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DISCLOSURE OF FEDERAL GRAND JURY MATERIAL

The proceedings of grand juries have traditionally been enshrouded with secrecy,¹ at least

¹ Until 1946 disclosure of grand jury materials was controlled by the common law. 48 VA. L. REV. 959 (1962). There was reluctance to grant disclosure to any party outside of the Department of Justice. See *United States v. Johnson*, 319 U.S. 503 (1943); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In some courts judicial "reluctance" bordered upon adamant refusal:

Finally, the defendants . . . move for inspection of the grand jury's minutes. . . . It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. . . . 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.

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (Learned Hand, J.). The liberal discovery policy of the Federal Rules did much to dissolve this unbending attitude against discovery of grand jury materials. Comment, *Grand Jury Minutes and the Rule of Secrecy in Federal Litigation*, 55 NW. U.L. REV. 482 (1960). The Supreme Court recognized in 1940 that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940). Still, "[t]ime after time in criminal cases courts . . . denied defendants' motions to examine grand jury transcripts pending trial." *United States v. General Motors Corp.*, 15 F.R.D. 486, 487 (D. Del. 1954). One case held that access must be denied absent "overwhelming public interest" in disclosure. *United States v. Smyth*, 104 F. Supp. 279, 281 (N.D. Cal. 1952).

Whether disclosure of grand jury materials to civil litigants was ever permissible remained in doubt until the decision in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). See Orfield, *The Federal Grand Jury*, 22 F.R.D. 343 (1958). Very few cases prior to *Procter & Gamble* had dealt with motions for disclosure from civil defendants. See *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D.N.J. 1955) (access granted); *United States v. General Motors Corp.*, 15 F.R.D. 486 (D. Del. 1954) (access denied). That access to grand jury materials could be permitted for non-administrative civil plaintiffs was first acknowledged in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962). Note, 112 U. PA. L. REV. 1133 (1964).

The doctrine of grand jury secrecy has recently been the subject of many critical articles. See, e.g., Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MAR. J. PRAC. & PRO. 18 (1967); Knudsen, *Pretrial Disclosure of Federal Grand Jury Testimony*, 48 WASH.

in American jurisdictions.² While much has been written concerning the right of criminal defendants regarding access to grand jury materials,³ this comment will examine the growing trend among the federal courts to allow exposure of grand jury proceedings for purposes other than the prosecution or defense of the main criminal action. To what degree and under what circumstances the federal policy in favor of liberal discovery in civil actions⁴ should outweigh objections to allowing civil litigants access to information gathered under the broad inquisitorial powers of the grand jury⁵ will be

L. REV. 423 (1973); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962). Most of the articles criticizing grand jury secrecy concentrate on the deleterious effect of the doctrine on the defense of an indicted defendant's criminal trial.

² The grand jury was not necessarily secret in its origin in England. Comment, *Federal Grand Jury Secrecy*, 5 GONZ. L. REV. 255 (1970). It was not until 1681 that grand jurors were found to have the right to hear testimony in private. The decision settling this right was the *Earl of Shaftesbury's Trial*, 8 How. ST. TR. 759 (1681). For the purposes of this paper, the most relevant aspect of the English doctrine of secrecy of grand jury proceedings is that its aim was primarily to protect the accused from the Crown, rather than to protect witnesses coming before it. Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MAR. J. PRAC. & PRO. 18 (1967). This purpose is in sharp contrast, both to the traditional American reasons for the rule of secrecy, and to the effect of the doctrine here, which is to strengthen the Government's case against a defendant.

³ See 66 DICK. L. REV. 379 (1962); 38 FORDHAM L. REV. 307 (1969); 81 HAWAII L. REV. 712 (1968); 62 NW. U.L. REV. 233 (1967); 1961 WASH. U.L.Q. 382.

⁴ *Associated Metal & Minerals Corp. v. S.S. Geert Howaldt*, 348 F.2d 457 (5th Cir. 1965); *June v. George C. Peterson Co.*, 155 F.2d 963 (7th Cir. 1946). See FED. R. CIV. P. 26-37.

⁵ The investigative and inquisitorial powers of a federal grand jury are great. The duty of subpoenaed witnesses to appear and testify before the grand jury was recognized in the First Judiciary Act. Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88. The only restrictions on the grand jury's right to "every man's evidence" is that the evidence be relevant and material. *In re Subpoena to Nixon*, 360 F. Supp. 1, 6 (D.D.C. 1973). Witnesses need not be informed of the nature of the offense being investigated before being called to testify. *Hale v. Henkel*, 201 U.S. 43, 65 (1906). Witnesses may not object to the jurisdiction

examined. Constitutionally and statutorily based criticism of the manner in which some litigants gain access to grand jury materials will be evaluated. In addition, this comment will place considerable emphasis on the degree to which the reasons behind the grand jury secrecy rule are satisfied by the application of the current standards for disclosure requests.

The purposes for grand jury secrecy in American jurisdictions were set out in *United States v. Amazon Industrial Chemical Corp.*:⁶ 1) to prevent the escape of suspects before indictment can be accomplished; 2) to protect the freedom of grand jury deliberations; 3) to prevent tampering with grand jury witnesses before their testimony is given at public trial; 4) to encourage unrestrained disclosures by grand jury witnesses, with no fear of retaliation; and 5) to protect a suspect found innocent by the grand jury.⁷ Federal courts since the *Amazon*

decision have recognized, more or less, these same bases of the grand jury secrecy rule.⁸ In general the case law concerning whether grand jury material may be disclosed to litigants and, indeed, the reasons for secrecy themselves show a primary concern with the continued viability of the grand jury itself as an investigative body free from extraneous pressures.⁹ Pressures to which a grand jury may be exposed include not only the fear of retaliation in grand juror and grand jury witness alike, but also unnecessary control by any person or group over the direction a grand jury investigation may take. In order for the grand jury to function independently, it should ideally be free from the proddings of the judiciary, the executive, the numerous civil agencies and public opinion.

The rule of grand jury secrecy forbids only the disclosure of grand jury "materials." "Materials" include not only the transcript of proceedings, but also information concerning the identity of persons called to testify¹⁰ and documents subpoenaed.¹¹ In addition, "materials" subject to the secrecy rule may consist of sentencing memoranda prepared by the Government¹² or summaries of testimony prepared by

of a grand jury over the subject matter under investigation. *Blair v. United States*, 250 U.S. 273, 282 (1919). Testimony can be compelled through the grant of use immunity, despite a claim of fifth amendment privilege. *Kastigar v. United States*, 406 U.S. 441, 462 (1972). One may not refuse to answer questions on the ground that they are based on evidence taken in violation of fourth amendment rights. *United States v. Calandra*, 414 U.S. 338, 354 (1974). There is no right to counsel in the grand jury room. *Gallagher v. United States*, 419 F.2d 520, 523 (9th Cir.), cert. denied, 396 U.S. 960 (1969). Furthermore, a grand jury indictment may not be challenged at trial although based on hearsay, *Costello v. United States*, 350 U.S. 359, 363 (1956), or on evidence taken in violation of an accused's right against self-incrimination. *Lawn v. United States*, 355 U.S. 339, 349 (1958). In *United States v. Calandra*, 414 U.S. 338, 343 (1974), the Court stated:

The grand jury may compel production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.

