

**The USA PATRIOT Act of 2001, the Homeland Security Act of 2002,
and the False Dichotomy between Protecting National Security
and Preserving Grand Jury Secrecy**

September 11, 2001—in the blink of an eye, buildings demolished, lives shattered and the very institutions on which our nation was built shaken to their core. One such institution, the federal grand jury, continues to reverberate from that day. Long enshrined under the common law and more recently codified in Federal Rule of Criminal Procedure 6(e), the doctrine of grand jury secrecy faces perhaps the most serious threat in its centuries-long history—a threat which need never have existed.

In response to the continuing danger posed by terrorism, Congress has amended Federal Rule of Criminal Procedure 6(e) to create unprecedented exceptions to the rule that matters occurring before a federal grand jury must not be disclosed.¹ As part of a much larger plan to encourage the sharing of information by law enforcement and intelligence officials,² a new exception to Rule 6(e) created by the USA PATRIOT Act of 2001 facilitates the sharing of grand jury materials relating to intelligence matters with federal intelligence, immigration, defense, protective, and security officials.³ A second exception added by the Homeland Security Act of 2002 authorizes the disclosure of grand jury materials relating to threats to national security, such as terrorism and sabotage, to a wide array of officials, including foreign officials, for the purpose of addressing the threat.⁴ Neither of the new exceptions requires judicial approval of

¹ See *infra* notes 90 to 188 and accompanying text.

² See *infra* notes 92 to 95 and accompanying text.

³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act, Pub. L. No. 107-56, § 203, 115 Stat. 272, 279-80 (2001). See *infra* notes 92 to 155 and accompanying text.

⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, § 895, 116 Stat. 2135, 2256-57 (2002). See *infra* notes 156 to 188 and accompanying text.

disclosures and neither requires a showing that a particularized need exists for the disclosure. Challenges to the constitutionality of these exceptions are almost certain.⁵

Unlike many provisions of the USA PATRIOT Act of 2001 and the Homeland Security Act of 2002, the provisions creating new exceptions to Rule 6(e) contain no sunset rule.⁶ The changes are permanent—they are not wartime security measures. Nonetheless, Congress has an obligation to revisit these crucial policy decisions made with haste in a time of national crisis.

Part I of this article describes the history of grand jury secrecy within the United States from its common-law beginnings to the most recent amendments to Federal Rule of Criminal Procedure 6(e).⁷ Part II examines the relationship between the right of grand jury secrecy and the Grand Jury Clause of the Fifth Amendment, concluding that the right of grand jury secrecy enjoys constitutional protection.⁸ Part III concludes that the newly created exceptions to Rule 6(e) are at best bad public policy and at worst violations of the Grand Jury Clause of the Fifth Amendment.⁹ Finally, Part IV proposes an amendment to Rule 6(e) that would preserve a right valued for nearly a millennium and bring the new exceptions within constitutional limits without sacrificing national security interests.¹⁰

I. A Brief History of Grand Jury Secrecy within the United States

The history of grand jury secrecy within the United States can be broken down into three distinct eras: the common law era, the pre-9/11 rules era, and the post-9/11 rules era.

⁵ Frederick P. Hitz, *Unleashing the Rogue Elephant: September 11 and Letting the CIA Be the CIA*, 25 Harv. J.L. & Pub. Policy 765, 773 (2002).

⁶ The USA PATRIOT Act of 2001 contains a sunset provision that makes the Act ineffective as of December 31, 2005. Pub. L. No. 107-56, § 224(a), 115 Stat. 272, 295. However, the sunset provision specifically exempts section 203(a), which amended Rule 6(e). *Id.* The Homeland Security Act of 2002 contains sunset rules for a few provisions, e.g., Pub. L. No. 107-296, § 312(g), 116 Stat. 2135, 2176, but not the provisions which amend Rule 6(e). The proposed Patriot Oversight Restoration Act, S. 1695, 108th Cong. (2003) would extend the Patriot Act's Sunshine provision to include section 203(a).

⁷ See *infra* notes 11 to 188 and accompanying text.

⁸ See *infra* notes 189 to 292 and accompanying text.

⁹ See *infra* notes 293 to 384 and accompanying text.

¹⁰ See *infra* notes 385 to 391 and accompanying text.

A. The Common Law Era

The “long-established policy” of protecting grand jury secrecy is “older than our nation itself.”¹¹ A right to indictment by a grand jury journeyed to the New World with the English colonists,¹² and “in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret”¹³ For centuries, grand jury secrecy enjoyed the protection of the common law.¹⁴

To understand the reasons for grand jury secrecy, one must understand the role of the grand jury proceeding. Grand jury proceedings have traditionally served two functions: investigating whether probable cause exists to believe a crime has occurred (*i.e.*, the “sword” or “investigatory” function)¹⁵ and screening cases to shield innocent persons from unwarranted prosecution (*i.e.*, the “shield” or “screening” function).¹⁶ Thus, grand juries serve both the governmental interest in finding and punishing wrongdoers and the individual interest in avoiding the indiscriminate exercise of governmental authority. Although the grand jury was brought into being to serve the investigatory function,¹⁷ by the seventeenth century, the screening function had risen to prominence.¹⁸ Indeed, the screening function was viewed by the

¹¹ *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 399 (1959).

¹² *Costello v. U.S.*, 350 U.S. 359, 362 (1956). See generally Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 Fla. St. U. L. Rev. 1, 5-16 (1996). The first regular American grand jury sat in the Massachusetts Bay Colony in 1635. Richard D. Younger, *The People’s Panel: The Grand Jury in the United States, 1631-1941* 6 (Brown U. Press 1963).

¹³ *Costello*, 350 U.S. at 362. In the early English criminal courts, “if a grand juror disclosed to a person accused the evidence before the grand jury in his case, such grand juror became accessory to the crime, if it was a felony, and a principal, if it was treason” *In re Atwell*, 140 F. 368, 370 (W.D.N.C. 1905), *rev’d*, *Atwell v. U.S.*, 162 F. 97 (4th Cir. 1908). In the American courts, the punishment for disclosure came in the form of contempt proceedings. *Goodman v. U.S.*, 108 F.2d 516, 519 (9th Cir. 1939)

¹⁴ See, e.g., *id.* at 520 (holding despite the lack of a statute or rule requiring grand jurors or grand jury witnesses to take an oath of secrecy, it was within the discretionary power of the courts to do so). American courts often required grand jurors and witnesses to take an oath of secrecy. *Id.* at 518-19.

¹⁵ Susan W. Brenner and Gregory G. Lockhart, *Federal Grand Jury Practice* § 3.1 (West Group 1996).

¹⁶ *Id.* § 2.2.

¹⁷ E.g., Younger, *supra* note 12, at 1.

¹⁸ “[U]nlike 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.” Kadish, *supra* note 12, at 10.

nation's founders as being of such consequence¹⁹ that it was incorporated into the Fifth Amendment of the United States Constitution.²⁰

Given the functions served by the grand jury, it is easy to see why its proceedings must be conducted in private.²¹ Long before the discovery of the New World, grand jurors were required to take an oath of secrecy,²² and long before the War of Independence, governmental representatives were barred from jury deliberations.²³ In 1681, John Somers, a noted scholar read on both sides of the Atlantic, outlined three reasons why secret proceedings serve the public good.²⁴ One, if targets were aware of the grand jury proceedings, they might conspire to "hide their crimes."²⁵ Two, were targets to be made aware of the proceedings against them, they might flee.²⁶ Either of these events would impede the investigatory function. Three, questioning witnesses privately and separately aids in discovering the truth,²⁷ a goal vital to both the innocent target²⁸ (*i.e.*, the screening function) and the King²⁹ (*i.e.*, the investigatory function).

¹⁹ *E.g.*, *Wood v. Georgia*, 370 U.S. 375, 390 (1962) ("Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.").

²⁰ *See generally infra* notes 189 to 292 and accompanying text. By the end of the Revolutionary War "indictment by a grand jury had assumed the position of a cherished right." Younger, *supra* note 12, at 41.

²¹ For a more detailed explanation of the interests protected by grand jury secrecy see *infra* notes 211 to 227 and accompanying text.

²² Kadish, *supra* note 12, at 13.

²³ *Id.*

²⁴ John Somers, *The Security of English-Mens Lives, or the Trust, Power, and Duty of the Grand Jurys of England* 44-55 (photo reprint 1979) (1681).

²⁵ *Id.* at 44.

²⁶ *Id.* at 46.

²⁷ *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 Examination of Witnesses in many, if not 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 biassed [sic] 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 is present or future, or Promises of impunity for some enormous Crime .").

²⁸ *Id.* at 49-52.

²⁹ *Id.* at 53-55.

Under the common law, the right of grand jury secrecy was qualified in the sense that it could be overcome upon a showing that disclosure was “essential to the enforcement of the constitutional guaranties or to the protection, preservation, or enforcement of public or private rights.”³⁰ The standard applied was stringent. Matters occurring before a grand jury were almost never subject to disclosure absent a showing of substantial need of some kind.³¹ A majority of the reported cases involved requests for disclosure by defendants seeking to contest an indictment,³² but disclosure was also sought by government attorneys desiring to use grand jury materials at trial³³ and in other proceedings.³⁴ Disclosure was permitted in only a handful of reported decisions.³⁵

³⁰ *McKinney v. U.S.*, 199 F. 25, 38 (8th Cir. 1912) (Sanborn, J., dissenting).

³¹ *E.g.*, *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) (“[A]fter the grand jury’s functions are ended, disclosure is wholly proper *where the ends of justice require it.*”) (emphasis added); *U.S. v. Terry* 39 F. 355, 356 (D.C.Cal. 1889) (stating, “general rules or doctrines must in some cases give way; but exceptions to their application must be admitted with extreme caution, and on the clearest ground of their necessity, to secure substantial, and not merely technical, rights”); *U.S. v. Farrington*, 5 F. 343, 347 (D.C.N.Y. 1881) (“The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations, because this cannot serve any of the purposes of justice.”) (citations omitted).

In *Atwell v. U.S.*, the Fourth Circuit Court of Appeals departed from the rule of secrecy, holding that once the grand jury has issued an indictment and been discharged and the defendant has been taken into custody, grand jurors are no longer bound by an oath of secrecy. 162 F. 97, 98-103 (4th Cir. 1908). The idea that the need for secrecy diminishes after the grand jury has completed its work gained some acceptance, *e.g.*, *Metzler v. U.S.*, 64 F.2d 203, 206 (9th Cir. 1933), but the court’s holding that no requirement of secrecy remains, “seems to have made but slight impression upon the federal courts in disposing of many kindred questions” in the years following the decision. *U.S. v. United States Med. Assn.*, 26 F. Supp. 429, 430 (D.D.C. 1939).

³² *E.g.*, *Shushan v. U.S.*, 117 F.2d 110, 113 (5th Cir. 1941) (upholding trial court’s denial of defendants’ plea to review sufficiency of evidence before the grand jury); *U.S. v. Central Supply Assn.*, 34 F. Supp. 241, 242-46 (N.D. Ohio 1940) (overruling defendants’ motion to release grand jury witnesses from their oath of secrecy to allow defendants to prepare for trial); *United States Med. Assn.*, 26 F. Supp. at 429-31 (granting government’s motion to strike defendant’s motion to elicit information from grand jurors relating to possible prosecutorial misconduct); *U.S. v. Perlman*, 247 F. 158, 161-62 (S.D.N.Y. 1917) (denying defendant’s motion to quash an indictment and concluding insufficient reason existed to warrant inspection of the grand jury minutes by the court or the defendant).

³³ *See, e.g.*, *Socony-Vacuum Oil Co.*, 310 U.S. at 233 (concluding the “use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge”).

³⁴ *E.g.*, *in re Grand Jury Proc.*, 4 F. Supp. 283, 283-85 (E.D. Pa. 1933) (addressing whether grand jury testimony could be used at a proceeding for the revocation of a beer permit). *See U.S. v. Corban*, 127 F. 713, 721-22 (D. Mont. 1904) (permitting examination of grand jurors to determine if prosecutorial misconduct tainted the grand jury proceeding).

³⁵ *E.g.*, *Socony-Vacuum Oil Co.*, 310 U.S. at 231-34 (permitting court-authorized disclosure because “necessary or appropriate” for refreshing the recollection of a witness at trial.); *in re Grand Jury Proc.*, 4 F. Supp. 283, 283-85 (E.D. Pa. 1933) (permitting grand jury testimony to be used at a proceeding for the revocation of a beer permit);

Persons seeking disclosure bore the burden of showing a particularized need for disclosure—vague generalities did not suffice.³⁶ For example, grand jury secrecy was “not to be set aside on every request or suggestion of the person indicted, but only when there [was] a probability of serious illegality.”³⁷ Further, it was the duty of the court to determine if and when some other need outweighed the need for secrecy.³⁸ Breach of the rule of secrecy was not taken lightly and could result in prosecution for criminal contempt.³⁹

These basic policies continued with the adoption of Federal Rule of Criminal Procedure 6(e), which is discussed in the sections that follow.⁴⁰

B. Rule 6(e) Before 9/11

Prior to the events of September 11, 2001, both the text of Rule 6(e) and its interpretation by the United States Supreme Court reflected “the orthodox view that all proceedings before the Grand Jury should remain secret unless extraordinary circumstances are present.”⁴¹

Farrington, 5 F. at 343-48 (recognizing the right of the court to remove the veil of secrecy to investigate prosecutorial misconduct before the grand jury).

³⁶ *E.g.*, Shushan, 117 F.2d at 113 (finding evidence that the grand jury was not presented direct testimony on a particular element was insufficient to justify reviewing the record of the proceedings because the element may have been established using circumstantial evidence); United States Med. Assn., 26 F. Supp. at 429-31 (refusing to review grand jury record based on the affidavit of a defense counsel that “he has been ‘informed’ by various defendants and ‘believes’ that attorneys for the government presented irrelevant testimony to the grand jury, advised it as to the law, and requested and persuaded it to return the indictment”).

³⁷ Shushan, 117 F.2d at 113. *Accord* Perlman, 247 F. at 161 (noting the right of the judge to inspect grand jury minutes “should be sparingly exercised, unless a strong case is made out requiring examination of the minutes in the furtherance of justice, or for the protection of individual rights”).

³⁸ *E.g.*, Schmidt v. U.S., 115 F.2d 394, 397 (6th Cir. 1940) (“Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its ‘judicial inquiry.’”); Goodman, 108 F.2d at 521 (holding “the court may at any time in the furtherance of justice remove the seal of privacy from grand jury proceedings”); Central Supply Assn., 34 F. Supp. at 243 (“We all know that from earliest times the veil of secrecy was cast over the deliberations of the grand jury and they were not called upon to disclose what occurred during their deliberations except in a judicial inquiry directed by a court.”); United States Medical Association, 26 F. Supp. at 430 (finding only a court could release grand jurors from their oath of secrecy). *But see* Atwell, 162 F. at 101 (finding grand jurors were not bound to oath of secrecy “after presentment and indictment found, made public, and custody of the accused had, and the grand jury finally discharged”).

³⁹ Blalock v. U.S., 844 F.2d 1546, 1556-57 (11th Cir. 1988) (citing *in re* Summerhayes, 70 F. 769, 773-74 (N.D. Cal. 1895)).

⁴⁰ See *infra* notes 41 to 188 and accompanying text.

⁴¹ U.S. v. Papaioanu, 10 F.R.D. 517, 518 (D. Del. 1950).

1. The Text of Rule 6(e)

In 1944, the common-law doctrine of grand jury secrecy was codified by the adoption of Federal Rule of Criminal Procedure 6(e). As adopted, Rule 6(e) stated:

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 conjunction 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 because of matters occurring before the grand jury.⁴²

Despite the absence of an express provision permitting contempt as a remedy for unauthorized disclosure, the courts continued to view contempt as the proper sanction for persons removing the veil of secrecy.⁴³

According to the Advisory Committee, the new rule “continue[d] the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure.”⁴⁴ Rulemakers seemingly never questioned the idea that this practice must continue; grand secrecy was part and parcel of the Criminal Rules from the preliminary draft.⁴⁵ In the notes

⁴² Fed. R. Crim P. 6(e) (1976) (amended 1977).

⁴³ *E.g.*, U.S. v. Hoffa, 349 F.2d 20, 43 (6th Cir. 1965) (finding the proper sanction for unauthorized disclosure would be contempt); U.S. v. Schiavo 375 F.Supp. 475, 478 (D.C.Pa. 1974) (noting the proper sanction for unauthorized disclosure would be “to punish the offending party in a contempt proceeding); U.S. v. Smyth 104 F.Supp. 283, 293 (D.C.Cal. 1952) (concluding a court has the inherent power to “discipline the attorneys, the attendants or the grand jurors themselves for breach of the secrecy surrounding the body.” This practice was consistent with the intent of the rulemakers as expressed in the notes accompanying the early drafts of the Rule. *E.g.*, Fed. R. Crim. P. 6 advisory committee’s note (Second Prelim. Draft 1944) (reprinted in *Drafting History of the Federal Rules of Criminal Procedure* vol. IV, 20 (Madeleine J. Wilken & Nicholas Triffin eds. 1991)) (“Violation of this rule renders such person liable to contempt proceedings.”).

⁴⁴ Fed. R. Crim. P. 6 advisory committee’s note. *Accord* U.S. v. Sells Eng’g, Inc., 463 U.S. 418, 425 (1983).

⁴⁵ Fed. R. Crim. P. 7(c) (Prelim. Draft of Adv. Comm. 1942) (reprinted in *Drafting History of the Federal Rules of Criminal Procedure* vol. I, 50 (Madeleine J. Wilken & Nicholas Triffin eds. 1991)).

accompanying the early drafts of the Rule,⁴⁶ the Committee specifically pointed to the justifications for secrecy set forth in *United States v. Providence Tribune Co.*,⁴⁷ which warned:

Secrecy is essential to the proceedings of a grand jury for many reasons. Publicity may defeat justice by warning offenders to escape, to destroy evidence, or to tamper with witnesses. . . . Secrecy is also required in order that the reputations of innocent persons may not suffer from the fact that their conduct is under investigation, or has been investigated, by a grand jury. . . . Secrecy is further required for the protection of witnesses who may go before the grand jury, and to encourage them to make full disclosure of their knowledge of subjects and persons under investigation, without fear of evil consequences to themselves.⁴⁸

The term “matters occurring before the grand jury” has been interpreted to encompass and protect a wide variety of materials.⁴⁹

[It] includes not only what has occurred and what is occurring, but also what is likely to occur. Encompassed within the rule of secrecy are “the identities of witnesses or jurors, the substance of testimony” as well as actual transcripts, “the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.”⁵⁰

The basic idea is to prevent the disclosure of “anything which may reveal what occurred before the grand jury.”⁵¹ Among other things, grand jury records and transcripts are protected⁵² as is the testimony of witnesses.⁵³ Reports which summarize or analyze materials presented to the grand jury are also protected.⁵⁴

Under the original Rule 6(e), the sole exception to the requirement of judicial approval involved disclosure to “attorneys for the government for use in the performance of their duties.”

