

# THE PATRIOT ACT GRAND JURY DISCLOSURE EXCEPTION: A PROPOSAL FOR RECONCILING CIVIL LIBERTY AND LAW ENFORCEMENT CONCERNS

*Sara Levy*

## I. INTRODUCTION

The passage of the *Uniting & Strengthening of Americans by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*<sup>1</sup> (“Patriot Act”) following the September 11 attacks has raised endless questions involving the constitutionality and effectiveness of criminal procedure modifications that depart from traditional methods.<sup>2</sup> Congress hastily passed the Patriot Act to enhance law

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<sup>1</sup> 107 P. L. 56, 15 Stat. 272, Oct. 26, 2001.

<sup>2</sup> These concerns are best highlighted in an excerpt from a New York Times editorial a day after the September 11 attacks.

There must be an exacting examination of how the country can face this threat without sacrificing its liberties. . . . Americans must rethink how to safeguard the country without bartering away the rights and privileges of the free society that we are defending. The temptation will be great in the days ahead to write draconian new laws that give law enforcement agencies - or even military forces - a right to undermine the civil liberties that shape the character of the United States. President Bush and Congress must carefully balance the need for heightened security with the need to protect the constitutional rights of Americans. That includes Americans of Islamic descent, who could now easily become the target for another period of American xenophobia and ethnic discrimination.

enforcement's authority to target and prosecute domestic and international security threats.<sup>3</sup> Consequently, many criminal procedure measures that had governed law enforcement investigations were modified, allowing law enforcement authorities greater latitude in the pursuit of criminal activity.<sup>4</sup> This Paper focuses on the Patriot Act's amendment of Section 203 of the Federal Rules of Criminal Procedure to allow the

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Editorial, *The War Against America; The National Defense*, N.Y. TIMES, Sept. 12, 2001, at A-26. *See also*, Jim McGee, *An Intelligence Giant in the Making*, WASH. POST, Nov. 4, 2001, at A4.

<sup>3</sup> *See* Jennifer Van Bergen, *Repeal the Patriot Act*, TRUTHOUT ISSUES, Apr. 12, 2001, available at, [http://www.truthout.org/docs\\_02/04.02A.JVB.Patriot.htm](http://www.truthout.org/docs_02/04.02A.JVB.Patriot.htm) (last visited, Feb. 28, 2004) (discussing the fact that the Patriot Act generally and its passage with little, if any, debate in Congress). *See* Editorial *Anti-terror act extends, not creates, powers*

<sup>4</sup> The main changes to the traditional criminal procedure framework are as follows: Section 203 amends Federal Rule of Criminal Procedure 6(e)(3)(C) to permit sharing of grand jury information with other agencies if it involves foreign intelligence information, as defined. It also amends 18 U. S. C. § 2517 to permit similar sharing of information from wiretaps. Section 213 adds subsection (b) to 18 U. S. C. § 3103a to authorize delayed notice of execution of a warrant, if three conditions are met: (1) immediate notice would have an "adverse result," defined as physical danger, flight from prosecution, destruction of evidence, intimidation of witnesses, jeopardizing investigation, or delay of a trial; (2) no tangible property or wire, electronic, or stored communications are to be seized, with exceptions; and (3) notice will be given "within a reasonable period." Section 219 amends Federal Rule of Criminal Procedure 41(a) to authorize nationwide search warrants in terrorism investigations. Subsection (a) amends 18 U. S. C. § 2520, relating to wiretapping, to provide for court referrals for administrative discipline of employees. It also provides that use of intercepted information beyond that authorized by Section 2517 is a violation for the purpose of the civil remedy of the existing § 2520(a). Section 412(a) adds § 236A to the Immigration and Nationality Act. The new section requires the Attorney General to take into custody any alien certified to be inadmissible or deportable on one of six grounds: 8 U. S. C. § 1182(a)(3)(A)(i) (espionage, sabotage, or export restrictions); § 1182(a)(3)(A)(iii) (attempt to overthrow the government); § 1182(a)(3)(B) (terrorist activities, amended by § 411 of the Act); and parallel provisions of § 1227, subdivisions (a)(4)(A)(i) & (iii) and (a)(4)(B). Section 412(b) limits judicial review of detentions under § 412(a) to habeas corpus. It expressly includes judicial review of the merits of the decision to detain, but it does not specify a standard of review. In most cases, the habeas petition would be in the district court in the place of detention.

sharing of grand-jury information with other agencies, a sharing of information that was traditionally prohibited.

Rule 6(e) of the Federal Rules of Criminal Procedure provides that prosecutors, grand jurors, and other administrative and investigatory personnel, “shall not disclose matters occurring before the grand jury,” except for a limited number of circumstances.<sup>5</sup> Historically, the federal courts have placed significant value and focus on grand jury integrity.<sup>6</sup> Protecting grand jury disclosure concomitantly protects civil liberty interests.<sup>7</sup> These interests include but are not limited to preventing defendants from suborning perjury or otherwise tampering with potential witnesses, preventing defendants from importing the grand jurors themselves, and thereby ensuring that grand jurors can deliberate free from improper influence, encouraging frank disclosure from witnesses called before the grand jury, and protecting accused individuals later determined to be innocent from public censure and ridicule.<sup>8</sup> The controversy surrounding the modifications to section 203 are premised on these interests.

Section 203 amended the Federal Rules of Criminal Procedure to permit disclosures of “matters occurring before the grand jury” when the matters “involve foreign intelligence or counterintelligence” to “any Federal law enforcement,

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<sup>5</sup> FED. R. CRIM. P. 6(e) (2004).

