. See *supra* notes 99-109 and accompanying text. The common rationale driving each enumerated secrecy interest showed that any relaxation of the secrecy rule would hinder the truth-seeking function of the grand jury. See *supra* notes 100-03 and accompanying text. It follows then, that any practice which might stifle that ultimate function is a legitimate interest in grand jury secrecy. Exercise of the grand jury powers to elicit testimony, which may be used in a proceeding with lesser safeguards than that which screens the grand jury's actions, thus becomes a primary interest in secrecy because such a practice would encourage misuse of those powers.

154. In *Hurtado v. California*, 110 U.S. 516 (1884), the court determined that the Due Process Clause of the Fourteenth Amendment did not require states to initiate criminal proceedings by the grand jury process, yet it did not address the issue of fundamental fairness presented by parallel proceedings. *Id.* at 534-35.

Similarly, cases in which the courts provided no due process safeguards in the grand jury process did not present the unique issues that arise when the extraordinarily broad powers of the grand jury are used to gain evidence for a civil proceeding. See, e.g., *McKin-*

#### IV. 1946 CODIFICATION OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Supreme Court created the Federal Rules of Criminal Procedure, which became effective on March 21, 1946.<sup>155</sup> The purpose of the Rules, as stated in Rule 2, was “to provide for the just determination of every criminal proceeding . . . to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.”<sup>156</sup> The Rules balanced the need for enforcing laws against the necessity of safeguarding fundamental rights of the accused.<sup>157</sup> The Department of Justice be-

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ney v. United States, 199 F. 25, 28-29 (8th Cir. 1912) (finding that “[d]ue process of law within the meaning of the Constitution does not even embrace such an important safeguard as exemption from compulsory self-incrimination, much less mere rules of procedure like those pertaining to evidence before grand juries”); *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (stating that neither target nor witness has a right to have counsel present in grand jury room); *United States v. Calandra*, 414 U.S. 338, 351-52 (1974) (stating that Fourth Amendment exclusionary rule does not apply to grand juries); *United States v. Washington*, 431 U.S. 181, 189 (1977) (finding no requirement that target be informed of status as target); *United States v. Williams*, 504 U.S. 36, 50-51 (1992) (stating that prosecutor is under no obligation to present exculpatory evidence to grand jury).

One of the more alarming concerns in this context is the potential use of compelled, immunized, and self-incriminating grand jury testimony in a civil trial. See, e.g., *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983) (finding that immunized grand jury testimony did not possess immunity in subsequent civil trial, even where grand jury transcript formed basis for civil deposition questions; defendant must be granted new immunity by federal prosecutor for civil trial or invoke Fifth Amendment right against self-incrimination); Helene Schwartz, Note, Recent Development: Disclosure and Civil Use of Immunized Testimony, 35 VAND. L. REV. 1211 (1982).

Other concerns include the potential use of biased and untested testimony, see *Mandujano*, 425 U.S. at 581 (finding that neither target nor witness has right to have counsel present in grand jury room), and the potential use of illegally seized evidence to form the basis of civil discovery, see *Calandra*, 414 U.S. at 351-52 (stating that Fourth Amendment exclusionary rule does not apply to grand juries).

155. In 1940, Congress authorized the Supreme Court to develop rules to regulate criminal procedure in the federal courts. Act of June 29, 1940, 54 Stat. 688 (codified as amended at 28 U.S.C. §§ 2071-72 (1994)). In 1941, the Court appointed the “Advisory Committee on Rules of Criminal Procedure, Supreme Court of the United States,” which included “eighteen representative members of the Bar including defense counsel, district attorneys, prosecutors, judges, former judges, and law professors.” MADELEINE J. WILKEN & NICHOLAS TRIFFIN, *DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE* xi (1991). The Advisory Committee worked in cooperation with city and state bar committees, as well as circuit and district court committees. *Id.* at xii. The Committee submitted two preliminary drafts and a final reported draft to the Supreme Court, which prescribed the “truly final” version of the Rules on December 26, 1944. *Id.* at xii-xv. The Attorney General then reported the Court’s final version to Congress on January 3, 1945. *Id.* at xv. The Rules became effective on March 21, 1946. *Id.*

156. FED. R. CRIM. P. 2; see also Hon. Harold Judson, Assistant Solicitor General of the United States, *Improvement in Criminal Procedure From the Viewpoint of The Department of Justice*, 5 F.R.D. 39, 42 (1945).

157. Alexander Holtzoff, Special Assistant to the Attorney General of the United States; Secretary of the Advisory Committee on Federal Rules of Criminal Procedure, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 446 (1944):

lieved such a balance was obtained under the new Rules.<sup>158</sup> To achieve this balance, however, a great deal of preexisting common law criminal procedure was simplified, and some outmoded technical rules were completely eliminated.<sup>159</sup> Significantly, the rule of grand jury secrecy was made into positive law in subsections (d) and (e) of Rule 6.<sup>160</sup>

As adopted, Rule 6 included two grand jury secrecy provisions. The first provision limited who could be present during grand jury sessions,<sup>161</sup> while the second imposed a general rule of se-

The formulation and regulation of criminal procedure has broad implications and wide ramifications. It involves more than merely the manner of drawing pleadings and details of practice. In a larger sense, it must necessarily crystallize a philosophy of administration of criminal justice. It must arrive at a nice and well-balanced adjustment between two basic factors. On the one hand, it must be conducive to a simple, effective, and expeditious prosecution of crimes. Perpetrators of crimes must be detected, apprehended and punished. The conviction of the guilty must not be unduly delayed. Criminals should not go unwhipped of justice because of technicalities having no connection with the merits of the accusation. The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government. Any form of criminal procedure that unnecessarily hampers and unduly hinders the successful fulfillment of this duty must be discarded or radically changed. On the other hand, the converse factor consists in the necessity of preserving and safeguarding the fundamental rights of the accused. These rights, which are derived from the basic Anglo-Saxon principles of fair play and are in part embodied in the Constitution of the United States, are intended, first, to protect the innocent against an erroneous conviction, and, second, to assure the use of civilized standards in dealing even with the guilty. No system of criminal procedure may be deemed successful unless it properly balances these two opposing forces.

158. Improvement in Criminal Procedure, 5 F.R.D. at 42-43:

The purpose of any rules of criminal procedure should be to see that any individual accused of crime is given a fair and speedy hearing. There are two interests to be served in criminal proceedings: (1) the interest of the individual accused, and (2) the interest of the public which has been harmed. A fair criminal procedure will insure that neither interest suffers at the expense of the other. . . . The advantages which [the new Rules] offer in achieving simply and efficiently the ends of justice, while carefully protecting and preserving the fundamental rights of defendants under our system of jurisprudence, should impress themselves inevitably upon lawyers throughout the country.

When the new Rules were substantially completed, the former Attorney General praised them and advocated approval. Hon. Homer Cummings, *The Third Great Adventure*, 3 F.R.D. 283, 284 (1943).

159. Reform of Federal Criminal Procedure, 3 F.R.D. at 447:

The simplification of procedure has been accomplished, however, without sacrifice of any safeguards that properly surround a defendant in a criminal case. In fact, in some respects the new rules have cemented and strengthened the protection accorded the defendant.

160. FED. R. CRIM. P. 6(d)-(e).

161. 18 U.S.C. § 687 (1946) (current version at 18 U.S.C. app. (1994)):

Who May be Present. Attorneys for the government, the witness under examination, interpreters when needed, and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

crecy with specific and limited exceptions.<sup>162</sup> Civil adjudication and administrative regulation aided by the grand jury process were not widespread common law practices and were not contemplated in the new procedural grand jury rule.<sup>163</sup>

It was even unclear whether the common law permitted prosecuting attorneys in grand jury proceedings when the Constitution was adopted,<sup>164</sup> but the practice had become widespread by 1946.<sup>165</sup> Consequently, Rule 6 contained an exception that allowed automatic disclosure of "matters occurring before the grand jury, other than its deliberations and the vote of any juror"<sup>166</sup> to "attorneys for the government."<sup>167</sup> A second exception allowed witnesses to disclose their own testimony in the interests of justice.<sup>168</sup> The third exception allowed disclosure as directed by the

For an early analysis of cases construing Rule 6(d), see Lester B. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 378-82, 423-25 (undated). For a more recent analysis, see Andrea G. Nadel, Annotation, Presence of Persons Not Authorized by Rule 6(d) of Federal Rules of Criminal Procedure During Session of Grand Jury as Warranting Dismissal of Indictment, 68 A.L.R. FED. 798 (1984).

162. 18 U.S.C. § 3771 (1953) (including Rule 6(e)) (current version at 18 U.S.C. app. (1994)):

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

163. When the drafting committee was preparing the original 1946 Federal Rules of Criminal Procedure, it did not occur to them to make provisions for the civil use of grand jury materials, and nothing in the drafting history shows a common law interest in the civil use of the grand jury process. See 7 WILKEN & TRIFFIN, *supra* note 155, at 241-43.

164. See *United States v. Huston*, 28 F.2d 451, 452 (N.D. Ohio 1928) (allowing prosecution to assist with presentation of evidence but finding that its participation in deliberation or vote-taking by the members of the grand jury was not allowed at time of adoption of Fifth Amendment). But cf. *United States v. Wells*, 163 F. 313, 324 (D. Idaho 1908): "The rights of the defendants are to be measured by the grand jury system as it existed and was understood at the time of its adoption. At the common law the prosecutor had no right to attend the sessions." Note, however, that Wells cited as authority George J. Edwards, Jr.'s *The Grand Jury*, which suggested that the common law never guaranteed the power of a prosecutor to present an indictment before a grand jury. EDWARDS, *supra* note 24, at 114-17. See also Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 457 (1965) (observing that grand juries commonly received evidence outside presence of prosecutor).

165. "It has become the practice for the United States Attorney to attend grand jury hearings . . ." Orfield, *supra* note 161, at 346 (referring to history of enactment of Federal Rule of Criminal Procedure 6(e)).

166. 18 U.S.C. § 3771 (1953) (including Rule 6) (current version at 18 U.S.C. app. (1994)).

167. *Id.* "Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice." FED. R. CRIM. P. 6(e) advisory committee's note.

168. FED. R. CRIM. P. 6(e) advisory committee's note.

supervising court “preliminarily to or in connection with a judicial proceeding.”<sup>169</sup> The fourth and final exception, no doubt influenced by the conflict in earlier case law, allowed disclosure to a defendant for the purpose of dismissing an invalid indictment.<sup>170</sup>

When criminal grand jury investigations overlap with civil regulatory inquiries, the government has both procedural and cost-saving incentives to seek grand jury discovery in parallel civil or administrative proceedings.<sup>171</sup> The first and third exceptions allowing disclosure to “attorneys for the government” and “preliminarily to or in connection with a judicial proceeding” have therefore resulted in prolific litigation seeking broad judicial construction of the phrases.<sup>172</sup> The drafting history of Rule 6(e) shows how the secrecy requirement was intended to limit grand jury access by Department of Justice civil attorneys and other federal agency attorneys.

The preliminary draft of Rule 6(e) was proposed as Rule 7(e).<sup>173</sup> As distributed to the bench and bar, preliminary Rule 7(e) provided in part that:

A juror, attorney, interpreter, clerk, or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with another judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, and in that case disclosure may also be made to the attorney for the government.<sup>174</sup>

Government attorneys and judges were concerned about this language,<sup>175</sup> which seemed to preclude the U.S. Attorney present-

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169. “The necessity for disclosure of grand jury proceedings is left to the discretion of the judge in those situations where disclosure is permitted by the terms of the rule.” 4 WILKEN & TRIFFIN, *supra* note 155, at 21 (citing Note to Subdivision 6(e), Notes of Advisory Committee on Rules, second preliminary draft).

170. 18 U.S.C. § 3771 (1953) (codified as amended 18 U.S.C. app. (1994)).

171. BEALE & BRYSON, *supra* note 22, § 8:01.

172. See Richard Neumeg, Annotation, Who Are “Government Personnel” Within Meaning of Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure to Whom Matters Occurring Before Grand Jury May Be Disclosed, 54 A.L.R. FED 805 (1981); see also Bruce I. McDaniel, Annotation, What Is “What Is Judicial Proceeding” Within Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure Permitting Disclosure of Matters Occurring Before Grand Jury When So Directed by Court Preliminarily to or in Connection with Such Proceeding, 52 A.L.R. FED. 411 (1981).

173. Rule 7 became Rule 6 in the Second Preliminary Draft distributed in 1944. See generally WILKEN & TRIFFIN, *supra* note 155 (contrasting Rule 7(e) in volumes 1-3 with Rule 6(e) in volume 4); see also *United States v. Sells* 463 U.S. 418, 468 (1983) (Burger, J., dissenting).

174. See 1 WILKEN & TRIFFIN, *supra* note 155, at 20-21.

175. See generally 2 *id.* at 58-61; 3 *id.* at 352-57.

ing a criminal case to the grand jury from obtaining grand jury transcripts without a court order.<sup>176</sup> Also, when Congress enacted the Rules, the courts were already experiencing the phenomenon of parallel criminal and civil (or administrative) proceedings arising from a common factual nexus.<sup>177</sup> Written comments submitted to the drafters focused attention on the potential use of criminal grand jury information in civil and administrative agency investigations and litigation.<sup>178</sup> In fact, one prescient U.S.

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176. "As the proposed rule now reads, it would prevent the United States Attorney [from] obtaining a transcript from his own reporter, consulting with his Assistants, or conferring with agents of the F.B.I. and the like. Will that further the administration of justice?" 2 *id.* at 59 (quoting Letter from Joseph T. Votava, U.S. Attorney for the District of Nebraska, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (July 22, 1943)). See also 3 *id.* at 353 (quoting Letter from Hon. Orrie L. Phillips, U.S. Circuit Judge for the Tenth Circuit, to the ABA Institute on Rules of Criminal Procedure (Aug. 24, 1943)); 3 *id.* at 354 (quoting Letter from Robert S. Rubin, Special Counsel, Securities and Exchange Commission, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (Sept. 14, 1943)) ("Nor is it clear whether the United States Attorney has to obtain an order of court before he can get a copy of the transcript of the grand jury proceedings."); 3 *id.* at 355 (quoting Letter from Hon. Joseph F. Deeb, U.S. Attorney for the Western District of Michigan, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (Sept. 10, 1943)) ("[S]ome exception should be made because as the rule now stands, the stenographer may be precluded from giving, without an order of the Court, a transcript of his notes to the United States Attorney."); 3 *id.* (quoting Letter from Hon. Paul J. McCormick, U.S. District Judge for the Southern District of California, to the Judicial Conference for the Ninth Circuit (Sept. 9, 1943)) ("If the rule contemplates a restriction on the United States Attorney's use of the transcript, I believe that he should be excepted from the provision requiring the permission of the court.")

177. See, e.g., *In Re Grand Jury Proceedings*, 4 F. Supp. 283 (E.D. Pa. 1933); see also Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 *HARV. L. REV.* 27 (1950) (describing three large antitrust actions that began in 1944 and 1947); Urban A. Lavery, *The Administrative Process: Factual Analysis of the "Report of Attorney General's Committee on Administrative Procedure"*, 1 *F.R.D.* 651, 653-54 (undated) (listing 51 administrative agencies and federal departments in existence that have been exercising administrative powers since 1789).

178. Securities Exchange Commission Special Counsel Robert S. Rubin wrote: "I believe that the clause 'preliminarily to or in connection with another judicial proceeding' (lines 64-66), may cause considerable difficulty in application. For example, is it intended that judicial proceedings should include civil actions? I think such use of grand jury proceedings would be most inappropriate." 3 *WILKEN & TRIFFIN*, *supra* note 155, at 354 (quoting Letter from Robert S. Rubin, Special Counsel, Securities and Exchange Commission, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (Sept. 14, 1943)). Rubin noted that:

The Commission has specifically directed me to request the amendment of proposed Rule 7(d) in order to permit attendance before the grand jury of representatives of the government agency which investigated the case to assist the United States Attorney or other attorney for the government. Such a change certainly would be of immeasurable aid both to the United States Attorney and the grand jury.

3 *id.* at 352. U.S. District Judge Paul J. McCormick wrote that "Rule 7, subdivision (e), provides that an attorney may disclose matters occurring before the grand jury only when so directed by the court. As a matter of common practice the United States Attorney uses the grand jury transcript rather freely with investigators and attorneys for the various governmental agencies." 3 *id.* at 355 (quoting Letter from Hon. Paul J. McCormick, U.S.

Attorney specifically recommended tightening the language to preclude the possibility that any attorney associated with the government, whether presenting a criminal case or not, might lift the shroud of secrecy and gain access to grand jury materials for civil enforcement purposes.<sup>179</sup> The Advisory Committee ultimately changed the language of the draft.<sup>180</sup> As rewritten, the second preliminary draft of what is now Rule 6(e) included a new first sentence that opened the grand jury proceedings to the “attorneys for the government.”<sup>181</sup>

As finally adopted, the Rule specified that grand jury materials could be disclosed to attorneys for the government “for use in the performance of their duties.”<sup>182</sup> By way of guidance, the Advisory Committee’s notes<sup>183</sup> stated: “Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be

District Judge for the Southern District of California, to the Judicial Conference for the Ninth Circuit (Sept. 9, 1943)).

179. “This proposal should be clarified so it will not be construed to mean that any attorney working for the Government can appear before a Grand Jury, by adding the words ‘any attorney authorized to prosecute criminal cases.’” 3*id.* at 355 (quoting Letter from Victor E. Anderson, U.S. Attorney for the District of Minnesota, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (Aug. 20, 1943)).

180. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

4 *id.* at 15-16 (quoting 2d Preliminary Draft of Rule 6(e), formerly Rule 7(e)).

181. “Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties.” 4 *id.* (quoting 2d Preliminary Draft of Rule 6(e), formerly Rule 7(e)). Consequently, the drafters dropped the earlier draft language that permitted access to the grand jury by the attorney for the government to rebut a claim by a defendant seeking to quash an indictment. Because the new language broadened the government attorney’s access for all criminal law purposes, it no longer needed to address the individual limited exceptions allowing access.

182. 18 U.S.C. § 687 (1946) (current version at 18 U.S.C. app. (1994)).

183. The notes to the Federal Rules of Criminal Procedure were the last project on which the Advisory Committee worked. The Committee intended them “to indicate . . . which provisions of the Rules are restatements of existing law, to define the extent of any changes, and to the extent that any of these Rules, involve innovations, to ascertain their background and source.” 1 WILKEN & TRIFFIN, *supra* note 155, at xv-xvi (citation omitted). As Wilken and Triffen point out, “[t]he [Advisory Committee’s] Introductory Statement . . . also makes very clear that the Supreme Court had no hand in supervising or revising the preparation of the Notes and did not approve or sponsor them.” 1*id.* at xvi.

present in the grand jury room during the presentation of evidence.”<sup>184</sup> Otherwise, the Rule required secrecy except under court-supervised disclosure.<sup>185</sup> Given the concerns the Advisory Committee addressed<sup>186</sup>—as well as the underlying purpose of the Federal Rules of Criminal Procedure,<sup>187</sup> the arguably defendant-oriented purpose behind the witness exception,<sup>188</sup> and the lack of a civil enforcement agency exception<sup>189</sup>—the Committee intended the language adopted in Rule 6(e) to allow automatic grand jury disclosure to government attorneys only for criminal prosecutions on which they were working.<sup>190</sup>

## V. INTERPRETATIONS OF THE 1946 SECRECY RULE

In the 1940s, the creation of many administrative agencies with overlapping criminal and civil enforcement powers exacerbated the potential use of grand jury information by civil gov-

184. FED. R. CRIM. P. 6(e) advisory committee’s note.

185. The first sentence of the 1946 version of Rule 6(e) provided for automatic disclosure to attorneys for the government, while the second sentence of the 1946 version of Rule 6(e) provided for court-ordered disclosure. Rules of Criminal Procedure for the District Courts of the United States (1946), reprinted in 7 WILKEN & TRIFFIN, *supra* note 155, at 139-40.

186. See *supra* notes 176, 174-75.

187. See *supra* note 157 and accompanying text; see also *supra* note 158.

188. See William W. Barron, Proceedings of the Institute on Federal Rules of Criminal Procedure, 5 F.R.D. 150, 151 (1945):

Rule 6(e) . . . imposes no obligation of secrecy on a witness. . . .

This is a step forward. Inexperienced prosecutors have been known to caution witnesses not to talk to anybody about the case. Defense counsel have sometimes omitted proper preparation for trial because of doubt of their right to examine witnesses before trial or because of the refusal of witnesses on advice of the prosecutor to talk. Certainly defense counsel in his investigation of the facts of the offense charged against his client, has every right to talk to every witness who can shed light on those facts. This right should be protected and enforced by the court whenever necessary for the due and seemly administration of justice.

189. The Advisory Committee was specifically requested to create such an exception: “I would like to urge the Committee to change the present Rule 6(e) so as to permit disclosure of such matters in connection with federal administrative proceedings.” 6 WILKEN & TRIFFIN, *supra* note 155, at 12 (quoting Letter from Robert S. Rubin, Special Counsel, Securities and Exchange Commission, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (May 24, 1944)).

190. Under Federal Rule of Criminal Procedure 54(c), an “[a]ttorney for the government” includes “the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney.” FED. R. CRIM. P. 54(c). To justify a broader construction of Rule 6(e), the Department of Justice eventually combined Rule 6(e) with Rule 54(c), as well as 5 U.S.C. § 310, which gave discretion to the Attorney General to structuring the Department of Justice:

It should be noted that, until the enunciation of the . . . principles of law by our highest court in [United States v. Procter & Gamble Co., 356 U.S. 677 (1958)], the United States Department of Justice had held the view that the . . . Government had the legal right to use the Grand Jury simply to elicit evidence in and for a civil case.

United States v. Procter & Gamble Co., 187 F. Supp. 55, 56 (D.N.J. 1960).

ernment attorneys.<sup>191</sup> Two issues emerged: first, whether Congress intended Department of Justice civil attorneys and other administrative agency attorneys to have access to grand jury materials for preparation of civil cases (and if so, whether they were to have automatic access as an “attorney for the government”); and second, by what standard would a private party be allowed access to grand jury information. The lower courts disagreed over whether to permit access to grand jury materials, regardless of whether the party seeking disclosure was public<sup>192</sup> or private.<sup>193</sup>

In *In re April 1956 Term Grand Jury*,<sup>194</sup> the Seventh Circuit vigorously protected grand jury secrecy in a case that continued for almost eight years. The litigation involved criminal and civil investigations of alleged tax evasion.<sup>195</sup> The Department of Justice had appointed Treasury Department agents who were actively involved in both inquiries as “assistants” to the grand jury.<sup>196</sup> The grand jury subpoenaed documents—many of which

191. John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,”* 64 B.U. L. REV. 737, 758-59 (1984) (citing KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.3 (2d ed. 1978)).

192. Compare *In re April 1956 Term Grand Jury*, 239 F.2d 263, 272 (7th Cir. 1956) (“The safeguard of secrecy, in the interest of the public, continues even after the grand jury has completed its efforts and therefore forbids any use in civil proceedings of information derived by or through an examination of records and documents made under the authority of the grand jury.”) and *United States v. Crolich*, 101 F. Supp. 782, 784 (S.D. Ala. 1952) (refusing to disclose grand jury materials to Mobile County Board of Commissioners for investigation of alleged election corruption because county administrative proceedings were not ‘judicial proceedings’ within meaning of Rule 6(e)) with *Doe v. Rosenberg*, 255 F.2d 118, 120 (2d Cir. 1958) (“We cannot agree that the Rule should be limited to criminal proceedings; on the contrary we hold that, prima facie, the term ‘judicial proceeding’ includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.”). See also *Application of Kelly*, 19 F.R.D. 269, 270 (S.D.N.Y. 1956) (allowing disclosure when federal prosecutor represented that only his staff, FBI agents, and IRS agents would access materials obtained pursuant to grand jury subpoena duces tecum); *In re Bullock*, 103 F. Supp. 639, 643 (D.D.C. 1952) (allowing limited disclosure of grand jury transcript to D.C. Board of Commissioners to investigate police corruption).

193. Compare *United States v. General Motors Corp.*, 15 F.R.D. 486, 488 (D. Del. 1954) (denying civil disclosure of grand jury transcripts for impeachment because defendant had other discovery tools available that would not jeopardize effective grand jury inquiry and deliberation) and *United States v. Radio Corp. of Am.*, 21 F.R.D. 103, 104 (E.D. Pa. 1957) (denying access to grand jury witness statements because defendant had list of witnesses and could depose them) with *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 200 (D.N.J. 1955) (granting defendant’s motion for civil discovery of trial witness transcripts because government already had access; “[l]ooking at the parties themselves, the ends of justice would clearly call for a discovery of what plaintiff knows of this relevant testimony, to defendant, in order that the parties may be placed on a parity”).

194. 239 F.2d 263 (7th Cir. 1956).

195. *Id.* at 265.

196. *Id.* at 265-67. The Treasury Department had begun an investigation into alleged tax evasion. *Id.* at 265. The target “furnished to treasury agents its records and suitable

the Treasury Department had originally requested—turned the documents over to the agent assistants, and then recessed for a week.<sup>197</sup> The targets of the investigation petitioned the federal district court to examine the grand jury minutes, question the grand jurors concerning the conduct of the agents, and hold in contempt any Treasury agents that had perused grand jury materials outside the scope of the grand jury investigation. The district court dismissed the petition, and the targets appealed, claiming that such misuse of grand jury powers violated their Fourth and Fifth Amendment Rights.<sup>198</sup> The Seventh Circuit agreed, holding that opening the envelope of grand jury secrecy to government agents becomes a constitutional violation of Fourth and Fifth Amendment protections the moment that the otherwise-protected grand jury matters are used “in any manner for the purposes” of a civil proceeding.<sup>199</sup> Although the court would not condone interference with the grand jury’s actions in making

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accommodations for the agents at its offices, and expended about \$20,000 in making the services of its auditors available to said agents . . .”*Id.* The target was indicted, tried, and convicted, but the conviction was reversed because of the admission of illegal evidence.*Id.* The Treasury Department then began a new investigation.*Id.* Again, the target provided all information requested (approximately a van load).*Id.* at 265-66. When the Treasury Department issued more subpoenas that sought much of the information reviewed during the first investigation, the target challenged them as unreasonable harassment, an unreasonable search and seizure, and a denial of due process of law.*Id.* at 266. While the Treasury Department did not attempt to enforce the subpoenas, it did recommend that the Department of Justice begin a grand jury investigation.*Id.* The Department of Justice then appointed two Treasury Department agents as special assistants to conduct a grand jury investigation. *Id.* at 266-67.

197. *Id.* at 267.

198. *Id.* at 268.

199. *Id.* at 271-73:

If . . . efforts are directed toward the procuring of evidence for civil proceedings now or hereafter pending against petitioners, and that purpose is accomplished, then the secrecy of the grand jury has been breached. We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding. The Fifth Amendment’s adoption of the grand jury for use in the United States was for the historic purpose of initiating prosecutions for serious crimes. With the grand jury came its time-honored policy of secrecy. The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings.

. . . The application of secrecy to [the grand jury’s] proceedings is a safeguard for the grand jury itself, because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings. . . .

. . . .

. . . [W]e think it is now apparent that, as far as civil proceedings are concerned, the production of these records and documents pursuant to a grand jury subpoena, if followed by their use in any manner for the purposes of such a civil proceeding against petitioners, violates their constitutional rights under . . . provisions of the Fourth and Fifth Amendments.

the disclosures to the Treasury Department, it did determine that the targets of the investigation could invoke the court's supervisory powers to protect their constitutional rights.<sup>200</sup>

On the other hand, in *In re Petroleum Industry Investigation*,<sup>201</sup> a Virginia federal district court adopted the policy urged by the government. The court held that the government should be able to use information gained by grand jury criminal process for civil litigation.<sup>202</sup> The court also found that the absence of other means of gathering the evidence was irrelevant to the court's determination of whether to allow penetration of the grand jury.<sup>203</sup>

The D.C. Circuit articulated a third approach to the secrecy issue in *Maryland & Virginia Milk Producers Ass'n v. United States*.<sup>204</sup> The court adopted a well-balanced solution: it allowed government attorneys to retain and use grand jury materials for subsequent civil proceedings, but only to the extent that those materials would have been discoverable through civil discovery devices.<sup>205</sup> The precise procedure outlined by the court placed the onus on the government to give the defendants notice of its intention to use grand jury materials sixty days before the civil proceeding occurred.<sup>206</sup> Thus, the procedure provided defendants the

200. *Id.* at 272.

201. 152 F. Supp. 646, 647 (E.D. Va. 1957).

202. *Id.*:

[I]f books and papers coming to the knowledge of the Government's attorneys in a grand jury investigation develop a demand, and an adequacy of proof, for resort to civil litigation in the public interest, it is certainly proper, indeed incumbent upon them, to use for that purpose the information in their hands.

Accord *United States v. Procter & Gamble Co.*, 14 F.R.D. 230, 233 (D.N.J. 1953) (finding no authority for Procter & Gamble's contention that civil use of grand jury process was illegal and refusing to accept the Procter & Gamble contention as the rule).

203. *In re Petroleum Indus. Investigation*, 152 F. Supp. at 647. "This is nonetheless true though no process available in a civil action has the competency to discover this data beforehand." *Id.*

204. 250 F.2d 425 (D.C. Cir. 1957). For the district court's analysis proposing the approach taken in the circuit court, see *Maryland & Virginia Milk Producers Ass'n v. United States*, 151 F. Supp. 438, 440 (D.D.C. 1956). Judge Holtzoff, the author of the district court opinion, was Secretary to the Advisory Committee on the Federal Rules of Criminal Procedure. See also *supra* notes 155, 157.

205. *Maryland & Virginia Milk Producers Ass'n*, 250 F.2d at 425-26.

206. *Id.*

[T]he United States may use in the trial of any future civil action against the Association only such of the [grand jury] documents, of which it has retained copies, as it could obtain through discovery processes available to civil actions and only such as are enumerated by it as those upon which it will or possibly may rely . . . .

*Id.* at 426.

This approach is infinitely more equitable than granting automatic disclosure because the defendant will at least have an opportunity to challenge the disclosure before it occurs. "The fundamental requisite of due process of law is the opportunity to be heard. . . . The

same opportunity to challenge the requested disclosure that they would have if the government had utilized civil investigatory devices.<sup>207</sup> This procedure fairly weighed the government's interest in civil law enforcement against the interest in protecting individuals from the abusive use of grand jury powers for civil discovery.

In its one-page panel order,<sup>208</sup> the D.C. Circuit provided the linchpin for a fair grand jury process. Although few courts have adopted the language and wisdom of *Maryland & Virginia Milk Producers Ass'n*,<sup>209</sup> its importance to grand jury jurisprudence cannot be overemphasized. The order provided an equitable solution to problematic discovery issues in parallel proceedings. Thus, the court's analysis should profoundly affect the next revisitation of this issue by the Supreme Court's and any lower courts.

Having no guidance from the Supreme Court on this problematic and perplexing issue, however, courts often lifted the veil of grand jury secrecy for civil use in the decade following promulgation of Rule 6(e) by applying a standard that questioned whether "the ends of justice" demanded such disclosure.<sup>210</sup> The government often sought and received disclosure of grand jury materials for preparation of civil cases; consequently, civil defendants often requested reciprocal disclosure to prepare a defense. Many of the decisions granting civil defendants reciprocal access to grand jury materials in the 1940s and 1950s expressed concern for funda-

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hearing must be 'at a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 nn.11-12 (1970) (citations omitted).

207. See generally *infra* notes 264-67 (explaining that civil agency subpoenas may be challenged prior to compliance and appealed).

208. The order in its entirety is contained in the Appendix to this Article. See also *Maryland & Virginia Milk Producers Ass'n*, 151 F. Supp. at 438 (underlying district court opinion).

209. Two district court cases adopted the approach taken in *Maryland & Virginia Milk Producers Ass'n*. See *United States v. General Elec. Co.*, 211 F. Supp. 641, 643 (E.D. Pa. 1962); *United States v. Moore*, 423 F. Supp. 858, 859 (S.D. W. Va. 1976).

210. Because the courts had no guidance on the emerging civil use of grand jury materials, they borrowed heavily from the criminal context. The "ends of justice" standard came from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940), a criminal case in which the Supreme Court stated: "Grand jury testimony is ordinarily confidential. . . . [b]ut after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *Id.* at 233-34 (citations omitted); see also *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 200 (D.N.J. 1955) (reviewing a False Claims Act case in which "the ends of justice would clearly call for a discovery of what plaintiff knows of this relevant [trial witness] testimony, to defendant, in order that the parties may be placed on a parity"); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 194 F. Supp. 763, 765 (D. Mass. 1958) (granting Sherman Act defendant's civil subpoena duces tecum served on Attorney General to produce plaintiff's ten-year-old grand jury testimony against defendant in original criminal investigation and concluding that "no evidence which is calculated to do justice should be suppressed by either side"); *In re Special 1952 Grand Jury*, 22 F.R.D. 102, 108 (E.D. Pa. 1958) ("[A]s a matter of justice the defendant has a right to discovery of testimony necessary to enable it to prepare its defense.").

mental fairness of process and parity between the parties.<sup>211</sup> But these decisions were inconsistent, confusing, and provided no clear guidance to government counsel or defendants. The Supreme Court was slow to address this critical aspect of Rule 6(e).

## VI. PROCTER & GAMBLE: A MISSED OPPORTUNITY<sup>212</sup>

In 1956, twelve years after promulgation of Rule 6(e), the Supreme Court first addressed the civil use of grand jury materials in *United States v. Procter & Gamble Co.*<sup>213</sup> Procter & Gamble was a classic “big case”<sup>214</sup> under the Sherman Antitrust Act.<sup>215</sup> Like all “big cases,” this case involved possible criminal and civil liabilities<sup>216</sup> and engendered both criminal and civil investigations. The clash between the civil and criminal rules of procedure and the need for a definitive ruling on the use of grand jury materials in civil litigation compelled the Supreme Court to grant certiorari.

Procter & Gamble began with an eighteen-month-long grand jury investigation into possible criminal violations of the Antitrust Act by the corporation.<sup>217</sup> The grand jury’s term expired without an indictment.<sup>218</sup> The United States then filed a civil enforcement action under section 4 of the Sherman Act.<sup>219</sup> Thereafter, the government sought and received from the district court a civil discovery order compelling Procter & Gamble to produce approximately 800 documents.<sup>220</sup> These same documents had been subpoenaed by the grand jury.<sup>221</sup> The government’s civil discovery motion, in fact, identified the documents by the very exhibit

211. See sources cited *supra* note 210.

212. The Supreme Court’s first opportunity to address the government’s use of grand jury materials for civil actions failed to even consider the balanced approach presented by *Maryland & Virginia Milk Producers Ass’n*. Although the precise issue was not on appeal, the Court did address it in dictum and left the lower courts as confused as before. See *infra* notes 244-48 and accompanying text.