⁴⁶ E.g., Fed. R. Crim. P. 6 advisory committee’s note (Second Prelim. Draft 1944) (reprinted in *Drafting History of the Federal Rules of Criminal Procedure* vol. IV, 20 (Madeleine J. Wilken & Nicholas Triffin eds. 1991)).

⁴⁷ 241 F. 524 (D.R.I. 1917).

⁴⁸ *Id.* at 526 (citations omitted).

⁴⁹ See generally Brenner & Lockhart, *supra* note 15, at § 8.4.

⁵⁰ *In re* Motions of Dow Jones & Co., 142 F.3d 496, 499 (C.A.D.C.1998) (quoting *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C.Cir.1980) (en banc); *Fund for Constitutional Gov’t v. National Archives & Records Serv.*, 656 F.2d 856, 869 (D.C.Cir.1981)).

⁵¹ *In re* Grand Jury Matter 682 F.2d 61, 63 (3d Cir. 1982)

⁵² Brenner & Lockhart, *supra* note 15, at § 8.4.1.

⁵³ *Id.* § 8.4.3.

⁵⁴ *Id.* § 8.4.3.

This exception (hereafter referred to as the “government-attorney exception”) was entirely consistent with the doctrine of grand jury secrecy for it was intended to allow disclosure to persons who were already entitled to be present in the grand jury room.⁵⁵

In 1977, Rule 6(e) was amended to allow disclosure without judicial approval to “such government personnel 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 criminal law.”⁵⁶ Rule makers justified the disclosure based on the inability of government attorneys to adequately conduct grand jury investigations without the help of additional government personnel.⁵⁷ In a sense, the government personnel are merely extensions of the government attorney.⁵⁸ Under this exception (hereafter referred to as the “law-enforcement exception”), such personnel are only permitted to use grand jury materials to assist the attorney in enforcing federal criminal law.⁵⁹ The obligation of secrecy is imposed upon them, and any knowing violation of this obligation may be considered a contempt of court.⁶⁰ Further, the government attorney is required to promptly notify the court of any disclosure and to specify the government personnel to whom disclosure was made.⁶¹

The 1977 amendment also expressly provided for the sanction of contempt for the unauthorized disclosure of grand jury materials.⁶² This provision was intended in part to “allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand

⁵⁵ Fed. R. Crim. P. 6 advisory committee’s note (“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.”)

⁵⁶ Fed. R. Crim. P. 6(e)(3)(A)(ii) (amended 2002).

⁵⁷ Fed. R. Crim. P. 6 advisory committee’s note.

⁵⁸ *See generally* S. Rep. 95-354, at 6 (July 20, 1977) (*reprinted in* 1977 U.S.C.C.A.N. 527, 530) (“Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees.”).

⁵⁹ Fed. R. Crim. P. 6(e)(3)(B).

⁶⁰ Fed. R. Crim. P. 6(e)(7).

⁶¹ Fed. R. Crim. P. 6(e)(3)(B).

⁶² Fed. R. Crim. P. 6(e)(2) (“A knowing violation of Rule 6 may be punished as a contempt of court.”). The current version of this provision is found at Fed. R. Crim. P. 6(e)(7).

jury to enforce non-criminal Federal laws.”⁶³

In 1983, Rule 6(e) was amended to permit government attorneys to share grand jury materials with other federal grand juries.⁶⁴ Again, this exception (hereafter referred to as the “grand-juror exception”) is not inconsistent with the doctrine of grand jury secrecy for the grand jurors to whom the information is disclosed are bound by their oaths of secrecy.⁶⁵

Finally, in 1985, Rule 6(e) was amended to clarify that state and local government personnel are included within the definition of government personnel to whom disclosure by a government attorney is permitted.⁶⁶ To additionally safeguard grand jury secrecy, rulemakers required the government attorney making the disclosure to warn the government personnel, federal, state, or local, of the obligation of secrecy.⁶⁷

2. *U.S. v. Sells Engineering, Inc.*⁶⁸: A Narrow Interpretation

Perhaps the most significant interpretation of Rule 6(e) was provided by the United States Supreme Court in *United States v. Sells Engineering, Inc.*⁶⁹ In that case, the Court was asked to determine whether government attorneys working for the Civil Division of the Department of Justice could access grand jury materials for the purpose of preparing a civil suit.⁷⁰ The Government first argued that as the attorneys for the Civil Division fell within the category of “attorneys for the government,” such materials could be automatically disclosed under Rule 6(e)(3)(A)(i), the government-attorney exception.⁷¹ The Court agreed that attorneys for the Civil

⁶³ S. Rep. 95-354, at 8 (1977 U.S.C.C.A.N. 527, 531).

⁶⁴ Fed. R. Crim. P. 6(e)(3)(C)(iii) (2000) (current version at Fed. R. Crim. P. 6(e)(3)(C)).

⁶⁵ Fed. R. Crim. P. 6 advisory committee’s note.

⁶⁶ Fed. R. Crim. P. 6(e)(3)(A)(ii) (amended 2002).

⁶⁷ Fed. R. Crim. P. 6(e)(3)(B).

⁶⁸ 463 U.S. 418.

⁶⁹ *Id.*

⁷⁰ *Id.* at 420.

⁷¹ *Id.* at 427.

Division do fall within the class of “attorneys for the government.”⁷² Nonetheless, the Court concluded that the Government was not entitled to automatic disclosure.⁷³ Specifically, the Court held that “[t]he policies of Rule 6 require that any disclosure to attorneys other than prosecutors be judicially supervised rather than automatic.”⁷⁴

In so holding, the Court noted that the government-attorney exception only permits disclosure “in the performance of such attorney’s duty.”⁷⁵ Ultimately, it concluded that “preparation of a civil suit by a Justice Department attorney who had no part in conducting the related criminal prosecution” does not fall within that category of duties covered by the exception.⁷⁶ The Court’s decision to narrowly interpret Rule 6(e)’s government-attorney exception was driven by “the strong historic policy of preserving grand jury secrecy.”⁷⁷ It found “disclosure for civil use unjustified by the considerations supporting prosecutorial access”—in sum, grand juries can function perfectly well without such disclosure.⁷⁸

But the Court did not end its analysis with this finding. It took great pains to articulate the “affirmative mischief” such disclosure could cause.⁷⁹ The Court was greatly concerned by the prospect that broad disclosure would increase “the risk of inadvertent or illegal release to others” and “render[] considerably more concrete the threat to the willingness of witnesses to come forward and to testify fully and candidly.”⁸⁰ It also expressed concern for “the integrity of

⁷² *Id.* at 427-28 (noting “Rule 54(c) defines the phrase expansively, to include authorized assistants to the Attorney General”; 28 U.S.C. § 515(a) provides that the Attorney General may direct any attorney employed by the Department to conduct “any kind of legal proceeding, civil or criminal, including grand jury proceedings . . .”).

⁷³ *Id.* at 435.

⁷⁴ *Id.*

⁷⁵ *Id.* at 428.

⁷⁶ *Id.* at 428-35.

⁷⁷ *Id.* at 428.

⁷⁸ *Id.* at 431.

⁷⁹ *Id.* at 431.

⁸⁰ *Id.* at 432.

the grand jury itself,” fearing that the institution might be used for purposes other than criminal investigation and that such misuse might be difficult to ascertain.⁸¹

The Government also sought disclosure under then Rule 6(e)(3)(c)(i),⁸² which permitted court-ordered disclosure ““preliminary to or in connection with a judicial proceeding.””⁸³ In so doing, the Government sought to distinguish cases involving disclosure to government officials from those involving private parties, arguing that when government officials seek disclosure ““in furtherance of their responsibility to protect the public weal,”” they should not be required to make a showing of particularized need.⁸⁴ At the heart of the Government’s argument was the idea that ““disclosure of grand jury materials to government attorneys typically implicates few, if any, of the concerns that underlie the policy of grand jury secrecy.””⁸⁵ While acknowledging that the Government’s argument had “some validity,” the Court found it to be “overstated,”⁸⁶ and refused to waive application of the particularized-need standard to government officials.⁸⁷

Thus, prior to the events of 9/11, the only persons to whom grand jury materials could be disclosed without prior judicial approval were government attorneys involved in federal criminal investigations, government personnel assisting government attorneys in federal criminal investigations, and federal grand jurors. Each of these groups is essential to the functioning of a

⁸¹ *Id.* at 432-33. A third concern was that the “use of grand jury materials by government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government’s power of discovery and investigation.” *Id.* at 433.

⁸² This exception is currently contained in Fed. R. Crim. P. 6(e)(3)(E)(i).

⁸³ *Id.* at 442.

⁸⁴ *Id.* at 443. Specifically, the Government sought to avoid the application of the standard articulated in *Douglas Oil*:

“Parties seeking grand jury transcripts under Rule 6(e) 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 443 (quoting *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 222-23 (1979) (citations omitted)).

⁸⁵ *Id.* at 444-45.

⁸⁶ *Id.* at 445.

⁸⁷ *Id.* at 444-45. The Court did note that “the standard itself accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case.” *Id.* at 445.

federal grand jury and each has an obligation of secrecy under Rule 6(e)(2).⁸⁸ All others seeking disclosure, including government officials, were required to obtain judicial approval by making a showing of particularized need.⁸⁹

⁸⁸ On September 11, 2001, Rule 6(e) of the Federal Rules of Criminal Procedure read as follows:

(e) Recording and disclosure of proceedings.

(1) Recording of proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) 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 (3)(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.

(3) 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 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 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;

(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; or

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

(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.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

C. Rule 6(e) After 9/11

The terrorist attacks of September 11, 2001 changed lives and laws. Within fifteen months after the attacks, Congress had enacted two massive pieces of legislation aimed at addressing the terrorist threat: the USA PATRIOT Act of 2001⁹⁰ and the Homeland Security Act of 2002.⁹¹ Each significantly amended the provisions of Rule 6(e).

1. The USA PATRIOT Act Amendments

As an immediate response to the tragic events of 9/11, Congress enacted sweeping legislation in the form of the USA PATRIOT Act of 2001, intended to “deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”⁹² A key function of the legislation was to break down the traditional

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. 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.

(5) Closed hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

⁸⁹ The requirement that a person seeking disclosure of grand jury materials establish a “particularized need” also applies when a defendant seeks disclosure pursuant to Fed. R. Crim. P. 6(e)(3)(C)(ii). *E.g.*, *U.S. v. Broyles*, 37 F.3d 1314, 1318 (8th Cir.1994). *Accord* *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 400 (1959) (applying the original version of Rule 6(e) and concluding, “the burden . . . is on the defense to show that ‘a particularized need’ exists for the [grand jury] minutes which outweighs the policy of secrecy”).

⁹⁰ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act*, Pub. L. No. 107-56, § 203, 115 Stat. 272, 272 (2001).

⁹¹ *Homeland Security Act of 2002*, Pub. L. No. 107-296, § 895, 116 Stat. 2135, 2256-57 (2002).

⁹² *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act*, Pub. L. No. 107-56, § 203, 115 Stat. 272, 272 (2001).

barriers between federal law enforcement officials and the intelligence community.⁹³ Bipartisan support existed for the idea that increased cooperation between law enforcement and the intelligence community was vital to preventing future terrorist acts.⁹⁴ In the words of Senator Orrin Hatch, “In this new war, terrorists are a hybrid between domestic criminals and international agents. We must lower the barriers that discourage our law enforcement and intelligence agencies from working together to stop these terrorists. These hybrid criminals call for new, hybrid tools.”⁹⁵ In a span of less than eighteen months, these tools were integrated into the war on terrorism.

a. The Amendment of Rule 6(e)

The USA PATRIOT Act included a provision amending Rule 6(e) to allow⁹⁶ disclosure of grand jury materials without judicial approval:⁹⁷

when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)),⁹⁸ or foreign intelligence information (as defined in clause (iv) of this subparagraph),⁹⁹ to any

⁹³ See generally Jim McGee, *An Intelligence Giant in the Making: Anti-Terrorism Law Likely to Bring Domestic Apparatus of Unprecedented Scope*, The Washington Post AO4, A04 (Nov. 11, 2001).

⁹⁴ E.g., 147 Cong. Rec. S10560 (daily ed. Oct. 11, 2001) (statement of Senator Orrin Hatch); *id.* at S10556 (statement of Senator Patrick Leahy) (noting “few would disagree that information learned in a criminal investigation that is necessary to combating terrorism or protecting the national security ought to be shared with the appropriate intelligence and national security officials”).

⁹⁵ *Id.* at S10560.

⁹⁶ Under the new provision disclosure “may” be made. Fed. R. Crim. P. 6(e)(3)(A)(amended 2002) (current version at Fed. R. Crim. P. 6(e)(3)(D)). Disclosure is not required. *But see infra* notes 116 to 122 and accompanying text.

⁹⁷ The House of Representatives’ version of this bill would have required judicial intervention. H.R. Rpt. 107-236(I), 107th Cong., 1st Sess., § 353 (Oct. 11, 2001).

⁹⁸ “The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.” 50 U.S.C. § 401a(2) (2000 & Supp. I 2002). “The term ‘counterintelligence’ means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.” *Id.* § 401a(2).

⁹⁹ Clause (iv) defines “foreign intelligence information” as meaning:

- (I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against--
 - (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.”¹⁰⁰

Congress included this provision based on the belief that in the course of criminal investigations, grand juries might well obtain information that could be used to prevent terrorist acts.¹⁰¹ However, the definitions used seem to encompass a much broader range of information, including information that is unrelated to any threat to the United States or its citizens. For instance, “foreign intelligence” includes information relating to the act of a foreign person.¹⁰² That could include the plans a foreign citizen to take part in a peaceful protest here or abroad or to buy a loaf of bread.

An argument exists that this new exception (hereafter referred to as the “PATRIOT intelligence exception”) significantly undermines the doctrine of grand jury secrecy.¹⁰³ It differs from other exceptions to Rule 6(e) secrecy in two critical respects. First, the PATRIOT intelligence exception permits prosecutors, acting solely on their own authority, to disclose grand jury materials to persons who are not involved in the prosecution of federal crimes.¹⁰⁴ Unlike

(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or
(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to--
(aa) the national defense or the security of the United States; or
(bb) the conduct of the foreign affairs of the United States.

¹⁰⁰ Fed. R. Crim. P. 6(e)(3)(C)(i)(V) (amended 2002) (current version at Fed. R. Crim. P. 6(e)(3)(D)).

¹⁰¹ For example, during the floor debate, Senator Bob Graham provided the following hypothetical:

Let me give a couple of hypothetical but eerily-close-to-reality examples. It is likely that there are, tonight, grand juries meeting at various places in the United States to deal with issues related to the events of September 11. Witnesses may be providing information-information about training camps in Afghanistan, ground warfare techniques used by al-Qaida and the Taliban, the types and quantity of weapons available. This type of information will be critical for the military-critical for the military now, not 2 years from now when these cases might go to trial.

147 Cong. Rec. at S10566 (statement of Senator Bob Graham).

¹⁰² See *supra* note 98.

¹⁰³ Irvin B. Nathan & Christopher D. Man, *The USA PATRIOT Act of 2001 Poses a New Threat to Grand Jury Secrecy*, 9 Bus. Crimes Bull. 1, 1 (February 2002).

¹⁰⁴ *Id.*

those traditional exceptions granting prosecutors the right to disclose grand jury materials,¹⁰⁵ this exception is not necessary to the proper functioning of the grand jury itself. The function of a grand jury is to determine whether probable cause exists to believe that a crime has occurred,¹⁰⁶ not to determine whether a crime will or might occur in the future. Under the traditional exceptions, a prosecutor might, for example, instruct an FBI agent to obtain physical evidence for submission to the grand jury. To achieve the legitimate goal of obtaining the additional evidence needed by the grand jury to reach a just result, the prosecutor might find it necessary to disclose grand jury materials to the agent. In short, the disclosure would be made with the intent to serve the grand jury.

The purpose of the new exception is fundamentally different. Under the PATRIOT intelligence exception, a prosecutor might, for example, report the existence of a financial link between a recent immigrant and a suspected terrorist to an immigration official. The immigration official would not be working for the prosecutor and would not be expected to report back to the grand jury. Instead, he or she might use the information as part of a deportation proceeding. In sum, the disclosure of the information would be completely unrelated to the functioning of the grand jury.

Unlike those traditional exceptions authorizing disclosure for purposes unrelated to the grand jury function,¹⁰⁷ this exception requires no judicial intervention and no showing of particularized need. Even as the USA Patriot Act was being enacted, Congressional concerns over the lack of judicial oversight were voiced,¹⁰⁸ but Congress' desire to take swift, decisive action to prevent another 9/11 outweighed concerns over the Act's individual components.

¹⁰⁵ See *supra* notes 55 to 67 and accompanying text.

¹⁰⁶ Brenner & Lockhart, *supra* note 15, at § 3.1.

¹⁰⁷ See *supra* notes 68 to 89 and accompanying text.

¹⁰⁸ 147 Cong. Rec. at S10556 (statement of Senator Bob Graham).

Second, the PATRIOT intelligence exception provides grand jury information to persons who are not subject to the same obligation of secrecy imposed upon the other categories of persons to whom grand jury materials may be disclosed without judicial intervention. Pursuant to Rule 6(e)(2)(B), grand jurors, attorneys for the government, and persons to whom disclosure is made under the law-enforcement exception are not permitted to disclose matters occurring before the grand jury, except as otherwise provided for in the rules. So, for instance, an FBI agent who receives grand jury materials pursuant to the law-enforcement exception¹⁰⁹ is not empowered to pass along those materials to other persons.