<sup>6</sup> *See, e.g.*, United States v. Sells Eng’g, 463 U.S. 418 (1983); Illinois v. Abbott & Assocs., 460 U.S. 557 (1983); United States v. Calandra, 414 U.S. 338 (1974).

<sup>7</sup> *See* Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL’Y 699, 706 (2002).

<sup>8</sup> *See* Fred A. Bernstein, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 600 (1994).

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.”<sup>9</sup> Criminal Procedure Rule 6(e)(3)(c) governs the permissive disclosure and use of information revealed in a grand jury proceeding, which prior to the enactment of the Patriot Act could be disclosed only when directed by a court in connection with a judicial proceeding.<sup>10</sup> Additionally, courts would also permit disclosure of grand jury information upon the request of the defendant, upon a showing that the information discloses a violation of a state criminal law, or when disclosed by the prosecutor to another grand jury.<sup>11</sup>

The new law requires that a disclosure made under the new exception be revealed, under seal, to the court.<sup>12</sup> The term “foreign intelligence information” is defined as information that “relates to the ability of the United States to protect against” an actual or potential attack, hostile act, sabotage, international terrorism, or clandestine intelligence activities conducted by a foreign power or its agent, as well as information relating to the national defense, security, or conduct of foreign affairs of the United States.<sup>13</sup>

Section 203 also amended 18 U.S.C. 2517, which governs the permissive disclosure and use of intercepted communications.<sup>14</sup> Under the new law, intercepted

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<sup>9</sup> *See* USA PATRIOT Act § 203(a).

<sup>10</sup> *See* FED. R. CRIM. P. 6(e)(3)(c) (2004).

<sup>11</sup> *See id.*

<sup>12</sup> *See* USA PATRIOT Act § 203(a).

<sup>13</sup> *See id.* *See also* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

<sup>14</sup> *See* 18 U.S.C. § 2517 (2004).

information related to “foreign intelligence or counterintelligence” can be disclosed to “any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official” to the extent that “such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.” Additionally, the information can be used by any officer properly in possession of the information to assist in the performance of his official duties.<sup>15</sup>

Part II of this Paper discusses the grand jury and its investigatory functions and importance in law enforcement. This Part discusses the functions of the grand jury and the traditional scheme governing federal grand juries under Rule 6 of the Federal Rules of Criminal Procedure. Additionally, the secrecy of grand jury information and its exceptions prior to the passage of the Patriot Act are discussed. This Part assesses the policy reasons for allowing more grand jury information sharing, as well as the law enforcement justifications for doing so.

Part III provides a detailed analysis of how the Patriot Act exception to grand jury secrecy would function and the exception’s underlying policies. Part IV discusses the relevant United States Supreme Court cases that relate to the grand jury’s functions and the secrecy exceptions and attempts to reconcile the Patriot Act exception with the framework and policy emphasis found in those decisions. Since the Supreme Court strongly emphasizes the benefit of grand jury secrecy and the potential abuse that disclosure would lead to, this paper advocates for the adoption of several features that aim to limit the abusive potential of the Patriot Act exception.

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<sup>15</sup> See USA PATRIOT Act § 203(a).

Ultimately, Part V proposes three revisions to the current rule: Limiting the agencies who have access to grand jury information, enacting guidelines limiting the purposes and uses of the information, and enacting a sunset provision as a way for Congress to reassess the utility of the new exception in due time. Enacting these three proposals would better reconcile the Patriot Act exception with the Supreme Court's strong policy emphasis on grand jury secrecy.

## II. GRAND JURIES BEFORE THE PATRIOT ACT

The grand jury mechanism has been a central part of the criminal justice system since the country's inception. The grand jury's source of authority derives the Fifth Amendment of the federal constitution. The Fifth Amendment states that

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger.<sup>16</sup>

Most state constitutions also constitutionalize the grand jury's functions or at the very least codify them into statutes.<sup>17</sup> The constitutionalization of the grand jury's functions is

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<sup>16</sup> See U.S. Const. Amend. V.

<sup>17</sup> See, e.g., N.Y. CRIM. PROC. LAW 190.50(5)(a) (Consol. 1996) ("When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf . . ."). For a discussion of the differences among state grand juries, see George H. Dession & Isadore H. Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1982). See also, Comment, *Grand Jury - Reports - Power of Court to Cite for Contempt*, 48 IOWA L. REV. 725, 727 (1963) (discussing the reporting function grand juries serve in various jurisdictions).

demonstrative of its central importance in the fabric of American criminal justice.<sup>18</sup> This Part discusses the grand jury institution in light of its traditional functions. Additionally, the secrecy status of grand jury investigations prior to the Patriot Act will be addressed.

#### A. *The Grand Jury and Its General Functions*

The powers and functions of the federal grand jury differ from those of the federal trial jury, also known as the petit jury.<sup>19</sup> While petit juries listen to the evidence offered by the prosecution and the defense during a criminal trial and returns a verdict, the grand jury does not determine guilt or innocence.<sup>20</sup> The grand jury determines whether there is probable cause to believe that a crime was committed and that a specific person or persons committed it.<sup>21</sup> If the grand jury determines that probable cause is present, then

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<sup>18</sup> See, e.g., *United States v. Williams*, 504 U.S. 36, 47 (1992) (reiterating the Constitutional importance of the federal grand jury). For a historical overview of the grand jury and its many functions see generally, Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699 (2002). See also, *United States v. Calandra*, 414 U.S. 338 (1974) (noting that the functions of the historical English grand jury, protecting society from both individual and governmental wrongdoing, still survive in the modern day American model).