213. 356 U.S. 677 (1958).

214. *United States v. Procter & Gamble Co.*, 19 F.R.D. 122, 128-29 (D.N.J. 1956); see also Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950).

215. 15 U.S.C. §§ 1-7 (1994). The case began as a civil action under § 4 of the Act, with the prosecution alleging criminal conspiracies in violation of §§ 1 and 2 as the basis for the claim. *Procter & Gamble*, 19 F.R.D. at 123 n.1.

216. *Procter & Gamble*, 19 F.R.D. at 130.

217. *Id.* at 123.

218. *Id.* In fact, the grand jury was never asked to return an indictment. *United States v. Procter & Gamble Co.*, 187 F. Supp. 55, 57 (D.N.J. 1960).

219. See *Procter & Gamble*, 19 F.R.D. at 123 n.1.

220. *United States v. Procter & Gamble Co.*, 14 F.R.D. 230, 233 (D.N.J. 1953).

221. *Id.*

numbers placed upon them when they were produced for the grand jury.<sup>222</sup> Procter & Gamble produced the documents and then, to prepare for trial, moved for disclosure of the entire grand jury transcript under Rule 34 of the Federal Rules of Civil Procedure.<sup>223</sup>

Procter & Gamble claimed that the ends of justice required reciprocal access because the United States had used and would continue to use grand jury materials in its civil enforcement action.<sup>224</sup> The Department of Justice, arguing against reciprocal disclosure, admitted that the grand jury had been convened to investigate both criminal and civil violations of the Sherman Act,<sup>225</sup> and claimed a right and a duty to use grand jury materials for the preparation of related governmental civil actions.<sup>226</sup> The district court, while acknowledging that the government's use of grand jury materials in the civil case was not at issue,<sup>227</sup> took the government's nonreciprocal use of grand jury material into consideration to determine whether disclosure of the entire transcript to Procter & Gamble was warranted.

Aligning itself with earlier decisions that focused on the "ends of justice" standard in granting reciprocal access,<sup>228</sup> the district court ordered disclosure of the requested grand jury minutes to establish parity in trial preparation.<sup>229</sup> While the government's prior and continuing nonreciprocal use of grand jury transcripts was "perhaps sufficient" in and of itself to justify granting the defendant's discovery request,<sup>230</sup> the discovery benefit in this case,

222. *Id.*

223. *United States v. Procter & Gamble Co.*, 1955 Trade Cases (CCH) ¶ 68,228 (D.N.J. 1955); see also *Procter & Gamble*, 19 F.R.D. at 123. The then-current version of Federal Rule of Civil Procedure 34 provided in part:

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control . . .

*Fed. R. Civ. P. 34* (1957).

224. *Procter & Gamble*, 19 F.R.D. at 124-25.

225. *Id.* at 125.

226. *Id.* at 124.

227. *Id.* at 124-25.

228. See sources cited *supra* note 210. Although recognizing the need for equity in civil discovery, the court failed to recognize the simple method for achieving that equity presented in *Maryland & Virginia Milk Producers Ass'n*. See *supra* text accompanying notes 204-09; see also discussion *infra* part XIII.

229. *Procter & Gamble*, 19 F.R.D. at 128.

230. *Id.* at 125. Although not cited in the district court opinion, the "ends of justice" rationale had already been put forward in a criminal context by the Supreme Court: "Grand jury testimony is ordinarily confidential. . . . But after the grand jury's functions

where the government had not even identified the issues for trial,<sup>231</sup> was of primary importance to the court's decision to lift the grand jury veil of secrecy.<sup>232</sup>

The government appealed to the Supreme Court on one issue: whether a private defendant could gain access to grand jury transcripts under Federal Rule of Civil Procedure 34.<sup>233</sup> The Supreme Court, like the district court, weighed the fair trial objectives of civil discovery against the "long established policy that maintains the secrecy of the grand jury proceedings . . . ."<sup>234</sup> The Court, while acknowledging that the United States was subject to the rules of civil discovery,<sup>235</sup> determined that Procter & Gamble had not met the "good cause" requirement of Rule 34.<sup>236</sup> The Court concluded that the "good cause" necessary to justify grand jury disclosure required a showing of "compelling necessity" without which "a defense would be greatly prejudiced or that without reference to it an injustice would be done."<sup>237</sup> The Court also noted that this necessity "must be shown with particularity,"<sup>238</sup> thus establishing a "particularized need" standard for disclosure. Applying the criteria, the Court held that Procter & Gamble would not be prejudiced merely because use of ordinary civil discovery rules would involve delay and substantial costs.<sup>239</sup>

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are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940) (citations omitted).

231. See *Procter & Gamble*, 19 F.R.D. at 133.

232. *Id.* at 128:

The court concludes that since plaintiff is using the transcripts containing relevant information, the ends of justice require the court to order plaintiff to produce and permit the inspection and copying by defendants of the transcripts; equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial; none of the reasons for the rule of secrecy applies.

233. See *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 434 n.19 (1983) ("The Court [in *Procter & Gamble*] did not address . . . the conditions under which . . . civil use by the Government could be permitted, since the issue in the case was only whether private parties could obtain access [to grand jury materials].").

234. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (citations omitted).

235. *Id.*

236. *Id.*; see also *United States v. Procter & Gamble Co.*, 1955 Trade Cases (CCH) ¶ 68,228 (D.N.J. 1955); *Procter & Gamble*, 19 F.R.D. at 123.

237. *Procter & Gamble*, 356 U.S. at 682.

238. *Id.* In *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), the Supreme Court revisited this standard in a purely civil case. The Court clarified the standard that was required for particularized necessity: "Parties . . . must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Id.* at 222 (citation omitted).

239. *Procter & Gamble*, 356 U.S. at 682.

While the government's use of grand jury transcripts was not directly at issue in the appeal, the Court, recognizing that the district court's decision rested heavily upon that question, noted in dictum that there had been no finding of fact that the government had used the grand jury process solely to elicit evidence for the civil proceeding.<sup>240</sup> The Court also noted, however, that "[i]f the prosecution were using that device, it would be flouting the policy of the law,"<sup>241</sup> and "wholesale discovery" to the defendant would then be an appropriate remedy.<sup>242</sup> Nevertheless, the Court did not find that the government's mere use of grand jury materials in Procter & Gamble presented the same concerns;<sup>243</sup> and, in the final analysis, the case failed to address the real issue of grand jury secrecy.

The holding of Procter & Gamble placed a heavy burden upon civil defendants seeking to gain access to grand jury materials: they either must show particularized need for the material or must prove that the prosecutor subverted the grand jury process. Moreover, the majority provided no standard for assessing either government subversion or the need for access to grand jury materials. Procter & Gamble created a substantial imbalance in civil discovery and left the lower courts in the same state of confusion as before.

Agreeing with the majority that there was no finding by the district court that the government had used the grand jury investigation for a civil purpose, Justice Whittaker, in a concurring opinion, recognized that the Department of Justice probably impaneled grand juries for precisely that purpose in similar cases.<sup>244</sup> Condoning this breach of the secrecy rule would, in his opinion, encourage government attorneys to abuse the grand jury process.<sup>245</sup> Therefore, he concluded that fundamental fairness and concerns of grand jury abuse justified requiring government attorneys to show the same particularized need for access to grand jury materials as any private litigant.<sup>246</sup>

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240. *Id.* at 683.

241. *Id.*

242. *Id.* at 684: "It is only when the criminal procedure is subverted that 'good cause' for wholesale discovery and production of a grand jury transcript would be warranted."

243. *Id.* Without any discussion of grand jury secrecy or a standard to justify disclosure, the Court stated: "The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case." *Id.*

244. *Id.* at 684 (Whittaker, J., concurring).

245. *Id.* at 685.

246. In order to maintain the secrecy of grand jury proceedings; to eliminate the temptation to conduct grand jury investigations as a means of ex parte procurement of direct or derivative evidence for use in a contemplated civil suit; and to

The Procter & Gamble Court missed the opportunity to directly address the critical secrecy issue. The decision foreclosed trial courts from granting reciprocal disclosure to defendants for the purpose of insuring parity in discovery. Consequently, the focus of grand jury disclosure litigation inevitably shifted to the propriety of governmental breaches of the secrecy rule.

Immediately after the Supreme Court's decision, the parties resumed battle in the district court. Procter & Gamble attempted to establish a "finding of fact" that grand jury abuse had occurred.<sup>247</sup> For the next two years, the trial court rendered decisions that interpreted and applied the Supreme Court's guidelines to ever-expanding discovery issues.<sup>248</sup> The trial court first determined that proof of subversion of the grand jury process at some point during the grand jury proceeding only warranted discovery of the minutes transcribed after that time.<sup>249</sup> The point at which the subversion occurred identified the breach of grand jury secrecy; therefore,

[t]he critical question . . . is, when this case first became only "a civil case." From that time on, our highest court has said that using the Grand Jury to elicit evidence in that case would flout the law, would subvert criminal procedure, would require that any advantage thus obtained improperly by the Government be wiped out, by giving the opposing party the use of so much of the Grand Jury transcript as was thus obtained by a criminal procedure in a purely civil case.<sup>250</sup>

The court further concluded that a defendant had the right to discover government information that would prove the point at

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eliminate, so far as possible, fundamental unfairness and inequality by permitting the Government's attorneys, agents and investigators to possess and use such materials while denying like possession and use by attorneys for the defendants in such a case, I would adopt a rule requiring that the grand jury minutes and transcripts and all copies thereof and memoranda made therefrom, in cases where a "no true bill" has been voted, be promptly upon return sealed and impounded with the clerk of the court, subject to inspection . . . only upon order of the court . . . upon a showing of such exceptional and particularized need as is necessary to establish "good cause" . . . under Rule 34.

Id.

247. See *United States v. Procter & Gamble Co.*, 174 F. Supp. 233, 234 (D.N.J. 1959).

248. See *id.*; *United States v. Procter & Gamble Co.*, 175 F. Supp. 198 (D.N.J. 1959); *United States v. Procter & Gamble Co.*, 180 F. Supp. 195 (D.N.J. 1959); *United States v. Procter & Gamble Co.*, 25 F.R.D. 485 (D.N.J. 1960); *United States v. Procter & Gamble Co.*, 187 F. Supp. 55 (D.N.J. 1960).

249. *Procter & Gamble*, 174 F. Supp. at 235.

250. *Id.* at 235-36.

which subversion of the grand jury began,<sup>251</sup> holding that no presumption of regularity<sup>252</sup> or privilege<sup>253</sup> would bar such discovery.

After discovery compliance by the government revealed evidence of at least partial abuse of the grand jury proceeding, the district court made a “finding of fact” that abuse had indeed occurred.<sup>254</sup> Procter & Gamble immediately moved to suppress or impound all evidence gained through the breach of secrecy.<sup>255</sup> Finding that the Supreme Court had indicated that reciprocal access was the appropriate remedy, the court denied the motion.<sup>256</sup>

251. The court granted the defendant’s motion to compel discovery from Department of Justice officials concerning the progression of their investigation and their determination to pursue the case as a civil action, stating:

It is the lack of proof in this cause as to what such authoritative determination by the Government was, and when it was made, that made our highest court in Procter & Gamble say that “there is no finding that the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach.” But that Court has also held that the use of “criminal procedures to elicit evidence in a civil case . . . would be flouting the policy of the law,” and a subversion of criminal procedure, and that this would call for “wholesale discovery” by clear inference of all of the Grand Jury proceedings which were taken after the Government had determined not to proceed criminally. Thus it now becomes necessary, in order to do justice, to determine when the Government did finally determine to proceed against the present defendants solely by the present civil complaint, as it obviously did at some time.

Id. at 240.

252. As for the Government’s objection that a presumption of regularity in the conduct of governmental affairs should be deemed to exist, it should be noted, first, that previous to the decision in Procter & Gamble, the Department of Justice had regularly considered it the proper thing to do, when the occasion arose, to use the Grand Jury to make even a solely civil case under the anti-trust laws. Thus the question here is not whether the Government did the regular thing in fact, but whether this regular thing which it did was in fact lawful, in the light of the rule for the first time laid down by our highest court in Procter & Gamble.

Id. at 237 (citation omitted).

253. [W]here the Executive Department of the Government has voluntarily sought the aid of the Judicial Department of the Government to enforce the law of the land, as here, and the United States Supreme Court has declared that the law of the land requires a certain “finding,” in order to do justice between the parties in that judicial proceeding, it would not seem that the Executive Department could rely on a mere “housekeeping” privilege of its own, to refuse to abide by the law of the land and give evidence as to such “finding.”

Id. at 238.

The executive privilege is discussed more fully in *United States v. Procter & Gamble Co.*, 25 F.R.D. 485 (D.N.J. 1960). As explained in that case, the issue was whether “an executive privilege exists to engage in full discussion and deliberation with subordinates as well as Department heads without disclosing same, ‘in order to form a proper judgment’ as that judgment affects not only the Government’s rights but those of opposing parties in the course of litigation.” Id. at 489 (citation omitted).

254. *United States v. Procter & Gamble Co.*, 175 F. Supp. 198, 199-200 (D.N.J. 1959).

255. *United States v. Procter & Gamble Co.*, 180 F. Supp. 195, 200 (D.N.J. 1959).

256. In so doing, the court addressed the very real and unique problems faced by the Department of Justice when pursuing cases that involve both criminal and civil liabilities. The court noted that the Sherman Antitrust Act is primarily a criminal statute. See Proc-

Therefore, the court granted Procter & Gamble disclosure of grand jury testimony to the extent it had proven grand jury abuse.<sup>257</sup> To do otherwise, the court reasoned, would “put an end to the Government’s case” and make it impossible for the Department of Justice to enforce antitrust laws.<sup>258</sup>

Dissatisfied with this decision, Procter & Gamble set out to prove that the government had subverted the entire grand jury proceeding. Through civil discovery, it obtained proof that the Department of Justice had convened the grand jury knowing an indictment was improbable; in fact, the government had always planned to seek a civil remedy.<sup>259</sup> Faced with this clear evidence, the district court granted full disclosure of grand jury transcripts to Procter & Gamble.<sup>260</sup> Nine years of litigation finally ended with proof of grand jury secrecy abuse that required reciprocal access in the name of fairness.

The potential for abuse of grand jury secrecy, while not the focal point of the Supreme Court’s decision in Procter & Gamble, at least established such abuse as a critical concern in the context of such epic civil antitrust litigation. However, given the example of Procter & Gamble, the administration of justice would be better served by the equitable approach adopted in Maryland & Virginia Milk Producers Ass’n.<sup>261</sup> This approach would serve the needs of civil law enforcement yet still protect the due process rights of the individual by discouraging grand jury abuse.

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ter & Gamble, 180 F. Supp. at 203. Section 4 of the Act also provides a civil equitable remedy for the same conduct, however. 15 U.S.C. § 4 (1994). Thus, an investigation would certainly involve conduct that could be construed as either criminal or civil. The choice of remedy is left in the discretion of the prosecutor. The critical question becomes the timing of that choice. To use the criminal grand jury process solely to develop a civil case is, according to the Supreme Court, to flout the policy of law. *United States v. Procter & Gamble*, 356 U.S. 677, 683 (1958).

257. *Procter & Gamble*, 180 F. Supp. at 206-07.

258. *Id.* at 200. While the district court recognized the unique difficulties involved in investigating civil antitrust violations, it failed to recognize that a solution existed that would allow for governmental use of grand jury materials while still protecting the rights of the individual. If the court had applied the rationale of *Maryland & Virginia Milk Producers Ass’n*, this nine-year battle could have been avoided.

259. Procter & Gamble obtained numerous internal Department of Justice memoranda, many of which noted that the original intent of the investigation against Procter & Gamble was to file a civil suit. *United States v. Procter & Gamble Co.*, 187 F. Supp. 55, 59-60 (D.N.J. 1960).

260. *Id.* at 58.

261. See *supra* notes 204-09 and accompanying text; see also discussion *infra* part XIII.

## VII. EMERGING CONCERNS OVER ADMINISTRATIVE AGENCY ACCESS TO GRAND JURY MATERIALS

Issues pertaining to the propriety of the Department of Justice's use of grand jury materials for civil litigation were not the only concerns arising from the 1946 codification of Rule 6(e). A similar question about administrative agency access to grand jury materials quickly surfaced.<sup>262</sup> The investigative powers of federal administrative agencies are more limited than those which a grand jury may employ in criminal investigations,<sup>263</sup> and agency actions are statutorily subject to judicial review.<sup>264</sup> Although certain federal statutes grant administrative agencies subpoena powers when they are necessary to carry out the agencies' investigative and adjudicatory functions,<sup>265</sup> gathering information in this manner often proves more costly and frustrating than obtaining the materials from the grand jury.<sup>266</sup> Thus, administrative agencies, like the Department of Justice's own civil attorneys, have attempted to seek information from a particular grand jury to circumvent their more restrictive investigation scheme. This has resulted in Rule 6(e) disclosure litigation.<sup>267</sup>

The Advisory Committee was aware of the agencies' role in law enforcement while drafting the Federal Rules of Criminal Procedure.<sup>268</sup> Indeed, Congress enacted the Administrative Proce-

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262. See sources cited *supra* notes 178-80.

263. For a comprehensive overview of administrative agency powers of investigation, see generally KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed. 1978). For a more detailed look at the enforcement programs of selected federal agencies, see NEIL A. KAPLAN ET AL., *PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS* 27-59 (1981).