The obligation of secrecy imposed by Rule 6(e)(2) does not apply to persons obtaining information under the PATRIOT intelligence exception. Instead, Rule 6(e)(3)(D)(i), provides that federal officials receiving information under the new exception “may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.”¹¹⁰ The USA Patriot Act provided no explicit sanction for officials who violate this limitation.¹¹¹ Indeed, as a practical matter, the prospects of identifying persons in violation are poor for no record of those receiving information is filed with the court overseeing the grand jury.¹¹²

b. The Adoption of Information-Sharing Guidelines

¹⁰⁹ Fed. R. Crim. P. 6(e)(3)(A)(ii).

¹¹⁰ See also 50 U.S.C. § 403-5d (Supp. I 2002) (authorizing the sharing of foreign intelligence and counterintelligence information “obtained as part of a criminal investigation” with federal intelligence officials, etc. and mandating that such information be used “only as necessary in the conduct of the person’s official duties subject to any limitations on the unauthorized disclosure of such information”).

¹¹¹ A court might attempt to rely upon its inherent powers to order a contempt sanction. See *supra* notes 39, 43 and accompanying text.

¹¹² Rule 6(e)(3)(D)(ii) merely requires that “within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.” Its failure to require prosecutors to specifically identify the federal officials to whom disclosure is made contrasts sharply with the requirement that government personnel to whom disclosure is made pursuant to Rule 6(e)(3)(A)(ii) be identified. Fed. R. Crim. P. 6(e)(3)(B).

Congress did provide a mechanism for limiting disclosure.¹¹³ Section 905(a) of the USA PATRIOT Act required the Attorney General to develop guidelines for the sharing of information by federal law enforcement agencies with the federal intelligence community.¹¹⁴ These guidelines were to be promulgated after consultation with the Director of the Central Intelligence Agency.¹¹⁵

On September 23, 2002, Attorney General John Ashcroft issued the required guidelines.¹¹⁶ The new guidelines do little to safeguard grand jury secrecy. If anything, they make it more likely that grand jury materials will be disclosed. While the PATRIOT intelligence exception¹¹⁷ *permits* disclosure to federal intelligence officials, “these guidelines *require* expeditious disclosure.”¹¹⁸

¹¹³ The USA PATRIOT Act, Pub. L. No. 107-56, § 905(a), 115 Stat. 272, 388-90.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Memo, from John Ashcroft, U.S. Atty. Gen., to Heads of Dept. of Just. Components & Heads of Fed. Depts. & Agencies with L. Enforcement Resps., *Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation* (Sept. 23, 2002).

¹¹⁷ Fed. R. Crim. P. 6(e)(3)(D).

¹¹⁸ Memo, from John Ashcroft, *supra* note 116, at Guideline 2 (emphasis added). Specifically Guideline 2 states: Law Enforcement Information Subject to Mandatory Disclosure. Subject to any exceptions established by the Attorney General in consultation with the Director of Central Intelligence (the "Director") and the Assistant to the President for Homeland Security, section 905(a) and these guidelines require expeditious disclosure to the Director, the Assistant to the President for Homeland Security or other members of the U.S. intelligence community or homeland security agencies as are designated under paragraph 4, *infra*, of foreign intelligence acquired in the course of a criminal investigation conducted by Federal Law Enforcement Agencies.

- a. As used herein, the term “foreign intelligence” is defined in section 3 of the National Security Act of 1947 (50 U.S.C. § 401a) as: “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.”
- b. The term “section 905(a) information” means foreign intelligence acquired in the course of a criminal investigation.
- c. Section 203(d) of the USA PATRIOT Act, provides that: “Notwithstanding any other law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. § 401a)) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.” Thus, no other Federal or state law operates to prevent the sharing of such information so long as disclosure of such information will assist the Director and the Assistant to the President for Homeland Security in the performance of their official duties, and Federal Law Enforcement

The guidelines do allow for “exemptions from the mandatory disclosure obligation.”¹¹⁹ Requests for exemption “must be submitted by the department, component or agency head in writing [*i.e.*, the United States Attorney] with a complete description of the facts and circumstances giving rise to the need for an exception and why lesser measures such as use restrictions are not adequate.”¹²⁰ The Attorney General makes the final determination as to whether an exemption is warranted.¹²¹ Exemptions are considered on a case-by-case basis.¹²²

The standard created by the guidelines is a mirror opposite of that applied in every other situation involving prosecutorial release of grand jury materials. Instead of a presumption of secrecy, a presumption of disclosure exists. Rather than requiring a particularized showing of the need for disclosure, the guidelines require a particularized showing of the need for secrecy.

The guidelines also allow for the “originator” of the information to place some restrictions on its use.¹²³ As a general rule, information disclosed under the guidelines will be disclosed “free of any originator controls or information use restrictions.”¹²⁴ However, use of grand jury materials may be restricted “to comply with notice and record keeping requirements and to protect sensitive law enforcement sources and ongoing criminal investigations and prosecutions.”¹²⁵ Any restrictions on use “shall be no more restrictive than necessary to accomplish the desired effect.”¹²⁶ Unless the information contained within the grand jury

Agencies shall, notwithstanding any other law, expeditiously disclose to the Recipients (as defined below) section 905(a) information.

¹¹⁹ *Id.* Guideline 9.

¹²⁰ *Id.* Guideline 9(c).

¹²¹ *Id.* Guideline 9(b). In making this determination, the Attorney General is to consult with the Director of the Central Intelligence Agency and the Assistant to the President for Homeland Security. *Id.*

¹²² *Id.*

¹²³ *Id.* Guideline 8.

¹²⁴ *Id.* Guideline 8(a).

¹²⁵ *Id.* Guideline 8(c).

¹²⁶ *Id.* Guideline 8(b)(i).

materials relates to potential terrorism or weapons of mass destruction, the prosecuting official assigned to the case must be consulted prior to disclosure.¹²⁷

Again, this standard runs counter to that applied to every other prosecutorial release of grand jury materials. In the absence of use restrictions, as long as the recipients of the materials believe that disclosure is necessary in the conduct of their duties, they are free to pass them along to anyone.¹²⁸ This “second generation” of recipients did not exist under the exceptions in existence prior to 9/11. Those who received grand jury materials from a prosecutor were prohibited by their own obligation of secrecy from disclosing them to a second generation of recipients.¹²⁹ Neither Rule 6(e) nor the guidelines purport to limit the use of grand jury materials by second generation recipients. Once they reach this point, any pretext of secrecy is a thing of the past.

One other feature of the guidelines is worthy of note. The Attorney General has distinguished between the treatment of materials relating to “a potential terrorism¹³⁰ or WMD [Weapons of Mass Destruction¹³¹] threat to the United States homeland, its critical infrastructure,

¹²⁷ *Id.* Guideline 5(c). The disclosure must be made “within 48 hours after the prosecutor is initially notified.” *Id.*

¹²⁸ Fed. R. Crim. P. 6(e)(3)(C)(iii). Some protection may be afforded to “United States persons” under Exec. Or. 12333, 46 Fed. Reg. 59941, 59950 (Dec. 4, 1981), which places limitations on the ability of intelligence agencies “to collect, retain or disseminate information concerning United States persons.” Before disclosing grand jury materials identifying United States persons to federal intelligence officials, the prosecutor must label the materials as containing identifying information. Memo. from John Ashcroft, U.S. Atty. Gen., to Heads of Dept. Components, *Guidelines for Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information Identifying United States Persons* (Sept. 23, 2002). Under certain circumstances, identifying references to United States persons may be deleted by the receiving agency. *Id.*

¹²⁹ See generally *supra* notes 55 to 67 and accompanying text.

¹³⁰ “Terrorism Information” is defined as follows:

All information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign or international terrorist groups or individuals or threats posed by such groups or individuals to the United States, United States persons, or United States interests, or to those of other nations, or to communications between such groups or individuals, or information relating to groups or individuals reasonably believed to be assisting or associated with them.

Memo. *supra* n.116, at Guideline 5(a)(i).

¹³¹ “Weapons of Mass Destruction (WMD) Information” is defined as follows:

All information relating to conventional explosive weapons and non-conventional

key resources (whether physical or electronic) or to United States persons or interests worldwide” and the treatment of other grand jury materials subject to disclosure under Rule the PATRIOT intelligence exception. The former must be disclosed to the proper authorities “immediately,” while the latter must be disclosed “as expeditiously as possible.”¹³² When grand jury materials are released under the “as expeditiously as possible” standard, a period of forty-eight hours exists during which the prosecutor may identify use restrictions or seek an exception to the requirement of disclosure from the Attorney General.¹³³

c. The Use of the PATRIOT Intelligence Exception

Any question as to whether the PATRIOT intelligence exception would be used was quickly answered. Between September 11, 2001 and July 26, 2002, approximately forty disclosures of federal grand jury materials containing foreign intelligence information were made.¹³⁴ These disclosures involved thirty-nine separate grand juries.¹³⁵

Interestingly, twenty-seven of the disclosures during this period involved the use of pre-PATRIOT ACT procedure.¹³⁶ The exact procedures used are unclear. On September 20, 2002, the Justice Department informed the House Committee on the Judiciary that “grand jury material was shared under Rule 6(e)(3)(A)(ii),” the law-enforcement exception, which permits disclosure *without court approval* to government personnel needed to help prosecutors enforce federal

weapons capable of causing mass casualties and damage, including chemical, biological, radiological and nuclear agents and weapons and the means of delivery of such weapons.

Id. Guideline 5(a)(ii).

¹³² *Id.* Guideline 5(a).

¹³³ *Id.* Guideline 5(a),(c).

¹³⁴ Ltr. From Daniel J. Bryant, Asst. Atty. Gen., to the Hon. F. James Sensenbrenner, Jr., Chairman, Comm. on the Jud., U.S. H.R., *Questions Submitted by the House Judiciary Committee to the Attorney General on USA Patriot Act Implementation 1* (July 26, 2002).

¹³⁵ Ltr. From Daniel J. Bryant, Asst. Atty. Gen., to the Hon. F. James Sensenbrenner, Jr., Chairman, Comm. on the Jud., U.S. H.R., *Follow-up Questions Submitted by the House Judiciary Committee to the Attorney General on USA Patriot Act Implementation 1* (Sept. 20, 2002). Presumably, the bulk of these disclosures were made prior to the enactment of the USA PATRIOT Act.

¹³⁶ Ltr. From Daniel J. Bryant, Asst. Atty. Gen., to the Hon. F. James Sensenbrenner, Jr., Chairman, Comm. on the Jud., U.S. H.R., *Grand Jury Notice Information 1* (Oct. 4, 2002).

criminal law.¹³⁷ However, on October 4, 2002, the Justice Department reported that the districts involved “filed a motion and obtained an order from the court permitting such disclosure.”¹³⁸

Since the law-enforcement exception permits disclosure without a court order, this discrepancy is puzzling. It seems that prosecutors either sought court approval of their Rule 6(e)(3)(A)(ii) disclosure as some sort of check on their decision making or sought disclosure pursuant to Rule 6(e)(3)(C)(i),¹³⁹ which permits court-ordered disclosure. Using either of these provisions for purposes of sharing information with the intelligence community is problematic.¹⁴⁰

The law-enforcement exception¹⁴¹ might legitimately be used if the prosecutor’s purpose were to obtain additional information for the federal criminal case under investigation.¹⁴² If, for example, a prosecutor needed the help of the CIA to obtain information about a foreign target to present to the grand jury, a CIA agent might fall with the category of government personnel to whom disclosure is permitted. But if the prosecutor’s intent is not to enforce federal criminal law, but rather to inform the CIA of a threat to national security, the law-enforcement exception does not apply. In addition, a CIA agent who received grand jury materials under this exception could not disclose them to others.¹⁴³ If the intent of the Justice Department in making the

¹³⁷ Ltr., *supra* n.135 , at 1.

¹³⁸ Ltr., *supra* n.136 , at 1.

¹³⁹ The current version of this exception is found at Fed. R. Crim. P. 6(e)(3)(E)(i).

¹⁴⁰ Indeed, at least one Senator who supported the amendment of Rule 6(e) did so because she believed that “[u]nder current law, law enforcement officials involved in a grand jury investigation cannot share information gathered in the grand jury with the intelligence community, even if that information would prevent a future terrorist act.” 147 Cong. Rec. at S10592 (statement of Senator Diane Feinstein).

¹⁴¹ Fed. R. Crim. P. 6(e)(3)(A)(ii).

¹⁴² The Justice Department explained, “[i]n the context of the 9/11 investigation, grand jury information was shared with members of numerous JTTFs [Joint Terrorism Task Forces] around the country who participated in the PENTBOMB [9/11] investigation as well as representatives of the various agencies stationed at SIOC [Strategic Information and Operations Center]. The reason for this is that it is often necessary to disclose grand jury testimony to those involved in an investigation to further that investigation.” Ltr., *supra* note 135, at 1.

¹⁴³ See *supra* notes 56 to 60 and accompanying text.

disclosures was to address a threat to national security, an absolute ban on further disclosure seems unworkable.

In contrast, court-ordered disclosure under Rule 6(e)(3)(C)(i), which permits court ordered disclosure “preliminarily to or in connection with a judicial proceeding,” would not impose an obligation of secrecy upon the recipient.¹⁴⁴ Again, however, this exception does not appear to apply to situations in which the disclosure is intended to protect national security interests. In *United States v. Baggot*,¹⁴⁵ the United States Supreme Court strictly construed this language holding, “the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. . . . If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted.”¹⁴⁶ Thus, the fact that “litigation is factually likely to emerge” from an investigation of a threat to national security would not support disclosure under Rule 6(e)(3)(C)(i).¹⁴⁷

The remaining disclosures were made under the PATRIOT intelligence exception. According to the Justice Department, all of the reporting districts¹⁴⁸ invoking the new exception had filed the required notice of disclosure with the court supervising the grand jury through which the information was obtained.¹⁴⁹ No complaints have been received from the supervising courts as to the timeliness of the notices filed.¹⁵⁰

¹⁴⁴ The obligation of secrecy imposed by Fed. R. Crim. P. 6(e)(2) applies only to grand jurors, interpreters, persons recording or transcribing the testimony, prosecutors, and persons to whom disclosure is made under the law-enforcement exception.

¹⁴⁵ 463 U.S. 476 (1983).

¹⁴⁶ *Id.* at 480.

¹⁴⁷ *Id.*

¹⁴⁸ At the time the Justice Department made it report, thirty-six of the thirty-eight districts involved in the disclosure of intelligence materials had reported. Ltr., *supra* n. 136, at 1.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* According to the Justice Department, “[t]he courts supervising the grand juries are responsible for supervising the filing of notices and for disciplining any failure to file such notices.” Ltr., *supra* n.135 , at 1. How the supervising court would ever learn of a failure to file is an open question.

The Justice Department provided the House Judiciary Committee with a redacted exemplar¹⁵¹ that provides some valuable insights into how the exception is being used.¹⁵² The

¹⁵¹ *Id.*

¹⁵² The notices are provided in the form of pleadings filed under seal. *Id.* The text of the sample notice reads as follows:

Pursuant to Section 203(a) of the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 279 (2001), codified as Fed. R. Crim. P. 6(e)(3)(C), the undersigned attorney for the government hereby provides notice to the Court regarding the disclosure to certain Federal departments, agencies, and entities of criminal investigative information that may include “matters occurring before” the above-captioned grand jury regarding xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and related criminal activity, as follows:

1. Grand juries empaneled in this district have issued subpoenas and engaged in other investigative activities in conjunction with xx and related criminal activity. To the extent that information relating to the grand juries’s [sic] activities constitutes “matters occurring before the grand jury” within the meaning of Rule 6(e)(2) of the Federal Rules of Criminal Procedure, it may not be disclosed “except as provided for” under the Rules. Fed. R. Crim. P. 6(e)(2).

2. Section 203(a) of the USA PATRIOT Act , which was signed into law on October 26, 2001, amends Rule 6(e)(3)(C)(i) to authorize disclosure of matters occurring before the grand jury:

(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)) [sic], or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.

Fed. R. Crim. P. 6(e)(3)(C)(i)(V).

3. The investigation into the September 11 attacks and related criminal activity involves such “foreign intelligence or counterintelligence and foreign intelligence information. Moreover, the sharing of information developed during the investigation assists a variety of “Federal law enforcement, intelligence, protective, immigration, national defense, [and national] security officials in the performance of their official duties. Consequently, criminal investigative information, which may include matters occurring before grand juries, has been disclosed and will continue to be disclosed to such officials. Of course, an official who receives such information “may use it only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.” Fed. R. Crim. P. 6(e)(3)(C)(iii).

4. The amended rule requires that, “[w]ithin a reasonable time after such disclosure an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which disclosure was made.” *Id.* Unlike the disclosure required in other contexts, *see* Fed. R. Crim. P. 6(e)(3)(B), in matters involving these sort of intelligence interests, which may (as in this case) involve literally thousands of Federal law enforcement and other officials, the rule does not require notice to name each individual official to whom grand jury information has been disclosed, only their “departments, agencies, or entities.”

most striking feature of the exemplar is the sheer breadth of the disclosure. The Court is informed that the intelligence interests in question “involve literally thousands of Federal law enforcement and other officials.”¹⁵³ The recipients include everyone from the CIA to the Social Security Administration Inspector General.¹⁵⁴ Such widespread dissemination of grand jury materials is unprecedented. Under the new exception, prosecutors are not even constrained by the need to list the individuals receiving the information.¹⁵⁵ Clearly, the passage of the USA PATRIOT Act ushered in a new era in the use of federal grand jury materials.

2. The Homeland Security Amendments

The new era continued with the passage of yet more far-reaching legislation in the form of the Homeland Security Act of 2002.¹⁵⁶ While much of the public’s attention to this Act was

5. Accordingly, the undersigned attorney for the government hereby notifies the Court that information relating to the above-captioned grand jury investigations, which may include “matters occurring before the grand jury,” has been and will be disclosed to the following Federal departments, agencies, and entities pursuant to Fed. R. Crim. P. 6(e)(C)(i)(V):

- (a) Department of Justice (including Federal Bureau of Investigation).
- (b) Department of Treasury.
- (c) Department of Defense.
- (d) Department of State.
- (e) Department of Transportation.
- (f) Department of Energy.
- (g) Postal Inspection Service.
- (h) Central Intelligence Agency.
- (i) National Security Agency.
- (j) National Security Council.
- (k) Naval Criminal Investigative Service
- (l) Nuclear Regulatory Commission.
- (m) Federal Aviation Administration.
- (n) Social Security Administration Inspector General.