<sup>19</sup> See W. LAFAVE, CRIMINAL PROCEDURE Sec. 8.12 (2003). The petit jury is also important in safeguarding the rights of the accused. See, e.g., *Silverthorne v. United States*, 400 F.2d 627, 634 (9th Cir. 1968) (stating that the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence).

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

it will return a statement of the charges, the indictment.<sup>22</sup> After such a finding, the case against the accused will proceed to trial.

The grand jury normally hears only that evidence presented by the government which tends to demonstrate the commission of a crime.<sup>23</sup> The grand jury must determine from this evidence, and generally without evaluating evidence from the defense, whether a person should be prosecuted for a serious federal crime.<sup>24</sup> The Bill of Rights refers to a crime that carries a sentence as an “infamous crime.”<sup>25</sup> Generally, an individual cannot be prosecuted for a serious crime unless the grand jury decides that evidence of probable cause exists.<sup>26</sup> Therefore, the grand jury functions both as proverbial sword and shield,

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<sup>22</sup> *See id.* *See also*, Megan Hall, *Grand Jury Provisions of the Patriot Act*, available at [www.trialbriefs.com/GrandJury.htm](http://www.trialbriefs.com/GrandJury.htm) (last visited Mar. 17, 2004).

<sup>23</sup> *See* Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 706 (5th ed. 1996) (“The high proportion of true bills . . . is not surprising. The grand jury is neither a rubber stamp nor a body with no mind of its own. What it is, however, is a body that hears only one side of a case. And it reacts to that side. . . . The principal function of the grand jury today probably is not to refuse indictment, but to force the prosecution to gather and to offer evidence in some systematic way before a charge is brought.”).

<sup>24</sup> *See id.*

<sup>25</sup> *See id.*

<sup>26</sup> It should be noted that grand juries are not completely free to compel a trial of anyone it chooses. The United States Attorney must sign the indictment before an individual is prosecuted. *See* W. LaFave *supra* note 18. Additionally, a federal grand jury (except a special grand jury impaneled under 18 U.S.C. BB3331-3334) is not authorized to investigate situations involving the conduct of individuals, public officials, agencies or institutions that the grand jury believes is subject to criticism rather than a violation of federal statutes.

authorizing the government's prosecution of suspected defendants, while protecting the citizenry from unwarranted or frivolous prosecutions.<sup>27</sup>

As discussed, the federal grand jury's function is to determine whether an individual should be tried for a serious federal crime alleged to have been committed within the district where the grand jury convenes.<sup>28</sup> Matters may be brought to its attention in three ways: by the United States Attorney, by the court that has called it to duty, and from the personal knowledge of a member of the grand jury.<sup>29</sup> In all of these cases, the grand jury hears and assesses evidence before making their recommendation.<sup>30</sup>

After it has received evidence against an individual, the grand jury decides whether the evidence presented justifies an indictment, or "true bill," which is the formal

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<sup>27</sup> *But cf.* Melvin P. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153, 154-55 (1965); LEWIS KATZ ET AL., JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 48, 121 (1972) (stating that the grand jury is a rubber stamp for the prosecutor); Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 57 (1979) (stating that the grand jury is the prosecutor's darling); Wayne L. Morse, *A Survey of the Grand Jury System (Part II)*, 10 OR. L. REV. 217, 329 (1931) (stating that grand juries are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval, and often uncritically, the wishes of the prosecuting attorney).

<sup>28</sup> *See* U.S. Const. amend. V; *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>29</sup> *See, e.g.*, Bruce Zucker & Michelle Carey, *Capturing the Harm: Defining "Tax Loss" for Use in Federal Sentencing*, 15 AKRON TAX J. 1, 29 (2000) (discussing the U.S. attorneys involvement in grand jury proceedings involving a tax evasion case).

<sup>30</sup> *See* *Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (stating the purpose of the grand jury to be determining whether probable cause exists to bring an accused to trial); *United States v. DiGrazia*, 213 F. Supp. 232, 235 (N.D. Ill. 1963) ("The Grand Jury exists as an integral part of Anglo-American jurisprudence for the express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons").

criminal charge returned by the grand jury.<sup>31</sup> Upon the indictment's filing in court, the accused must either plead guilty, *nolo contendere*, or stand trial.<sup>32</sup> If the evidence does not meet the probable cause threshold required to demonstrate that the person committed a crime, the grand jury will vote a "no bill," or "not a true bill."<sup>33</sup> When this occurs, the individual at issue is not required to plead to a criminal charge, and no trial is required.

The most important portion of the grand jury's work is concerned with evidence brought to its attention by the prosecution. The grand jury may consider additional matters brought to its attention through different sources, but should consult with the United States Attorney or the court before undertaking investigations of such matters.<sup>34</sup> The grand jury's investigatory power is limited by the fact that it generally has no investigative staff or legal assistance.<sup>35</sup>

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<sup>31</sup> See 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 324, at 219 (1980).

<sup>32</sup> See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 378 (2d ed. 1992).

<sup>33</sup> See, e.g., Ric Simmons, *Re-Examining The Grand Jury: Is There Room For Democracy In The Criminal Justice System?*, 82 B.U. L. REV. 1 (2002) (discussing the grand jury no true bill and true bill process in an early English case).