264. See Administrative Procedure Act, 5 U.S.C. § 702 (1994); see also Urban A. Lavery, *The Administrative Process: Factual Analysis of the Report of Attorney General's Committee on Administrative Procedure*, 1 F.R.D. 651, 672-73 (1940):

In the whole field of Administrative Law, the functions that can be performed by judicial review are fairly limited. Its objective, broadly speaking, is to serve as a check on the administrative branch of the government. Judicial review is rarely available, theoretically or practically, to compel effective enforcement of the law by administrators. It is adapted chiefly to curbing excess of power, not toward compelling its exercise.

265. See, e.g., 15 U.S.C. § 49 (1994) (granting subpoena powers to Federal Trade Commission); 15 U.S.C. § 78(u) (1994) (granting subpoena powers to the Securities and Exchange Commission); 26 U.S.C. §§ 7602, 7609 (1994) (granting subpoena powers to Internal Revenue Service); 47 U.S.C. § 409(e) (1994) (granting subpoena powers to Federal Communication Commission).

266. See, e.g., *Petition for Certiorari at 12a, United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983) (No. 81-1032) ("In fact, frustration over limitations on civil discovery may have prompted the government to convene the grand jury here.").

Agency subpoenas must be enforced in federal district court and an enforcement order may be appealed. See, e.g., I.R.C. § 7604 (1994).

267. See e.g., *In re April 1956 Term Grand Jury*, 239 F.2d 263, 271 (7th Cir. 1956).

268. In 1939, Congress appointed a committee to investigate administrative procedures and to suggest improvements. The result of the committee's work was the Federal

cedure Act concurrently with the completion of the Rules.<sup>269</sup> Congress created the Act to establish uniform procedures for all federal agencies and to serve as a “check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.”<sup>270</sup> Additionally, the Advisory Committee was asked specifically to resolve the issue of administrative agency access to grand jury materials.<sup>271</sup> Unfortunately, Rule 6(e), as finally adopted, did not do so. Thus, trial and appellate court decisions concerning disclosure to federal agencies were far from uniform.<sup>272</sup>

The first and leading appellate case dealing with the disclosure of grand jury material to federal agencies was *Doe v. Rosenberg*,<sup>273</sup> decided the same year as *Procter & Gamble*. In *Rosenberg*, a federal grand jury had been investigating a New York attorney’s alleged criminal activity.<sup>274</sup> While the grand jury did not return an indictment, it did refer information concerning the attorney’s activities to the New York Bar Association’s Grievance Committee.<sup>275</sup> The Committee then sought and obtained a court order for disclosure of grand jury transcripts under Rule 6(e).<sup>276</sup> The attorney challenged the order on the grounds the investigation was not conducted “preliminarily to . . . a judicial proceeding” within the meaning of Rule 6(e).<sup>277</sup> A court cannot grant an order for disclosure, even where particularized need exists, if this

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Administrative Procedure Act. The Chairman of the Advisory Committee on the Federal Rules of Criminal Procedure, Arthur T. Vanderbilt, also was a member of the Attorney General’s Committee on Administrative Procedure. Compare Attorney General’s Committee on Administrative Procedure, 1 F.R.D. 259 (1941) (appointing Arthur T. Vanderbilt as member), with 7 WILKEN & TRIFFIN, *supra* note 155, at xi-xii (quoting Letter of Transmittal submitted by Arthur T. Vanderbilt, Chairman, Advisory Committee on the Federal Rules of Criminal Procedure (July 1944)). See also Urban A. Lavery, *The Administrative Process: Factual Analysis of the Report of Attorney General’s Committee on Administrative Procedure*, 1 F.R.D. 651 (1940) (listing all federal administrative agencies and federal departments created before 1940 that were exercising administrative powers).

269. 5 U.S.C. § 1009(a) (1946) (current version at 5 U.S.C. § 702 (1994)); see also Urban A. Lavery, *The Practicing Lawyer and the New Federal Administrative Procedure Act*, 6 F.R.D. 51 (1946).

270. *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950).

271. See 3 WILKEN & TRIFFIN, *supra* note 178, at 352.

272. See generally David E. Brodsky & Nicholas M. De Feis, Note, *Facilitating Administrative Agency Access to Grand Jury Material*, 91 YALE L.J. 1614 (1982) (analyzing inconsistent and contradictory decisions interpreting Rule 6(e) in context of federal agency access to grand jury materials).

273. 255 F.2d 118 (2d Cir. 1958). See also Brodsky & De Feis, *supra* note 272, at 1627 n.49 (stating that *Rosenberg* was the first appellate decision concerning administrative agency access to grand jury materials under Rule 6(e)).

274. *Rosenberg*, 255 F.2d at 119.

275. *Id.*

276. *Id.*

277. See *id.*

threshold criterion is not met.<sup>278</sup> The decision in *Rosenberry*, therefore, turned upon the meaning of “preliminarily to.”

In assessing whether disclosure was appropriate, the court employed a two-prong test: first, whether any hearing before the grievance committee was “preliminary to” any charges of unprofessional conduct that might take the matter into court; and second, whether any court proceeding was a “judicial proceeding” under the Rule.<sup>279</sup> The court defined a “judicial proceeding” broadly to include “any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.”<sup>280</sup> Finding that the two-prong test had been met, the court upheld the disclosure order<sup>281</sup> but never addressed what standard of need was required before disclosure would be allowed. The court posited a test that balanced the public interest in maintaining the integrity of the bar against the appellant’s interest in grand jury secrecy.<sup>282</sup>

Procter & Gamble, however, did set forth the standards of need for private parties seeking disclosure.<sup>283</sup> Whether those same standards applied to federal agencies became the subject of litigation. Initial decisions held that federal agency attorneys were not allowed automatic access as “attorney[s] for the government” under Rule 6(e)<sup>284</sup> and that the “particularized need” standard set forth in *Procter & Gamble* applied to federal agencies seeking court-ordered disclosure.<sup>285</sup> Some courts were not as certain that they should interpret Rule 6(e) so narrowly, however, especially where a U.S. Attorney sought a disclosure order to ac-

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278. *Id.*

279. *Id.* at 120.

280. *Id.*

281. *Id.*

282. See *id.*; see also *In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952) (finding that public interest in preserving integrity of police department outweighed interest in secrecy).

283. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). In 1979, the Supreme Court revisited this question in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), where it expanded the scope of this standard by creating a three-part test a private litigant must meet to gain disclosure. *Id.* at 222.

284. *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3rd Cir. 1962):

The term “attorneys for the government” is restrictive in its application and does not include the attorneys for the administrative agencies. If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided.

285. A federal agency “stands in no higher degree of privilege than a private litigant” seeking access to grand jury materials. *In re Grand Jury Proceedings*, 29 F.R.D. 151, 154 (E.D. Pa. 1961), *aff’d*, 309 F.2d 440 (3d Cir. 1962).

quire assistance from a federal agency attorney on a criminal case being investigated by a grand jury. One case in particular that raised this issue and eventually prompted congressional action was *In re William H. Pflaumer & Sons, Inc.*<sup>286</sup>

In *Pflaumer*, the federal district court was confronted with the overlapping enforcement duties of the Internal Revenue Service's criminal and civil investigation divisions<sup>287</sup> in a racketeering and tax case against *Pflaumer & Sons'* beer distributing company.<sup>288</sup> Surveying the limited case law,<sup>289</sup> Judge Becker found that courts uniformly refused to condone automatic exceptions to grand jury secrecy for the IRS, the Federal Trade Commission, and the Tennessee Valley Authority.<sup>290</sup> However, citing the Advisory Committee's notes for Rules 6(e) and 54(c), the court found no guidance on what the drafters meant by "attorneys for the government."<sup>291</sup> Judge Becker, therefore, decided to grant automatic disclosure to government agency personnel under an "aegis" theory.<sup>292</sup> The

286. 53 F.R.D. 464 (E.D. Pa. 1971).

287. "An intelligence division agent within the Internal Revenue Service is responsible for criminal investigations; a separate kind of agent—a revenue agent—is responsible for civil investigations." Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law, House Comm. on the Judiciary, 95th Cong., 1st Sess. 765 (1977) (statement of Benjamin R. Civiletti, Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice).

288. *Pflaumer*, 53 F.R.D. at 466.

289. *Id.* at 470.

290. *Id.* at 473-76.

291. *Id.* at 476 n.31. Judge Becker's quotation from the Advisory Committee's notes used an ellipsis to stop short of the explanation for granting automatic disclosure to attorneys for the government "inasmuch as they may be present in the grand jury room during the presentation of evidence." FED R. CRIM. P 6(e) advisory committee's note. Contrary to Judge Becker's conclusion, there is very little historical support for the assertion that Department of Justice attorneys not directly involved in the grand jury presentation should have automatic access to grand jury material.

292. *Pflaumer*, 53 F.R.D. at 476. The "aegis" theory was developed under the district court's supervisory power to oversee who was having a look at grand jury materials, when, and for how long. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 34-37 (1977) (statement of Hon. Edward R. Becker, U.S. District Judge, Eastern District of Pennsylvania) [hereinafter Becker Statement]. The acting prosecutor guiding the grand jury proceeding was charged with ensuring that materials disclosed for the criminal case were not leaked or otherwise made available to parties outside of the potential prosecution. *Id.*

In practice when a citizen turns over his cartons of papers to the grand jury they will be examined by the government personnel assisting the attorneys for the government in the offices of their own agency. We must remember, in that context, that access to these records was made possible because they were subpoenaed to a secret grand jury. We must also note that grand jury material will often be examined pursuant to Rule 6(e) by government and administrative agencies, and yet: (1) the powers of federal administrative agencies are tightly circumscribed by the statutes creating them; (2) federal agencies (including IRS) are not permitted to launch general investigations which do not concentrate on a specific target; (3) agency subpoenas are subjected to greater scrutiny.

disclosure, however, was automatic only for use in the criminal case before the grand jury.<sup>293</sup> In expanding the terms of Rule 6(e), Judge Becker suggested that the rule needed clarification.<sup>294</sup> Apart from Judge Becker's recommendation, there was no apparent urgency behind the resulting proposal to amend the Rule,<sup>295</sup> particularly in light of the work that had already begun on plenary grand jury reform legislation.<sup>296</sup>

## VIII. CONGRESSIONAL ACTION

### A. The 1977 Amendment

The Advisory Committee prepared five amendments<sup>297</sup> to the Federal Rules of Criminal Procedure in late 1972.<sup>298</sup> However, the

tiny than grand jury subpoenas; (4) the agencies are not usually subject to the direct supervision of the courts; and (5) their activities, unlike those of the United States Attorney in connection with a given prosecution, are ongoing, so that vindication at trial does not serve as a meaningful protection in cases of abuse.

Congress has thus determined not to give administrative agencies powers comparable to the grand jury. Yet the danger exists that the execution may accede to the grand jury's extraordinary powers via Rule 6(e).

Id. at 49-50.

293. See Pflaumer, 53 F.R.D. at 475.

294. Id. at 468. Judge Becker made the specific suggestion to reevaluate and clarify the phrase "attorneys for the government" to resolve "how far the 'Attorney for the government' exception to the secrecy principle may extend in view of the myriad situations in which the United States Attorney works with and through other government agencies in developing factual material for civil and criminal actions." Id. He personally suggested clarification to Judge Maris, with whom he worked in the U.S. Courthouse in Philadelphia, and who was then chairman of the Supreme Court Rules Committee. Becker Statement, *supra* note 292, at 28. One day, Judge Becker said to Judge Maris, "I wrote this [Pflaumer] opinion, and [R]ule 6(e) ought to be clarified." Id. Judge Becker testified that Judge Maris replied, "Send it to me." Id.

295. Such was the case even six years later: "[P]articularly since there has been no demonstration or suggestion of any apparent urgency for the proposed amendment, the subject of disclosure of grand jury proceedings and grand jury secrecy should be considered as a whole together with the other legislation." Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 150-51 (1977) (statement of Bernard J. Nussbaum, Esq., Chicago) [hereinafter Nussbaum Statement].

296. "The questions concerning grand jury secrecy presented by the proposed substantive change are basic to the function and operation of the grand jury. . . . The issues surrounding Rule 6(e) and the proposed substantive change will be taken up by [the Subcommittee on Immigration, Citizenship, and International Law] during its work on the grand jury reform legislation." H.R. REP. NO. 195, 95th Cong., 1st Sess. 5 (1977), reprinted in Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 275 (1977) (Appendix 6).

297. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 1 (1977).

amendment proposing to clarify the first sentence of Rule 6(e)<sup>299</sup> was not reported to Congress until April 26, 1976.<sup>300</sup> It was soon

298. *Id.* at 84 (statement of Prof. Wayne LaFave, University of Illinois, reporter to the Advisory Committee) [hereinafter LaFave Statement].

299. The 1976 proposal to amend Rule 6(e) stated:

(e) **SECRECY OF PROCEEDINGS AND DISCLOSURE.**—Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, “attorneys for the government” includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person, except in accordance with this rule . . . .

SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., AMENDMENTS, FEDERAL RULES OF CRIMINAL PROCEDURE 7 (Comm. Print 1977) (new language underlined).

300. H.R. REP. NO. 195, 95th Cong., 1st Sess. 2 (1977) reprinted in Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 272 (1977) (Appendix 6).

There are at least three explanations for the four-year drafting period. First, the proposals were first printed in the federal reporters during the summer of 1973 while 5,000 copies of the proposed amendments were circulated to the bench and bar for comments to be received back by February 1974. Those comments led to revisions. LaFave Statement, *supra* note 298, at 84. Second, Congress was involved with the Federal Rules of Evidence and during that period did not consider the amendments to the Federal Rules of Criminal Procedure. Becker Statement, *supra* note 292, at 46. Third, the Nixon administration's abuse of the grand jury process to harass its political opponents triggered a series of grand jury reform proposals that overlapped the grand jury provisions of Federal Rule of Criminal Procedure 6. In his June 10, 1976, opening remarks to the first ever congressional hearings on grand jury reform, Joshua Eilberg said,

In recent years . . . increasing evidence has been presented that the historic function of the grand jury has been perverted and that its historic purpose has been disregarded.

It has been almost 3 years since this subcommittee began its study of alleged abuses in the Federal grand jury system.

In March of 1973, we received testimony regarding the so-called Fort Worth Five controversy and listened to witnesses describe the use of grand juries to investigate “political crimes”; the locating of grand jury inquiries, often for political purposes, far from the site of an alleged offense; the use of grants of immunity to elicit testimony; and the use of the court's contempt power to coerce it.

Federal Grand Jury: Hearings on H.J. Res. 46, H.R. 1277 and Related Bills Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 94th Cong., 2nd Sess. 2 (1976) (statement of Hon. Joshua Eilberg, Chairman of the Subcommittee). See also generally Reform of the Grand Jury System: Hearings on S. 3274, H.R. 1277, H.R. 6006, H.R. 6207, H.R. 10947, H.R. 11660, H.R. 11870, H.R. 14146, and H.J. 46 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2nd Sess. (1976); Grand Jury Reform: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977).

afterwards that the Advisory Committee began deliberations to clarify the Rule 6(e) grand jury secrecy exceptions that had caused confusion and that were addressed by the proposed amendment. The primary focus was whether automatic disclosure of grand jury materials could be made to federal agency personnel in furtherance of the grand jury proceeding. If adopted as proposed in 1976, the Rule, it was argued, could have expanded the automatic exception to grand jury secrecy to include any employee within the federal government.<sup>301</sup> According to Acting Deputy Attorney General Richard Thornburgh, grand jury investigations were a team effort that required limited secrecy breaches.<sup>302</sup> It was common practice for agency lawyers to be appointed as Assistant U.S. Attorneys<sup>303</sup> and expert witnesses, to explain evidence to the grand jury.<sup>304</sup> To the Department of Justice, the 1976 proposal was simply intended to make all the grand jury evidence available to every legitimate member of the team,<sup>305</sup> thus, the executive and judicial branches did not view Rule 6(e) as foreclosing unauthorized and automatic disclosure of grand jury material to agents of the government at the sole discretion of the prosecuting attorney conducting the grand jury investigation.<sup>306</sup>

Nonreciprocal disclosure of grand jury materials to government agents would have created an unacceptable imbalance between the government and defendants in subsequent civil regula-

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301. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 19-20 (1977) (statement of Terry Philip Segal, Boston attorney and former Assistant U.S. Attorney for Massachusetts and the District of Columbia).

302. Proposed Amendments to the Federal Rules of Criminal Procedure, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 66-67 (1977) (testimony of Richard L. Thornburgh) [hereinafter Thornburgh Statement]. See also Nussbaum Statement, *supra* note 295, at 149 ("No one is left out, not even Members of Congress or the military.").

303. See generally Annotation, Propriety of Appointing an Attorney for a Federal Agency as Special Assistant U.S. Attorney for Grand Jury Proceedings in Which the Agency Is Interested, 58 A.L.R. FED. 696 (1982).

304. See *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 475-76 (E.D. Pa. 1971).

305. Thornburgh Statement, *supra* note 302, at 66-67.

306. See, e.g., *Robert Hawthorne, Inc. v. Director of IRS*, 406 F. Supp. 1098, 1120 n.38 (E.D. Pa. 1976) (granting Rule 6(e) disclosure but expressing doubts that court order was required for IRS agent access to books, records, and transcripts presented before grand jury). In at least one other jurisdiction, automatic disclosure seemed appropriate without court supervision even after the potential misuse of grand jury material was challenged. See *Pflaumer*, 53 F.R.D. at 473. In *In re Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956), a federal prosecutor represented to the court that only his staff, the FBI, and the IRS would examine union records acquired through a grand jury subpoena *duces tecum*. *Id.* at 270. Such cases are rare, possibly because the issue of automatic disclosure only arises for review when a grand jury target files a motion for a protective order—as Kelly did. See *id.*

tory proceedings.<sup>307</sup> The 1976 proposal attracted substantial criticism.<sup>308</sup> It was, however, apparent that Rule 6(e) needed congressional attention.<sup>309</sup>

The well-documented abuses of the grand jury process by the executive branch under President Nixon made the legislative branch skeptical of the judicial branch and unlikely to rubber stamp judicial promulgations of new grand jury rules.<sup>310</sup> Conse-

307. "[T]here is a significant imbalance in favor of the government attorneys in preparation for trial of a criminal antitrust case, and the proposed amendment would increase that imbalance." Proposed Amendments to the Federal Rules of Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 79 (1977) (statement of John F. McClatchey, Member of the Ohio Bar).