⁶ 55 F.2d 254, 261 (D. Md. 1931).

⁷ For the purposes of this paper, only the fourth reason—the encouragement of unrestricted testimony by grand jury witnesses—is of much import since disclosure of grand jury materials to civil litigants is generally requested following the completion of the main criminal litigation. The first, second and fifth bases of grand jury secrecy are no longer applicable once an indictment has been returned, the accused is in custody, and the grand jury is dismissed. The third basis is not relevant once the criminal trial has ended. The fourth basis, however, is considered applicable to a subsequent civil proceeding. The Supreme Court has interpreted the fourth reason to

include the encouragement of *future* grand jury witnesses to testify freely. In *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958), the Court stated that: "[t]he grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." Therefore, district courts in deciding requests for disclosure often make inquiry into the effect of present disclosure on the freedom of grand jury witnesses to testify in the future, a speculative inquiry at best. One may also question whether the average grand jury witness expects his testimony to remain secret. See text accompanying note 82 *infra*.

⁸ See *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965); *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954); *In re Cement-Concrete Block*, 381 F. Supp. 1108 (N.D. Ill. 1974).

⁹ Note, 112 U. Pa. L. Rev. 1133, 1140 (1964).

¹⁰ *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968); *Application of California*, 195 F. Supp. 37 (E.D. Pa. 1961).

¹¹ *Krause v. Rhodes*, 390 F. Supp. 1072 (N.D. Ohio 1975); *Corona Construction Co. v. Ampress Brick Co., Inc.*, 376 F. Supp. 598 (N.D. Ill. 1974).

¹² *ABC Great Stores, Inc. v. Globe Ticket Co.*, 309 F. Supp. 181 (E.D. Pa. 1970); *Hancock Brothers, Inc. v. Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968); *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir. 1965).

the defense¹³ if these reports contain grand jury information. Documents subpoenaed by a grand jury are not subject to the rule of secrecy if independently discovered by a civil litigant.¹⁴

A federal statute¹⁵ ostensibly covers the matter of disclosure of grand jury material.¹⁶ The statute is uncomplicated. According to Rule 6(e), disclosure can be made to any "attorneys for the government." In addition disclosure can be made at a trial court's direction when "preliminary to or in connection with a judicial proceeding." Three fairly recent Supreme Court decisions have dealt with the question of when a trial judge may order disclosure. In *United States v. Procter & Gamble Co.*,¹⁷ the Court

¹³ *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. 1969); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 275 F. Supp. 146 (E.D. Pa. 1967).

¹⁴ *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972). This exception to the rule of grand jury secrecy is applicable where a discovering party identifies documents that happened to be before the grand jury at some point in time, in contrast to a general request for all documents examined by the grand jury. The rationale for this exception is that the documents are being sought "for their own intrinsic value" rather than to learn "what transpired before the grand jury." 405 F. Supp. at 931.

¹⁵ FED. R. CRIM. P. 6(e) provides in part:

(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. 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.

¹⁶ The federal courts have tempered the terms of the statute by limiting, in some situations covered by the statute, the circumstances in which disclosure may be granted, see text accompanying note 17 *infra*, and by permitting disclosure in some circumstances not contemplated by the statute. See *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973).

¹⁷ 356 U.S. 677 (1958). *Procter & Gamble*, the defendant in a civil antitrust suit, argued that since the Government had free access to the grand jury transcript, the defendant should, too. The company

established that although the power of a trial judge to order disclosure of grand jury material is discretionary, the discretion may be exercised only where the party seeking disclosure can show "particularized need."¹⁸ In *Pittsburgh Plate Glass Co. v. United States*,¹⁹ it was held that "[t]he burden . . . is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy."²⁰ The most recent Supreme Court decision on the subject, *Dennis v. United States*,²¹ evidenced approval of the trend toward more liberal discovery rules in the criminal area.²² *Dennis* also indicated that disclosure of grand jury material questions would be decided on a case by case basis, with inquiry into the particular facts giving rise to a need for disclosure.²³ This trilogy of Supreme Court decisions can be read as significantly relaxing the doctrine of grand jury secrecy, judicial response to disclosure requests having advanced from outright refusal, or application of an "ends of justice" test in the pre-*Pittsburgh Plate* cases²⁴ to a standard

also contended that only the "good cause" standard of FED. R. CIV. P. 34 need be shown in a civil suit. Both arguments failed in the Supreme Court.

¹⁸ *Id.* at 683. "Particularized need" has not been defined by the Court. However, it is clear that an articulated, non-frivolous need for grand jury materials is, at the least, expected. General helpfulness in preparing one's case for trial is not sufficient to constitute "particularized need." *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486, 489 (E.D. Pa. 1962).

¹⁹ 360 U.S. 395 (1959).

²⁰ *Id.* at 400. The defendant in this criminal prosecution did not attempt to show particularized need for the grand jury minutes requested, but asserted a right to the material based upon the Jencks Act, 18 U.S.C. § 3500 (1970).

²¹ 384 U.S. 855 (1966).

²² These [case law] developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.

Id. at 870.

²³ The facts found sufficient in *Dennis* for disclosure of grand jury testimony of certain prosecution witnesses were: 1) the trial testimony of the witnesses would postdate their grand jury testimony by 15 years; 2) the witnesses were key to the case; 3) their testimony was largely uncorroborated; 4) the witnesses were not impartial observers and, thus, their testimony was suspect. On the other hand, it was observed that none of the reasons behind the policy of grand jury secrecy, as articulated in the *Amazon* case, was applicable. *Id.* at 872-73, n. 18.

²⁴ See cases cited note 1, *supra*.

in which the articulated need of the litigant for materials is balanced against the reasons for grand jury secrecy still applicable in the particular case.

ACCESS TO GRAND JURY MATERIALS BY LAW ENFORCEMENT OFFICIALS

Rule 6(e) provides that disclosure can be made to "attorneys for the government" without an order from the district court. The cases are now consistent in holding that "attorneys for the government" includes only federal officials.²⁵ These federal officials may have access to grand jury material in subsequent civil actions also,²⁶ with some restrictions. The major restriction is that the Government cannot use the grand jury process in order to make out a civil case.²⁷ The caselaw concerning when the grand jury system is abused varies. It has been held that the investigation must have been "in [its] inception exclusively criminal."²⁸ Another court found that there would be no misuse of the grand jury system if at the time of the investigation the Justice Department had an "open mind as to what the appropriate remedy should be, civil, criminal, or both," but there would be an abuse if the Justice Department had only the barest expectation of prosecuting an indictment.²⁹ Although the Supreme Court has said that the fact that a grand jury returned

²⁵ See, e.g., *United States v. Downey*, 195 F. Supp. 581 (S.D. Ill. 1961), denying the status to a state attorney general. See also *FED. R. CRIM. P.* 54(c), which states:

"'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney . . ."