<sup>34</sup> An example of the grand jury's reliance on the courts is when the grand jury depends on the court to execute its important subpoena power. See *U.S. v. Calandra*, 414 U.S. at 346 n.4 (stating that the grand jury may ask the court to compel production of books, papers, documents, and the testimony of witnesses). Courts may limit the grand jury's subpoena power in certain circumstances. *Id.* at 346 (stating that grand jury subpoena power is not unlimited). The court, for instance, may quash or modify a subpoena on motion if it is overly broad, or if compliance would be "unreasonable or oppressive." *Id.* at 346 n.4 (citing Fed. R. Crim. P. 17(c)).

<sup>35</sup> See Roger T. Brice, Comment, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761, 764 (1972) (asserting that although the grand jury's reliance upon professional investigatory agencies and the prosecutor to gather evidence has increased efficiency in investigation and decision making . . . [i]t has made the modern grand jury a generally more passive instrument than its precursors.

### ***B. Rule 6(e) and the Secrecy of Grand Jury Proceedings***

Section 203 of the USA PATRIOT Act amends Rule 6(e) of the Federal Rules of Criminal Procedure.<sup>36</sup> Rule 6(e) contemplates preservation of secrecy of grand jury proceedings.<sup>37</sup> Secrecy has been an important component of the grand jury process since at least the seventeenth century, when grand jurors successfully objected to the king's efforts to publicize grand jury proceedings.<sup>38</sup> This notion of secrecy was embraced by the American colonies and applied to their own grand jury systems.<sup>39</sup> Challenges to the principle of grand jury secrecy began almost immediately. Courts generally sided with arguments from the government for the courts to uphold the government's interest in maintaining the secrecy of grand jury proceedings.<sup>40</sup> The government's interest in

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(footnote omitted)); U.S. v. Linton, 502 F. Supp. 861, 865 (D. Nev. 1980) (stating that “the passive role of the modern grand jury is perhaps an inevitable function of our complex urban society. Nevertheless, at its best the grand jury is capable of acting as something more than a rubber stamp.” (quoting 8 James W. Moore et al., Moore's Federal Practice 6.02 1, at 6-12 (1976))). *But cf.* U.S. v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 521 (E.D.N.Y. 1974) (“Today the grand jury's independence in the criminal justice system has declined with the increasing complexity of crime and the growth of the role of prosecutors, professional police and investigative forces”).

<sup>36</sup> See USA PATRIOT Act § 203(a).

<sup>37</sup> See FED. R. CRIM. P. 6(e)(2) (2004).

<sup>38</sup> SUSAN W. BRENNER & GREGORY G. LOCKHART, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 7.02 (1996). See also 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, 13 (1996)

<sup>39</sup> See Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699 (2002).

<sup>40</sup> See also 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, 17 (1996).

secrecy in a particular instance would outweigh and trump the defendant's need for access to those proceedings.<sup>41</sup> Rule 6(e) later codified the common law notion of secrecy.<sup>42</sup>

In essence, Rule 6(e) orders prosecutors and grand jurors, although not witnesses themselves, to keep information related to a grand jury investigation secret.<sup>43</sup> The general secrecy provision under Rule 6(e)(2) provides that these individuals, and other administrative and investigatory personnel,

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.<sup>44</sup>

A difficult point of contention and confusion amongst courts involves the definition of what constitutes "matters occurring before the grand jury."<sup>45</sup> What is clear, however, is

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<sup>41</sup> *See id.*

<sup>42</sup> *See* FED. R. CRIM. P. 6(e)(2) (2004).

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See, e.g., In re Grand Jury Subpoena*, 103 F.3d at 238-39 (discussing meaning of "matters occurring before the grand jury"); *SEC v. Dresser Indus. Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc); *In re Grand Jury Proceedings (Kluger)*, 827 F.2d 868, 874 (2d Cir. 1987) (recognizing tax materials as privileged, thus requiring showing of particularized need before further disclosure would be granted); *Texas v. U.S. Steel Corp.*, 546 F.2d 626, 629 (5th Cir. 1977) (finding transcript of corporate employee's testimony entitled to grand jury secrecy). *See also*, Andrea M. Nervi, Comment, *FRCRP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury*, 57 U. CHI. L. REV. 221, 226 (1990) ("Certain classes of materials, such as transcripts of grand jury proceedings and the names of witnesses testifying before the grand jury, are clearly 'matters occurring before the grand jury.' But once we move beyond these areas of universal agreement, the phrase 'matters occurring before the grand jury' poses problems.").

the fact that any testimony given before the grand jury may not be disclosed to anyone except under very limited circumstances.<sup>46</sup> These limited circumstances constitute the exceptions to the general secrecy provision.

### *C. Exceptions to Secrecy Under Rule 6(e)*

Several basic exceptions to grand jury disclosure exist under Rule 6(e). For instance, Rule 6 contemplates disclosure made to “an attorney for the government for use in the performance of such attorney’s duty.”<sup>47</sup> Additionally, disclosures can be made 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 federal criminal law.”<sup>48</sup> These exceptions to secrecy are necessary for the grand jury process to function properly. The purpose of disclosure under these exceptions is to assist the government’s attorney “in the performance of such attorney’s duty to enforce federal criminal law.”<sup>49</sup>

Even under these seemingly necessary exceptions to secrecy, “[a]n 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

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<sup>46</sup> *See id.*

<sup>47</sup> *See* FED. R. CRIM. P. 6(e)(2) (2004).