The American Bar Association requested that Congress make an explicit statement "to insure that the grand jury information disseminated to [government] experts is not used in violation of any constitutional rights, in unrelated criminal cases, or in any civil proceedings." Proposed Amendments to the Federal Rules of Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 111 (1977) (statement of David Epstein, A.B.A. Crim. Just. Section).

308. "It is past history at this point that the Supreme Court proposal attracted substantial criticism, which seemed to stem more from the lack of precision in defining, and consequent confusion and uncertainty concerning, the intended scope of the proposed change than from a fundamental disagreement with the objective." S. REP. NO. 354, 95th Cong., 1st Sess. 6 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 529 (citing hearings that took place in the House of Representatives on February 23 and 24, and March 2, 1977).

309. As pointed out during the House Subcommittee hearings, "at least one bill introduced during the 94th Congress expressly recognized the necessary and appropriate primacy of the legislative—not the rulemaking—function in this important policy area." Nussbaum Statement, *supra* note 295, at 150 (citing H.R. 6207, 94th Cong., 1st Sess. (1975)).

310. On Tuesday, September 25, 1976, the Chairman of the Senate Subcommittee on Constitutional Rights opened hearings on grand jury reform:

This morning's hearing marks the first time the U.S. Senate has examined the grand jury system since the grand jury's inclusion in the Bill of Rights some 185 years ago. This long-overdue examination is a logical extension of the hearings on "The Causes of Popular Dissatisfaction with the Administration of Justice" that this author conducted this summer.

Continuing revelation of Government lawlessness has led to a breakdown in public trust in the integrity of our institutions. The Federal grand jury has not escaped this skepticism.

....

... [C]onfronted by instance after instance of grand jury abuse, the courts have repeatedly failed to exercise their supervisory responsibilities over the grand jury process.

Reform of the Grand Jury System: Hearing before the Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2nd Sess. 2 (1976) (opening statement of Sen. John V. Tunney). The hearing began consideration of four omnibus grand jury reform bills introduced in the House, four House bills with grand jury reform provisions, and a Senate bill to reform the grand jury. *Id.* at 1.

Introducing the Senate Grand Jury Reform Bill, Senator Abourezk stated that "the Nixon administration used the grand jury as a tool of political repression in its effort to silence the anti-war movement." Reform of the Grand Jury System, Hearing before the Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2nd Sess. 4 (1976) (statement of Sen. James Abourezk). See also Federal Grand Jury: Hearings before the Subcomm. on Immigration, Citizenship, and International Law, House Comm. on the Judiciary, 94th Cong., 2nd Sess. 730-35 (1976) (providing synopses of selected cases alleged to have been examples of grand jury abuse, including the Leslie Bacon case, the

quently, a year later, on April 11, 1977, the House Committee on the Judiciary formally disapproved the substantive amendment<sup>311</sup> to Rule 6(e).<sup>312</sup> The Senate Committee redrafted the Rule.<sup>313</sup> Eschewing the House plan to consider the exceptions to secrecy as part of an overall reform bill,<sup>314</sup> the Senate recommended passage, and Congress finally adopted the proposed amendment, as modified, on July 30, 1977.<sup>315</sup> It parsed Rule 6(e) into enumerated paragraphs,<sup>316</sup> beginning with the general rule of secrecy and de-

Patty Hearst case, the Daniel Ellsberg/Pentagon Papers case, the Harrisburg 7 case, the John Fuerst case, the Tallahassee 23/Vietnam Veterans Against the War case, and the Camden 28 case); Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1179-83 (1984).

311. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 272 (1977). The amendment to Rule 6(e) also included a technical change to make the Rule "consistent with other provisions in the Rules and in the Bail Reform Act of 1966." *Id.* at 274.

312. "Present Rule 6(e) does not clearly spell out when, under what circumstances, and to whom grand jury information can be disclosed. It ought to be rewritten entirely." H.R. REP. NO. 195, 95th Cong., 1st Sess. 5 (1977), reprinted in Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 275 (1977) (Appendix 6) (citation omitted).

313. S. REP. NO. 354, 95th Cong., 1st Sess. 7-8 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 530-31.

314. H.R. REP. NO. 195, 95th Cong., 1st Sess. 5 (1977), reprinted in Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 275 (1977) (Appendix 6).

315. Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319 (1977) (codified as amended at 18 U.S.C. app. (1994)).

316. S. REP. NO. 354, 95th Cong., 1st Sess. 7 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 530-31. The Rule, as adopted, read as follows:

(1) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(2) Exceptions.—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government

limiting exceptions to that general rule.<sup>317</sup> As explained in the Senate Report recommending passage, subparagraph (A) defined “automatic” but expressly limited disclosure exceptions to “an attorney for the government” and those personnel necessary to assist that attorney in the enforcement of criminal law.<sup>318</sup> The Advisory Committee’s notes to the 1977 amendment are in accord with the Senate Report and show an intention to limit disclosure, but only for the criminal case under consideration.<sup>319</sup> To strengthen court supervision and resolve potential claims of improper automatic disclosure, the Senate substitute also added to subparagraph (B) new language that required a record of the personnel obtaining automatic access to grand jury material under subparagraph (A).<sup>320</sup> Thus, the new language of Rule 6(e), con-

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shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminary to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) SEALED INDICTMENTS—The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

Act of July 30, 1977, Pub. L. No. 95-78, §§ 1-3, 91 Stat. 319, 319-21 (1977) (codified as amended at 18 U.S.C. app. (1994)).

317. In 1979, Rule 6(e) was again amended to require recording of proceedings. The requirement caused the paragraphs to be renumbered so that the 1977 paragraph 1 became paragraph 2 and the 1977 paragraph 2 became paragraph 3, which is how the rule reads now in 1996. See FED. R. CRIM. P. 6(e).

318. S. REP. NO. 354, 95th Cong., 1st Sess. 7 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 531. The language of the report states that disclosure otherwise prohibited “may be made to an attorney for the government for use in the performance of his duty and to such personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such an attorney’s duty to enforce Federal criminal law.” *Id.* Note that the singular form chosen by the Senate Report—“an attorney”—echoes the 1945 Advisory Committee’s note.

319. Although the case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required. This is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation. *Id.* at 6 (citation omitted).

320. S. REP. NO. 354, 95th Cong., 1st Sess. 7-8 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 530-31. Subparagraph (B) added the specificity requirement that enables court supervision of personnel allowed access to grand jury materials but does not connect the personnel to the specific material disclosed, as suggested by Judge Becker in *Hawthorne v.*

gressional intent, and the Advisory Committee's position demonstrate that disclosure is automatic only when the material is sought to aid criminal prosecutions. The 1977 amendment did not affect the court-order exception by which access could be gained for civil use.<sup>321</sup> As part of the inevitable congressional compromise, however, the Senate Report included language that seemingly encouraged court-ordered disclosure for civil or regulatory purposes.<sup>322</sup> Thus, the resolution of the 1977 Rule 6 amendment, which reflected the never-ending dichotomy between law enforcement and the rights of the accused, presented questions for further litigation. The language of the amendment was ambiguous enough to leave open an argument that the criminal law limitation applied only to personnel assisting the grand jury and did not foreclose automatic disclosure to civil attorneys for civil use.<sup>323</sup> Hence, the 1977 Amendment still failed to resolve the questions of civil use that emerged even prior to the 1946 codification.

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Director of Internal Revenue Service, 406 F. Supp. 1098, 1127 (1975), and Judge Hufstедler in *In re J.R. Simplot Co.*, 77-1 U.S. Tax Cases (CCH) ¶ 9146 (1976).

321. What had been the second sentence of the 1946 codification became subparagraph (C) and remained unchanged.

322. The Rule, as redrafted, is designed to accommodate the belief on the one hand that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order made under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions. [See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683-85 (1958); *Robert Hawthorne, Inc. v. Director of IRS*, 406 F. Supp. 1098 (E.D. Pa. 1976)] It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be ex parte so as to preserve, to the maximum extent possible, grand jury secrecy. But see *In re J.R. Simplot Co.*, 77-1 U.S. Tax Cases (CCH) ¶ 9146 (1976)].

S. REP. NO. 354, 95th Cong., 1st Sess. 8 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 531.

323. See *In re Grand Jury*, 583 F.2d 128, 130 (5th Cir. 1978).

### B. 1981 Amendment Proposal

In October 1981, the Standing Committee on Rules of Practice and Procedure circulated a thoroughly amended preliminary draft of Rule 6(e) to the bench, bar, and media.<sup>324</sup> The secrecy revisions included:

(1) a definition of "matters occurring" in 6(e)(2);<sup>325</sup>

(2) an express provision limiting disclosure only to an "attorney for the government" for criminal enforcement purposes in 6(e)(3)(A)(i);<sup>326</sup>

(3) an additional exception under 6(e)(3)(C) allowing disclosure when a party in another proceeding has an independent basis for subpoenaing grand jury evidence;<sup>327</sup>

(4) an additional exception under 6(e)(3)(C) allowing disclosure to another federal grand jury;<sup>328</sup>

(5) a new section 6(e)(3)(D) establishing venue for disclosure petitions and affording interested parties notice of the petitions plus an opportunity to be heard;<sup>329</sup>

(6) guidelines in a new section 6(e)(3)(E) for transferring grand jury materials to another federal district;<sup>330</sup>

(7) a new section 6(e)(5) providing for closed hearings on matters relating to grand jury proceedings in order to keep secret past and pending or continuing grand jury proceedings;<sup>331</sup> and

(8) a new section 6(e)(6) requiring grand jury records, orders, and subpoenas to be kept under seal.<sup>332</sup>

Two years later, the Supreme Court transmitted slightly modified versions of proposals four through eight to Congress for adoption.<sup>333</sup> The amendments strengthened the shroud of secrecy surrounding grand jury proceedings but ultimately did not address the civil access issues that have persisted since Procter & Gamble.

The first and third proposals were a response to the confusion over what constituted "matters occurring."<sup>334</sup> The two proposals

324. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289 (1981).

325. *Id.* at 301.

326. *Id.* at 302.

327. *Id.* at 302-03.

328. *Id.* at 303.

329. *Id.* at 303-04.

330. *Id.* at 304.

331. *Id.* at 304-05.

332. *Id.* at 305.

333. *In re Proposed Amendments to Federal Rules of Criminal Procedure*, 97 F.R.D. 245 (1983).

334. Preliminary Draft, 91 F.R.D. at 305-06.

were withdrawn because, according to the Advisory Committee chairman, they were unnecessary.<sup>335</sup> An examination of the next ten years of reported cases leads to the opposite conclusion, however.<sup>336</sup> Clarifying the definition in the rule would have extended the shroud of secrecy over all the material subpoenaed by a grand jury and would have avoided litigation on the technicalities of how a grand jury uses books, papers, and documents. Instead, litigation over “matters occurring” proliferated, and the resulting decisions have not been uniform.<sup>337</sup>

The second proposal, which would have explicitly limited disclosure to government attorneys “to enforce federal criminal law,” was withdrawn by the Advisory Committee because the Supreme Court granted certiorari<sup>338</sup> to decide whether the automatic disclosure exception for “attorneys for the government” extended to government civil attorneys.

## IX. SELLS AND BAGGOT

In 1983, the United States Supreme Court finally and directly addressed the government’s civil use of grand jury materials in *United States v. Sells Engineering, Inc.*<sup>339</sup> and *United States v. Baggot*.<sup>340</sup> *Sells* dealt with the Department of Justice’s use of grand jury material for civil litigation, while *Baggot* addressed the issue of federal administrative agency access.<sup>341</sup> Both cases, perhaps influenced by the proposed 1982 amendment, and certainly influenced by concerns of fundamental fairness addressed

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335. Proposed Amendments, 97 F.R.D. at 260 (citing Letter of Transmittal from Walter E. Hoffman, Chairman of the Advisory Committee on Criminal Rules).

336. For in depth analysis of “matters occurring” case law, see Andrea M. Nervi, Comment, FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury, 57 U. CHI. L. REV. 221 (1990).

337. See *id.* (proposing—not unlike 1981 Preliminary Draft proposal—a principled test of “matters occurring,” framed without reference to grand jury and limited to those documents created independently of any grand jury investigation). While this Article does not focus on the problematic issue of what constitutes a “matter occurring,” the author notes that the procedure proposed in *Maryland & Virginia Milk Producers Ass’n* would be an equitable means of determining whether documents could be disclosed. See *supra* notes 204-09 and accompanying text; see also *infra* discussion part XIII. Use of such a procedure would eliminate the resort to fictional definitions of “matters occurring” to allow disclosure of documents that would have been readily available through civil discovery.

338. *United States v. Sells Eng’g, Inc.*, 456 U.S. 960 (1982).

339. 463 U.S. 418 (1983).

340. 463 U.S. 476 (1983).

341. A third case was decided with *Baggot* and *Sells*. This case, *Illinois v. Abbott & Associates*, 460 U.S. 557 (1983), dealt with a state’s access to federal grand jury materials for use in prosecuting state criminal laws. The Supreme Court determined that a state, just like any other private litigant, must meet the “particularized need” standard first set forth in *Procter & Gamble*. *Id.* at 567.

in lower court opinions, tightened the restrictions on civil use of grand jury material.

#### A. United States v. Sells Engineering, Inc.

In *Sells*, the Supreme Court revisited the issues presented in *Procter & Gamble*, which Congress had consistently failed to clarify. The *Sells* Court definitively determined the standards by which Department of Justice attorneys could gain access to grand jury materials for use in civil actions.

*Sells*, like *Procter & Gamble*, involved parallel criminal and civil investigations<sup>342</sup> and consequently raised the issue of misuse of the grand jury process.<sup>343</sup> The case began as an IRS administrative audit of *Sells Engineering, Inc.* and related parties.<sup>344</sup> The IRS, seeking the production of records in the investigation, issued administrative summonses, many of which the affected parties challenged.<sup>345</sup> The federal district court ordered enforcement of all of the summonses except those pertaining to one partnership.<sup>346</sup> Enforcement of the summonses was stayed pending an appeal of the decision.<sup>347</sup> During the wait, the IRS referred the case to the Department of Justice for investigation into possible criminal charges of fraud and income tax evasion.<sup>348</sup> The Justice Department convened a grand jury, which issued subpoenas<sup>349</sup> that requested essentially the same materials sought by the IRS summonses.<sup>350</sup> The documents were produced for the grand jury and, consequently, the IRS did not pursue enforcement of the administrative summonses.<sup>351</sup>

As a result of its investigation, the grand jury indicted *Sells Engineering* and two of its officers, Peter Sells and Fred Witte,

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342. *Sells*, 463 U.S. at 421.

343. *Id.* at 422.

344. Respondent's Brief at 1. While the case involved *Sells Engineering* and several related business entities, the challenge upon which the decision was based came from *Sells Engineering, Inc.*

345. *Id.* at 2.

346. *Id.*

347. *Id.*

348. *Id.* The IRS requested the Department of Justice to begin an open-ended grand jury investigation. *Id.* According to the IRS manual in effect at that time, an open-ended grand jury proceeding referred to an exploratory investigation under the powers of the grand jury which could be sought by the IRS agents if the administrative proceedings were stymied. *Id.* at 2 n.4.

349. Whether the grand jury had any control over these subpoenas at all was a matter of dispute. Attorneys for *Sells* argue that some grand jury subpoenas were issued at a time when no grand jury was even in session. See *id.* at 28.

350. See *id.* at 7 n.7.

351. See *id.* at 3.

for conspiracy to defraud the government and for tax evasion. The defendants filed motions to dismiss the indictments, claiming abuse of the grand jury's function.<sup>352</sup> However, late in the evening of the day before the motion was scheduled to be heard, the parties reached agreement on a favorable plea bargain (particularly as to sentencing), and the defendants entered guilty pleas.<sup>353</sup> The defendants also withdrew their complaints of grand jury misuse.<sup>354</sup>

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352. See *id.* at 11. In summarizing the allegations of abuse in the Respondent's Brief, counsel for Sells wrote:

It was the IRS in this case that initiated the open-ended grand jury investigation after being "stymied" in the courts in its administrative proceedings. . . . In this case the same IRS agents participated in the grand jury investigation as were conducting the prior administrative investigation. . . . In this case no 6(e) orders were obtained for the assistance of [the IRS agents] though they were enlisted to assist the grand jury over one year before Rule 6(e) was amended. . . . The very first grand jury subpoenas issued were for the very same records that the IRS had been judicially "stymied" in obtaining under its administrative summons. . . . In this case virtually all of the witnesses subpoenaed were diverted to 'voluntary' interrogation by a Special Agent of the IRS and did not testify before the grand jury. . . . [S]everal of these same witnesses were intimidated by use of the subpoena power into 'voluntarily' waiving their fifth amendment rights in testifying before a special agent, rather than the grand jury, and in signing affidavits prepared by the special agent in a form acceptable to him. . . . In this case subpoenas appear to have been issued when no grand jury was assembled to investigate this case and for the purpose of diverting witnesses before a Special Agent of the IRS. . . . No 6(e) orders were obtained for the use of private stenographers to take down the "voluntary" interrogations by IRS [agents] conducted under grand jury subpoena. . . . The IRS made the real decision to prosecute at its District and Regional offices based on its own review of the evidence. . . . The only testimony presented to the grand jury to obtain the indictment was the hearsay testimony of government agents summarizing their view of the evidence and of the testimony of all the "witnesses." . . . The grand jury had no real evaluation of the evidence and facts but were essentially directed by the predetermination of the IRS and its selective presentation. . . . As a plea bargain condition, defendants were required to execute a very detailed and itemized Agreed Statement of Facts scheduling and explaining every false deduction from which their exact tax liability could be calculated—prepared by the IRS directly from grand jury materials without any 6(e) order. . .