²⁶ The Supreme Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), implicitly acknowledged use of grand jury transcripts by the United States in its civil antitrust suit, despite the disadvantage to the defendant. In *United States v. General Electric Co.*, 209 F. Supp. 197, 201 (E.D. Pa. 1962), it was reasoned that the work of the Justice Department is not limited to the bringing of criminal prosecutions. Also, the court likened the institution of government civil antitrust suits to a prosecution, in that the goal is correction rather than remedy. *Id.* at 202.

²⁷ *United States v. Procter & Gamble Co.*, 187 F. Supp. 55 (D.N.J. 1960).

²⁸ *United States v. Doe*, 341 F. Supp. 1350, 1352 (S.D.N.Y. 1972). Thus, where the Justice Department applied for a 6(e) order to investigate whether there had been civil or criminal violations of Title 26, United States Code, the order was denied.

²⁹ 187 F. Supp. at 57.

no indictment against a person under investigation is not evidence of the Government's lack of integrity,³⁰ the fact that an indictment was returned is sufficient to show good faith.³¹ In addition to the restriction that the Government not abuse the grand jury process to obtain evidence for civil litigation, a court may place certain procedural requirements on the use of the grand jury transcript in a civil case in an attempt to minimize the defendant's disadvantage.³²

A state law enforcement official seeking disclosure of grand jury minutes logically falls within the second sentence of Rule 6(e), that is, he must show particularized need preliminary to or in connection with a judicial proceeding.³³ At least one Supreme Court Justice has recently imposed a particularized need standard on a request for disclosure from a state prosecutor.³⁴ However, other courts have been more lenient with the disclosure requests of state enforcement officials, seeming to require only a showing of "good cause" as opposed to particularized need.³⁵ This preference for the Rule 6(e)

³⁰ *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

³¹ See *United States v. Morton Salt Co.*, 216 F. Supp. 250 (D. Minn. 1962), *aff'd*, 382 U.S. 44 (1965).

³² In *United States v. Max Factor & Co.*, 39 F.R.D. 3 (W.D. Mo. 1966), the court restricted the use of grand jury testimony by the Government while deposing its own and the defendant's witnesses by ordering the Government to 1) announce that it would use the prior testimony, and 2) show the witness a copy of it, allowing him time to read it before deposing him.

³³ See *Petition of Brooke*, 229 F. Supp. 377 (D. Mass. 1964), where the Attorney General of Massachusetts sought disclosure of grand jury minutes for use in both an on-going civil suit by the Commonwealth, and to obtain criminal indictments; *Application of California*, 195 F. Supp. 37 (E.D. Pa. 1961), where California, private utilities and municipalities bringing a civil antitrust action were denied disclosure of grand jury subpoenas upon a showing of mere economic and time savings.

³⁴ *Smith v. United States*, 423 U.S. 1303 (Douglas, Circuit Justice, 1975). The petitioner argued that obtaining the grand jury material would save the state investigatory expenses and would be useful in refreshing witnesses' memories when they testified before the state grand jury. Justice Douglas found it "doubtful" that particularized need was made out. *Id.* at 1304. Another factor indicating need—that the statute of limitations would soon run out on the offense suspected—was rejected as under the prosecutor's control.

³⁵ See *United States v. Downey*, 195 F. Supp. 581 (S.D. Ill. 1961), where the court implied that the

motions of state prosecutors may be explained by their desire to encourage the public's interest in justice.³⁶ If the major thrust of Rule 6(e) is to foster the enforcement of *federal* statutes by allowing free access to grand jury transcripts to particular persons,³⁷ that aim is not satisfied by applying lenient disclosure rules to requests from state prosecutors enforcing *state* laws.³⁸ However, upon consideration of the *Amazon* reasons for grand jury secrecy, it would appear that disclosing materials to a state prosecutor conducting a subsequent criminal inquiry does not harm the integrity of the grand jury as an institution. All but the fourth reason, the encouragement of free disclosure, are inapplicable to the situation. Grand jury witnesses expect, if anything, that the evidence they give will be used by a prosecutor to build a criminal case; there should be little intimidation from the knowledge that the prosecutor works at a state level. More importantly, it is improbable that a state prosecutor could control the direction of a federal grand jury investigation for his own purposes; independence of the grand jury is not threatened by the disclosure.

state attorney general could obtain disclosure of federal grand jury minutes upon a showing that an offense had been committed under Illinois laws, that showing satisfying the particularized need requirement; *In re* Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960), where the state prosecutor was found to have established particularized need where he anticipated the use of grand jury materials to save him time and effort, to determine which persons to call as witnesses before the state grand jury and to serve general discovery purposes. Two restrictions were placed upon the prosecutor. He was to wait for termination of the federal proceeding before obtaining the material. "Protection of the witnesses—a constituent of the rule of grand jury secrecy—dictates this course." *Id.* at 41. The prosecutor was also to limit the use of grand jury materials to development of leads; he was not to use the materials as evidence at trial.

³⁶ "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

³⁷ See *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962).

³⁸ On the other hand, private civil litigants, *e.g.* in the antitrust field, may have a significant part in enforcing federal statutes. Yet the particularized need standard is applied to them. See text accompanying notes 67-69, *supra*.

ACCESS TO GRAND JURY MATERIALS BY ADMINISTRATIVE BODIES

Administrative agencies generally seek access to grand jury materials in one of two ways: the agency may request disclosure in connection with its own proceedings, or it may seek disclosure as an investigatory aide of the United States Attorney, *i.e.*, in connection with the criminal proceedings. A federal agency does not come within the first sentence of Rule 6(e);³⁹ therefore, it must show particularized need in order to gain disclosure. This is true even though the agency is joined with the Government as co-plaintiff⁴⁰ or the agency is represented by an attorney in the Justice Department.⁴¹

A common objection to a request by an administrative body for use of grand jury materials in its own right has been that the disclosure is not "preliminarily to or in connection with a judicial proceeding" per Rule 6(e).⁴² In

³⁹ *In re* Grand Jury Investigation, 414 F. Supp. 74 (S.D.N.Y. 1976) (SEC); *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975) (HUD); *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962) (TVA); *In re* Grand Jury Proceedings, 29 F.R.D. 151 (E.D. Pa. 1961) (FTC).

⁴⁰ *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962). The United States was allowed free access to grand jury materials, but co-plaintiff Tennessee Valley Authority was not. The holding that TVA would not be permitted access would seem to be applicable to all federal agencies even though "the TVA is a quasi-governmental corporation and is not really an administrative agency at all." *In re* William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971).

⁴¹ *In* *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. at 934 (D. Mass. 1975), an assistant U.S. Attorney representing H.U.D. sought disclosure of grand jury materials while the grand jury was still in session:

Permitting an administrative agency access to grand jury material while the grand jury is still conducting its investigation creates a number of potential problems among them being erosion of congressional limitation on agency powers, the possible chilling effect on potential witnesses and undue agency influence on the course of grand jury inquiry.

The court denied that the U.S. Attorney himself could use grand jury materials to prepare a civil case while the grand jury was still investigating.

⁴² See *In re* Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960), where a city was denied disclosure of grand jury evidence to be used in an administrative hearing; *United States v. Crolich*, 101 F. Supp. 782 (S.D. Ala. 1952), where the Government moved for disclosure to the county election board.