<sup>48</sup> *See* FED. R. CRIM. P. 6(e)(3) (2004).

<sup>49</sup> *See id.*

persons of their obligation of secrecy under this rule.”<sup>50</sup> Other non-controversial exceptions to secrecy include disclosure by a government attorney to another federal grand jury<sup>51</sup> and (when approved by a federal court) disclosure by a government attorney to a state official upon a showing that the grand jury information will disclose a violation of state criminal law.<sup>52</sup>

Over the past three decades, the grand jury secrecy rules have been further amended to reflect changes in the law enforcement environment.<sup>53</sup> Many of these secrecy exceptions contemplate judicial supervision.<sup>54</sup> This judicial supervision is said to curtail potential abuses related to the dissemination of grand jury information.<sup>55</sup> Prior to 1985, federal courts were limited in their authority to order disclosure of grand jury material. Disclosure could be ordered in connection with a judicial proceeding where a

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<sup>50</sup> *See id.*

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> It should be noted that there have also been unsuccessful efforts to expand the disclosure provisions pertaining to grand jury materials. One proposed expansion would have permitted disclosure of grand jury materials concerning a federal health care offense to an attorney for the government for “use in any investigation or civil proceeding related to health care fraud.” *See* H.R. CONF. REP. NO. 104-350, pt. 2, at 1185 (1995). The proposal passed both the House of Representatives and the Senate, but was eliminated from the final bill in conference. *See id.* A second proposal would have allowed disclosure of grand jury material to the Securities and Exchange Commission (“SEC”) where the information involved conduct that might violate federal securities laws. *See* S. REP. NO. 101-337, at 4 (1990). Although disclosure of grand jury information would have assisted the SEC and the agencies that regulate federal health care programs, presumably this need was deemed insufficient to justify erosion of the wall of secrecy surrounding grand jury proceedings.

<sup>54</sup> *See* FED. R. CRIM. P. 6(e)(3)(c)(i) (2004).

<sup>55</sup> 147 CONG. REC. S10993 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

party was able to make a “strong showing of particularized need” for the grand jury materials.<sup>56</sup> Requests for secrecy exemptions in a grand jury investigation under this strict framework were and still are seldom granted.<sup>57</sup> Another instance where court approval is required is “upon a showing [by the defendant] that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.”<sup>58</sup>

#### ***D. Policies Underlying Grand Jury Secrecy***

The court’s supervision and involvement in the grand jury secrecy exception process has several identifiable underlying policies. These policies have been articulated and advanced by courts confronted with questions involving grand jury information disclosure. The reviewing court functions as gatekeeper in upholding these policies.

Four policies have been advanced to justify grand jury secrecy:

- To prevent the accused from escaping before he is indicted and arrested or from tampering with adversarial witnesses;<sup>59</sup>

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<sup>56</sup> See *U.S. v. Sells Eng’g*, 463 U.S. 418, 420 (1983).

<sup>57</sup> The Supreme Court has insisted that private parties seeking grand jury transcripts demonstrate that without the transcript or reference to it a defense would be greatly prejudiced or an injustice committed. The showing of need for the transcripts must be made “with particularity” so that the secrecy of the proceedings may be lifted discretely and limitedly. See, e.g., *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-682 (1958). See also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>58</sup> See *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931).

<sup>59</sup> See *Pittsburgh Plate Glass Co. v. United States*, 79 S.Ct. 1237, 1244 (1959) (Brennan, J. dissenting)

- To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted;<sup>60</sup>
- To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation;<sup>61</sup> and
- To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.<sup>62</sup>

These policies have been applied in many requests for judicial approval of grand jury discretion. For instance, *Douglas Oil Co. v. Petrol Stops Northwest*,<sup>63</sup> several oil companies sought review of a judgment, which ordered disclosure of grand jury transcripts related to a government investigation of petitioners. The case involved gas retailers who charged petitioners with conspiring to restrain trade in gasoline in violation of §§ 1 and 2 of the Sherman Act.<sup>64</sup> Petitioners asserted that the grand jury court applied the wrong standard to determine whether disclosure was proper under Fed. R. Crim. P. 6(e), and the grand jury court was the wrong court to decide whether disclosure was proper because it did not know whether disclosure was necessary for the civil antitrust proceedings.

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> 441 U.S. 211, 219 (1979).

<sup>64</sup> 15 U.S.C.S. §§ 1, 2.

In reviewing the lower court's approval of grand jury disclosure, the Supreme Court held respondents, in seeking grand jury transcripts, had to show the material sought was necessary to avoid possible injustice in the civil case, the need for disclosure was greater than the need for continued secrecy, and their request was structured to cover only material so needed. The Court also held the grand jury court abused its discretion in granting disclosure where it was largely ignorant of the necessity of disclosure to the civil proceedings.

The essence of the Supreme Court's holding in *Douglas Oil* centered on the policies underlying grand jury secrecy. Along these lines the Court expressly stated that

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. Moreover, 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. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against the indictment. Finally, 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.<sup>65</sup>

Consequently, the Supreme Court itself recognized that it "must always be reluctant to conclude that a breach of secrecy has been authorized."<sup>66</sup> As will be demonstrated, the new amendments to Rule 6(e) allow for easier access to grand jury information and signify a departure from the secrecy policies in favor of national security.

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<sup>65</sup> See 441 U.S. at 219.