*Id.* at 28-29.

353. See *id.* at 10 n.20:

The Disposition Agreement was negotiated and entered into in a late night negotiation session directly with U.S. Attorney . . . and finalized only hours before the calendared hearing on respondents' comprehensive grand jury abuse motion seeking among other things, an evidentiary proceeding on the abuse issues. . . . It was the concern as to what would be developed in an evidentiary hearing that respondents believe persuaded the U.S. Attorneys office to enter into the late night Disposition Agreement, including an agreed limitation on sentencing.

354. *Id.* at 11: "On Friday, December 15, 1978, respondents Sells and Witte entered guilty pleas to one count of conspiracy tax fraud. This mooted the grand jury abuse issue to be heard that day in the criminal case resulting in the motion being withdrawn and not argued in that case as originally calendared."

After the pleas were entered, the government moved for disclosure of the grand jury materials to attorneys in the civil fraud division of the Department of Justice for use in a possible civil suit. The district court granted this request on the grounds that the civil division attorneys had automatic access as attorneys for the government under Rule 6(e)(A)(i). On appeal, the Ninth Circuit reversed, holding that civil attorneys only could gain access by meeting the standard originally set forth in *Procter & Gamble*.<sup>355</sup> The Supreme Court granted certiorari.<sup>356</sup>

Writing for the Court, Justice Brennan focused on the general reasons for grand jury secrecy, the limited policy reasons for granting government attorneys access to grand jury materials in criminal cases, and the legislative history of Federal Rule of Criminal Procedure Rule 6(e).<sup>357</sup> Analyzing the historical perspective behind grand jury secrecy,<sup>358</sup> the Court revived the forgotten notion that the secret grand jury process was created to protect the individual from unfair and unfounded accusations.<sup>359</sup> Justice Brennan also recognized the grand jury's broad investigatory powers (without which it would be unable to decide whether to indict<sup>360</sup>) as well as its need for secrecy to gather the information necessary to determine whether probable cause existed to indict.<sup>361</sup>

The majority then analyzed the legislative history of Rule 6(e) and concluded that the Justice Department's own representative,<sup>362</sup> as well as the Advisory Committee's notes,<sup>363</sup> demon-

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355. *United States v. Sells Eng'g, Inc.*, 642 F.2d 1184, 1186 (9th Cir. 1981).

356. *United States v. Sells Eng'g, Inc.*, 456 U.S. 960 (1982).

357. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 426 (1983).

358. *Id.* at 424.

359. *Id.* ("Grand jury secrecy, then, is 'as important for the protection of the innocent as for the pursuit of the guilty.'"). The Court viewed the historical purpose of the grand jury as "[a] dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Id.* at 423.

360. *Id.* at 423-24:

These broad powers are necessary to permit the grand jury to carry out both parts of its dual function. Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution.

361. "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Id.* at 424.

362. Admitting that it would be a bad idea to allow agency personnel to have automatic use of grand jury materials for civil purposes, Acting Deputy Attorney General Richard Thornburgh had stated:

The cleanest example I can think of where a 6(e) order is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued. It would be the practice of the Department at that time to

strated that Congress had never intended disclosure for civil purposes and that Congress would have to make clear its intention to bypass the important rule of secrecy.<sup>364</sup>

Examining the limited policy reasons for granting government attorneys access to grand jury materials, Justice Brennan questioned the wisdom of giving access at all, even to prosecutors.<sup>365</sup> However, he recognized that a modern grand jury would be severely limited without the assistance of an attorney for the government to present evidence and explain the law; moreover, the prosecutor would have difficulty determining whether to prosecute a case if not informed of the evidence going before the grand jury.<sup>366</sup> Nevertheless, Justice Brennan saw no similar policy reasons for extending disclosure to government civil attorneys.<sup>367</sup> In fact, he noted several reasons to preclude civil attorneys from gaining access to grand jury materials.

seek a 6(e) order from the court in order that evidence could be made available for whatever civil consequences might ensue.

Id. at 439 (emphasis added). Ironically, although Sells was precisely the type of case to which Thornburgh had referred, the Department of Justice was now arguing for automatic access.

363. Citing the Advisory Committee's notes to the 1977 Amendment, the Court stated:

This paragraph reflects the distinction the Senate Committee had in mind: "Federal prosecutors" are given a free hand concerning use of grand jury materials, at least pursuant to their "duties relating to criminal law enforcement"; but disclosure of "grand jury-developed evidence for civil law enforcement purposes" requires a (c)(i) court order.

Id. at 441-42.

364. Id. at 425.

365. Id. at 428 ("Given the strong historic policy of preserving grand jury secrecy, one might wonder why Government attorneys are given any automatic access at all.")

366. Id. at 430:

[A] modern grand jury would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands. The prosecutor ordinarily brings matters to the attention of the grand jury and gathers the evidence required for the jury's consideration. Although the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witness it requires. The prosecutor also advises the lay jury on the applicable law. The prosecutor in turn needs to know what transpires before the grand jury in order to perform his own duty properly. If he considers that the law and the admissible evidence will not support a conviction, he can be expected to advise the grand jury not to indict. He must also examine indictments, and the basis for their issuance, to determine whether it is in the interests of justice to proceed with prosecution.

367. Id. at 431:

None of these considerations, however, provides any support for breaching grand jury secrecy in favor of government attorneys other than prosecutors—either by allowing them into the grand jury room, or by granting them uncontrolled access to grand jury materials. An attorney with only civil duties lacks both the prosecutor's special role in supporting the grand jury, and the prosecutor's own crucial need to know what occurs before the grand jury.

First, disclosure increased the number of people having information and thus inherently increased the risk of illegal leaks.<sup>368</sup> Second, disclosure posed a threat to the functioning of the grand jury by raising the possibility an attorney would use a witness's statements against the witness in a later civil forum.<sup>369</sup> Third, disclosure threatened the integrity of the grand jury itself: if prosecutors knew that grand jury information might be helpful to their civil colleagues, they would be tempted to elicit evidence for that purpose.<sup>370</sup> Such misconduct not only would subvert the grand jury process, but also would be difficult to prove if it did occur.<sup>371</sup> Fourth, Justice Brennan found that use of grand jury material for civil purposes would subvert the civil discovery process as well.<sup>372</sup> Discussing this fourth reason, he explained:

To allow these agencies to circumvent their usual methods of discovery would not only subvert the limitations and procedural requirements built into those methods, but would grant to the Government a virtual *ex parte* form of discovery, from which its civil litigation opponents are excluded unless they make a strong showing of particularized need.<sup>373</sup>

Implicit in this analysis is Justice Brennan's recognition of the fundamental fairness issues presented by the discovery proceedings attacked in *Sells*. Thus, the Court determined that use of the grand jury process to aid agency civil lawsuits must not undermine grand jury secrecy.

Observing that the primary interest of the government civil attorney was to save time and expense through access to the grand jury investigation,<sup>374</sup> Justice Brennan stated that "[w]e have consistently rejected the argument that such savings can justify a

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368. *Id.* at 432.

369. *Id.*

370. *Id.*:

If prosecutors in a given case knew their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely.

371. *Id.* at 432; see also *supra* text accompanying notes 217-60.

372. *Sells*, 463 U.S. at 433.

373. *Id.* at 433-34.

374. *Id.* at 431:

Of course, it would be of substantial help to a Justice Department civil attorney if he had free access to a storehouse of evidence compiled by a grand jury; but that is of a different order from the prosecutor's need for access. The civil lawyer's need is ordinarily nothing more than a matter of saving time and expense.

breach of grand jury secrecy.”<sup>375</sup> Consequently, the Court held that government civil attorneys must obtain a court order to obtain disclosure of grand jury materials for civil use.<sup>376</sup>

The Sells Court based much of its decision on its apparent acceptance of the Ninth Circuit’s premise that automatic disclosure encouraged abuse of the grand jury process.<sup>377</sup> Interestingly, the Department of Justice argued that denial of automatic disclosure to civil attorneys exacerbated the potential for grand jury abuse because Rule 6(e) did not preclude assigning responsibility for both criminal and civil liability to a single attorney.<sup>378</sup> Strict enforcement against disclosure, it contended, would therefore “foster grand jury abuse by encouraging such dual assignments.”<sup>379</sup> The Supreme Court left that argument unanswered.<sup>380</sup>

After concluding that a court order was necessary for disclosure, the Court then addressed the standard of need the government had to meet. Finding that the government attorneys must show the same particularized compelling need as private litigants,<sup>381</sup> the Court indicated that the balancing test could take

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375. *Id.*

376. *Id.* at 442. Although providing a prophylactic rule to eliminate grand jury abuse, Sells placed a heavy burden upon the government in investigating and initiating civil suits. Duplicating grand jury investigations is extremely costly and time consuming. The Sells rule seems to insulate grand jury materials that would have been discoverable through use of government civil investigative devices simply because the information went before the grand jury. The procedure presented in *Maryland & Virginia Milk Producers Ass’n*, which, like Sells, does not allow automatic disclosure, balances the government’s need for the information against the need to guard against grand jury abuse. See *supra* notes 204-09 and accompanying text; see also discussion *infra* part XIII.

377. *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1190 (9th Cir. 1981) (“To grant the government an absolute right of access to grand jury materials for civil use might irresistibly encourage use of the grand jury as a tool of civil discovery. It would also severely limit court review of any such abuse.”).

378. See Petition for Certiorari at 13:

The rule clearly permits attorneys who become privy to grand jury material by assisting a grand jury employ that material for civil litigation purposes, and it does not prohibit the Attorney General from assigning criminal and civil litigation responsibilities arising from a common nucleus of operative facts to a single attorney. Indeed, if it were true, as the court of appeals apparently supposed, that the temptation to abuse the grand jury process is irresistible, and that there are no other adequate safeguards against such abuse, one could only conclude that the court of appeals’ interpretation of Rule 6(e)(3) would foster grand jury abuse encouraging such dual assignments.

379. See *id.* at 17-18 n.11. Similarly, Associate Deputy Attorney General Jay Stephens, testifying before the Senate Judiciary Committee on a bill that would have permitted congressional access to grand jury information on a showing of “substantial need,” emphasized that congressional oversight of grand jury investigations would compromise the Justice Department’s conduct of a criminal investigation by injecting congressional influence into the proceedings. Senate Committee Urged Not to Give Congress Access to Grand Jury Data, *DAILY REP. FOR EXECUTIVES*, Nov. 25, 1985, at A5.

380. Sells, 463 U.S. at 431 n.15.

381. *Id.* at 444.

into consideration the “public interest” in disclosure to the government, as well as any alternative discovery tools available to obtain such information.<sup>382</sup> Thus, Sells, relying upon the importance of grand jury secrecy, foreclosed automatic disclosure of grand jury materials to government attorneys for use in civil proceedings. The Sells balancing test, which takes alternative discovery devices into consideration, comes close to the test this author advocates;<sup>383</sup> unlike the method proposed in *Maryland & Virginia Milk Producers Ass’n*, however, the Sells test fails to set forth a workable method for weighing these interests. Further, one primary distinction between Sells and the proposed test is that *Maryland & Virginia Milk Producers Ass’n* precludes disclosure for civil purposes of information that government attorneys could not obtain through the government’s civil investigative devices. This would ensure that evidence obtainable through use of the grand jury’s extraordinarily broad powers but not through civil discovery—such as immunized, self-incriminating testimony—would never form the basis of a civil lawsuit.

### B. *United States v. Baggot*

Having decided in Sells that disclosure to the Civil Division of the Department of Justice required a court order, the Supreme Court turned to interpreting Rule 6(e) as it applied to federal administrative agencies.<sup>384</sup> *United States v. Baggot*<sup>385</sup> involved a large-scale investigation into possible criminal violations of the Commodities Exchange Act and the Internal Revenue Code.<sup>386</sup> The investigation spanned two grand jury terms and targeted James Baggot.<sup>387</sup> As a result of plea negotiations, Baggot was not indicted but pled guilty to two misdemeanor violations of the Commodities Exchange Act.<sup>388</sup> Part of the plea bargain required Baggot to read to the grand jury a government-prepared state-

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382. *Id.* at 445.

383. See *supra* notes 204-09 and accompanying text; see also discussion *infra* part XIII.

384. Rule 6(e)(3)(C)(i) provides:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

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

385. 463 U.S. 476 (1983).

386. Petitioner’s Brief at 3.

387. Respondent’s Brief Opposing Petition for Certiorari at 2.

388. Petitioner’s Brief at 4.

ment based upon his confession during the plea negotiations.<sup>389</sup> The Department of Justice then filed a motion for disclosure of the grand jury transcripts to the Internal Revenue Service for use in a tax audit against Baggot.<sup>390</sup>

The government contended that the historical precedent of disclosing grand jury material to the IRS justified its continuation, arguing that the 1977 legislative history showed congressional awareness of the practice.<sup>391</sup> The Baggot Court faced the same issues that arose in *Doe v. Rosenberry*.<sup>392</sup> The threshold question was thus “whether the IRS’s civil tax audit is ‘preliminar[y] to or in connection with a judicial proceeding’ under (C)(i).”<sup>393</sup> The Court concluded that it was not.<sup>394</sup>

Writing again for the majority in this long-awaited and definitive ruling, Justice Brennan stated that the language of Rule 6(e)(3)(C)(i) “contemplate[d] only uses related fairly directly to some identifiable litigation, pending or anticipated,”<sup>395</sup> stressing that the focus of this exception was on the actual use to be made of the requested materials.<sup>396</sup> The Court found that this language reflected “a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy.”<sup>397</sup> The Court also noted that because the IRS’s tax assessments were self-executing, no necessity existed for a judicial proceeding.<sup>398</sup> Allowing disclosure in this circumstance, where the primary use of the grand jury materials was for an extrajudicial proceeding,<sup>399</sup> would have abrogated the rule.<sup>400</sup> While the Court’s decision left unanswered many ques-

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389. *Id.*

390. “The substance of Baggot’s crime was a scheme to use sham commodities transactions to create paper losses, which he deducted on his tax returns. A fraction of the ‘losses’ was then recovered in cash kickbacks which were not reported as income.” Baggot, 463 U.S. at 477.

391. Supreme Court: Grand Jury Disclosure to IRS Debated, *DAILY REP. FOR EXECUTIVES*, Mar. 4, 1983, at G6.

392. 255 F.2d 118 (2d Cir. 1958). See also *supra* text accompanying notes 273-76.

393. Baggot, 463 U.S. at 478.

394. *Id.* at 479.

395. *Id.* at 480.

396. *Id.*

397. *Id.*

398. *Id.* at 481.

399. *Id.*

400. *Id.* at 479-82.

The provision in (c)(i) that disclosure may be made ‘preliminarily to or in connection with a judicial proceeding’ is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials. . . . Where an agency’s action does not require resort to litigation to accomplish the agency’s present goal, the action is not preliminary to a judicial proceeding for purposes of (C)(i).

tions regarding administrative agency access,<sup>401</sup> and apparently was confined to consideration of IRS procedures, it effectively closed the door on agency use of grand jury materials for purely administrative purposes.<sup>402</sup>

As a result of *Baggot and Sells*, government attorneys who sought access to grand jury materials for civil or administrative use clearly would have to obtain them through a court order. Although these cases provided a prophylactic bright-line rule that protected the individual against government abuse, they did so at the expense of government efficiency. Controversy over these rulings arose immediately.

#### X. 1985 AMENDMENT TO RULE 6(E)

In 1985, the Supreme Court again strengthened the secrecy language of Rule 6(e) by requiring attorneys for the government to certify to the supervising court that they had expressly advised persons obtaining automatic access to grand jury information under subsection (A)(ii) of their obligation to keep grand jury information secret.<sup>403</sup> In addition to this amendment, Rule 6(e) was at the same time expanded to permit disclosure of information to enhance state criminal prosecutions.<sup>404</sup> This expansion of Rule 6(e) to aid state prosecutions marked the beginning of an executive branch effort to dilute the protective role of the grand jury.

The Department of Justice acknowledged the limitations placed upon their civil investigatory process by *Sells and Baggot*.

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Id. at 482.

401. Id. at 482-83 n.6. The Court did not decide whether the rule would be different for agencies that did have to resort to a court for enforcement of their rules: "We decline in this case to address how firm the agency's decision to litigate must be before its investigation can be characterized as 'preliminar[y] to a judicial proceeding,' or whether it can ever be so regarded before the conclusion of a formal preliminary administrative investigation." Id.

402. Id. at 483 (comparing court-approved disclosure granted in *In re Grand Jury Proceedings (Miller Brewing Co.)*, 687 F.2d 1079 (7th Cir. 1982), where court recourse was clearly anticipated, with case at bar and stating that "[i]n such a case, the Government's primary purpose is plainly to use the materials sought to defend the Tax Court litigation, rather than to conduct the administrative inquiry that preceded it").