1958 an influential opinion by Judge Learned Hand defined "judicial proceeding" liberally, so that many administrative hearings might fit within the second sentence of Rule 6(e).⁴³ Practically any administrative hearing is preliminary to a judicial proceeding in the sense that a court might be called upon to review some aspect of the hearing. Therefore, the objection has not succeeded in preventing administrative bodies from gaining access to grand jury materials.⁴⁴

A second method by which administrative access to grand jury materials is gained is through providing technical assistance to the Government in preparing a grand jury case. The assistance of professional administrative personnel may be necessary in preparing highly complex cases, e.g., tax evasion cases.⁴⁵ However, the subsequent use of knowledge gleaned from grand jury materials in a civil administrative hearing smacks of abuse of the grand jury processes.

⁴³ [W]e hold that, prima facie, the term "judicial proceeding" includes any proceeding determinable by a court, having 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.

Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958). A United States Attorney had obtained an order directing him to disclose grand jury minutes to the Grievance Committee of the New York City Bar Association. The court found the disclosure to be preliminary to a proceeding before the New York Appellate Division to discipline a member of the bar.

⁴⁴ Disclosure has been granted to participants in a proceeding for revocation of a beer permit upon an "ends of justice" criterion, *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E.D. Pa. 1933), and to those conducting a police disciplinary hearing, found to be preliminary to a judicial proceeding under Judge Hand's test, *In re Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973).

⁴⁵ As the court in *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971), pointed out, the Justice Department does not typically employ its own personnel for technical analysis:

Even though investigative agents are assigned by the various agencies to assist the government's attorneys, they are never assigned in a capacity which separates them operationally from their agencies. No matter what agency they work for, they are required to submit reports to their agencies and are subject to supervision within each particular agency. Apparently, this is a constant practice throughout the federal law enforcement system.

Id. at 475.

It is clear that a grand jury investigation cannot be instituted solely for the purpose of making an inquiry into civil matters.⁴⁶ Access by administrative personnel has been denied where the investigation had an admittedly dual civil and criminal interest.⁴⁷ However, it may be difficult to uncover the basic purpose of a grand jury inquiry. Some courts have examined the history of administrative interest in the person(s) under scrutiny by the grand jury to determine if abuse of the system was indicated.⁴⁸ Upon a granting of a motion to disclose grand jury materials to administrative agency personnel, the court order usually contains a requirement that the material remain under the "aegis" of the Government.⁴⁹ But "aegis" is a murky concept.⁵⁰ Some measure of control over the grand jury materials is to be retained by the prosecution, but the amount of control is unclear. For example, that the grand jury material has been moved physically to the offices of an agency does not, in itself, indicate lack of control by the Government.⁵¹ As long as agency access to grand jury materials is gained through a *bona fide* prosecution, and the materials remain under the "aegis" of the prosecution, a majority of courts sees no barrier to subsequent use of that information in an administrative civil suit.⁵²

⁴⁶ *In re Kadish*, 377 F. Supp. 951 (N.D. Ill. 1974).

⁴⁷ *United States v. Doe*, 341 F. Supp. 1350 (S.D.N.Y. 1972).

⁴⁸ *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956), cert. denied, 352 U.S. 998 (1957). At the request of the Treasury Department, which had begun its own investigation, the Justice Department called a grand jury to investigate the tax returns of petitioners. Treasury officials aided the grand jury investigation. The Seventh Circuit concluded that any future civil use of the information by the Treasury Department would violate the petitioners' fourth and fifth amendment rights. But see *In re William G. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971), where a protective order against I.R.S. access to grand jury materials was denied even though the agency had previously been investigating the petitioner and dropped that inquiry to participate in the criminal investigation.

⁴⁹ See *In re July 1973 Grand Jury*, 374 F. Supp. 1334 (N.D. Ill. 1973); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971).

⁵⁰ *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976).

⁵¹ *Id.*

⁵² See *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971). Although the United States Attorney admitted that civil use of the materials might follow, the court denied an application for a protective order against the I.R.S. reasoning that,

Access to grand jury materials through the status of an investigative or technical aide to the Government has been granted to personnel of the Internal Revenue Service,⁵³ Securities and Exchange Commission,⁵⁴ the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department⁵⁵ and the Post Office.⁵⁶ Though these agencies would have to demonstrate particularized need in order to gain access to grand jury materials in connection with their own civil proceedings, by aiding in the presentation of evidence to a grand jury, the agencies can avoid having to make such a showing.

An article⁵⁷ published in 1975, which has already influenced decisions in this area,⁵⁸ discussed several objections to allowing agency access to grand jury material through this "back door" method. First, the primary and only work of the grand jury is to accuse individuals

"the mere fact that the government contemplates possible use of the subpoenaed material in a possible future civil proceeding is no grounds for a protective order." *Id.* at 472.

Employment of grand jury evidence in a concurrent civil administrative trial has been approved by at least one court. *In re Kadish*, 377 F. Supp. 951 (N.D. Ill. 1974). The taxpayer moved to quash a grand jury subpoena for his records on the theory that the evidence gained would be used to establish civil liability.

It is well established that a grand jury may not be utilized solely for the purpose of making an investigation of civil matters. . . . However, this does not preclude the government from using this evidence, legitimately developed by the grand jury, in concurrent or future civil proceedings.

Id. at 952. *Contra*, *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975) (court questioned concurrent use of grand jury materials by the Justice Department in a civil matter).

⁵³ See *Coson v. United States*, 533 F.2d 1119 (9th Cir. 1976); *In re July 1973 Grand Jury*, 374 F. Supp. 1334 (N.D. Ill. 1973).

⁵⁴ See *United States v. Anzelmo*, 319 F. Supp. 1106 (E.D. La. 1970).

⁵⁵ *United States v. Evans*, 526 F.2d 701 (5th Cir. 1976).

⁵⁶ *United States v. Culver*, 224 F. Supp. 419 (D. Md. 1963).

⁵⁷ Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162 (1975).

⁵⁸ See, e.g. *In re Grandburg*, *Simplot Co. v. United States District Court* 77-1 U.S. Tax Cas. 86,195, 86,197 (9th Cir. 1976); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 note 7 (E.D. Pa. 1975). Both cases dwelled considerably on the criticisms of administrative access to grand jury materials presented in Note, *supra* note 57.

of crimes. It is contrary to that sole purpose to involve the grand jury in the investigation of civil liability. Nor should the grand jury be subjected to any control by an administrative agency. Second, Congress has established the proper scope of administrative investigative powers under the Administrative Procedure Act and other statutes. To permit these safeguards⁵⁹ to be avoided through resort to the wider-reaching powers⁶⁰ of the grand jury is an abuse of the criminal process.