6. Pursuant to Rule 6(e)(3)(C)(iii), this notice is filed UNDER SEAL.

Id. at Attachment to Follow-up Question 4 (footnotes omitted).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ The Justice Department termed the requirement under Rule 6(e)(3)(A)(ii) that prosecutors provide a list of every individual to whom information is disclosed “onerous and a diversion of resources from investigative activity.” *Ltr., supra* n.135 , at 1.

¹⁵⁶ Homeland Security Act of 2002, Pub. L. No. 107-296, § 895, 116 Stat. 2135, 2256-57 (2002).

directed towards provisions creating a new cabinet-level Department of Homeland Security, the Act also included provisions that purported to amend Rule 6(e) yet again.¹⁵⁷

The concern that the improvements in information sharing wrought by the enactment of the USA PATRIOT Act did not go far enough prompted this amendment.¹⁵⁸ Specifically, legislators expressed their concern that the USA PATRIOT Act failed to bring state and local officials into the information loop.¹⁵⁹ Such officials were believed to be at the vanguard of the war on terrorism.¹⁶⁰ It was the sense of Congress “that Federal, State, and local entities should share homeland security information to the maximum extent possible.”¹⁶¹ Legislators also voiced their concerns that the USA PATRIOT Act failed to address the problem of domestic terrorism.¹⁶²

a. The Purported Amendment of Rule 6(e)

In some respects, the changes wrought to Rule 6(e) by the USA PATRIOT Act pale in comparison to those Congress sought to create via the Homeland Security Act. The Homeland Security Act of 2002 contained additional amendments to Rule 6 that further erode the doctrine of grand jury secrecy.¹⁶³

The most significant amendment creates a new exception to the obligation of grand jury secrecy which allows disclosure without judicial approval:

¹⁵⁷ *Id.* The Homeland Security Act of 2002 incorporated the provisions of an earlier bill, H.R. 4598, the “Homeland Security Information Sharing Act.”

¹⁵⁸ *E.g.*, 148 Cong. Rec. H3939 (June 26, 2002) (statement of Rep. F. James Sensenbrenner).

¹⁵⁹ *E.g., id.*

¹⁶⁰ *Id.* Congress specifically found that “[s]ome homeland security information is needed by State and local personnel to prevent and prepare for terrorist attack” and that “State and local personnel have capabilities and opportunities to gather information on suspicious activities and terrorist threats not possessed by Federal agencies.” Homeland Security Act of 2002, Pub. L. No. 107-296, § 891(b)(4),(8), 116 Stat. 2135, 2252 (2002).

¹⁶¹ *Id.* § 891(c).

¹⁶² 148 Cong. Rec. at H3939. *See also* H.R. Rpt. 107-534 § 6 (June 25, 2002) (“Domestic threat information is included because it is not always clear whether threats to public safety result from international or domestic terrorism threats. The anthrax attacks are one example of where the origin of that attacks is not clear.”).

¹⁶³ 116 Stat. at 2256-57.

when matters involve a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat.¹⁶⁴

Congress has again created an exception that fundamentally differs from the traditional exceptions¹⁶⁵ by permitting prosecutors to disclose grand jury materials to persons who are not intimately involved in the prosecution of federal crimes.¹⁶⁶ In contrast to those traditional exceptions controlling disclosure to persons unrelated to the grand jury function,¹⁶⁷ the new exception (hereafter referred to as the “Homeland Security exception”) requires no judicial intervention and no showing of particularized need.

Several aspects of this new exception are disquieting. First, the Act ill defines the types of information subject to disclosure. In drafting the amendments contained within the USA PATRIOT Act, Congress defined the categories of information that may be disclosed—it provided specific definitions for “foreign intelligence,” etc.¹⁶⁸ These definitions may be broad,

¹⁶⁴ 116 Stat. at 2256.

The Act also sought to amend the language of existing Rule 6(e)(3)(A)(ii) to include personnel of a foreign government among those to whom an attorney for the government may disclose grand jury materials when needed to assist in enforcing federal criminal law. *Id.* A prosecutor disclosing grand jury materials to a foreign official under this provision would be required to provide the official’s name to the court that impaneled the grand jury. Fed. R. Civ. P. 6(e)(3)(B). Foreign officials receiving grand jury materials pursuant to this exception would have an obligation of secrecy under existing Rule 6(e)(2).

In addition, the Act sought to amend the language of existing Rule 6(e)(3)(C)(i)(I) to expressly allow a court to order disclosure “upon request by an attorney by the government when sought by a foreign court or prosecutor for use in an official criminal investigation.” 116 Stat. at 2256. In essence, this amendment clarified that at least some foreign proceedings qualify as “judicial proceedings” under Rule 6. Along the same lines, the Act sought to amend existing Rule 6(e)(3)(C)(i)(IV) to expressly permit a court to order disclosure of a violation of foreign criminal law to a foreign official for the purpose of enforcing that law. 116 Stat. at 2256. This amendment was believed necessary because “even when the Government [made] an appropriate showing to the court (i.e., a showing similar to that required for disclosure of grand jury material in a domestic proceeding), the rule as . . . written [did] not expressly authorize courts to order disclosure. As a consequence, the U.S. prosecutor sometimes [was forced to] re-subpoena the same information from the original sources.” H.R. Rpt. 107-534 at § 6.

¹⁶⁵ See *supra* notes 55 to 67 and accompanying text.

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* notes 68 to 89 and accompanying text.

¹⁶⁸ See *supra* notes 98-99 and accompanying text.

but they do place some limitation on disclosure. The Homeland Security Act provides no such definitions. For example, a term like “domestic terrorism” could be susceptible to varying interpretations. If a prosecutor learns via grand jury testimony of a planned anti-war sit-in may the prosecutor inform intelligence officials of the identity of its planners?¹⁶⁹ The question of where “ordinary” crime ends and “domestic terrorism” begins is left unanswered.¹⁷⁰

Second, the Act provides no limitation on the category of government official to whom information may be disclosed. It may be given to any “appropriate” official.¹⁷¹ Congressional testimony¹⁷² and debate¹⁷³ centered on the need to involve state and local officials in the war on terrorism, but the new exception also permits disclosure to foreign officials. Nothing in the Congressional record explains this decision. Indeed, there is no discussion of the unique risks disclosure to non citizens and residents might pose to the grand jury process.

Once more, the language of the Homeland Security exception contrasts sharply with that of the PATRIOT intelligence exception, which provides a list of approved categories.¹⁷⁴ Given that the Homeland Security exception is intended to prevent acts such as terrorism and sabotage, and that the circumstances surrounding such acts would be highly variable, the desire to allow some leeway as to the selection of the appropriate official is understandable. Nonetheless, the utter lack of boundaries creates unprecedented access to grand jury materials.

¹⁶⁹ Leaving decisions as to when disclosure is warranted in the hands of individual prosecutors is bound to lead to inconsistencies in interpretation.

¹⁷⁰ Under federal criminal law, “domestic terrorism” is defined as activities that-- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended--(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2331(5) (2000 & Supp I 2002).

¹⁷¹ 116 Stat. at 2256.

¹⁷² E.g., Subcomm. on Crime H.R. Jud. Comm., *H.R.4598, The Homeland Security Information Sharing Act*, Cong. Test., 2002 WL 20317655 (June 4, 2002) (statement of Rep. Saxby Chambliss).

¹⁷³ E.g., 148 Cong. Rec. at H3941-H3942 (statement of Rep. Anthony Weiner).

¹⁷⁴ See *supra* note 100 and accompanying text.

Legislators did express some concern over the disclosure of grand jury information.¹⁷⁵ However, they believed that the Act contained adequate safeguards to protect grand jury secrecy.¹⁷⁶ As with persons receiving grand jury materials under the PATRIOT intelligence exception, the obligation of secrecy imposed by Rule 6(e)(2) does not apply to persons obtaining information under the Homeland Security exception. Still, some limitations on use exist. Officials receiving grand jury materials pursuant to this exception may use it only as needed in the conduct of their duties.¹⁷⁷ They must use it for the purpose specified by the exception, “to prevent or respond to a threat.”¹⁷⁸ Joint guidelines to be promulgated by the Attorney General and the Director of the CIA may impose additional limitations on use by state, local, and foreign officials.¹⁷⁹ Such officials may be punished for contempt of court for any violation of that obligation.¹⁸⁰

The effectiveness of these safeguards remains to be seen. As with the PATRIOT intelligence exception,¹⁸¹ there is no requirement that prosecutors identify recipients of grand jury materials to the court overseeing the grand jury. Prosecutors need only file a notice with the court indicating that the information was disclosed and identifying the entity receiving the materials.¹⁸² Further, with the exception of the contempt sanction created for violations of the joint guidelines discussed above,¹⁸³ Congress again failed to expressly grant the courts the power

¹⁷⁵ *E.g.*, 148 Cong. Rec. at H3942 (statement of Rep. Anthony Weiner) (“I share the concerns that some raised in committee that we do not want this information to chip away at the confidentiality of the grand jury.”)

¹⁷⁶ *Id.* at H3939 (statement of Rep. F. James Sensenbrenner) (noting, “[t]he information may only be disclosed for the specified purpose of preventing and responding to a threat. Additionally, recipients may only use the disclosed information in the conduct of their official duties as is necessary, and they are subject to the restrictions for unauthorized disclosures, including contempt of court.”).

¹⁷⁷ 116 Stat. at 2256.

¹⁷⁸ H.R. Rpt. 107-534 at § 6.

¹⁷⁹ *Id.* Persons receiving information under this exception “shall use that information only consistent with such guidelines as the Attorney General and Director of Central Intelligence shall jointly issue.” *Id.* at 2257.

¹⁸⁰ *Id.* at 2256.

¹⁸¹ *See supra* note 112 and accompanying text.

¹⁸² 116 Stat. at 2256.

¹⁸³ *See supra* notes 179 to 180 and accompanying text.

to impose the sanction of contempt.¹⁸⁴ And how a court might be expected to impose contempt sanctions without knowing the identity of the person or persons to whom disclosure was made is a mystery.

b. The Current Status of Rule 6(e)

The Homeland Security Act amendments were supposed to become effective sixty days after the date of enactment.¹⁸⁵ However, in drafting the amendments, Congress failed to consider the amendment and restructuring of Rule 6(e) that came into effect on December 1, 2002.¹⁸⁶ This restructuring made the amendments incapable of execution.¹⁸⁷ President George

¹⁸⁴ Again, the courts may possess the inherent power to impose this sanction. . See *supra* notes 39, 43 111 and accompanying text.

¹⁸⁵ Homeland Security Act of 2002, Pub. L. No. 107-296, § 4, 116 Stat. 2142 (2002).

¹⁸⁶ As of the writing of this article, Fed. R. Crim P. 6(e)(2),(3) reads as follows:

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

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

- (i) an attorney for the government for use in performing that attorney's duty;
- (ii) any government personnel--including those of a state or state subdivision or of an Indian tribe--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or
- (iii) a person authorized by 18 U.S.C. § 3322.

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

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

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence,

protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.

(i) Any federal official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

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

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

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

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

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

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

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

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

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

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

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

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is *ex parte*--as it may be when the government is the petitioner--the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

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

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

Along with restyling Rule 6(e), the 2002 amendments contained some substantive changes that are worthy of note. Under Rule 6(e)(3)(A)(iii), a prosecutor may disclose grand jury materials to an attorney for the government for purposes of enforcing civil forfeiture laws and civil banking laws under 18 U.S.C. § 3322. This provision was added to ensure that the amendments to Rule 6 did not supercede 18 U.S.C. § 3322. Fed. R. Crim. P. 6 GAP Rpt. 2002 amends. Underlying section 3322 is the idea "because all civil forfeiture actions are now recognized as law enforcement functions, grand jury information should be available to government attorneys for their use in all civil forfeiture cases." See generally H.R. Rpt. 105-358(I) § 8 (Oct. 30, 1997). Also, Rule 6(e)(3)(A)(ii) now expressly

W. Bush has indicated that he plans to seek technical amendments from Congress that will permit the provisions to go into effect.¹⁸⁸

The simple fact that Congress amended Rule 6(e) without taking into account its planned restructuring underscores the haste with which it reached its decision to alter centuries-old policies. Now is an opportune moment for Congress to reflect on the changes it has wrought. Before considering the technical amendments sought by the President, it would be prudent for Congress to revisit the post 9/11 amendments, considering both their constitutionality and their impact upon the functioning of the grand jury.

II. Grand Jury Secrecy and the Fifth Amendment

The Grand Jury Clause of the Fifth Amendment to the United States Constitution guarantees, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” The parameters of this right have yet to be fully defined. In particular, the United States Supreme Court has never directly ruled on whether the right to secrecy of grand jury proceedings is implicit in a person’s right to indictment by a grand jury. The examination of whether Congress should rethink the recent amendments to Rule 6(e) begins with an analysis of whether grand jury secrecy has constitutional underpinnings. Given the magnitude of change they create, the recent amendments to Rule 6(e) should compel Congress (if not the courts) to ponder this thorny issue.

A. *Costello v. United States*: The Final Word on Grand Jury Rights?

In *Costello v. United States*,¹⁸⁹ the Supreme Court provided its clearest statement of the rights guaranteed by the Grand Jury Clause. The defendant in that case, Frank Costello, was indicted

recognizes that to enforce federal criminal law a prosecutor may need to disclose information to government personnel of an Indian tribe.

¹⁸⁷ The renumbering of the sections within Rule 6(e) made it impossible to make the requested insertions.

¹⁸⁸ George W. Bush, *Statement on the Signing of H.R. 5005, the Homeland Security Act of 2002*, 2002 WL 31650677 at 4 (Nov. 25, 2002).

for and ultimately convicted of willfully attempting to avoid federal income taxes.¹⁹⁰ Both during and after trial, the defendant moved to dismiss the indictment on the ground that it was based solely upon hearsay evidence and thus violated the Grand Jury Clause.¹⁹¹ The United States District Court for the Southern District of New York denied his motion and the United States Court of Appeals for the Second Circuit affirmed.¹⁹² In upholding the lower courts' rulings, the Supreme Court concluded, "An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."¹⁹³

Standing alone, *Costello* could be read to stand for the proposition that the right to indictment by a grand jury does not encompass the right to secrecy of grand jury proceedings. If a grand jury is legally constituted and unbiased and if it issues an indictment, the constitutional requirements are satisfied. Indeed, a few lower courts have specifically found that the right to secrecy "was never intended as a safeguard for the interests of the accused,"¹⁹⁴ and thus, cannot be said to be incorporated into the Fifth Amendment rights of the accused.

B. *Midland Asphalt Corporation v. United States*: Acknowledging the Role of Grand Jury Secrecy

Treating *Costello* as the final word on the rights encompassed in the Grand Jury Clause stretches the Court's holding too far. *Costello* addressed the limited question of what the Grand

¹⁸⁹ 350 U.S. 359.

¹⁹⁰ *Id.* at 359-60.

¹⁹¹ *Id.* at 361.

¹⁹² *Id.*

¹⁹³ *Id.* at 363.

¹⁹⁴ *E.g., in re Grand Jury Proceedings*, 4 F. Supp. at 284-85. *See also* U.S. v. Amazon Indus. Chemical Corp., 55 F.2d 254, 261 (D.C. Md. 1931) (concluding, "none of the reasons for [grand jury secrecy] 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").

Jury Clause requires before a person may be subjected to trial.¹⁹⁵ It did not address whether the Grand Jury Clause contains other requirements that must be satisfied to avoid dismissal of an indictment. In *Midland Asphalt Corporation v. United States*,¹⁹⁶ the Supreme Court spoke to this critical distinction.¹⁹⁷ The defendants, Midland Asphalt Corporation and Albert C. Litterer, moved to dismiss the indictment against them on the grounds that the Government had violated Rule 6(e) by disclosing matters occurring before the grand jury.¹⁹⁸ The United States District Court for the Southern District of New York denied the motion, and on appeal, the United States Court of Appeals for the Second Circuit dismissed defendants' appeal on the grounds that "the indictment was not a 'final decision' under 28 U.S.C. § 1291."¹⁹⁹ In affirming the Second Circuit's decision, the Supreme Court held, "There is a 'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'"²⁰⁰

Consistent with the *Costello* decision, the Court noted that "a right not to be tried" exists "when there is no grand jury indictment."²⁰¹ The Court went on to hold, "Only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment gives rise to the constitutional right not to be tried."²⁰² The "isolated breach of the traditional secrecy requirements" by the Government was deemed insufficient to satisfy either of these requirements.²⁰³ Nonetheless, the *Midland Asphalt* Court's ruling left open

¹⁹⁵ *Costello*, 350 U.S. at 363.

¹⁹⁶ 489 U.S. 794 (1989).

¹⁹⁷ *Id.* at 800-02.

¹⁹⁸ *Id.* at 796.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 801 (quoting *U.S. v. Hollywood Motor Car Co.*, 458 U.S. 263, 269, 102 S.Ct. 3081, 3085, 73 L.Ed.2d 754 (1982)).

²⁰¹ *Id.* at 802.

²⁰² *Id.*

²⁰³ *Id.*

the possibility that violations of the secrecy requirements incorporated into Rule 6(e) might provide the basis for a reversal of a conviction on appeal.²⁰⁴

Perhaps, most importantly, the Court clarified the protections afforded by the Grand Jury Clause, acknowledging, “Undoubtedly the common-law protections traditionally associated with the grand jury attach to the grand jury required by [the Grand Jury Clause]—including the requisite secrecy of grand jury proceedings.”²⁰⁵ In essence, the Court seemed to indicate that defendants have a Fifth Amendment right to be indicted by a grand jury that functions under the traditional, common-law rules of secrecy.²⁰⁶ Given that the Supreme Court has “consistently . . . recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings,”²⁰⁷ such a rule would make sense.