403. Supreme Court of the United States, *Federal Rules of Criminal Procedure*, 105 F.R.D. 179, 180-81 (1985).

404. Id. A new paragraph was added to Rule 6(e) allowing access "when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law." FED. R. CRIM. P. 6(e)(3)(C)(iv). This amendment overcame the particularized need standard that the Supreme Court imposed upon states seeking to obtain federal grand jury information in *Illinois v. Abbott & Associates*, 460 U.S. 557 (1983). While the amendment did expand the disclosure exceptions, disclosure under this section is only allowed for state criminal law purposes.

The current Department of Justice Manual, citing Sells, clearly instructs that “[d]isclosure to government attorneys and their assistants for use in a civil suit is permissible only with a court order under Rule 6(e)(3)(C)(i).”<sup>405</sup> The Manual further concedes that “it is clear that Rule 6(e) does not authorize disclosure to attorneys for other federal government agencies.”<sup>406</sup> The Manual outlines the procedure and standard by which a federal agency may obtain grand jury materials, explaining that “[a] failure to demonstrate sufficient need can result in the denial of a request for otherwise permissible disclosure.”<sup>407</sup> While the Department of Justice outwardly indicated its reluctant compliance with the mandates of Sells and Baggot, the Manual also clearly enunciates the Department’s “position that the particularized need requirement is inapplicable when grand jury materials are sought for federal law enforcement purposes.”<sup>408</sup>

Notwithstanding the certification and state enhancement amendments, a congressional stalemate developed between members who favored strengthening the enforcement/investigative role of the grand jury and those who favored strengthening its protective/investigative role. This clash was epitomized by two diametrically opposed grand jury measures introduced in 1985.

From May 1985 until August 1986, hearings were held in the House of Representatives on Representative John Conyer’s Model Grand Jury Act.<sup>409</sup> The purpose of the proposed Act was to inject comprehensive due process safeguards into grand jury proceedings and insure their protective role.<sup>410</sup> The proposal died in

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405. See U.S. DEP’T OF JUSTICE MANUAL § 9-11.250 (1992 Supp.).

406. *Id.*

407. *Id.* at § 9-11.252.

408. *Id.*

409. H.R. 1407, 99th Cong., 1st Sess. (1985). Representative Conyers introduced H.R. 1407 on March 8, 1985. The Bill was referred to committee on May 8, 1985. Hearings were held. The last mention of the bill was when it was scheduled for markup on August 7, 1986. The bill then vanished from the Congressional Record.

410. The proposal would have (1) authorized the presence of a witness’s attorney in the grand jury room; (2) provided transactional immunity to a witness who is compelled to give self-incriminating testimony; (3) required that the target of an investigation be permitted to testify before the grand jury if the target wished to do so; (4) precluded the use of evidence seized in violation of the constitutional rights of the target; and (5) required that the government present exculpatory evidence to the grand jury. *Id.* In proposing the bill, Representative Conyers stated:

The time is long overdue for Congress to bring the Federal grand jury out of the dark ages and into the 20th century with realistic reform. If enacted, my legislation will return the Federal grand jury to its historical role as a people’s watchdog against overzealous prosecutors and governmental corruption.

131 CONG. REC. 4564 (1985).

committee<sup>411</sup> and was the last major effort by Congress at federal grand jury reform.<sup>412</sup>

The first major legislative effort to undermine the protective role of Rule 6(e) began soon thereafter. On September 18, 1985, Representative George Gekas introduced House Bill 3340, the Grand Jury Disclosure Amendments Act.<sup>413</sup> Two days later, Senator Strom Thurmond introduced virtually the same bill<sup>414</sup> as part of the Reagan Administration's legislative initiative aimed at

411. See *supra* note 410.

412. Grand jury reform bills continue to be offered in the Congress, but, since 1986, they have been much more narrowly drawn. See, e.g., S. 284, 99th Cong., 1st Sess. (1985) (allowing witness's counsel into grand jury proceedings); H.R. 5367, 99th Cong., 2nd Sess. (1986) (requiring dismissal of indictment following prosecutorial abuse).

413. H.R. 3340, 99th Cong., 1st Sess. (1985); see also 131 CONG. REC. 11,875 (1985).

414. S. 1676, 99th Cong., 1st Sess. (1985) [hereinafter Disclosure Amendments Act]. Senator Thurmond's amendment to Rule 6(e) was as follows:

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) any attorney for the government for use in the performance of an attorney for the government's duty to enforce federal criminal or civil law; and

(ii) such government personnel (including personnel of a State or subdivision of a State) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting an attorney for the government in the performance of such attorney's duty to enforce federal criminal or civil law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited under this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court, upon a showing of particularized need, preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury;

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State of [sic] subdivision of a State for the purpose of enforcing such law; or

(v) at the request of an attorney for the government, and when so permitted by a court upon a showing of substantial need, to personnel of any department or agency of the United States—

(I) when such personnel are deemed necessary to provide assistance to an attorney for the Government in the performance of such attorney's duty to enforce Federal civil law, or

(II) for use in relation to any matter within the jurisdiction of such department or agency.

fraud in government procurement.<sup>415</sup> The Department of Justice initiated the Grand Jury Disclosure Amendments Act<sup>416</sup> to overcome the “impediments” created by Sells and Baggot.<sup>417</sup> The proposed legislation also purported to answer the question left open in Sells by permitting the same federal prosecutor to use grand jury materials in a companion civil case.<sup>418</sup> During the congressional debate over these proposed amendments the Supreme Court granted certiorari in *United States v. John Doe, Inc.*<sup>419</sup>

#### XI. UNITED STATES V. JOHN DOE, INC.

*United States v. John Doe, Inc.*<sup>420</sup> was a case in which the Department of Justice convened a grand jury as part of a criminal antitrust investigation against several American corporations for price-fixing in tallow sales to foreign countries.<sup>421</sup> Although the targeted corporation challenged jurisdiction under the Sherman Act,<sup>422</sup> the grand jury investigation continued for two years, after which time the Department of Justice “tentatively concluded”

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415. 131 CONG. REC. 11,875 (1985) (statement of Sen. Thurmond).

416. “The Department of Justice and the Attorney General are to be commended for initiating this legislative effort.” *Id.*

Little nuances in the section-by-section analysis also indicate that the Department of Justice drafted the legislation. For example, note 1 of the section-by-section analysis reads: “We have included in our proposed statute the amendments to Rule 6(d) . . . .” *Id.* at 11,879. Further on, the analysis states: “This provision will provide the only available method of disclosure for private parties. It can also be used by government agencies when the Justice Department exercises its discretion. . . . [G]overnment agencies with independent litigating authority would thus be able, over our objection, to gain access to grand jury material . . . .” *Id.* at 11,875 (Bills and Brief Accompanying Materials appended to Sen. Thurmond’s remarks).

417. [T]his proposal contains amendments to Rule 6(e) designed to overcome the impediments caused by Sells and Baggot to the government’s ability to pursue important non-criminal remedies.

. . . .

. . . [T]o whatever extent Sells precludes or minimizes a court’s consideration of the government’s saving time or increasing efficiency in its disclosure determinations, Sells no longer applies. . . .

This amendment would overrule Baggot . . . .

*Id.* at 11,875.

418. *Id.* (“The amendment also answers the ‘same attorney’ question left undecided in Sells by allowing the criminal prosecutor to use grand jury materials in a companion civil case.”); see also Sells, 463 U.S. at 431 n.15.

419. 476 U.S. 1140 (1986).

420. 481 U.S. 102 (1987).

421. *Doe*, 481 U.S. at 104.

422. Although no sales were being made in the United States, the Justice Department pursued an investigation into possible violations of the Sherman Act. Respondent’s Brief at 1 (“The theory of the grand jury investigation was that Sherman Act jurisdiction existed for sales of drummed tallow, even though that commodity is not sold within the United States, because foreign countries sometimes use some funds appropriated for their use by Congress to pay for the commodity.”).

that the companies had violated the Sherman Act but that it would not seek indictments.<sup>423</sup> After the grand jury's dismissal, the Department of Justice immediately began civil proceedings with the same attorneys who had conducted the criminal investigation.<sup>424</sup> The attorneys issued to the companies Civil Investigative Demands that were "essentially copies of earlier grand jury subpoenas."<sup>425</sup> Two of the companies refused to comply with the Civil Investigative Demands.<sup>426</sup> As a result of the civil investigation, the Antitrust Division of the Justice Department concluded that the companies had violated the Sherman Act and possibly the False Claims Act as well.<sup>427</sup> The Antitrust Division attorneys then requested and received a Rule 6(e) order allowing disclosure of grand jury materials for consultation with the Justice Department's Civil Division attorneys.<sup>428</sup> The "John Doe" corporation moved to vacate the order and requested that the government be enjoined from using grand jury materials in the civil suit.<sup>429</sup> The government attorneys admitted using grand jury materials to prepare for the civil action.<sup>430</sup> The Second Circuit held that the Justice Department's Criminal Division attorneys could not continue to use grand jury materials in the subsequent civil proceeding.<sup>431</sup>

The Supreme Court granted certiorari to answer the question left open in *Sells*: whether government attorneys who conducted a criminal investigation could continue to use grand jury material for preparation of a civil suit.<sup>432</sup> The second issue on appeal was whether disclosure could be made to the Justice Department's Civil Division attorney's for consultation on the False Claims Act suit.<sup>433</sup> Consequently, the case also presented an opportunity for

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423. *Id.* at 4.

424. *Doe*, 481 U.S. at 105.

425. "The Civil Investigative Demands were accompanied by a letter advising each recipient that the CID could be complied with by certifying that all documents sought had been produced to the grand jury." Respondent's Brief at 2.

426. *Doe*, 481 U.S. at 105.

427. *Id.*

428. *Id.* at 105-06.

429. *Id.* at 106.

430. "[T]he Antitrust Division conceded to the District Court that at least 90 percent of the material on which the civil case is based was grand jury material." Respondent's Brief at 3 (citation omitted).

431. *In re Grand Jury Investigation*, 774 F.2d 34, 42 (2d Cir. 1985), *rev'd*, 481 U.S. 102 (1987).

432. *Doe*, 481 U.S. at 104.

433. *Id.* "Although the Antitrust Division is authorized to prosecute False Claims Act suits when the conduct in question also violates the antitrust laws, the primary responsibility for the enforcement of that statute rests with the Civil Division of the Department of Justice." Petitioner's Brief at 5.

the Court to apply the “particularized need” test to a request by the government for disclosure.<sup>434</sup>

Addressing the first issue, the Court focused on “the plain meaning” of the term “disclosure” under Rule 6(e)<sup>435</sup> and determined that no “disclosure” occurred where an attorney, who legitimately obtained information from a grand jury, reviewed that information in preparing a civil suit.<sup>436</sup> However, the Court specifically narrowed this ruling to allow only “refamiliariz[ation]” of grand jury material by the attorney who conducted the grand jury proceeding.<sup>437</sup> The Court forbade any use of the materials in the pleadings or proceeding that might disclose the information to any other parties.<sup>438</sup> Although its holding on this issue was narrowly drawn to allow only refamiliarization, the Court, in taking this “plain meaning” approach, ignored the Sells analysis of potential grand jury abuse and concerns of fundamental fairness of process.<sup>439</sup>

Turning to the second issue, and confirming that the government was subject to the “particularized need” test as first set forth in *Procter & Gamble*,<sup>440</sup> the Court concluded that the test could be more easily met by the government than a private party.<sup>441</sup> Balancing “the public benefits of the disclosure” against

434. *Doe*, 481 U.S. at 111; see also *supra* text accompanying notes 234-39.

435. Unlike our previous decisions in this area, which have primarily involved exceptions to the general rule [of secrecy], this case involves a more preliminary question: what constitutes disclosure?

....

Because we decide this case based on our reading of the Rule’s plain language, there is no need to address the parties’ arguments about the extent to which continued use threatens some of the values of grand jury privacy identified in our cases and catalogued in *Sells Engineering*.

*Doe*, 481 U.S. at 109 (citations omitted).

436. *Id.* at 108.

437. *Id.* at 111.

438. *Id.* at 110.

[I]t is important to emphasize that the issue before us is only whether an attorney who was involved in a grand jury investigation (and is therefore presumably familiar with the “matters occurring before the grand jury”) may later review that information in a manner that does not involve any further disclosure to others. Without addressing the very different matter of an attorney’s disclosing grand jury information to others, inadvertently or purposefully, in the course of a civil proceeding, we hold that Rule 6(e) does not require the attorney to obtain a court order before refamiliarizing himself or herself with the details of a grand jury investigation.

*Id.* at 111.

439. See *supra* text accompanying notes 357-73.

440. See *supra* text accompanying notes 237-39.

441. “[T]he concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves Government attorneys.” *Doe*, 481 U.S. at 112.

“the dangers created by the limited disclosure requested,”<sup>442</sup> the Court identified a public interest in the efficient, effective, and evenhanded enforcement of federal statutes, and focused primarily on avoidance of the costs and delays involved in duplicating grand jury investigations.<sup>443</sup> Balanced against those interests were the concerns of fair process expressed in *Sells*.<sup>444</sup> The Doe Court concluded that the benefit of avoiding the cost and delay of reproducing grand jury material outweighed the interests in grand jury secrecy, and granted disclosure to the Civil Division attorneys.<sup>445</sup>

The Doe Court’s reliance upon the law enforcement interest undercut the holding of *Sells*. It also partially achieved the Department of Justice’s goal of overcoming the protective “impediments” of *Sells*.<sup>446</sup> Justice Brennan, dissenting in *Doe*, criticized the majority by observing that the focus in *Sells* was on the “actual use” of grand jury information.<sup>447</sup> The Doe Court, focusing on who accessed the information rather than the purpose of such access, bypassed the very real concerns of grand jury abuse and fundamental fairness of process raised in *Sells*, as well as the Department of Justice’s own admission that the practice of granting dual assignments to one attorney would “foster” such

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442. *Doe*, 481 U.S. at 113. Cf. *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443 (1983) (citation omitted) (“It is clear . . . that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy . . .”).

443. *Doe*, 481 U.S. at 113.

444. See *Sells*, 463 U.S. at 418.

445. *Doe*, 481 U.S. at 116. In its analysis, the Court reasoned that disclosure would not increase the risk of inadvertent or illegal leaks to others. *Id.* at 114. The Court found that the limited use sought by the Department of Justice did not pose the same threat as the widespread disclosure requested in *Sells*. *Id.* Such disclosure, the Court said, would also have little effect on a future witness’s willingness to testify fully and frankly because disclosure would not result in a witness’s testimony being used against him in a civil proceeding. *Id.* The Court then addressed the issue of manipulating the grand jury to gain information for a civil proceeding. *Id.* The Court concluded that this risk was not likely to occur where a court order must be obtained for disclosure, thereby giving the defendant an opportunity to raise the issue of abuse. *Id.* at 114-15. Finally, the Court considered whether the government would be able to subvert limitations on civil discovery rules by using disclosed grand jury materials. *Id.* at 115. The Court summarily concluded that this was “not seriously implicated when the Government simply wishes to use the material for consultation,” claiming that no per se rule had ever been established to deny disclosure even though the materials sought could be obtained through civil discovery procedures. *Id.* at 115-16.

446. See *supra* note 417 and accompanying text. Because the scope of the civil attorney’s use of grand jury materials under the *Doe* analysis is purely for “refamiliarization,” however, any use which might further disclose the information must still pass the test set forth in *Sells*.

447. “The crucial fact is that the use to which that attorney [who conducted the grand jury hearing] would put this information is in no way in aid of the grand jury.” *Doe*, 481 U.S. at 118 (Brennan, J., dissenting).

abuse.<sup>448</sup> Further, Doe ignored the Sells Court's concern that abuse, if it occurred, would be virtually impossible to show,<sup>449</sup> particularly where the defendant may be unable to obtain the grand jury transcripts necessary to prove abuse.<sup>450</sup> This unfairness demonstrates the reality that individuals caught in the Doe vice cannot adequately test the merits of the government's theory of liability. In fact, as early as *Procter & Gamble*, litigants recognized that civil enforcement interests might subvert the grand jury into a civil discovery tool.<sup>451</sup> Moreover, in *Sells*, Justice Brennan recognized that the exercise of the grand jury's extraordinary powers solely for civil investigations gave an unfair advantage to the government as a civil plaintiff<sup>452</sup> and left the defendant with an extremely difficult case to defend. Consequently, Doe gave the Department of Justice access to grand jury information through the backdoor in a manner clearly prohibited by the Court's prior ruling in *Sells*.

Perhaps more damaging to the Sells notion of fairness in the civil arena is the Doe Court's conclusion that cost and delay may be sufficient to prove "particularized need" for government access.<sup>453</sup> *Procter & Gamble* explicitly rejected this justification when a civil defendant sought access to prepare for trial against the government,<sup>454</sup> while Sells rejected cost and delay as a sole justification for government access.<sup>455</sup> As a result of this retreat from Sells, information that may be critical for trial preparation can be granted to the government but denied to the defendant. This imbalance goes directly against the purpose behind the Federal Rules of Civil Procedure<sup>456</sup> and the concept of fundamental fairness. At a time when civil sanctions can be as punishing, if not more so, than some criminal penalties,<sup>457</sup> one must question

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448. See *supra* note 379 and accompanying text.

449. See *Sells*, 463 U.S. at 432.

450. This poignant problem is exemplified by the *Procter & Gamble* parties' successful proof of grand jury abuse, which took nine years and twelve published opinions before the parties could define the issues for actual litigation. See *supra* notes 217-60 and accompanying text.