Two court opinions have responded to this criticism in a significant way. In *Robert Hawthorne, Inc. v. Director of Internal Revenue*,⁶¹ new procedural requirements in connection with Rule 6(e) orders were announced. These requirements were aimed at ensuring that grand jury materials remain under the control of the Justice Department.⁶² In *J. R. Simplot Co. v. United States District Court*,⁶³ the Ninth Circuit held that the Government must show particularized and compelling need before administra-

⁵⁹ Under the Administrative Procedure Act witnesses are afforded measures of protection not available to grand jury witnesses. They may be represented by counsel while testifying. 5 U.S.C. § 555 (b) (1970). Testimony must be recorded, and a transcript supplied to every witness. 5 U.S.C. § 555 (c) (1970). Additional limitations are placed on individual agencies by statute. For example, an I.R.S. subpoena must be relevant or material to the inquiry in progress. I.R.C. § 7 602 (1970). No taxpayer can be subjected to unnecessary investigation. I.R.C. § 7 605 (b) (1970).

⁶⁰ See note 5, *supra*.

⁶¹ 406 F. Supp. 1098 (E.D. Pa. 1975). The court suggested that the Justice Department, when bringing I.R.S. aides into the investigation, require an oath of secrecy concerning the grand jury materials' contents, prepare comprehensive written instructions on the use of the material, and ensure that grand jury material be kept separate from other I.R.S. papers.

In addition, the Justice Department was ordered to keep a record of 1) a general description of the investigation; 2) the persons being investigated; 3) the administrative personnel having access to the material; 4) the supervisory personnel of the agency involved in the investigation; 5) the supervisory personnel of the Justice Department involved, and 6) dates on which the material was received, consulted, and use terminated by the agency.

⁶² "These devices should help insure that the records will not be utilized by the agency in any independent sense; concomitantly, they underscore and infuse meaning into the 'aegis' concept." *Id.* at 1128.

⁶³ [1977] TAX CAS. (CCH) 86,195 (9th Cir. 1976). The I.R.S. had been investigating Simplot for several years prior to the grand jury inquiry. Simplot appealed the granting of a 6(e) order to disclose grand jury material to I.R.S. personnel.

tive access to grand jury materials will be ordered,⁶⁴ and that a district court granting access would retain "close supervision" over the information in an attempt to prevent civil use of the materials.⁶⁵ The court also indicated that the remedy for civil use of information obtained through aiding a grand jury investigation would be suppression of that evidence at the civil trial.⁶⁶

ACCESS TO GRAND JURY MATERIALS BY INDIVIDUAL CIVIL LITIGANTS

In *United States v. Procter & Gamble Co.*,⁶⁷ the Supreme Court established that disclosure would be granted to individual litigants only upon a showing of particularized need. The Court did enumerate, however, several uses to which grand jury materials could be put at trial which would qualify as particularized need,⁶⁸ indicating that disclosure would be warranted if this need outweighed the policy in favor of grand jury secrecy.⁶⁹

Civil litigants, in particular those involved in treble damage antitrust suits, would often benefit greatly by examination of grand jury

minutes. At question in their motions for disclosure under Rule 6(e) is what minimal degree of need must be demonstrated, especially in those circumstances in which the traditional reasons for the rule of secrecy of grand jury proceedings⁷⁰ are no longer applicable. There is some indication that federal courts are turning away from the somewhat nebulous⁷¹ standard presented in *Procter & Gamble*. At least one circuit court of appeals has discarded altogether the requirement that a criminal defendant show need before disclosure of grand jury materials can be granted.⁷² In civil litigation, some requests for disclosure have been met with a modified *Procter & Gamble* balancing test.⁷³ Rather than determining if a particularized need outweighs the policy in favor of secrecy, the inquiry has been whether any reasons behind the policy of secrecy outweigh the petitioner's need.⁷⁴ A slight need, e.g., use for discovery leads, has sufficed where the policy reasons in favor of grand jury secrecy were unsubstantial.⁷⁵ It appears that equitable notions of fair play have influenced decisions in disclosure.

The first⁷⁶ federal decision allowing civil plaintiffs limited disclosure of a civil defendant's grand jury minutes for deposition purposes employed two justifications for the inva-

⁶⁴ The Government must show the necessity for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise. Moreover, absent an explanation for the failure to use qualified personnel within the Justice Department, the Government cannot carry its burden

Id. at 86,198.

⁶⁵ *Id.*

⁶⁶ Two requirements, however, are so basic to the preservation of values served by grand jury secrecy that they should be explicitly stated: (1) on appropriate request, the agency must identify the source of its information in a civil case that was preceded by a grand jury investigation in which its personnel were used to assist the prosecutor in presenting a case to the grand jury; and (2) upon a motion to suppress in the civil proceeding, the agency bears the burden of proving an independent source for the information.

Id. at 86,199. See also *United States v. Procter & Gamble Co.*, 175 F. Supp. 198 (D.N.J. 1959), where the remedy employed for improper use of grand jury processes was to grant equal access to the materials to the defendant.

⁶⁷ 356 U.S. 677 (1958).

⁶⁸ We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.

Id. at 683.

⁶⁹ *Id.* at 682.

⁷⁰ See text accompanying note 3 *infra*.

⁷¹ At various points in the opinion the Court seemed to require either a proof of "particularized need," "compelling necessity" or that "without [disclosure] a defense would be greatly prejudiced or . . . an injustice would be done." 356 U.S. at 682.

⁷² *United States v. Youngblood*, 379 F.2d 365 (2d Cir. 1967). The Second Circuit interpreted *Procter & Gamble* and *Pittsburgh Plate* to establish merely "a minimum standard to which the courts must adhere" rather than to require a particular showing before disclosure could be made. *Id.* at 369.

⁷³ "There are instances when that need will outweigh the countervailing policy." *Procter & Gamble*, 356 U.S. at 682.

⁷⁴ See *United States v. Scott Paper Co.*, 254 F. Supp. 759 (W.D. Mich. 1966), where the court saw the major issue to be "whether or not defendant's proposed order on disclosure might tend to inhibit future grand jury testimony." *Id.* at 765.

⁷⁵ [I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need.

U.S. Industries v. United States District Court, 345 F.2d 18, 21 (9th Cir. 1965).

⁷⁶ See Note, *Release of Grand Jury Minutes, in the National Deposition Program of the Electrical Equipment Cases*, 112 U. PA. L. REV. 1133, 1141 (1964).

sion of the secrecy rule.⁷⁷ The justifications were the unique nature of the nation-wide deposition program involved,⁷⁸ and the fact that some plaintiffs were agencies charged with protecting the public's interest. In addition disclosure was to be minimal. Grand jury secrecy was to be safeguarded by the use of *in camera* inspection for inconsistencies in grand jury testimony of each individual deponent.

A trend toward freer use of grand jury testimony in deposition taking is appearing. It has been held not to be necessary to show inconsistency between the two testimonies in order to establish particularized cause. Where a fair amount of time has elapsed between the two statements,⁷⁹ where the deponent's memory proves dim,⁸⁰ or where deponents are not subject to service of process,⁸¹ a court might find particularized cause for producing grand jury transcripts. The practice of examining *in camera* grand jury transcripts before releasing for deposition purposes has fallen into disfavor;⁸² the Supreme Court has indicated⁸³ that

it is the function of the advocate, not the trial judge, to determine the usefulness of evidence to a side's cause.