C. Exploring the Interests Protected by Grand Jury Secrecy

Understanding the constitutional underpinnings of the right to secrecy is impossible without understanding the function of the grand jury. The grand jury’s “establishment in the Constitution 'as the sole method for preferring charges in serious criminal cases' indeed 'shows the high place it (holds) as an instrument of justice.’”²⁰⁸ In recent years, the Supreme Court has stressed that the grand jury serves “the ‘dual function of determining if there is probable cause to believe that a crime has been committed *and* of protecting citizens against unfounded criminal

²⁰⁴ *See id.* at 799-800. The Court also left open the possibility that in an extreme circumstance, a violation of grand jury secrecy could give rise to the right not to be tried. *See id.* at 802. Although the court found that an “isolated breach of the traditional secrecy requirements” did not give rise to such a right, *id.*, it did not address whether a pattern of such breaches might do so.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). *Accord* *Butterworth v. Smith*, 494 U.S. 624, 630 (1990).

²⁰⁸ *Pittsburgh Plate Glass Co.*, 360 U.S. at 399-400 (quoting *Costello v. U.S.*, 1956, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397). *See generally* *Hurtado v. People of State of California*, 110 U.S. 516, 554-55 (1884) (Harlan, J., dissenting) (“In the secrecy of the investigations by grand juries, the weak and helpless--proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor--have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies.”).

prosecutions.’”²⁰⁹ “The . . . concern for the grand jury’s dual function underlies the ‘long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.’”²¹⁰

The Supreme Court has recognized four distinct interests protected by the right to secrecy in grand jury proceedings.²¹¹ One, “if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony.”²¹² Two, “witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements.”²¹³ Three, the risk would exist “that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment.”²¹⁴ Four, “by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.”²¹⁵

Clearly, not all of these interests implicate the constitutional rights of a defendant.²¹⁶ But interests one and two go to the very heart of the grand jury function of shielding the innocent from prosecution. The system cannot work without witnesses who “feel free to speak the truth without reserve.”²¹⁷ The “cloak of silence” covering grand jury proceedings was born in part of

²⁰⁹ *Sells Eng’g, Inc.*, 463 U.S. at 423 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 686-687, 92 S.Ct. 2646, 2659, 33 L.Ed.2d 626 (1972) (footnote omitted)) (emphasis added). See *supra* notes 15 to 20 and accompanying text.

²¹⁰ *Id.* at 424 (quoting *Proctor & Gamble*, 356 U.S. 677, 681, 78 S.Ct. 983, 986, 2 L.Ed. 1077 (1958) (footnote omitted)). “The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor.” *Costello*, 350 U.S. at 362. The English grand jury traditionally “act[ed] in secret.” *Id.*

²¹¹ *E.g.*, *Sells Engineering, Inc.*, 463 U.S. at 424; *Douglas Oil Co.*, 441 U.S. at 218.

²¹² *Id.* at 219.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Interest three, for example, relates to the public’s interest in determining whether probable cause exists to believe a crime has been committed.

²¹⁷ *Goodman*, 108 F.2d at 519.

“the desire to create a sanctuary, inviolate to any intrusion except on proof of some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation.”²¹⁸

It is not unreasonable to ask why special protection of grand jury witnesses is warranted. Today’s grand jury witness may be tomorrow’s trial witness and, therefore, subject to public questioning. But not every grand jury proceeding results in an indictment, not every indictment results in a trial,²¹⁹ and not every trial requires testimony from every grand jury witness. It is far from certain that any given grand jury witness will ever be asked to testify at trial.

Perhaps more important, the difference in circumstances between an appearance at trial and an appearance before the grand jury may also justify greater protection.²²⁰ Grand jury witnesses appear unprotected by counsel²²¹ and can be subjected to intense questioning or even browbeating by prosecutors.²²² Prosecutors are allowed to “go fishing” and to seek evidence, such as hearsay, that would not be admissible at trial.²²³

“Grand jury secrecy . . . ‘is as important for the protection of the innocent as for the pursuit of the guilty.’”²²⁴ If potential, but unknown, witnesses fear that their grand jury testimony will not be protected, they may remain in the shadows, and if known witnesses fear for their safety or that of friends of family, they may be provide incomplete or inaccurate

²¹⁸ Texas v. U.S. Steel Corp., 546 F.2d 626, 629 (5th Cir. 1977).

²¹⁹ For example, in fiscal year 1999 only six percent of all federal criminal defendants were disposed of by trial. Executive Office for U.S. Attorneys, U.S. Dep’t of Justice, United States Attorneys Annual Statistical Report 14 (2000).

²²⁰ See generally Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 Am. Crim. L. Rev. 339, 353-54 (1999).

²²¹ A grand jury witness does not have the right to have counsel present during questioning. *Petition of Groban*, 352 U.S. 330, 333 (1957). In essence, the scope of the questioning is completely in the hands of the prosecutor.

²²² *Illinois v. F.E. Moran, Inc.*, 740 F.2d 533, 540 (7th Cir. 1984).

²²³ *Costello*, 350 U.S. at 361-64.

²²⁴ *Sells Engineering, Inc.*, 463 U.S. at 424. *Contra in re Grand Jury Proc.*, 4 F. Supp. at 284-85 (“The rule of secrecy . . . was designed for the protection of the witnesses who appear and for the purpose of allowing a wider and freer scope of the grand jury itself, and was never intended as a safeguard for the interests of the accused or any third person.”).

testimony.²²⁵ When either of these events takes place, when less than the whole story is told, an innocent person may stand accused.²²⁶ The Grand Jury Clause requires a grand jury that is a real grand jury with all of its protections, not a grand jury in name only.

Repeated breaches of grand jury secrecy result in systemic injury to the grand jury process. They are like termites undermining the structure of a building. It is the cumulative effect of disclosures that ultimately denies grand jury targets their Fifth Amendment right to a meaningful review by the grand jury. That is arguably why the courts and rulemakers have been so miserly in recognizing exceptions to the rule of grand secrecy and in granting disclosure pursuant to those exceptions. If the exceptions are permitted to swallow the rule, the grand jury process suffers.

To illustrate, if the testimony of a grand jury witness in Case A is disclosed, no injury may result to the target in Case A. The disclosure may have no impact whatsoever on the proceedings involving this particular target. But that does not mean that the disclosure is not harmful. The harm comes over time. As more and more disclosures occur and as the ramifications of those disclosures gradually become public knowledge, a chilling effect²²⁷ sets in.

²²⁵ *E.g.*, *Pittsburgh Plate Glass Co.*, 360 U.S. at 400 (noting, “testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused”); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979) (recognizing “if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony” and “witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as inducements”).

²²⁶ In the words of Justice Harlan,

In the secrecy of the investigations by grand juries, the weak and helpless--proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor--have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies. 'The grand juries perform,' says STORY, 'most important public functions, and are a great security to the citizens against vindictive prosecutions, either by the government or by political partisans, or by private enemies.'

Hurtado v. California, 110 U.S. 516, 554-555, 4 S. Ct. 292, 301 (1884) (Harlan, J., dissenting) (citation omitted).

²²⁷ I am not suggesting that the right of grand jury secrecy is based in any way upon the First Amendment. What I am suggesting is that there are times when the mere threat of a governmental action can deter a person from speaking. For example, United States Supreme Court has long recognized that the threat of the loss of a financial

Fearing retribution of some sort, a witness in Case X fails to step forward with information about the identity of the true perpetrator of the crime and another witness tells the grand jury less than the whole story or flat out lies. The target in Case X becomes the victim of a grand jury system weakened by breaches of secrecy.

D. Understanding the Dearth of Supreme Court Authority

The dearth of Supreme Court authority directly addressing the existence of a constitutional right of grand jury secrecy can be explained by the types of cases it has heard. Some cases have simply not implicated secrecy interests relating to the constitutional rights of defendants. For instance, *Pittsburgh Plate Glass Co. v. United States*²²⁸ and *Dennis v. United States*²²⁹ involved motions in which the accused sought to obtain grand jury materials. Since any constitutional right to secrecy arises only from the Grand Jury Clause and since the Grand Jury Clause creates rights belonging to the accused, not the Government, these rights would not ordinarily come into play in a case in which the accused sought disclosure.²³⁰ In other cases, the Court was able to reach a finding that disclosure was not permitted under Federal Rule of Criminal Procedure 6(e),²³¹ and thus, no need existed to examine any constitutional requirements.

benefit, such as a job or a contract, “in retaliation for speech may chill speech on matters of public concern” *E.g.*, *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 674 (1996). In the case of actual and potential grand jury witnesses, the threat that their testimony may be disclosed to those who would cause them harm may deter witnesses from speaking freely and truthfully.

²²⁸ 360 U.S. at 396.

²²⁹ 384 U.S. 855, 868 (1966).

²³⁰ Of course, even in the absence of any constitutional protection, the Court may consider the “long-established policy of secrecy” in interpreting Rule 6(e) of the Federal Rules of Criminal Procedure. *See, e.g.*, *Pittsburgh Plate Glass Co.*, 360 U.S. at 398-401.

²³¹ *Baggot*, 463 U.S. at 477-80 (holding disclosure of grand jury materials to the IRS to allow it to determine tax liability was not permitted under Rule 6(e)); *Illinois v. Abbott & Associates*, 460 U.S. 557, 566-568 (1983) (finding disclosure of grand jury materials to state attorney general without court approval and without a showing of particularized need would not comport with the requirements of Rule 6(e)); *U.S. v. Proctor & Gamble Co.*, 356 U.S. 677, 681-82 (1958) (concluding defendants in a civil antitrust action were not entitled to discovery of a grand jury transcript in the possession of the Government).

In the last fifty years, only one Supreme Court decision, *United States v. John Doe, Inc. I*,²³² has ordered disclosure pursuant to Federal Rule of Criminal Procedure 6(e). That case involved a request by attorneys in the Antitrust Division of the Department of Justice to disclose grand jury materials to the United States Attorney for the Southern District of New York and to five named attorneys within the Civil Division.²³³ The purpose of this disclosure was to allow attorneys from the Antitrust Division to consult with their counterparts²³⁴ before filing a civil action.²³⁵

The United States District Court for the Southern District of New York concluded that the Department of Justice had satisfied the requirements of Federal Rule of Criminal Procedure 6(e)(3)(C)(i) by showing “a particularized need for disclosure,” but the United States Court of Appeals for the Second Circuit reversed, deeming the disclosure “unnecessary.”²³⁶ After reviewing the record, the Supreme Court concluded that the District Court correctly applied the “particularized need” standard and did not abuse its discretion in allowing disclosure.²³⁷

The *John Doe, Inc. I* case provided the Court with perhaps its best opportunity to examine the relationship between the right of grand jury secrecy and the right to a grand jury created by the Grand Jury Clause. Still, even this case did not require the Court to do so. It involved the application of Rule 6(e)(3)(C)(i),²³⁸ which requires a court order to obtain discovery²³⁹ and which requires “‘a strong showing of particularized need’ before disclosure is

²³² U.S. v. John Doe, Inc. I, 481 U.S. 102 (1987).

²³³ *Id.* at 104-05.

²³⁴ The case involved a potential claim under the False Claims Act, and such claims were more typically handled by the Civil Division. *Id.* at 105.

²³⁵ *Id.*

²³⁶ *Id.* at 111.

²³⁷ *Id.* at 116-17.

²³⁸ The current version of this exception is found at Fed. R. Crim. P. 6(e)(3)(E)(i).

²³⁹ *John Doe, Inc. I*, 481 U.S. at 111.

permitted.”²⁴⁰ Even if the Court were to have expressly recognized the constitutional underpinnings of the right to secrecy, the test it applied would have likely been the same.²⁴¹ Indeed, in applying the test, the Court specifically examined whether the disclosure would seriously threaten the recognized secrecy interests.²⁴²

In sum, the United States Supreme Court has never directly addressed the constitutional underpinnings of the doctrine of grand jury secrecy because the need to do so has never arisen. The common law and the pre-9/11 version of Rule 6(e) provided safeguards to the doctrine at least equal to those required by the Fifth Amendment. If faced with the issue of whether a material breach of the traditional protection afforded grand jury secrecy violates the Constitution, the Supreme Court should conclude that it does do so. To rule otherwise would strip the right to indictment by a grand jury of all meaning.

E. Examining the Parameters of Grand Jury Secrecy

Although the Supreme Court should recognize a Fifth Amendment right of grand jury secrecy, it should also recognize that any such right is not absolute.²⁴³ The common-law protections attaching to the grand jury required by the Fifth Amendment have always allowed for disclosure under certain circumstances.²⁴⁴ To determine the test for the constitutionality of a disclosure, one must scrutinize these protections, both as articulated by the courts and as codified in Rule 6(e).

²⁴⁰ *Id.* at 112 (quoting *U.S. v. Sells Engineering, Inc.*, 463 U.S. 418, 423, 443-45, 103 S. Ct. 3133, 3148-49 (1983)).

²⁴¹ *See infra* notes 243 to 292 and accompanying text.

²⁴² *John Doe, Inc. I*, 481 U.S. at 113-15.

²⁴³ *E.g., In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1443 (11th Cir. 1987) (“The policy of grand jury secrecy, whether viewed as a deeply-rooted tradition of the common law or as itself implicit in the Fifth Amendment guarantee of indictment for ‘infamous crime,’ is nonetheless a generalized one. The balancing that must take place is between the specific need of the Committee for material necessary to its constitutionally empowered task of impeachment in *this* case versus the specific secrecy interests that remain in *these* grand jury materials.”).

²⁴⁴ *See supra* notes 31 to 39 and 42 to 67 and accompanying text .

A review of the existing authorities indicates that for the disclosure of grand jury materials to comport with the Fifth Amendment two criteria must be satisfied. One, a “compelling necessity” for the disclosure must be established.²⁴⁵ Two, barring extraordinary circumstances, disclosure must be judicially supervised.²⁴⁶

1. The Requirement of Compelling Necessity

The Supreme Court’s decision in *United States v. Proctor & Gamble Co.* provides an excellent starting point for examining the common-law protections:

The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This ‘indispensable secrecy of grand jury proceedings,’ must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity.²⁴⁷

From *Proctor & Gamble*, it can be gleaned that a person seeking disclosure of grand jury materials bears the burden of establishing a “compelling necessity” for the disclosure.²⁴⁸ Such a requirement is entirely consistent with the common law as created by the courts and reflected in pre-9/11 Rule 6(e). The analysis of whether a compelling necessity exists requires the application of a two-pronged test.²⁴⁹ Historically, matters occurring before a federal grand jury have been subject to disclosure in only a handful of circumstances: to serve the grand jury;²⁵⁰ to protect defendants against prosecutorial misconduct;²⁵¹ to further the ends of justice in a judicial

²⁴⁵ See *supra* notes 30 to 37 and 84 to 89 and accompanying text.

²⁴⁶ See *supra* notes 38 to 39, 44, 74, and 89 and accompanying text.

²⁴⁷ *Proctor & Gamble Co.*, 356 U.S. at 682 (citation omitted).

²⁴⁸ *Id.*

²⁴⁹ See generally *Baggot*, 436 U.S. at 479-80.

²⁵⁰ See *supra* notes 55 to 59 and 64 to 66 and accompanying text. See also Fed. R. Crim. P. 6(e)(3)(A) (Disclosure may be made to “an attorney for the government for use in the performance of such attorney’s duty” and to government personnel “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.”); Fed. R. Crim. P. 6(e)(3)(C) (“An attorney for the government may disclose any grand-jury matter to another federal grand jury.”)

²⁵¹ See *supra* note 32 and accompanying text. See also Fed. R. Crim. P. 6(e)(3)(E)(ii) (Disclosure may be made when authorized by the court “at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.”).

proceeding;²⁵² and to assist state and Indian tribal officials in the prosecution of state and Indian tribal crimes.²⁵³ In each of these circumstances, disclosure may be required to protect an important societal interest. Not every category of need is sufficient to outweigh the policy of protecting grand jury materials.²⁵⁴ Thus, a person seeking disclosure must first establish that his or her need is of the right kind.²⁵⁵

But merely establishing that a request falls within one of the recognized categories does not establish that disclosure is appropriate. A person seeking disclosure must prove a particularized need exists for disclosure in the case at bar.²⁵⁶ “The particularized need test is one of *degree . . .*.”²⁵⁷ In essence, the courts have said that the need for the grand jury materials must be real.

For example, both private parties and governmental officials²⁵⁸ seeking grand jury materials for use in another judicial proceeding “must show the material they seek is needed to avoid a possible injustice in [the] judicial proceeding, that the need for disclosure is greater than the need for secrecy, and that the request is structured to cover only the material so needed.”²⁵⁹ Satisfying this burden is not easy—to overcome the need for secrecy, the party seeking disclosure must establish non-disclosure would result in great prejudice.²⁶⁰ Simply showing that

²⁵² See *supra* notes 33 to 34 and 83 to 87 and accompanying text. See also Fed. R. Crim. P. 6(e)(3)(E)(i) (Disclosure may be made when authorized by the court “preliminarily to or in connection with a judicial proceeding.”).

²⁵³ See Fed. R. Crim. P. 6(e)(3)(E)(iii) (Disclosure may be made “at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law.”).

²⁵⁴ *Baggot*, 436 U.S. at 480 (holding “not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy”).

²⁵⁵ *Id.*

²⁵⁶ See *supra* notes 36 to 37 and 83 to 87 and accompanying text.

²⁵⁷ *Baggot*, 463 U.S. at 480 (emphasis in original).

²⁵⁸ See *supra* notes 83 to 87 and accompanying text.

²⁵⁹ *Douglas Oil Co.*, 441 U.S. at 222.

²⁶⁰ *Id.* at 221.

the grand jury materials sought are “relevant” is insufficient.²⁶¹ In determining whether disclosure is necessary, a court may weigh the likelihood that the information could be obtained through other means.²⁶²

Nonetheless, the “particularized need” standard has always had some flexibility.²⁶³ It involves a balancing of interests, which by its very nature requires that the facts be considered on a case-by case basis. For instance, “a court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage than would disclosure to private parties or the general public.”²⁶⁴ Additionally, “under the particularized need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body”²⁶⁵

The sole exception to the requirement of a showing of particularized need arises when a prosecutor seeks to disclose information to other government attorneys involved in federal criminal investigations,²⁶⁶ government personnel assisting government attorneys in such investigations,²⁶⁷ or federal grand jurors.²⁶⁸ Sharing information with members of these groups falls within the definition of disclosure in the sense that it involves “revealing such information to other persons,”²⁶⁹ but it does not involve a revelation to a person not intimately involved in the functioning of the grand jury. Two of the three groups, government attorneys and grand jurors, have the right to be present in the grand jury room.²⁷⁰ The third, government personnel assisting government attorneys, is in some ways akin to a group that has long had access to the

²⁶¹ *Sells Eng’g, Inc.*, 463 U.S. at 444.