451. *Procter & Gamble*, 356 U.S. at 681-84.

452. See *Sells*, 463 U.S. at 433-34.

453. See *Doe*, 481 U.S. at 116.

454. *Procter & Gamble*, 356 U.S. at 682-83.

455. See *Sells*, 463 U.S. at 431.

456. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

457. See, e.g., *E.F. Hutton Mail and Wire Fraud Case*, Part 1 and 2: Hearings Before the Subcomm. on Crime of the House Comm. of the Judiciary, 99th Cong., 1st Sess. (1985). The grand jury investigation of the E.F. Hutton Company's illegal use of bank floats and interest-free loans was settled before trial with acceptance by Hutton of a maximum fine of \$2 million, restitution of lost opportunity profits totaling approximately \$264 million, and an unprecedented reimbursal of the Justice Department's costs of investigation. *Id.* at 1-2.

whether issues of cost and delay alone should outweigh the interests in a fair trial process.

This Article's proposed solution, the Maryland & Virginia Milk Producers Ass'n procedure, would take into consideration the cost and delay to the government of duplicating grand jury investigations for a subsequent civil action. Unlike the Doe decision, however, the procedure would require a showing by the government prior to disclosure that it could have obtained the materials through civil investigatory devices. Further, the defendant would receive notice of the potential disclosure, which would enable him or her to challenge the disclosure and raise the issue of grand jury abuse. This process eliminates duplication of investigations to the extent that civil attorneys could have obtained the material, while also eliminating disclosure of those materials that the civil attorneys could not have obtained. Unlike the Doe solution, the method provides no incentive to misuse the grand jury process because civil attorneys will gain no information they could not have gained through their own civil investigatory devices. Also, because materials sought from the grand jury become exposed to the defendant at the disclosure hearing and prior to filing of the civil complaint, the Maryland & Virginia Milk Producers Ass'n solution provides more incentive for the government to utilize civil investigatory tools. Further, because the materials are obtainable through civil discovery, the defendant will always gain reciprocal access to fully prepare for trial. The solution would eliminate the imbalance of discovery Doe and Procter & Gamble engendered.

## XII. GRAND JURY SECRECY AFTER DOE.

Congress never passed the Reagan Administration bills that were proposed in 1985 to overcome the "impediments" of Sells and Baggot.<sup>458</sup> They did not disappear, however, and surfaced again in a new form in the Senate version of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).<sup>459</sup> Section 918 of the Senate version included language

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See also *United States v. Halper*, 490 U.S. 435, 448-49, 451 (1989) (finding that civil sanction is "punishment" for double jeopardy purposes if it is based on same offense as criminal prosecution and is imposed in separate proceeding).

458. See *supra* note 417 and accompanying text.

459. FIRREA was introduced as S. 413 by Senators Donald E. Riegle and Jake Garn on February 22, 1989. 135 CONG. REC. S1513 (daily ed. Feb. 22, 1989). Representative Henry R. Gonzales introduced the House version, H.R. 1278, on March 6, 1989. On April 13, 1989, Senator Riegle introduced S. 774 as original legislation that included the same § 918

virtually identical to that proposed in the Grand Jury Disclosure Amendments Act of 1985.<sup>460</sup> When the House and Senate joined in conference, however, they discarded section 918.<sup>461</sup> What survived was an amendment<sup>462</sup> authorizing automatic disclosure of grand jury information concerning a banking law violation to the Resolution Trust Corporation attorney responsible for investigating such violations.<sup>463</sup> The decision to grant automatic access is now in the discretion of the Department of Justice attorney handling the grand jury investigation.<sup>464</sup> Additionally, the FIRREA amendment reduced the Rule 6(e) standard for court-ordered disclosure of banking law violations from “particularized need” to “substantial need” in situations where the Department of Justice declines to grant automatic disclosure.<sup>465</sup> This provision, which runs afoul of Rule 6(e) as interpreted by Sells and Baggot, has not yet been tested in the courts.<sup>466</sup>

The Bush Administration also attempted to get specific disclosure for securities law violations by seeking to include a disclosure provision in The Securities Law Enforcement Act of 1990.<sup>467</sup>

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as S. 413 of the Federal Savings and Loan Reform Act. S. REP. NO. 19, 101st Cong., 1st Sess. (1989). S. 774 superseded S. 413.

460. 135 CONG. REC. S1550 (daily ed. Feb. 22, 1989). Compare Disclosure Amendments Act, *supra* note 414, with S. 774, 101 Cong., 1st Sess. § 918 (1989) (striking through language proposed in the 1985 amendment and omitted in the 1989 amendment and underlining new language):

(A) Disclosure otherwise prohibited . . . may be made to—

(i) any attorney of the government for use in the performance of ~~by~~ an attorney ~~for~~ of the government's duty to enforce federal criminal or civil law; and

(ii) . . . to enforce federal criminal law.

(B) Any person . . . shall not utilize that grand jury material for any purpose other than assisting ~~the~~ an attorney for the government . . .

(C) Disclosure otherwise prohibited ~~under~~ by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court upon a showing of particularized need ~~preliminary~~ preliminarily to or in connection with a judicial proceeding.

461. H.R. REP. NO. 209, 101st Cong., 1st Sess. (1989).

462. Act of Aug. 9, 1989, Pub. L. No. 101-73, 103 Stat. 505 (codified at 18 U.S.C. § 3322 (1994)).

463. 18 U.S.C. § 3322(a) (1994)

464. *Id.*

465. *Id.* § 3322(b)(2). The Department of Justice might choose to decline automatic access in cases where the criminal investigation is on-going and disclosure might interfere with the investigation.

466. The author's research has revealed no case law interpreting this particular FIRREA provision, although it was enacted in 1989.

467. H.R. 975, 101st Cong., 2nd Sess. (1990).

I am submitting a proposed revised version of H.R. 975, the “Securities Law Enforcement Remedies Act of 1989 . . .” [T]he proposal would amend the Federal Criminal Code to authorize a court to issue an order permitting disclosure to the Commission of grand jury information concerning potential securities law violations . . . just as Congress provided such authority for the banking agencies in [FIRREA].

The disclosure provision was made a part of the Senate version of the bill but the House did not approve it.<sup>468</sup> In 1994, both the House and the Senate drafted health insurance acts that included FIRREA-like amendments.<sup>469</sup> At the close of 1995, a FIRREA-like amendment to fight fraudulent Medicare practices was included in the Medicare Preservation Act of 1995.<sup>470</sup> Perhaps the most subversive legislative exception to Rule 6(e) secrecy is the International Antitrust Enforcement Assistance Act of 1994 (IAEAA).<sup>471</sup> President Clinton signed the IAEAA into law on November 2, 1994.<sup>472</sup> This remarkable act, which represents a radical departure from the accepted practice of legislative drafting,<sup>473</sup> penetrates the grand jury secrecy protections of Rule 6(e) by expanding the definition of a "state" under 6(e)(3)(C)(iv)<sup>474</sup> to include foreign countries, and by defining a "state criminal law" as "a foreign antitrust law" and "an appropriate official" as "a foreign antitrust authority."<sup>475</sup> Given the proliferation of legislation

H.R. REP. NO. 616, 101st Cong., 2d Sess. 39 (1990), reprinted in 1990 U.S.C.C.A.N. 1379, 1406 (quoting Letter from Daniel L. Goelzer, Office of the General Counsel of the Securities and Exchange Commission, to Rep. John D. Dingell (Feb. 9, 1990)). H.R. 975 which was ultimately incorporated into H.R. 5325.

468. 136 CONG. REC. S14069 (daily ed. Sept. 27, 1990) (statement of Sen. Riegle).

469. H.R. 3600, 103d Cong., 2d Sess. (1994) (Health Security Act); S. 2357, 103d Cong., 2d Sess. (1994) (Universal Health Insurance Coverage Act); S. 2296, 103d Cong., 2d Sess. (1994) (Individual and Family Health Security Act).

470. H.R. 2425, 104th Cong., 1st Sess. (1995); see also H.R. REP. NO. 276, 104th Cong., 1st Sess. (1995).

471. Pub. L. No. 103-438, 108 Stat. 4597 (1994) (codified at 15 U.S.C. § 6204 (1994)).

472. H.R. REP. NO. 883, 103rd Cong., 2d Sess. 130 (1995).

473. "[Y]ou shouldn't define a word in a sense significantly different from the way it is normally understood by the persons to whom the legislation is primarily addressed. This is a fundamental principle of communication and it is one of the shames of the legal profession that draftsmen so flagrantly violate it." Reed Dickerson, *How to Write a Law*, 31 NOTRE DAME LAW. 14, 25 (1955)).

474. Federal Rule of Criminal Procedure 6 states in pertinent part:

Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

...

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

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

475. 15 U.S.C. § 6204(2)(A)-(B) (1994):

(2) Antitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law, except that for the purpose of applying Rule 6(e)(3)(C)(iv) of the Federal Rules of Criminal Procedure with respect to this section—

(A) a foreign antitrust authority with respect to which a particularized need for such antitrust evidence is shown shall be considered to be an appropriate official of any of the several States, and

(B) a foreign antitrust law administered or enforced by the foreign antitrust authority shall be considered to be a State criminal law.

granting specific rights of automatic disclosure for federal agencies' civil use, it seems clear that such legislation is also circumventing the "impediments" and teachings of Baggot.

In his recent article, Professor Graham Hughes questioned whether FIRREA might be the "crack that will eventually cause the collapse of the whole dam" in grand jury secrecy.<sup>476</sup> In light of the recent legislation incorporating disclosure clauses, the answer, unfortunately, appears to be yes. While the legislative provisions have not been constitutionally tested, efforts to enact greater executive branch use of the grand jury process for civil purposes apparently will continue,<sup>477</sup> although not all of them have met with success.<sup>478</sup> The movement toward the erosion of Rule 6(e) hopefully will yield to a more reasoned analysis along the lines of the proposal in Maryland & Virginia Milk Producers Ass'n, which would preserve to the greatest extent possible the historical importance of grand jury secrecy.

### XIII. THE MARYLAND & VIRGINIA MILK PRODUCERS ASS'N SOLUTION

This Article envisions the use in parallel criminal and civil regulatory investigations of a process that would eliminate the all-or-nothing approach of prior court decisions. This process reaches a compromise between the competing interests of government efficiency and the need to protect individuals from an overreaching executive branch.

If the Procter & Gamble Court had applied the Maryland & Virginia Milk Producers Ass'n procedure, it would have eliminated nine years of litigation. Government prosecutors would have been required to notify Procter & Gamble of their intent to disclose grand jury materials to civil attorneys. Having notice,<sup>479</sup> Procter & Gamble would then have had the opportunity to challenge the disclosure at a hearing, where prosecutors would have borne the burden of proving to the court that all information to be disclosed would be discoverable to the government civil attorneys

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476. Hughes, *supra* note 16, at 656 (advocating unification of federal criminal and civil compulsory processes).

477. The Balanced Budget Act of 1995 included House and Senate provisions for disclosure of health care offenses discovered during grand jury proceedings, but both provisions were dropped in conference. H.R. REP. NO. 350, 104th Cong., 1st Sess. (1995).

478. See *supra* text accompanying notes 467-68.

479. "Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951) (Douglas, J., concurring) (citations omitted).

through civil investigative devices. At this hearing, Procter & Gamble would have been given the opportunity to challenge that proof, just as they would have if the government had used civil investigatory devices. All materials the court deemed subject to disclosure at the hearing would likewise have been discoverable to Procter & Gamble under the Federal Rules of Civil Procedure once the complaint was filed.<sup>480</sup> Materials the court found were not subject to disclosure at the hearing could not have been used in the subsequent civil proceeding.<sup>481</sup> Any information the government gained without the aid of the grand jury would not have been exposed prior to filing of the complaint.<sup>482</sup> This process would save the cost of duplicate investigations while eliminating the temptation to use the grand jury process as a civil discovery device<sup>483</sup> and would maintain the balance of civil discovery.

Further, the D.C. Circuit's solution would result in a more expeditious determination of civil actions. If both parties knew from the case's inception that evidence is nondiscoverable through either grand jury access or civil investigatory devices, they would be able to gauge the probable trial outcome. Thus, this process would achieve the goals of the Federal Rules of Civil Procedure and further law enforcement objectives without sacrificing the integrity of the grand jury system.

#### XIV. CONCLUSION

"The history of American freedom is, in no small measure, the history of procedure."<sup>484</sup> The Grand Jury Clause of the Fifth Amendment protects individuals against oppression by the government. The procedural rule governing grand jury secrecy is a substantial part of that protection, yet it has been the subject of extensive litigation where parallel civil and criminal government investigations threaten to compromise that secrecy. When the

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480. FED. R. CIV. P. 26.

481. Such materials, generally speaking, would include information gained through grants of immunity or derived through illegal search and seizures.

482. *United States v. Markwood*, 48 F.3d 969, 984 (6th Cir. 1995).

483. We think the concern [of grand jury abuse] is far less worrisome when the attorneys seeking disclosure [of grand jury material for civil use] must go before a court and demonstrate a particularized need prior to any disclosure, and when, as part of that inquiry, the district court may properly consider whether the circumstances disclose any evidence of grand jury abuse.

*United States v. John Doe, Inc.*, 481 U.S. 102, 114-15 (1987). It would, inherently, also be far less worrisome if the government attorneys knew that the only information they could obtain from the grand jury could be gained through civil channels anyway and that their conduct would be open to scrutiny in a disclosure hearing.

484. *Malinski v. New York*, 324 U.S. 401, 414 (1945).

government seeks to penetrate secrecy to aid civil regulatory actions, courts should balance the interests advanced by the parties against the standard of fairness implicit in constitutional due process. Courts must balance consideration of the costs and delay in compelling the government to duplicate grand jury investigations in parallel or subsequent civil actions against the civil defendant's concern for the secrecy of grand jury proceedings. Use of the grand jury's extraordinary powers will give prosecutors incredible pretrial and trial advantages over future civil targets, especially where those powers are otherwise unavailable through authorized civil discovery tools.

While cost-effective civil law enforcement is a crucial issue in this era of alarming governmental deficits, coalescing the civil and criminal processes in the manner recommended by Professor Hughes is not the most equitable alternative in terms of fair process to the individual. Our justice system has survived on principles that preserve individual civil liberties and due process. From the perspective of those who founded a country by revolution against an overreaching and tyrannical government, arguing for efficiency at the cost of fair process is equivalent to advocating a return to the monarchy.<sup>485</sup>

Application of Federal Rule of Criminal Procedure 6(e) must balance the need for enforcing laws against the necessity of safeguarding fundamental rights. Maryland & Virginia Milk Producers Ass'n presented a common-sense solution to the issue of grand jury secrecy in the environment of parallel proceedings. On this fiftieth anniversary of the Federal Rules of Criminal Procedure, the Supreme Court and Congress should revisit the issue and decisively establish this equitable principle as an amendment to Rule 6(e). The following would modify Rule 6(e)(C)(i) in an appropriate manner:

- (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
  - (i) when so directed by a court preliminary to or in connection with a judicial proceeding upon the following showing:

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485. "Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?" *United States v. Ross*, 456 U.S. 798, 842 n.13 (1982) (Marshall, J., dissenting). See also *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting):

The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise. Rather, it was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing.

- (a) In civil regulatory proceedings involving the government, the government must prove grand jury matters sought to be used by the government in the civil proceeding would be obtainable through civil investigatory devices. Where the government obtains disclosure under such showing, the private opponent may discover these grand jury materials under the Federal Rules of Civil Procedure.
- (b) Where the government seeks disclosure of grand jury materials for use in a civil proceeding pursuant to subsection (a), notice must be given to the opponent and an adversarial hearing open only to the prosecutor and potential civil defendant and counsel must be conducted prior to disclosure.
- (c) In civil proceedings involving private parties, compelling particularized need for grand jury matter must be shown although the material may be discoverable under the Federal Rules of Civil Procedure.
- (d) Disclosure determinations for private litigants pursuant to subsection (c) may be ex parte.

## APPENDIX

“ORDER”<sup>486</sup>

During the grand jury proceedings which preceded these criminal cases, the United States obtained and copied thousands of documents from the files of the Maryland and Virginia Milk Producers Association. After the cases had terminated favorably to the Association, the Government returned to it the original documents but refused to return the copies, claiming them as its own property and saying it will or possibly may rely upon some of them in the trial of a civil action now pending in the United States District Court for the District of Columbia.

The Association moved the District Court to require the return of the copies. The motion was denied, the trial judge holding that, as the documents could be reached by the Government through discovery process in the civil action, it would be vain to order the copies delivered to the Association. This appeal is from the denial of the motion.

We hold the United States may retain the copies of the documents in question, subject to the following limitations:

1. That it may use in the trial of the pending civil action only such of the documents, of which it has retained copies, as it could obtain through discovery processes applicable to civil actions, and only such as are enumerated by it as those upon which it will or possibly may rely, in a list to be served upon the Association on or before March 1, 1958, and in no event less than 60 days prior to the commencement of such trial;

2. That the United States may use in the trial of any future civil action against the Association only such of the documents, of which it has retained copies, as it could obtain through discovery processes available to civil actions and only such as are enumerated by it as those upon which it will or possibly may rely, in a list to served upon the Association not less than 60 days prior to the commencement of the trial of any such future civil action;

3. That in the lists the documents intended to be relied upon shall be described and referred to by the identification numbers placed thereon by the Association at the time of their submission.

The order appealed from should be modified to include the foregoing provisions.

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486. *Maryland & Virginia Milk Producers' Ass'n v. United States*, 250 F.2d 425, 425-26 (D.C. Cir. 1957) (citations omitted).