Despite a unanimity of opinion in early case law that disclosure of grand jury material for purely discovery purposes should never be permitted,⁸⁴ it is often permitted today upon a showing of proper circumstances, reflecting a federal policy in favor of liberal discovery.⁸⁵ Disclosure for discovery purposes is allowed where the reasons behind the rule of grand jury secrecy are no longer applicable to any significant degree and/or where the party seeking disclosure will be at a disadvantage if grand jury material is not provided to him.

A group of cases granting disclosure of grand jury materials for purely discovery purposes has turned upon the fact that the party opposing the request had knowledge of the grand jury proceedings.⁸⁶ Courts perceive this situation as an inequitable one that should be remedied.⁸⁷ Disclosure of grand jury material has

⁷⁷ *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962). The case was one of 1800 civil antitrust suits filed following antitrust convictions of manufacturers of electrical equipment. The procedure by which deposition judges were to handle disclosure requests in this litigation was upheld by several circuit courts of appeal. *Atlantic City Electric Co. v. A.B. Chance Co.*, 313 F.2d 431 (2d Cir. 1963); *Narin v. Clary*, 312 F.2d 748 (3d Cir. 1963); *Allis-Chalmers Mfg. Co. v. City of Ft. Pierce*, 323 F.2d 233 (5th Cir. 1963). See Hanley, *Obtaining and Using Grand Jury Minutes in Treble Damage Antitrust Actions*, 11 ANTITRUST BULL. 659 (1966), in which a practitioner reacted to the *Philadelphia* case; Note, *supra* note 76.

⁷⁸ Under the national deposition program witnesses were to be deposed once for use in each of the suits. The depositions, then, were binding on all plaintiffs.

⁷⁹ However, where the delay is partly or wholly the fault of the petitioner for disclosure, the court may deny access. See *Baker v. U.S. Steel Corp.*, 492 F.2d 1074 (2d Cir. 1974).

⁸⁰ An extreme case of the deponent with a faulty memory was presented in *In re Special 1952 Grand Jury*, 22 F.R.D. 102 (E.D. Pa. 1958), where the deponent/plaintiff could not even remember the year in which he testified before the grand jury.

⁸¹ *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. 1969).

⁸² [I]t is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting disclosure of relevant testimony therein. *Washington v. American Pipe & Construction Co.*, 41 F.R.D. 59, 63-64 (S.D. Cal. 1966).

⁸³ *Dennis v. United States*, 384 U.S. 855, 875 (1966).

⁸⁴ If a precedent is set that evidence before a grand jury may at some future time be disclosed to the probing examination of civil litigants in preparation of the trial of their cause not alone in a collateral matter but . . . in directly related matters where the inquisitorial examination of the grand jury and a civil litigant's discovery in preparation for trial encompass the same subject matter . . . such precedent would tend to restrict the free function of the grand jury.

United States v. General Motors Corp., 15 F.R.D. 486, 488 (D. Del. 1954).

⁸⁵ See cases cited note 4 *supra*.

⁸⁶ See, e.g., *U.S. Industries v. United States District Court*, 345 F.2d 18 (9th Cir. 1965); *In re Cement-Concrete Block*, 381 F. Supp. 1108 (N.D. Ill. 1974); *Connecticut v. General Motors Corp.*, [1974] TRADE CAS. (CCH) ¶ 97,079 (N.D. Ill. 1974); *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. 1969); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 194 F. Supp. 763 (D. Mass. 1958). In *Schwabe* the plaintiff's counsel had worked with the prosecution in the previous criminal trial. He, therefore, had knowledge of the contents of the grand jury testimony.

⁸⁷ See, e.g., *U.S. Industries, Inc. v. United States District Court*, 345 F.2d at 23, where discovery of a government sentencing memorandum containing grand jury material was granted:

The facts in the present case lend additional support to a liberal discovery ruling, for here the document in question is of government origin and the party opposing disclosure has had an opportunity to inspect its contents. It therefore seems highly inequitable and averse to the principles of federal discovery to allow one party access to a government document and not the other. It is particularly inequitable when the

been granted to civil plaintiffs where the defendant had access to the grand jury transcript during his criminal trial,⁸⁸ where the defendant had examined a sentencing memorandum containing grand jury information at the sentencing stage of his criminal trial,⁸⁹ and where the defendant debriefed grand jury witnesses in preparation for trial.⁹⁰

A criminal defendant has a constitutional right to any exculpatory evidence known to the prosecution,⁹¹ which could be contained in grand jury transcripts. Absent a showing of compelling reasons for nondisclosure, a criminal defendant also has the right to examine any sentencing report prepared by the prosecution.⁹² To condition a defendant's exercise

of either of these rights upon the surrender of a claim of confidentiality of grand jury proceedings in a subsequent civil trial seems unfair, if not unconstitutional.⁹³ In *Hancock Bros., Inc. v. Jones*,⁹⁴ the court recognized a constitutionally-based objection, and in denying disclosure of a pre-sentencing memorandum to civil plaintiffs remarked that to allow disclosure would be unconstitutional. The same argument, however, was made without success in *Connecticut v. General Motors Corp.*⁹⁵ The court found that no right to secrecy of grand jury proceedings had ever rested in the defendants. Therefore, the exercise of any constitutional rights the defendants may have had at their criminal trial was not conditioned upon a release of any other right.⁹⁶ The analysis of the *General Motors*

policy reason for denying the other party access to the document is essentially inapplicable to the given situation.

⁸⁸ *In re Cement-Concrete Block*, 381 F. Supp. 1108 (N.D. Ill. 1974), where, although use of the grand jury transcript was limited to refreshing recollection, impeachment and testing credibility of trial witnesses, no particularized need was required to be shown. *Connecticut v. General Motors Corp.*, [1974] TRADE CAS. (CCH) ¶ 97,079 (N.D. Ill. 1974), where the court reasoned that since the only grand jury transcript had been physically delivered to the defendants, Rule 6(e) was not applicable at all to the plaintiffs' request for discovery.

The fact that the United States, as a civil plaintiff, has free access to grand jury materials, on the other hand, is not a sufficient basis for granting disclosure to the defendant. *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *United States v. Max Factor & Co.*, 39 F.R.D. 3 (W.D. Mo. 1966). The result is justifiable in light of Rule 6(e)'s preference for disclosure to United States Attorneys, *i.e.*, only United States Attorneys may have free disclosure without first petitioning the court under the rule.

⁸⁹ *U.S. Industries v. United States District Court*, 345 F.2d 18 (9th Cir. 1965). Disclosure of a sentencing report has been denied where only some of the defendants had seen it at the previous criminal trial. *Hancock Bros. Inc. v. Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968).

⁹⁰ *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. 1969). Discovery of a debriefing memorandum in this case raised questions of which corporate employees could claim a corporate client/attorney privilege as to information contained in the memorandum, and to what extent the report represented counsel's "work product" as opposed to investigative effort. *But see Philadelphia Electric Co. v. Anaconda American Brass Co.*, 275 F. Supp. 146 (E.D. Pa. 1967), where access to summaries of grand jury testimony prepared by the defendant was denied absent a showing of particularized need.

⁹¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁹² FED. R. CRIM. P. 32 (c) (3) (A) provides in part: Before imposing sentence the court shall upon

request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence. . . .