²⁶² *Id.* at 445.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Illinois*, 460 U.S. at 567 n. 15.

²⁶⁶ *See supra* note 55 and accompanying text.

²⁶⁷ *See supra* notes 56 to 63 and accompanying text.

²⁶⁸ *See supra* note 57 and accompanying text.

²⁶⁹ *See generally* *John Doe, Inc. I*, 481 U.S. at 108-09.

²⁷⁰ Fed. R. Crim. P. 6(d)(1).

grand jury room, court stenographers.²⁷¹ Like the stenographer, the FBI agent charged with gathering evidence serves as the handmaid of the grand jury.

Further, since persons within these groups may use the information disclosed only for purposes of furthering a grand jury investigation, absent a belief that a need exists for their assistance, there would be no logical reason for a prosecutor to disclose it. In short, a particularized need must exist or there would be no disclosure. The circumstances surrounding this exception are truly unique.

A finding of compelling necessity is clearly required for disclosure to comport with the requirements of the Grand Jury Clause of the Fifth Amendment. The question then becomes who is responsible for making such a finding.

2. The Need for Judicial Review

Throughout history, the decision to disclose grand jury materials has been in the hands of the judiciary.²⁷² To understand why this power has been placed in the hands of the judiciary, rather than the prosecutor, one must understand the unique status of the grand jury. “[T]he grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It “is a constitutional fixture in its own right.””²⁷³

But the independence of the grand jury is a fragile thing, dependent upon a delicate balance of judicial and prosecutorial oversight. “A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of

²⁷¹ *Id.*

²⁷² See *supra* notes 38, 44, 55 to 67, and 88 and accompanying text. See also *Illinois*, 460 U.S. at 567. (“There is only one exception to the general prohibition against disclosure without prior court approval, but that exception is limited to federal government personnel performing a specified federal law enforcement function.”).

²⁷³ *U.S. v. Williams*, 504 U.S. 36, 47 (1992) (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977)).

witnesses.”²⁷⁴ If the grand jury is an appendage of the court, it is also an appendage of the prosecutor for it is powerless to indict without the consent of the prosecutor.²⁷⁵ The Fifth Amendment's “constitutional guarantee [of the right to indictment by a grand jury] presupposes an investigative body ‘acting independently of either prosecuting attorney or judge.’”²⁷⁶ It is the fact that judge and prosecutor must share control that guarantees the grand jury’s independence.

The grand jury is intended to serve as a shield against prosecutorial abuse,²⁷⁷ not a prosecutor’s private tool. In the words of the old maxim, “Absolute power corrupts absolutely.” The involvement of the courts serves as a check on any abuse of power. For example, acting under the auspices of a court, a prosecutor may subpoena a witness or a record on the grand jury’s behalf.²⁷⁸ Nonetheless, the court retains the right to “quash or modify a subpoena on motion if compliance would be ‘unreasonable or oppressive.’”²⁷⁹

In the context of disclosures, it only makes sense that the courts be given the power to decide when the veil of secrecy may be lifted. Grand juries derive their subpoena power from the courts²⁸⁰ and while broad, this power is not unlimited.²⁸¹ Grand juries are intended to exercise this power to obtain evidence relating to whether probable cause exists to believe a crime has been committed.²⁸² They may not exercise this power for other purposes.²⁸³ “In short, if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of their task, the use of those powers ought to be limited as far as reasonably

²⁷⁴ *Brown v. U.S.*, 359 U.S. 41, 49 (1959), *overruled in part by Harris v. U.S.*, 382 U.S. 162 (1965).

²⁷⁵ *In re Grand Jury Proceedings, Special Grand Jury 89-2*, 813 F. Supp. 1451, 1462 (D. Colo. 1992)

²⁷⁶ *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (quoting *Stirone v. United States*, 361 U.S. 212, 218).

²⁷⁷ *See supra* notes 15 to 20 and accompanying text.

²⁷⁸ *See generally* Fed. R. Crim. P. 17.

²⁷⁹ *U.S. v. Calandra*, 414 U.S. 338, 346 n. 4 (1974) (quoting Fed. R. Crim. P. 17(c)).

²⁸⁰ *Brown*, 359 U.S. at 49.

²⁸¹ *U.S. v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991).

²⁸² *Id.* at 297.

²⁸³ *E.g., id.* at 299.

possible to the accomplishment of the task.”²⁸⁴ When information obtained via a grand jury subpoena is sought for a purpose other than that for which it was intended (*i.e.*, when disclosure is sought), the ultimate source of the subpoena power, the court, should be the final arbiter. If it is not, the grand jury does become the tool of the prosecutor and a potential for misuse arises.²⁸⁵

The court is also the body best suited to undertake the balancing of interests required to determine whether disclosure is warranted. “A court of law . . . is the sole means of protecting individual privacy from the airing of private judgment unguided by standards of due process.”²⁸⁶ If decision making were left in the hands of prosecutors, there would be no hearing, no presentation of evidence, no record, no guiding precedent, and no possibility of appeal. Most important, there would be no neutral decision maker. Weighing the various interests involved when disclosure of grand jury materials is at issue is a delicate task.²⁸⁷ The decision to remove the veil of grand jury secrecy should not be made on an ad hoc basis.

Again, the sole exception to the requirement that disclosure be subject to judicial approval arises when a prosecutor seeks to disclose information to other government attorneys involved in federal criminal investigations,²⁸⁸ government personnel assisting government attorneys in such investigations,²⁸⁹ or federal grand jurors.²⁹⁰ As discussed above, the circumstances giving rise to this exception are unique.²⁹¹ A prosecutor is the best judge of the amount and type of investigative support needed to conduct a grand jury investigation. In

²⁸⁴ *Sells Eng’g, Inc.* 463 U.S. at 434-435.

²⁸⁵ *See id.* at 432-33.

²⁸⁶ *In re Grand Jury Proceedings, Special Grand Jury 89-2*, 813 F. Supp. at 1458.

²⁸⁷ *Schmidt*, 115 F.2d at 397.

²⁸⁸ *See supra* note 55 and accompanying text.

²⁸⁹ *See supra* notes 56 to 63 and accompanying text.

²⁹⁰ *See supra* note 57 and accompanying text.

²⁹¹ *See supra* notes 266 to 271 and accompanying text.

addition, “interlocutory appeal of issues disruptive of a grand jury investigation are not favored.”²⁹² The sheer number of requests would overwhelm the system.

Based on the foregoing, to comport with the Fifth Amendment right of grand jury secrecy, the disclosure of grand jury materials must be the result of a compelling necessity and it must be judicially approved.

III. Rule 6(e), the Constitution, & Sound Public Policy

The exceptions to the doctrine of grand secrecy created by the USA PATRIOT Act²⁹³ and the Homeland Security Act of 2002²⁹⁴ fundamentally differ from the traditional exceptions to this doctrine.²⁹⁵ These permanent additions to the legal landscape were enacted in haste and buried deep within massive bills. They were a gut reaction to tragic events. But good law rarely results from gut reactions. If Congress intends to permanently alter the grand jury system that is older than our nation itself, it should do so with thought and great care.

The 340 plus page USA PATRIOT Act was conceived, written, and enacted within six weeks of the attacks of September 11. The typical committee hearings and debates surrounding legislation of this scope (or any scope for that matter) were missing.²⁹⁶ Indeed, in the immediate aftermath of the attacks, only the most courageous of legislators dared voice dissent for fear of being branded unpatriotic. Surely, this is not the careful deliberation envisioned by the framers of our Constitution.

²⁹² S. Rep. No. 95-707, at 13 n. 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527, 536. “The duration of its (the grand jury’s) life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of a trial after an indictment has been found.” *Id.* (quoting *Cobbledick v. United States*, 309 U.S. 323, 327 (1940)).

²⁹³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act, Pub. L. No. 107-56, § 203, 115 Stat. 272, 272 (2001).

²⁹⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, § 895, 116 Stat. 2135, 2256-57 (2002).

²⁹⁵ *See supra* notes 103 to 129 and 165 to 167 and accompanying text.

²⁹⁶ *See generally* Emmanuel Gross, *The Influence Of Terrorist Attacks On Human Rights In The United States: The Aftermath Of September 11, 2001*, 28 N.C. J. Int’l L. & Comm. Reg. 1, 3 (2002) (“Congress took action without a proper debate on the Patriot Act’s ramifications and without providing the American public with an opportunity to voice its opinion, despite the enormous impact of the Patriot Act on the daily lives of all American citizens.”).

During times of turmoil, the rights enshrined in our Constitution face their greatest threat.²⁹⁷ “In such periods the times seem so different, so out of joint, the threats from within or without seem so unprecedented, that the Constitution itself is perceived by many persons as anachronistic, or at least rigidly, unrealistically formalistic.”²⁹⁸ Congress must be ever aware of the dangers of allowing momentary fears to drive public policy.

The President has already called upon Congress to save the Homeland Security exception from oblivion by enacting technical amendments.²⁹⁹ Rather than apply a simple patch to Rule 6(e), Congress should take the opportunity to review and repair any damage inflicted by the recent amendments. It should examine the PATRIOT intelligence exception and the Homeland Security exception under the lens of the Constitution and the lens of sound public policy.

A. The PATRIOT Intelligence Exception

A careful study of the PATRIOT intelligence exception reveals that its application results in disclosures causing systemic injury to the grand jury process. As written and applied, the exception violates the Grand Jury Clause of the Fifth Amendment.³⁰⁰ Even if the constitutional problems are ignored, sound public policy reasons exist for reworking this exception.³⁰¹

1. The Fifth Amendment Analysis

To satisfy the Fifth Amendment, any disclosure must be justified by a compelling necessity and must be judicially supervised.³⁰² The PATRIOT intelligence exception sanctions disclosures that satisfy neither criterion. It permits a prosecutor to disclose “any grand-jury matter involving foreign intelligence, counterintelligence . . . , or foreign intelligence information

²⁹⁷ Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 456-57 (1985).

²⁹⁸ *Id.*

²⁹⁹ George W. Bush, *supra* note 188, at 4.

³⁰⁰ See *infra* notes 302 to 320 and accompanying text.

³⁰¹ See *infra* notes 321 to 356 and accompanying text.

³⁰² See *supra* notes 245 to 262 and accompanying text.

. . . to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.”³⁰³

Under the two-pronged compelling necessity test, the disclosure sought must be of a kind that serves an important societal interest,³⁰⁴ and the need for disclosure must be shown with particularity.³⁰⁵ The PATRIOT intelligence exception almost certainly satisfies the first prong of this test. Although disclosure for purposes of promoting national security has never been included among the recognized categories of disclosure, society’s interest in protecting the nation and its citizens against hostile acts, such as terrorism and sabotage, can hardly be less significant than its interest in the enforcement of public or private rights in a civil action, a long-recognized category of disclosure.³⁰⁶ Few would argue that if grand jury testimony uncovers a legitimate threat to the security of the nation, it should not be revealed to the proper authorities.

But the PATRIOT intelligence exception does not satisfy the second prong of the test. It does not require persons seeking disclosure to show a particularized need. This exception is written in the broadest possible terms—disclosure is not limited to instances in which the United States is faced with some sort of threat, immediate or otherwise. For example, under the definition of “foreign intelligence” incorporated into the exception,³⁰⁷ a prosecutor would be permitted to report a foreign student’s membership in a particular mosque to the F.B.I. or the C.I.A. The exception does not require any evidence of wrongdoing. If you happen to be a non-

³⁰³ Fed. R. Crim. P. 6(e)(3)(D). *See also supra* notes 97 to 133 and accompanying text.

³⁰⁴ *See supra* notes 249 to 255 and accompanying text.

³⁰⁵ *See supra* notes 256 to 271 and accompanying text.

³⁰⁶ *See e.g., in re Grand Jury Proc.*, 4 F. Supp. at 283-85 (E.D. Pa. 1933) (permitting grand jury testimony to be used at a proceeding for the revocation of a beer permit).

³⁰⁷ *See supra* note 98.

U.S. citizen, any of your activities may be reported to the listed federal officials whether they have any need for the information or not.

It is not simply the language of the PATRIOT intelligence exception that is troubling—none of the pre-9/11 exceptions contained in Rule 6(e) expressly require a showing of particularized need—the more troubling aspect of this exception is the manner in which it has been interpreted. The interpretation of this exception by the Department of Justice as reflected in the information-sharing guidelines promulgated by the Attorney General supports the idea that a showing “particularized need” is not required.³⁰⁸ In fact, the guidelines make disclosure mandatory.³⁰⁹ If information falls under the categories described in Rule 6(e), it “*shall* be shared.”³¹⁰ In the long history of the doctrine of grand-jury secrecy, no exception has ever been used to mandate disclosure.

The vast number of disclosures mandated by the guidelines is unprecedented. To illustrate, as discussed above,³¹¹ the broad definition of “foreign intelligence” covers every act by a foreign citizen, here or abroad. If the mandate provided by the guidelines is to be followed to the letter, a prosecutor would be charged with reporting a non-citizen’s trip to the grocery for milk and bread. As directed by Congress,³¹² the Department of Justice is creating a training program that will help prosecutors and other law enforcement officials identify foreign

³⁰⁸ See generally *supra* notes 117 to 122 and accompanying text.

³⁰⁹ Memo, from John Ashcroft, *supra* note 116, at Guideline 2. See also *supra* notes 117 to 118 and accompanying text.

³¹⁰ Memo, from John Ashcroft, *supra* note 116, at Guideline 5 (emphasis added).

³¹¹ See *supra* note 307 and accompanying text.

³¹² Congress is so concerned about foreign intelligence information being overlooked that it has mandated that the Department of Justice create a training program that helps law enforcement officials identify foreign intelligence materials that must be shared. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act, Pub. L. No. 107-56, § 908, 115 Stat. 272, 391.

intelligence information,³¹³ but there is no reason to believe that the Department will ignore the language of Rule 6 and instruct prosecutors to more narrowly define this term.

The guidelines do permit a prosecutor to petition the Attorney General for an exemption.³¹⁴ However, the focus appears to be on protecting criminal investigations, not on balancing the various interests involved.³¹⁵ No one seems to be watching out for the interests of grand jury targets. A presumption of disclosure exists.³¹⁶ In sum, as interpreted by the Attorney General, the Patriot intelligence exception not only permits disclosure without a showing of compelling need, it endorses such disclosure.

The PATRIOT intelligence exception also fails to satisfy the criterion that any disclosure be judicially supervised.³¹⁷ The decision to disclose is completely in the hands of the Justice Department. Indeed, the court under whose authority the evidence was gathered by the grand jury is not so much as given a list of those persons to whom the information is disclosed.³¹⁸ The exception contains no mechanism for preventing its misuse.

The PATRIOT intelligence exception creates a material breach of the protection afforded grand jury secrecy by the Fifth Amendment. The failure to require a showing of particularized need and the failure to require judicial supervision create a situation in which enormous numbers of disclosures can, have,³¹⁹ and will be made. The cumulative effect of these disclosures will be

³¹³ Memo, from John Ashcroft, *supra* note 116, at Guideline 3.

³¹⁴ *Id.* at Guideline 5(c).

³¹⁵ *Id.* at Guidelines 8(b), 9. The issue of when an exemption is proper is not adequately addressed by the guidelines. Guideline 9(b) indicates that until such time as the Attorney General creates permanent exemptions from the disclosure obligation, requests will be handled by the Attorney General on a “case-by-case” basis. No guidance as to the criteria to be considered is provided. However, Guideline 9(c) requires a written request for exemption that among other things explains why “measures such as use restrictions are not adequate.” So, it seems that exemptions will be considered using the same criteria as requests for use restrictions. Guideline 8(b) allows use restrictions when necessary “to protect sensitive law enforcement sources and ongoing criminal investigations and prosecutions.”

³¹⁶ *See id.* at Guideline 9(c).

³¹⁷ *See supra* notes 272 to 292 and accompanying text.

³¹⁸ *See supra* note 112 and accompanying text.

³¹⁹ *See supra* notes 134 to 155 and accompanying text.

to chill the participation of grand jury witnesses, and thereby cause systemic injury to the grand jury process.³²⁰

2. The Public Policy Analysis

Even setting aside the issue of its constitutionality, strong public policy arguments exist for the amendment of the PATRIOT intelligence exception. The collective wisdom of nearly a millennium has been that secrecy is “indispensable” to grand jury proceedings.³²¹ “[W]hen disclosure is permitted, it is to be done ‘discretely and limitedly.’”³²² The PATRIOT intelligence exception permits disclosure that is hardly discrete and far from limited.³²³ This exception permits so many disclosures that it threatens to swallow the rule of secrecy. Upon closer examination, Congress will discover its national security objectives could be met without resorting to such a drastic alteration of the grand jury system.

There can be little doubt that under some circumstances, the societal interest in national security outweighs the societal interest in grand jury secrecy. But that is not always the case. Every piece of information that falls within the broad definitions of foreign intelligence or counterintelligence or foreign intelligence information is not vital (or even relevant) to national security. The PATRIOT intelligence exception lacks a reasonable mechanism for separating the wheat from the chafe.

The most troubling aspect of this exception is the complete absence of judicial supervision.³²⁴ First, the lack of judicial supervision makes it more likely that intelligence information obtained in the course of ordinary grand jury investigations will be disclosed. Quite simply, there is no one there to say “no” to disclosure based on lack of relevancy or need. In

³²⁰ See generally *supra* notes 216 to 227 and accompanying text.

³²¹ *Procter & Gamble Co.*, 356 U.S. at 682. See also *supra* notes 11 to 26, 41 to 48, and 207 to 227.

³²² *Dennis v. U.S.*, 384 U.S. 855, 868 (1966) (quoting *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 683).