<sup>66</sup> *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983). For other discussions of the importance of grand jury secrecy, see, e.g., *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991); *In re Petition of Craig*, 131 F.3d 99, 101-02 (2d Cir. 1997); *Matter of EyeCare Physicians of Am.*, 100 F.3d 514, 518 (7th Cir. 1996); *In re North*, 16 F.3d 1234, 1242 (D.C. Cir. 1994); *In re Grand Jury Proceedings*, 942 F.2d 1195, 1198 (7th Cir. 1991).

### III. THE AMENDMENT TO RULE 6(E) UNDER THE PATRIOT ACT

As was discussed in the previous section, the Patriot Act departs from the grand jury secrecy rules and its exceptions. The Act permits disclosure to federal agencies without court approval.<sup>67</sup> The material disclosed must relate to foreign intelligence or counterintelligence, and the Act defines those terms with considerable breadth. The scope of the Patriot Act's grand jury secrecy exceptions will be important in light of assessing whether the act can be reconciled with existing Supreme Court precedent.<sup>68</sup>

The Act changes the secrecy rules by amending the disclosure provisions of Rule 6(e)(3)(C) to permit disclosure of grand jury matters involving “foreign intelligence or counterintelligence . . . or foreign intelligence information . . . 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.”<sup>69</sup> The Act requires that within a reasonable time after a disclosure under the new provision, “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.”<sup>70</sup>

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<sup>67</sup> Some of these administrative agencies are unrelated to law enforcement. This point will be addressed *infra* at text accompanying notes 121-24.

<sup>68</sup> *See infra* notes 115-24 and accompanying text.

<sup>69</sup> *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 203(a)(1), 115 Stat. 272, 279 (2001).

<sup>70</sup> *Id.* § 203(a), 115 Stat. at 279.

Both the Act and amended rule define the term “foreign intelligence” by reference to the National Security Act of 1947 to include “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons.”<sup>71</sup> The term “counterintelligence” is likewise defined by reference to the National Security Act, as “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.”<sup>72</sup> The PATRIOT Act itself broadly defines “foreign intelligence information” to include:

- (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
  - (cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (II) information, whether or not coming from 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.<sup>73</sup>

Under the Act, three important restrictions are placed on the disclosure: the official who receives the information may only use it in the course of his official duties; the use is “subject to any limitations on the unauthorized disclosure of such information”; and “within a reasonable time after such disclosure, an attorney for the government shall

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<sup>71</sup> § 203(a)(1), 115 Stat at 279-80, citing 50 U.S.C. § 401a(2) (1994).

<sup>72</sup> *Id.*, citing 50 U.S.C. § 401a(3).

<sup>73</sup> *Id.*

file under seal a notice with the court stating the fact that such information was disclosed” and the departments to which it was disclosed.<sup>74</sup> Furthermore, the statute does not list all of the federal agencies to which disclosure is permitted under the amended rule.<sup>75</sup>

Expressions of Congressional intent underlying the new exceptions to grand jury secrecy are relatively scant.<sup>76</sup> The original House and Senate versions contained dissimilar versions of the grand jury exception. The House version allowed disclosure of grand jury information only when authorized by a court.<sup>77</sup> The Senate version contained no requirement of prior judicial authorization or even of subsequent judicial notification.<sup>78</sup> The main Congressional debate centered on the judicial authorization requirement.<sup>79</sup> This was also a point of contention between the White House and the Senate Judiciary Committee, ultimately resulting in a compromise mandating only

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<sup>74</sup> USA PATRIOT Act § 203(a)(1), 115 Stat. at 279 (2001).

<sup>75</sup> *See infra* notes 121-24 and accompanying text.

<sup>76</sup> This is due in large part to the hasty manner in which the Patriot Act was enacted. President Bush submitted his anti-terrorism legislation to Congress on September 19, 2001, and signed the final version of the bill on October 26, 2001. *See* Martha Mendoza, *New Anti-Terror Law Brings Consternation: Security Officials and Lawyers Scramble to Decipher Complex Provisions: Federal Guidance is in Short Supply*, L.A. TIMES, Dec. 16, 2001, at A4 (noting that Congress held no hearings on the bill that became the PATRIOT Act, resulting in very limited legislative history).

<sup>77</sup> *See*, H.R. 2975, 107th Congress, § 353 (2001).

<sup>78</sup> *See* S. 1510, 107th Congress, § 203 (2001).

<sup>79</sup> *See* 147 CONG. REC. S11002 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy). *See also* John Lancaster, *Anti-Terrorism Bill Hits Snag on the Hill*, WASH. POST, Oct. 3, 2001, at A6; Stewart Baker, *Grand Jury Secrecy Rules Help the Terrorists*, WALL ST. J., Oct. 5, 2001, at A14 (stating that senate negotiators stalled the entire bill over proposal authorizing broader disclosure of grand jury information).

judicial notification.<sup>80</sup> Ultimately, the compromise was said to “maintain some degree of judicial oversight of the dissemination of grand jury information.”<sup>81</sup>

#### IV. THE SUPREME COURT AND GRAND JURY SECRECY

In interpreting Rule 6(e), the Supreme Court has repeatedly reaffirmed the importance of preserving the secrecy of grand jury proceedings. A review of the main Supreme Court cases relating to grand jury secrecy demonstrates the Supreme Court’s emphasis on the policies underlying grand jury secrecy. Essentially, the Court has exercised a gatekeeper function by balancing the interests disclosure and secrecy.