⁹³ The Supreme Court has cautioned against the conditioning of constitutional rights in a number of situations. *See Dunn v. Blumstein*, 405 U.S. 330 (1972) (durational residency requirement for voting struck down); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (receiving welfare benefits was conditioned upon residing in the state a length of time); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh Day Adventist had been denied unemployment compensation unless she agreed to work on Saturdays). *But see Sosna v. Iowa*, 419 U.S. 393 (1975) (Iowa durational residency requirement for obtaining a divorce upheld). The resolution of this line of cases would appear to turn upon the nature of the right being conditional. Where the right is "fundamental," a state must show a compelling interest to justify conditioning legislation. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁹⁴ 293 F. Supp. 1229 (N.D. Cal. 1968).

If disclosure to the defendant is used as a basis for disclosure to the third party litigants in a civil proceeding, the criminal defendant's access to information via Rules 32(c) and 6(e) of the Fed. R. Crim. P. is seriously hampered. The defendant is thereby compelled to choose between exercising a recognized privilege or maintaining the confidential nature of such information. This result is undesirable as well as unconstitutional in instances where the Constitution requires giving the defendant access to such information.

Id. at 1234.

⁹⁵ [1974] TRADE CAS. (CCH) ¶ 97,079 (N.D. Ill. 1974).

⁹⁶ The suggestion in the brief of Ford and General Motors that the disgorging by them of Grand Jury transcripts is somehow a deprivation of or encroachment upon the constitutional rights of these two corporations, is to assume a right to the continued secrecy of the testimony of certain individuals before the Grand Jury which no longer exists, and which never in any

court would appear to be correct, upon examination of the traditional reasons for the policy of grand jury secrecy.⁹⁷ It is clear that the policy exists only for the benefit of the undicted, as opposed to the indicted accused.⁹⁸

The constitutional objection to granting access to grand jury materials in order to "even up" the knowledge of the two litigants, however, is resolved if courts would permit free disclosure of grand jury minutes to all private litigants. This seems to be the direction courts are taking,⁹⁹ although *Procter & Gamble* has not been overruled. First, the major premise behind denying disclosure of grand jury testimony in subsequent litigation, that disclosure may deter future grand jury witnesses from testifying freely, is tenuous. The Supreme Court has argued that should grand jury testimony be released on less than a showing of particularized need "testimony would be parsimonious . . . Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness."¹⁰⁰ Nevertheless, grand jury witnesses often expect to, and do, testify later in open court. If the witness has testified truthfully before the grand jury, there is no more fear of retaliation than if disclosure were not permitted.¹⁰¹ Retaliation is not a significant consider-

ation where the witness is the defendant's employee and may be coerced into "volunteering" information to his employer anyhow.¹⁰² In the rare case in which retaliation is feared, the grand jury transcript may be released with names of witnesses deleted,¹⁰³ or with the prov-

before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce. If on the other hand his testimony now is inconsistent with that before the grand jury, the privilege ought not to apply. The need for the evidence in the criminal prosecution of *D* exceeds any injury that would inure to the witness-grand jury relation.

(2) If, on the contrary, the grand jury, after hearing *W*'s testimony, nevertheless discharges *D*, there may now be a motive for *W* to desire secrecy, as when on a subsequent trial it is desired to impeach *W* as a witness by showing his biased utterances against *D* before the grand jury. But here the privilege ought also to cease for another reason, namely, that the chance that such a disclosure will be called for is too small a contingency to have any effect a priori in rendering *W* unwilling to make complaint or give testimony before the grand jury; *W* naturally will have expected that *D* would be indicted. Moreover, when *W* is summoned on a civil trial involving the same matters as the criminal charge and it is desired to impeach him by his former testimony, all motive for secrecy ends for the same reasons noted in paragraph (1) *supra*.

8 WIGMORE, EVIDENCE § 2362 (McNaughton rev. 1961).

¹⁰² Grand jury witnesses may reveal their testimony to whomever they please. *Arlington Glass Co., Inc. v. Pittsburgh Plate Glass Co.*, 24 F.R.D. 50 (N.D. Ill. 1959). See *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. 1969). Harper & Row had "debriefed" its employees/grand jury witnesses in anticipation of the criminal litigation. The case illustrates that antitrust grand jury witnesses are not protected by the rule of grand jury secrecy, anyway, as long as employers can request them to "volunteer" their testimony to them. Whatever reprisal might be taken against antitrust employee/witnesses would logically take place once their employers gained knowledge of the testimony.

Where a grand jury witness/employee requests that a transcript of his testimony be furnished to his employer/defendant, the request is routinely granted. See *United States v. Scott Paper Co.*, 254 F. Supp. 759 (W.D. Mich. 1966); *United States v. Badger Paper Mills, Inc.*, 243 F. Supp. 443 (E.D. Wis. 1965).

¹⁰³ *U.S. Industries v. United States District Court*, 345 F.2d 18 (9th Cir. 1965). The plaintiffs in this civil antitrust suit requested and received disclosure of a sealed government memorandum referring to grand jury testimony.

event inured to the benefit of the corporate defendants, and therefore, may not be asserted by them.

Id. at ¶ 97,081.

⁹⁷ See text accompanying note 3 *supra*.

⁹⁸ See *Bertram v. State*, 33 Md. App. 115, 364 A.2d 1119 (1976), where the court stated that the rule of secrecy exists for three groups of people: the grand jury itself, witnesses before it, and undicted suspects.

⁹⁹ While the Supreme Court has not yet authorized automatic disclosure in treble damage actions, the scope of discovery is normally wider in civil litigation than in criminal prosecutions. *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37, 41 n.7 (N.D. Ill. 1969) (emphasis added).

¹⁰⁰ *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959).

¹⁰¹ But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:

(1) If the grand jury indicts *D* on *W*'s testimony, it is plain that secrecy is no longer of any avail, for *W* will be summoned as a witness at the trial and will be compellable to testify. If he tells the truth and the truth is the same as he testified

iso that only counsel for the discovering party see its contents.¹⁰⁴ Second, there is some fear that application of a rule of secrecy to grand jury testimony promotes perjury.¹⁰⁵ Third, even if testimony given to the grand jury is incompetent or hearsay, that does not, or should not, rule out its use for discovery leads. Fourth, treble damage suits are permitted by Congress to encourage private enforcement of the antitrust laws.¹⁰⁶ The institution of these suits would be greatly facilitated by making grand jury materials available for discovery. Finally, there is no fear in the case of the individual litigant's use of grand jury materials of abuse of the grand jury processes. The individual litigant who profits from information gathered by a grand jury does so through pure chance.