³²³ See *supra* notes 102, 107 to 112, 307, 311 to 318 and accompanying text.

³²⁴ See *supra* notes 97, 104 to 108, 317 to 318 and accompanying text.

fact, the information-sharing guidelines issued by the Attorney General in effect prohibit anyone from saying “no” to disclosure based on such considerations.³²⁵

Second, the lack of judicial supervision creates the temptation on the part of the Justice Department to abuse the grand jury system.³²⁶ Instead of using the powers of the grand jury to determine whether probable cause exists to believe that a crime has taken place, prosecutors could begin using the grand jury as a tool of the intelligence community.

The information-sharing guidelines already provide the Director of the CIA with a direct role in the disclosure process. They foster an unhealthy entanglement between the Justice Department and the CIA. The Director is charged with helping the Attorney General establish any formalized exceptions to the rule of disclosure,³²⁷ assisting in the design of a training curriculum which will allow law enforcement officials to identify intelligence information,³²⁸ and consulting with the Attorney General on decisions relating to whether to exempt specific materials from disclosure.³²⁹ Further, Guideline 6 permits recipients of information to request “additional information,” “clarification,” or “amplification.”³³⁰ If a prosecutor knows that the CIA wishes additional facts on a matter unrelated to the grand jury’s criminal investigation, directing questions on that matter to a witness would be all too easy.³³¹

Information sharing between federal law enforcement agencies and intelligence agencies may well be necessary to safeguard national security, but such sharing could be fostered without the excessive entanglement created by the PATRIOT intelligence exception. The dangers to our

³²⁵ See *supra* note 118 and accompanying text.

³²⁶ Jennifer M. Collins, *And The Walls Came Tumbling Down: Sharing Grand Jury Information With The Intelligence Community Under The USA Patriot Act*, 39 Am. Crim. L. Rev. 1261, 1276 (2002)

³²⁷ Memo, from John Ashcroft, *supra* note 116, at Guideline 2.

³²⁸ *Id.* at Guideline 3.

³²⁹ *Id.* at Guideline 9(b).

³³⁰ *Id.* at Guideline 6(b).

³³¹ Jennifer M. Collins, *supra* note 326, at 1276. That is especially true given the fact that the CIA itself lacks subpoena power. *Id.* See also 50 U.S.C. 403-3(d)(1) (2000).

civil rights posed by such entanglement are well documented.³³² The simple requirement of judicial supervision could prevent federal law enforcement agencies and intelligence agencies from heading down a very slippery slope.

The question then becomes whether any valid reason exists for omitting such a requirement from the PATRIOT intelligence exception. Several different justifications have been set forth for the lack of judicial supervision.³³³

The initial justifications were provided by members of the Bush Administration.³³⁴ The version of the PATRIOT intelligence exception approved by the House Committee on the Judiciary required judicial supervision.³³⁵ It would have allowed disclosure:

*when permitted by a court at the request of an attorney for the government, upon a showing that the matters pertain to international or domestic terrorism (as defined in section 2331 of title 18, United States Code) or national security, to any Federal law enforcement, intelligence, national security, national defense, protective, immigration personnel, or to the President or Vice President of the United States, for the performance of official duties.*³³⁶

A desire for judicial supervision also existed among at least some members of the Senate. Senator Patrick Leahy proposed to the Administration that judicial oversight of disclosure to intelligence officials of both wiretap information and grand jury materials was warranted.³³⁷ On September 30, 2001, the Administration agreed to judicial oversight, but within two days it reneged.³³⁸ According to Senator Leahy,

[t]he Administration offered three reasons for reneging on the original deal. First, they claimed that the involvement of the court would inhibit Federal investigators and attorneys from disclosing information needed by intelligence and national security officials. Second, they said the courts might not have adequate security

³³² See generally *id.* at 1277 (describing the massive abuse of federal law enforcement powers during the Cold War).

³³³ See *infra* notes 334 to 336 and 349 to 350.

³³⁴ See 147 Cong. Rec. S10555 (daily ed. Oct. 11, 2001) (statement of Senator Patrick Leahy).

³³⁵ H.R. Rpt. 107-236(I), 107th Cong., 1st Sess., § 353 (Oct. 11, 2001).

³³⁶ *Id.* (emphasis added).

³³⁷ 147 Cong. Rec. at S10555-S10556.

³³⁸ *Id.*

and therefore should not be told that information was disclosed for intelligence or national security purposes. And third, they said the President's constitutional powers under Article II give him authority to get whatever foreign intelligence he needs to exercise his national security responsibilities.³³⁹

The first argument (*i.e.*, that judicial supervision would somehow inhibit the disclosure of needed information) is specious. If information truly is “needed” by intelligence and national security officials, there is no reason to believe that a federal judge would not authorize its disclosure. By way of example, the Foreign Intelligence Surveillance Court, which is charged under the Foreign Intelligence Surveillance Act of 1978³⁴⁰ with approving electronic surveillance and physical searches for intelligence purposes, has rarely refused a request.³⁴¹ The seeming distrust of the judiciary by the executive branch is alarming.

The Bush Administration may also have been distrustful of the prosecutors themselves, fearing that prosecutors would be unwilling to expend the effort needed to obtain court approval.

After taking part in the Congressional Joint Inquiry into Intelligence Community Activities

³³⁹ *Id.* at S10556. Senator Leahy provided this explanation when discussing the Administration's reasons for renegeing on its agreement to permit judicial supervision of the disclosure of wiretap information. *Id.* at S10555-S10556. Presumably, it renegeed on its agreement to permit judicial supervision of the disclosure of grand jury information for the same reasons.

³⁴⁰ 50 U.S.C. §§ 1802, 1822 (2000).

³⁴¹ In 1999, “886 applications were made for orders and extensions of orders approving electronic surveillance or physical search under the Act. the [sic] United States Foreign Intelligence Surveillance Court issued orders in 880 applications granting authority to the Government for the requested electronic surveillance and electronic searches. . . . Five applications which were filed in late December 1999 were approved when presented to the Court on January 5, 2000. No orders were entered which modified or denied the requested authority.” Letter from Janet Reno, Attorney General of the United States, to the Honorable J. Dennis Hastert, Speaker of the House of Representatives 1 (Apr. 27, 2000). In calendar year 2000, “1005 applications were made to the Foreign Intelligence Surveillance Court for electronic surveillance and physical search. The Court approved 1003 of these applications in 2000. Two of the 1005 applications were filed with the Foreign Intelligence Surveillance Court in December 2000 and approved in January 2001. . . . No orders were entered which denied the requested authority.” Letter from John Ashcroft, Attorney General of the United States, to Mr. L. Ralph Mecham, Director, Administrative Office of the United States Courts 1 (Apr. 27, 2001). In calendar year 2001, “932 applications were made to the Foreign Intelligence Surveillance Court for electronic surveillance and physical search. The Court approved 934 applications in 2001. Two of the 934 applications were filed with the Foreign Intelligence Surveillance Court in December 2000 and approved in January 2001. Two orders and two warrants were modified by the Court. No orders were entered which denied the requested authority.” Letter from Larry D. Thompson, Acting Attorney General of the United States, to Mr. L. Ralph Mecham, Director, Administrative Office of the United States Courts 1 (Apr. 29, 2002). “[A]ll 1228 applications presented to the Foreign Intelligence Surveillance Court in 2002 were approved.” Letter from John Ashcroft, Attorney General of the United States, to Mr. L. Ralph Mecham, Director, Administrative Office of the United States Courts 1 (Apr. 29, 2003).

before and after the Terrorist Attacks of September 11, 2001, Senator Richard Shelby concluded that the PATRIOT intelligence exception was enacted because the Department of Justice used Rule 6(e) as an unwarranted excuse to avoid sharing information with the intelligence community.³⁴² It claimed Rule 6(e) protection for non-grand jury materials.³⁴³ “[W]orking from the assumption that it would be easier to change the law itself than to fix a parochial and dysfunctional institutional culture that used the Rule as an excuse to prevent all informationsharing [sic], [Attorney General Ashcroft and Congress] determined simply to change Rule 6(e) to permit information-sharing with intelligence officials.”³⁴⁴ Indeed, the law now requires law enforcement officials to share information.³⁴⁵

The fact that prosecutors may have abused Rule 6(e) protections in the past does not justify a wholesale change in the rule, and it certainly does not justify a change that eliminates judicial oversight of the process. If the institutional culture within the Department of Justice is dysfunctional, it must be changed from within.

The second argument (*i.e.*, that the courts lack adequate security to be entrusted with sensitive information) is equally unsound. First, the courts certainly have as much security as

³⁴² Report Of The Joint Inquiry Into The Terrorist Attacks Of September 11, 2001 –By The House Permanent Select Committee On Intelligence and The Senate Select Committee On Intelligence: September 11 and the Imperative of Reform in the U.S. Intelligence Community: Additional Views of Senator Richard Shelby, Vice Chairman, Senate Select Committee on Intelligence, S Rep. 107-351 (2002).

Rule 6(e) increasingly came to be used simply as an excuse for not sharing information - leaving vital collections of shareable information about international terrorist groups off-limits to IC intelligence analysts. For years, it was routine FBI and DOJ practice to respond to virtually any Intelligence Community requests for information with the answer that “Rule 6(e)” prevented any response. As two frustrated NSC veterans describe it, “Rule 6E [sic] is much more than a procedural matter: it is the bulwark of an institutional culture, and as Justice Department lawyers readily admit, it is used by the Bureau far more often than it should be. It is one of the Bureau's foremost tools for maintaining the independence that the FBI views as its birthright.”

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

many of the federal agencies and departments that will be the recipients of information disclosed under the PATRIOT intelligence exception. A federal court poses no greater security risk than does the Social Security Administration. Second, the problem of security could easily be overcome by creating a court that is akin to the Foreign Intelligence Surveillance Court established under the Foreign Intelligence Surveillance Act of 1978.³⁴⁶ For example, the chief judge for each district could appoint a judge to hear all requests under the PATRIOT intelligence exception. That judge could receive special training and could employ heightened security measures. Appeals could be made to a specialized court of review appointed by the Chief Justice. Multitudes of ways exist in which any security concerns might be addressed.

The third argument (*i.e.*, that the President could employ powers under Article II to compel disclosure) begs the question of whether he should do so. The proposition that the President has an absolute right to go digging through grand jury materials is dubious at best—no president has ever exercised such a power. Even assuming this power exists, exercising it in the indiscriminate manner permitted and even mandated under the PATRIOT intelligence exception would be foolhardy. Our system has checks and balances for a reason. “In fact the whole theory of [the grand jury’s] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.”³⁴⁷ The President should and must trust that the courts will recognize his or her needs.³⁴⁸

Another justification was hinted at by the Department of Justice in its response to questions by the U.S. House of Representatives’ Committee on the Judiciary.³⁴⁹ In explaining

³⁴⁶ See generally 50 U.S.C. § 1803 (2000 & Supp. 2001). The Foreign Intelligence Surveillance Court consists of eleven district court judges selected by the Chief Justice. *Id.* § 1803(a). The court is conducted in secret in Washington, D.C. with the judges presiding on a rotating basis. Jeremy D. Mayer, *9-11 and The Secret FISA Court: From Watchdog To Lapdog?*, 34 Case W. Res. J. Int’l L. 249, 250 (2002).

³⁴⁷ Williams, 504 U.S. at 47.

³⁴⁸ 147 Cong. Rec. at S10556 (statement of Senator Patrick Leahy).

³⁴⁹ Ltr., *supra* n.135, at 1.

how the PATRIOT intelligence exception aids in the information-sharing process, the Department of Justice noted the “practical difficulties” involved in utilizing the traditional exceptions.³⁵⁰

For example, in discussing the problems involved with using the law-enforcement exception, it pointed out that the exception requires a government attorney to provide the court with the name of each individual receiving information under the exception.³⁵¹ According to the Department of Justice, “[i]n the context of the 9/11 investigations and other terrorism investigations that are national and international in scope and may involve literally thousands of investigators and dozens of grand juries, this requirement was onerous and a diversion of resources from investigative activity.”³⁵² If the Department of Justice views merely reporting information to a court as “onerous,” it likely views obtaining approval for disclosure as extraordinarily burdensome. It cannot be denied that permitting disclosure without court approval saves the Department of Justice money. But the Supreme Court has never viewed cost savings as a valid reason for lifting the veil of grand jury secrecy.³⁵³ If the Department of Justice requires additional clerical or other help that is simply a cost society must bear.

Any “practical difficulties” arising from the time required to obtain court approval could easily be addressed in the text of the rule. The information-sharing guidelines issued by the Attorney General already distinguish between the treatment of materials relating to “a potential terrorism³⁵⁴ or Weapons of Mass Destruction³⁵⁵ threat” and the treatment of other grand jury

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *E.g.*, *Sells Eng’g, Inc.*, 463 U.S. at 431 (concluding that while 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,” this type of cost savings could not justify a breach of grand jury secrecy).

³⁵⁴ “Terrorism Information” is defined as follows:

All information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign or international

materials subject to disclosure under the PATRIOT intelligence exception by permitting a forty-eight hour delay in the disclosure of the latter.³⁵⁶ When an immediate threat exists to national security, prosecutors could be permitted to disclose without judicial approval. In contrast, when time is not of the essence, a fast-track judicial approval procedure could be used.

Based on the foregoing, it is clear that no valid justification exists for the absence of judicial supervision. Congress can easily amend Rule 6(e) to protect important national security interests without destroying the secrecy that is indispensable to grand jury proceedings.

B. The Homeland Security Exception

An examination of the Homeland Security exception reveals the same constitutional violations created by the PATRIOT intelligence exception. As written, the exception would violate the Grand Jury Clause of the Fifth Amendment.³⁵⁷ Again, even if the constitutional issues are ignored, sound public policy reasons exist for redrafting this exception.³⁵⁸ Should Congress elect to make the technical amendments necessary to revive this exception, it should also make the substantive amendments necessary to protect the doctrine of grand jury secrecy.

1. The Fifth Amendment Analysis

To satisfy the Fifth Amendment, any disclosure of grand jury materials must be justified by a compelling necessity and must be judicially supervised.³⁵⁹ The Homeland Security

terrorist groups or individuals or threats posed by such groups or individuals to the United States, United States persons, or United States interests, or to those of other nations, or to communications between such groups or individuals, or information relating to groups or individuals reasonably believed to be assisting or associated with them.

Memo. *supra* n.116 , at Guideline 5(a)(i).

³⁵⁵ “Weapons of Mass Destruction (WMD) Information” is defined as follows:

All information relating to conventional explosive weapons and non-conventional weapons capable of causing mass casualties and damage, including chemical, biological, radiological and nuclear agents and weapons and the means of delivery of such weapons.

Id. Guideline 5(a)(ii).

³⁵⁶ See *supra* notes 130 to 133 and accompanying text.

³⁵⁷ See *infra* notes 359 to 371 and accompanying text.

³⁵⁸ See *infra* notes 372 to 384 and accompanying text.

³⁵⁹ See *supra* notes 245 to 262 and accompanying text.

exception authorizes disclosures that satisfy neither criterion. This exception permits disclosure without judicial approval:

when matters involve a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat.³⁶⁰

Under the two-pronged compelling necessity test, the disclosure sought must be of a kind that serves an important societal interest,³⁶¹ and the need for disclosure must be shown with particularity.³⁶² Little doubt exists that the Homeland security exception satisfies the first prong of this test. This exception is more narrowly drawn than the PATRIOT intelligence exception in one important respect. The PATRIOT intelligence exception permits the disclosure of information that does not relate to a direct threat of some type to the United States. As discussed above,³⁶³ “foreign intelligence” could involve virtually any act by a non-citizen. In contrast, the Homeland Security exception for the most part focuses on activities, such as attack, sabotage, and terrorism that do involve a direct threat to public safety. Preventing such activities unquestionably serves a long-recognized societal interest.³⁶⁴

However, the Homeland Security exception fails to satisfy the second prong of the test for it permits disclosure without a showing of particularized need. Not every situation encompassed within the broad terms of the exception involves a real threat to public safety. For

³⁶⁰ 116 Stat. at 2256.

³⁶¹ See *supra* notes 249 to 255 and accompanying text.

³⁶² See *supra* notes 256 to 271 and accompanying text.

³⁶³ See *supra* note 307 and accompanying text.

³⁶⁴ Indeed, there have been rare occasions in our history when the Supreme Court was ready to sacrifice the most basic of individual liberties on the altar of national security. See, e.g., *Korematsu v. U.S.*, 323 U.S. 214, 215-23 (1944) (upholding a wartime exclusion order by the Commanding General of the Western Command, U.S. Army, “which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from [San Leandro, California, a military area]”).

instance, a multitude of actions could be disclosed under the undefined threat of “terrorism.”³⁶⁵

The county sheriff obviously needs to know that there are plans afoot to place a bomb in the county courthouse, but does not necessarily need to know that there are plans afoot for a peaceful protest within the courthouse. This exception could easily become a tool used against those who might voice public dissent.

Too, the exception permits disclosure to a wide range of officials, including everyone from the President of the United States to the mayor of a village in the middle of Tibet.³⁶⁶ The question of which official or officials have a genuine need to know about a particular “threat” is far from clear. In sum, as written, the Homeland Security exception permits disclosure when no compelling need for disclosure exists.

Since the exception has yet to become effective, it is difficult to predict how it will be applied.³⁶⁷ Although section 895 of the Homeland Security Act of 2002 indicates the Attorney General and the Director of the CIA will jointly issue guidelines governing the use of grand jury materials by state, foreign, and local officials who receive such information pursuant to the Homeland Security exception, it does not require that any guidelines be issued governing the disclosure of such information.³⁶⁸ Still, there is no reason to believe that the Attorney General will not follow the precedent set in the interpretation of the PATRIOT intelligence exception by making disclosure mandatory.

³⁶⁵ See *supra* notes 169 to 170 and accompanying text.

³⁶⁶ See *supra* notes 171 to 174 and accompanying text.

³⁶⁷ The Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation released by Attorney General Ashcroft on Sept. 23, 2002 apply to information sharing under section 905(a) of the USA PATRIOT Act. Memo, from John Ashcroft, *supra* note 116. Thus, these Guidelines do not apply to disclosures under the Homeland Security exception.

³⁶⁸ 116 Stat. at 2256-57.