In an early case, *United States v. Procter & Gamble Co.*,<sup>82</sup> the government sought review of a lower federal court order, which dismissed the government’s case filed under the Sherman Act against corporations when the government refused to release a grand jury transcript to the corporations.<sup>83</sup> The government filed a civil suit against the corporations relating to antitrust violations pursuant to 15 U.S.C.S. § 4 after a grand jury failed to return an indictment in a prior criminal proceeding.<sup>84</sup> The government used the grand jury transcript to prepare for the civil trial, and the corporations requested the same

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<sup>80</sup> See Lancaster, *supra* note 70.

<sup>81</sup> 147 CONG. REC. S10993 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

<sup>82</sup> 356 U.S. 677 (1958).

<sup>83</sup> See *id.* at 678.

<sup>84</sup> See *id.* The civil action sought to enjoin alleged violations of § 1 and § 2 of the Sherman Act.

privilege.<sup>85</sup> The corporations moved for discovery and production of the minutes.<sup>86</sup> The district court granted the motion, holding that the corporations had shown good cause.<sup>87</sup>

The government was directed to produce the transcript, but it refused to obey the order and filed a motion requesting the orders be amended to provide that if production was not made, the complaint would be dismissed.<sup>88</sup> The corporations did not oppose the motion, and the case was dismissed.<sup>89</sup> On appeal, the Supreme Court emphasized the long-established policy that maintained secrecy of grand jury proceedings in the federal courts.<sup>90</sup> The Court held that the “indispensable” secrecy of grand jury proceedings could not be broken except where there was a “compelling necessity.”<sup>91</sup> In reversing the judgment, the court concluded that no compelling necessity was shown for the wholesale discovery and production of a grand jury transcript under Fed. R. Civ. P. 34.<sup>92</sup>

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<sup>85</sup> *See id.* at 679.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.* Interestingly, the district court held that It rested on the ground that the Government was using the transcript in preparation for trial, that it would be useful to the corporations in their preparation, that only in this way could the corporations get the information.

<sup>88</sup> *See id.* at 682.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* Along these lines, the court stated, The 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 the reasons must be shown with particularity.

<sup>91</sup> *See id.* at 683

<sup>92</sup> *See id.* at 684.

Similarly, in *United States v. Sells Engineering Corp.*,<sup>93</sup> the Justice Department sought review of a Ninth Circuit decision, which held that disclosure of grand jury materials to government attorneys and their assistants for use in a civil suit was not permissible.<sup>94</sup> The Justice Department argued that its attorneys were entitled to have automatic access to grand jury materials under Fed. R. Crim. P. 6(e)(3)(A)(i).<sup>95</sup> The Ninth Circuit held that access was permissible only pursuant to a court order obtained upon the showing of a particularized need.<sup>96</sup> The government further asserted that the court below had not correctly applied the “particularized-need” standard.<sup>97</sup>

In affirming the Ninth Circuit decision, the Supreme Court held that disclosure as of right under Fed. R. Crim. P. 6(e)(3)(A)(i) applied only to those attorneys who conducted the criminal matters to which the materials pertained.<sup>98</sup> According to the Court, this conclusion was mandated by the general purposes of grand jury secrecy, by the limited reasons for which government attorneys were granted access to grand jury materials for criminal use, and by the legislative history of Fed. R. Crim. P. 6(e).<sup>99</sup> The Court also agreed with the Ninth Circuit’s statement that the fact that the grand jury

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<sup>93</sup> 463 U.S. 418 (1983).

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See id.* Fed. R. Crim. P. 6(e)(3)(A)(i) permits disclosure of grand jury materials without a court order to an attorney for the government for use in the performance of such attorney’s duty.

<sup>99</sup> *See id.*

materials were rationally related to the civil suit did not satisfy the particularized need standard for granting court-ordered access.<sup>100</sup>

The *Sells* Court emphasized that the grand jury would in fact be unable to function if the secrecy of its proceedings were not carefully maintained. Indeed, the Court has gone so far as to call grand jury secrecy “indispensable.”<sup>101</sup> *Sells* and *Procter* collectively represent the court’s staunch unwillingness to depart from grand jury secrecy. The Court in *Sells* established a higher threshold by strengthening the particularized needs analysis. In both these cases the court’s emphasis and respect for grand jury secrecy is virtually undeniable and almost absolute.

Similarly, in *Illinois v. Abbott & Associates, Inc.*,<sup>102</sup> the Supreme Court affirmed a lower court finding prohibiting a state attorney general access to transcripts and documents generated during two federal grand jury investigations of alleged bid-rigging in the construction trades in his state.<sup>103</sup> In *Abbott*, the Supreme Court found that there was a long tradition of grand jury secrecy that important to the justice system.<sup>104</sup>

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<sup>100</sup> *See id.* In this regard the Court held that parties seeking grand jury transcripts 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.

<sup>101</sup> *See id.*

<sup>102</sup> 460 U.S. 557 (1983).

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

Interestingly, however, in *U.S. v. John Doe, Inc.*,<sup>105</sup> the Supreme Court reversed a lower court decision and held that Fed. R. Crim. P. 6(e) did not require petitioner to obtain a court order before re-familiarizing himself with the details of a grand jury investigation.<sup>106</sup> In *Doe*, an attorney who conducted the criminal prosecution, simply wished to use the material for consultation regarding the civil phase of a dispute.<sup>107</sup> The Court decided that the Rule's plain language contained no prohibition against the continued use of information by attorneys who legitimately obtained access to the information through the grand jury investigation.<sup>108</sup>

The crucial part of the *Doe* analysis is the court's ruling that the public benefits of the disclosure in this particular case did not outweigh the dangers created by the limited disclosure requested; the Court reasoned that disclosure of a summary of a portion of the grand jury record to named attorneys for purposes of consultation did not pose a risk of a wide breach of grand jury secrecy.<sup>109</sup> The Court found the potential for grand jury abuse minimal where the civil use contemplated was simply consultation with various government lawyers about the prudence of proceeding with a civil action.