DISCLOSURE OF GRAND JURY MATERIAL TO THE PUBLIC

In a rare circumstance, a grand jury witness may request that his own testimony be made public. That request has been granted where disclosure was in the public interest.¹⁰⁷

Generally, however, release of grand jury materials to the public is effected through a grand jury report or presentment. The power of a grand jury to make a presentment is recognized in the Constitution.¹⁰⁸ Strictly speaking, a grand jury "presentment" is an accusation of crime, comparable to an unsigned indictment, while a "report" makes no such accusation.¹⁰⁹ While a federal grand jury clearly

has the power to make a presentment or report, the district court must decide what degree of disclosure, if any, will be made of it.¹¹⁰ A fairly recent opinion concluded that "the court should regulate the amount of disclosure, to be sure that it is no greater than required by the public 'interest in knowing' when weighed against the rights of the persons mentioned in the presentment."¹¹¹

There is a discernible trend in the federal courts toward permitting disclosure of grand jury reports. Where the grand jury had desired to present an indictment, but the United States Attorney has refused to sign it, disclosure of a presentment would seem to be in order.¹¹² Substantial publicity concerning the nature of a grand jury report has resulted in release of this report.¹¹³

On the other hand federal grand jury reports may be expunged if they deal with matters outside the grand jury's concern, *i.e.*, the enforcement of federal statutes.¹¹⁴ A report commenting upon the sufficiency of evidence against an indicted defendant also must be expunged, as violative of his right to a fair trial before an unprejudiced body of peers.¹¹⁵

Grand jury reports may request disclosure to a specific administrative,¹¹⁶ or legislative¹¹⁷ body, rather than to the public. Such reports are generally justified as the expression of

¹⁰⁴ *United States v. Scott Paper Co.*, 254 F. Supp. 759 (W.D. Mich. 1966).

¹⁰⁵ *United States v. Procter & Gamble Co.*, 19 F.R.D. 122, 126 (D.N.J. 1956), *rev'd*, 356 U.S. 677 (1958); 8 WIGMORE, EVIDENCE § 2362 (McNaughton rev. 1961).

¹⁰⁶ Note, 112 U. PA. L. REV. 1133 (1974).

¹⁰⁷ *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973). Mr. Biaggi, a Congressman, sought disclosure of his testimony after newspapers reported that he had exercised his fifth amendment right against self-incrimination 30 times. Although there was no judicial proceeding with which the disclosure could be connected, the court released the testimony under the theory that all those possibly benefiting from the rule of secrecy—the witness and the Government—had waived it.

¹⁰⁸ "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V.

¹⁰⁹ *Application of United Electrical, Radio & Machine Workers*, 111 F. Supp. 858, 863 n.13 (S.D.N.Y. 1953).

¹¹⁰ *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970).

¹¹¹ *Id.* at 678.

¹¹² *United States v. Cox*, 342 F.2d 167, 196 (5th Cir.), (Wisdom, J., concurring), *cert. denied*, 381 U.S. 935 (1965); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970).

An indictment unsigned by a Justice Department official cannot be a true bill; nor can a court order that an indictment be signed. *United States v. Cox*, 342 F.2d at 172.

¹¹³ *Application of Johnson*, 484 F.2d 791 (7th Cir. 1973); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970).

¹¹⁴ *In re Grand Jury Proceedings*, 479 F.2d 458 (5th Cir. 1973). A grand jury report criticizing a state prosecutor's handling of a criminal trial was expunged of all local references.

¹¹⁵ *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971). The accuseds, participants in the Kent State tragedy, brought a successful suit under 42 U.S.C. § 1983 for deprivation of their civil rights to due process by the issuance of the grand jury report.

¹¹⁶ See *Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958).

¹¹⁷ See *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.D.C. 1974).

concerned citizens. Where a grand jury report recommended submitting material to an appropriate governmental body, and the disclosure was in the public interest, it was permitted.¹¹⁸ However, where a report drew conclusions and appeared to direct a governmental agency to take certain action, the court refused to issue it, citing a separation of powers problem.¹¹⁹

Upon examining the grand jury report in light of the traditional reasons for secrecy, it is apparent that disclosure should be tightly regulated. There remains a great deal of debate concerning the fairness of the grand jury presentment or report. Although proponents argue that the public has a right to know about conduct falling just within the bounds of legality,¹²⁰ detractors view reports as possibly unfounded accusations of misconduct in which the accused is provided no forum of reply.¹²¹

¹¹⁸ *Id.* This case concerned a report prepared by the Watergate grand jury on the possible involvement of President Nixon, an unindicted co-conspirator. The grand jury report recommended that material be transmitted to the Judiciary Committee of the House of Representatives.

¹¹⁹ Application of United Electrical, Radio & Machine Workers, 111 F. Supp. 858 (S.D.N.Y. 1953). The report recommended that the NLRB revoke certification of some unions whose representatives had invoked the fifth amendment while testifying before the grand jury. The court saw a clear violation of the separation of powers principle, classifying the grand jury as an arm of the judiciary. *Contra*, United States v. Cox, 342 F.2d 167, 178-79 (5th Cir. 1965) (Rives, J., dissenting). However, the opinion can also be perceived as a reaction to an attempt by a grand jury to deprive the petitioners of their constitutional right against self-incrimination.

¹²⁰ Thus grand jury presentments of public affairs serve a need that is not met by any other procedure. The grand jury provides a readily available group of representative citizens of the county empowered, as occasion may demand, to voice the conscience of the community. There are many official acts and omissions that fall short of criminal misconduct and yet are not in the public interest. It is very much to the public advantage that such conduct be revealed in an effective, official way. No community desires to live a hairbreadth above the criminal level, which might well be the case if there were no official organ of public protest. Such presentments are a great deterrent to official wrongdoing. By exposing wrongdoing, moreover, such presentments inspire public confidence in the capacity of the body politic to purge itself of untoward conditions.

In re Presentment by Camden Grand Jury, 10 N.J. 23, 66, 89 A.2d 416, 443-44 (1952).

¹²¹ See *In re* Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960).

A grand jury report concerning an innocent person may cause that person unnecessary embarrassment. In addition, grand jury witnesses may be reluctant to testify freely if it becomes a common practice to expose the witness' testimony to public scrutiny. These objections, however, may be overcome where the grand jury investigation has received such publicity that only disclosure of the true nature of the proceedings can combat rumors. If the publicity is accurate, disclosure can do no more harm than has already occurred. If the publicity is inaccurate, disclosure of the true nature of a grand jury report could protect innocent persons.

CONCLUSION

The rule of secrecy of grand jury proceedings has at its roots a concern that the grand jury system be permitted to function as an independent institution empowered to investigate crimes. In order to function thus, grand jurors must be free to act on their own, independent of control by court, prosecutor or any civil agency. Grand jury witnesses must be free to testify without fear of reprisal. In determining motions for disclosure of grand jury materials under Rule 6(e), courts should emphasize the reasons behind the rule. The standard of "particularized need" should not be routinely applied to every request for disclosure. The perceived dangers of revealing grand jury materials vary from case to case. In particular, there is great variation among the four types of parties seeking access: state prosecutor, administrative agency, civil litigant or the public; each category presents its own threats to the grand jury system. The grand jury report cases are a commendable example of the value of a case by case analysis, unhampered by a "particularized need" requirement. The trial judge balances the public's "right to know" against any perceivable harm to a grand jury suspect or witness. The rule of grand jury secrecy in this way truly relates to its purposes. On the other hand, the cases determining access of official, administrative and private civil litigants to grand jury materials often show a preoccupation with the particularized need standard with little consideration of the real benefits or dangers of the disclosure requested.

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