The Homeland Security exception also fails to satisfy the criterion that any disclosure be judicially supervised.³⁶⁹ The language of the exception permits unilateral action by prosecutors. If a substantial threat is imminent, the government's interest in protecting national security may well outweigh any right to grand jury secrecy and such unilateral action may be constitutionally permissible. However, the language of the exception permits unilateral action even in the absence of an imminent threat. It excludes judicial participation in the decision-making process when no need for such exclusion exists.

As with the PATRIOT intelligence exception, the court is provided with nothing more than a vague, after-the-fact notice that "information" was disclosed to a particular department, agency, or entity.³⁷⁰ No meaningful role exists for the judiciary in this process.

Should Congress enact the technical amendments requested by President Bush and bring the Homeland Security exception into being, it will set the stage for a material breach of the protection afforded grand jury secrecy by the Fifth Amendment. Congress' failure to require a showing of particularized need and to allow a meaningful role for the courts creates a situation in which vast numbers of disclosures can and will be made. Again, the cumulative effect of these disclosures will be to chill the participation of grand jury witnesses, and thereby cause systemic injury to the grand jury process.³⁷¹

2. The Public Policy Analysis

Even assuming that the Homeland Security exception poses no constitutional problems, strong public policy arguments support its amendment. In creating this exception, Congress took measures far beyond those necessary to achieve the legitimate goal of preventing and responding

³⁶⁹ See *supra* notes 272 to 292 and accompanying text.

³⁷⁰ See *supra* note 182 and accompanying text. See generally Fed. R. Crim. P. 6(e)(3)(D)(ii).

³⁷¹ See generally *supra* notes 216 to 227 and accompanying text.

to threats to our national security. It unnecessarily sacrificed the “public interest” in secrecy.³⁷²

Judicious amendment of the Homeland Security exception could protect the doctrine of grand jury secrecy while actually furthering the goal of preventing and responding to threats to national security.

Few would disagree with Congress that a homeland security exception should exist in some form. If information regarding a true threat to national security becomes known during a grand jury session, it should be disclosed to the proper authorities. No one wants a repeat of the tragic events of September 11, 2001. Grand jury materials have been disclosed for lesser reasons.³⁷³

But in drafting the Homeland Security exception, Congress made some critical mistakes. First, it failed to set needed parameters in terms of the types of information that could be disclosed under the exception. Failing to define terms, such as “terrorism,”³⁷⁴ denies those seeking to apply the exception much needed guidance and opens the doors to abuse of this exception. It allows the disclosure of activities that do not pose any threat to national security.

Second, Congress again created a system that has no checks on the use of power by the executive branch. The judiciary lacks the ability to identify, much less prevent or punish, any abuses of this exception. Further, “[s]ince the Department of Justice has taken the position that the intelligence committees of Congress should not be permitted to see any grand jury information, this means that there is *no* oversight of what use is made of grand jury material passed to the Intelligence Community.”³⁷⁵ It is sadly ironic that the same information that is

³⁷² See generally *Douglas Oil Co. of California*, 441 U.S. at 218-23. See also *supra* notes 1 to 26, 4 to 48 and 207 to 227.

³⁷³ For instance, where a particularized need is established, grand jury materials may be disclosed for use in other civil and criminal proceedings. Fed. R. Crim. P. 6(e)(3)(E)(i).

³⁷⁴ See *supra* notes 169 to 170, 365 and accompanying text.

³⁷⁵ Report Of The Joint Inquiry Into The Terrorist Attacks Of September 11, 2001 –By The House Permanent Select Committee On Intelligence and The Senate Select Committee On Intelligence: September 11 and the Imperative of

entrusted to a foreign official may not be shared with the judicial or legislative branches of our own government.

Certainly, some situations exist in which it would be impracticable to require prosecutors to seek judicial approval—if a substantial, imminent threat exists, a prosecutor may need to shout what he or she knows from the rooftops, and the law should permit such disclosures. But not every situation requires immediate disclosure. Indeed, not every situation requires any disclosure. As well, there is no reason why prosecutors could not at the very least provide a list of those receiving information to the court.³⁷⁶

Prosecutors and judges can and should work hand in hand to determine when the public's interest in national security outweighs its interest in grand jury secrecy. It should be the role of the prosecutor to identify information that may evidence a threat and to immediately bring that information to the attention of the court. It should be the role of the court to quickly weigh all of the competing interests and to determine whether disclosure is warranted and the conditions under which it should be made.

Such a weighing of interests benefits all concerned. As discussed above, grand jury targets have a strong interest in a grand jury system which protects against unwarranted disclosures,³⁷⁷ but they are not alone in their need for secrecy for “the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.”³⁷⁸ The public and the government have an interest in maintaining a system in which grand jury witnesses feel free to step forward and testify “fully and frankly,” and in which targets are not provided the

Reform in the U.S. Intelligence Community: Additional Views of Senator Richard Shelby, Vice Chairman, Senate Select Committee on Intelligence, S Rep. 107-351 at n. 123 (2002). “The Senate Select Committee on Intelligence tried to provide for such oversight in its FY03 authorization bill, *see* S2506 (107 Cong., 2d Sess.), at § 306, but this provision was removed in conference at the insistence of the Administration.” *Id.*

³⁷⁶ *See generally supra* notes 351 to 353 and accompanying text.

³⁷⁷ *See supra* notes 216 to 227 and accompanying text.

³⁷⁸ *E.g.*, *Douglas Oil Co.*, 441 U.S. at 218.

opportunity to flee or intimidate witnesses or jurors.³⁷⁹ Secrecy is necessary to the discovery of the truth.

While the Bush Administration has fought hard to create the new exceptions to the rule of secrecy, it too apparently recognizes the value of secrecy. Early in 2003, the Administration reportedly floated legislation that would amend Rule 6(e) yet again to tighten the rule of secrecy.³⁸⁰ Section 206 of a proposal known as the Domestic Security Enhancement Act of 2003 would have imposed a requirement of secrecy on grand jury witnesses in some circumstances.³⁸¹ Although this proposal now appears to have been dropped, it evidences the vital role of the doctrine of grand jury secrecy to the grand jury system.

Yet another person with a substantial interest in maintaining grand jury secrecy is the grand jury witness. Under the Homeland Security exception as written, no one protects the interests of the witness. No one is charged with considering whether the disclosure of the testimony of a witness might place that witness, or perhaps a relative in a far off land, in danger. The danger of intimidation, injury, or even death should not be taken lightly—grand jury tampering does occur.³⁸² Judicial supervision of any proposed disclosure is necessary to protect grand jury witnesses from harm.

³⁷⁹ *Id.* at 219.

³⁸⁰ Patriot Act II (draft), *available at* http://www.eff.org/Censorship/Terrorism_militias/patriot2draft.html.

³⁸¹ *Id.* Specifically, the description of section 206, entitled “Grand Jury Information in Terrorism Cases” states, “This section amends Rule 6(e)(2)(B) of the Federal Rules of Criminal Procedure to make witnesses and persons to whom subpoenas are directed subject to grand jury secrecy rules in cases where serious adverse consequences may otherwise result, including danger to the national security or to the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, intimidation of a potential witness, or other serious jeopardy to an investigation. The provision would permit witnesses and recipients of grand jury subpoenas to consult with counsel regarding the subpoena and any testimony, but would impose the same secrecy obligations on counsel.”

Id.

³⁸² In the late 1970’s the General Accounting Office (GAO) documented “343 grand jury witnesses who had their identities revealed before any indictments were returned by grand juries, including 5 who were murdered, 10 who were intimidated, and 1 who disappeared.” Report to the Congress of the United States by the Comptroller General:

Judicial supervision may even further the goal of obtaining helpful intelligence information from grand jury witnesses. If the public begins to perceive grand juries as the tool of the intelligence community, revealing anything and everything, witnesses may withhold important information out of fear. Limiting disclosures to materials involving truly vital information may actually help the system to acquire such information.

One cannot dispute that it might be more convenient for the Department of Justice to act unilaterally in making the decision to disclose, but “‘doubtless all arbitrary powers, well executed, are the most *convenient*.”³⁸³ “[Y]et let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters.”³⁸⁴

Based on the foregoing, Congress should revive the Homeland Security exception, but in doing so, should amend this exception to protect the secrecy that is essential to grand jury proceedings.

IV. A Proposed Amendment to Rule 6(e)

To address the concerns outlined above, I propose that Congress amend Federal Rule of Criminal Procedure 6(e)(2),(3) to read as follows:³⁸⁵

(e) Recording and Disclosing the Proceedings.

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;

More Guidance and Supervision Needed over Federal Grand Jury Proceedings 6 (Oct. 16, 1980). Since the GAO studied only a few of the federal districts, these numbers represent only “the tip of the iceberg.” *Id.*

³⁸³ *Hurtado v. California*, 110 U.S. 516, 545 (U.S.1884) (Harlan, J. dissenting) (quoting Blackstone, 4 Bl. Comm. 349, 350.).

³⁸⁴ *Id.* (quoting Blackstone, 4 Bl. Comm. 349, 350.).

³⁸⁵ The substantive changes are underlined.

- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

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

- (i) an attorney for the government for use in performing that attorney's duty;
- (ii) any government personnel--including those of a state or state subdivision or of an Indian tribe--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or
- (iii) a person authorized by 18 U.S.C. § 3322.

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

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

(D) An attorney for the government may disclose any grand-jury matter when the matter involves information that he or she reasonably believes may evidence an imminent, substantial threat to the United States homeland, its critical infrastructure, its key resources (whether physical or electronic), or its persons or interests worldwide, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat.

(i) Any official who receives information under Rule 6(e)(3)(D) may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(ii) Any state, local, or foreign official who receives information pursuant to Rule 6(e)(3)(D) shall use that information only consistent with such guidelines as the Attorney General and Director of Central Intelligence shall jointly issue.

(iii) After a disclosure made pursuant to Rule 6(e)(3)(D), an attorney for the government must promptly provide the court with a notice containing

the names of all persons to whom a disclosure has been made, a brief description of the information disclosed and the reason for the disclosure, and a certification that the attorney has advised such persons of any obligation of secrecy under this rule or any applicable guidelines. This notice shall be filed under seal.

(E) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--of a grand-jury matter preliminarily to or in connection with a judicial proceeding.

(F) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.

(G) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs-- at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law.

(H) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(I) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--at the request of the government if it shows thatthe matter involves information that may evidence a substantial threat to the United States homeland, its critical infrastructure, its key resources (whether physical or electronic), or its persons or interests worldwide, or it shows that such matters involve clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat or such activities.

(i) Any official who receives information under Rule 6(e)(3)(I) may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(ii) In addition to any conditions imposed by the court, any state, local, or foreign official who receives information pursuant to Rule 6(e)(3)(I)

may use that information only consistent with such guidelines as the Attorney General and Director of Central Intelligence shall jointly issue.

(J) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--at the request of the government if it shows that such matters involve significant foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(J)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.

(i) Any federal official who receives information under Rule 6(e)(3)(J) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

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

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

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent;

or

- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

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

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

(K) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E) must be filed in the district where the grand jury convened. Unless the hearing is ex parte--as it may be when the government is the petitioner--the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

- (i) an attorney for the government;
- (ii) the parties to the judicial proceeding; and
- (iii) any other person whom the court may designate.

(L) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court

must afford those persons identified in Rule 6(e)(3)(K) a reasonable opportunity to appear and be heard.

(M) In Rule 6(e)(3)(D) and Rule 6(e)(3)(I),

(i) the term “substantial threat” means a threat of actual or potential attack or other grave hostile acts by a foreign power or an agent of a foreign power, sabotage (as defined in 18 U.S.C. §§ 2152-2156), domestic or international terrorism (as defined in 18 U.S.C. § 2331), or use of weapons of mass destruction.

(ii) the term “information” as it relates to “a threat of actual or potential attack or other grave hostile acts by a foreign power or an agent of a foreign power” means all information relating to the existence, organization, capabilities, communications, plans, intentions, vulnerabilities, means of finance or material support, or activities of a foreign power or an agent of a foreign power relating to such threat, or to the same information relating to groups or individuals reasonably believed to be assisting or associated with them.

(iii) the term “information” as it relates to a threat of “sabotage” means all information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of saboteurs or threats posed by such groups or individuals to the United States, its persons, or its interests or those of other associate nations (as defined in 18 U.S.C. § 2151), or to communications between such groups or individuals, or to the same information relating to groups or individuals reasonably believed to be assisting or associated with them.

(iv) the term “information” as it relates to a threat of “domestic or international terrorism” threat means all information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign, international, or domestic terrorist groups or individuals or threats posed by such groups or individuals to the United States, United States persons, or United States interests, or those of other nations, or to communications between such groups or individuals, or to the same information relating to groups or individuals reasonably believed to be assisting or associated with them.

(v) The term “information” as it relates to a threat of “use of weapons of mass destruction” means all information relating to conventional explosive weapons and non-conventional weapons capable of causing mass casualties and damage, including chemical, biological, radiological, and nuclear agents and weapons and the means of delivery of such weapons.

(N) A petition for disclosure pursuant to Rule 6(e)(3)(I) or Rule 6(e)(3)(J) shall be ruled upon by the judge designated in subparagraph (O)(i) within forty-eight (48) hours of its filing. Any review of a denial of such a petition shall be conducted as expeditiously as possible.

(O) A notice of disclosure pursuant to Rule 6(e)(3)(D) or a petition for disclosure pursuant to Rule 6(e)(3)(I) or Rule 6(e)(3)(J) shall be filed in the district where the grand jury convened.

(i) The Chief Judge for each district shall designate one judge serving within the district and one alternate to review such notices and hear such petitions for a term of three years. If a petition is denied, the court shall immediately provide for the record a written statement of each reason for its decision. On motion of the United States, the record shall be transmitted, under seal, to the court of review established in Rule 6(e)(3)(O)(ii).

(ii) The Chief Justice of the United States Supreme Court shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from each United States Court of Appeal who together shall comprise a court of review which shall have jurisdiction to review the denial of any petition within its Circuit under these subdivisions. If a court of review determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(iii) The record of proceedings under Rule 6(e)(3)(O) including notices filed, petitions made, and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence.

This amendment would preserve the best features of the PATRIOT intelligence exception, the Homeland Security exception, and the information-sharing guidelines issued by the Attorney General. It recognizes the need for and right of prosecutors to share grand-jury materials relating to substantial threats to the United States and its people. The pre-9/11 version of Rule 6(e) was lacking in that it failed to provide for situations in which the need for secrecy is outweighed by a need to protect against terrorism and other hostile acts.³⁸⁶ Congress did not err in seeking to rectify this flaw.

Congress did err in completely excluding the courts from the decision-making process and in completely ignoring the societal interest in grand jury secrecy. Proposed Rule 6(e)(3)(D)

³⁸⁶ The omission of an exception for the disclosure of intelligence information is understandable. Warfare has changed dramatically. Until recent years, it was unimaginable that the United States would face the type of terrorist attacks on the home front that now seem all too probable.

allows prosecutors to act unilaterally when an *imminent*, substantial threat exists. When time is of the essence to prevent harm, prosecutors are empowered to act. The definitions found in Rule 6(e)(3)(M) should help prosecutors identify the types of situations in which this power should be invoked, and the reporting requirement found in proposed Rule 6(e)(3)(D)(iii) should help prevent prosecutors from abusing this power.

When no imminent threat exists, the proposed amendment affords courts the opportunity to undertake the traditional, constitutional balancing analysis to determine whether a particularized need for disclosure exists in this instance and whether that need outweighs society's interest in maintaining grand jury secrecy.³⁸⁷ Proposed Rule 6(e)(3)(I) permits judicially-approved disclosure of substantial threats to the nation's security,³⁸⁸ and proposed Rule 6(e)(3)(J) permits judicially-approved disclosure of significant intelligence information.³⁸⁹

The need for heightened security is addressed in Rule 6(e)(3)(O) by the appointment of a special judge within each district and a special panel within each circuit to handle notices and petitions filed pursuant to the new exceptions. Not only does the appointment of this special court permit heightened security, it also creates a corps of judges with special expertise in this area.³⁹⁰ The need for a rapid decision is dealt with in Rule 6(e)(3)(N), which requires a decision within forty-eight hours of the filing of a petition.

In short, the proposed amendment would provide the benefit of protecting national security interests without the heavy cost of destroying the secrecy so crucial to the functioning of the grand jury.

V. Conclusion

³⁸⁷ See generally *supra* notes 243 to 292 and accompanying text.

³⁸⁸ Proposed Rule 6(e)(3)(D) and proposed Rule 6(e)(3)(I) replace the Homeland Security exception.

³⁸⁹ Proposed Rule 6(e)(3)(J) replaces the PATRIOT intelligence exception.

³⁹⁰ Such judges should be provided with specialized training.

In creating the PATRIOT intelligence exception and the Homeland Security exception, Congress acted with the best of intentions. It sought to spare our nation the horror of another 9/11. But in the words of Justice Brandeis,

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.³⁹¹

In its zeal to protect our security, Congress created laws which endanger our liberty. Both the PATRIOT intelligence exception and the Homeland Security exception violate the Grand Jury Clause of the Fifth Amendment.³⁹² Constitutional questions aside, these exceptions are quite simply bad public policy—they needlessly destroy the indispensable grand jury secrecy that has been relied upon for almost one thousand years.³⁹³

The end of grand jury secrecy alone would not bring the Republic to its knees, but the destruction of this right must be viewed as part of a pattern. With one stroke of the presidential pen, Americans arguably lost a right older than the nation itself. Countless other rights were also impacted by the enactment of the USA PATRIOT Act of 2001 and the Homeland Security Act of 2002. This silent erosion of our civil rights is frightening and dangerous. In times of national crisis we must be even more vigilant in protecting the basic rights on which our nation was built.

Congress can do its part to protect national security and to protect these basic rights by revisiting Federal Rule of Criminal Procedure 6(e). With careful drafting, Congress can produce a rule that strengthens national security while preserving the grand jury system. The goals of liberty and security are not and should never be viewed as mutually exclusive.

³⁹¹ *Olmstead v. U.S.* 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

³⁹² *See supra* notes 302 to 320 and 359 to 371.

³⁹³ *See supra* notes 321 to 356 and 372 to 384.