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<sup>105</sup> 481 U.S. 102 (1987).

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See id.* at 108.

<sup>109</sup> *See id.* That being said the court made it clear that it was not retracting on the "case law that had developed in response to requests for disclosure by private parties had consistently requir[ing] 'a strong showing of particularized need' before disclosure is permitted."

Because of *Doe*'s factual context, the case cannot be interpreted as a departure from the *Sells* and *Procter* holdings. The case nonetheless opens the door for grand jury disclosure by demonstrating the Court's willingness to allow such disclosure where the aggregate effect on grand jury secrecy is minimal. This is an important point in considering whether the Patriot Act's exception accommodates the Supreme Court's reverence and respect for grand jury secrecy and its underlying policies.<sup>110</sup>

In *United States v. Williams*,<sup>111</sup> the government challenged a Tenth Circuit decision dismissing an investor's indictment for making false statements to a bank because the prosecutor had failed to fulfill its obligation to present "substantial exculpatory evidence" to the grand jury.<sup>112</sup> The Supreme Court reversed the dismissal holding that the rule requiring disclosure to the grand jury of "substantial exculpatory evidence" was not supported by the trial court's "supervisory power."<sup>113</sup>

Essential to this holding was the court's general findings with respect to the grand jury as an institution. Along these lines the court stated that the

grand jury 'is a constitutional fixture in its own right.' The whole theory of its 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. Although the grand jury normally operates, of course, in the courthouse and under judicial

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<sup>110</sup> See *infra* notes 115-24 and accompanying text.

<sup>111</sup> 504 U.S. 36 (1992).

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 45. The Court's reversal hinged on the grand jury as an institution over whose functioning the courts did not preside. The Court found that the rule was inconsistent with the traditional function of the grand jury, which was to determine whether enough evidence existed to prosecute, not to allow the accused to put on a defense. The Court refused to convert a non-duty of the grand jury itself into an obligation of the prosecutor.

auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. [citations omitted]<sup>114</sup>

As such, the Court focused on the independence of the grand jury, an independence that is arguably breached when the government mandates grand jury information sharing with enforcement agencies. Similar to *Sells* and its predecessors, *Williams* upholds and safeguards the sanctity of the grand jury.<sup>115</sup> While *Sells* and prior cases aimed to protect the secrecy of grand jury information, *Williams* safeguarded the independence of the institution.

Both the independence and secrecy of the grand jury have been potentially subverted by the Patriot Act amendments to Rule 6.<sup>116</sup> Several common themes pervade the Supreme Court's review of grand jury disclosure disputes. The Court has been reluctant to allow for disclosure and when it has allowed it, it has done so in a restricted and limited manner. The concerns for grand jury abuse have been prevalent, and the Court has persistently applied the policies underlying secrecy as a ground for not allowing disclosure. Congress felt that there was no need for judicial approval in matters of national security. The next part will assess whether this is a sound policy and whether this accommodates the traditional judicial frameworks and concerns.

**A. *Reconciling Supreme Court Precedent and the New Exception***

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<sup>114</sup> *See id.* at 47.

<sup>115</sup> *See id.*

<sup>116</sup> *See supra* notes 111-13 and accompanying text.

Under the Patriot Act's amendment, Congress has made the policy choice of allowing grand jury disclosure; a choice that, until the Act's passage, has been subject to judicial review.<sup>117</sup> Following heated legislative debate surrounding the court approval requirement, Congress has made the decision to tip the balance in favor of national security.<sup>118</sup> After reviewing the relevant Supreme Court cases it is clear that the Court has been more careful in safeguarding disclosure than Congress has been.

Under the recent Changes to Rule 6(e), Congress has opened the door for grand jury disclosure without court approval. Many question Congress' action in this regard. The policy underlying Congress' amendment relates to the failure of law enforcement and the intelligence community in sharing of crucial information that was ultimately part of the cause for 9-11 terrorist attacks.

Central to this exception is enhancing the coordination of law enforcement, defense, and national security efforts. Combating the newly emerging face of terrorism necessarily requires increased coordination between police officers, intelligence agents, and the armed forces.<sup>119</sup> A good case can be made for an exception permitting the disclosure of some grand jury materials regarding foreign intelligence and

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<sup>117</sup> For more on this point see generally Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699, 706 (2002).

<sup>118</sup> See Stewart Baker, Grand Jury Secrecy Rules Help the Terrorists, WALL ST. J., Oct. 5, 2001, at A14 (stating that senate negotiators stalled the entire bill over a proposal authorizing broader disclosure of grand jury information).

<sup>119</sup> See BBC News: Americas, *Congress Damns U.S. Intelligence Agencies*, Jul. 17, 2002, [news.bbc.co.uk/1/hi/world/americas/2134086.stm](http://news.bbc.co.uk/1/hi/world/americas/2134086.stm) (last visited Mar. 27, 2004).

counterintelligence to federal agencies responsible for matters such as national security, immigration, and military defense.

While national security is a strong competing interest that may arguably trump the policies underlying grand jury disclosure, Congress could have provided for a more limited exception, one that takes into account the Supreme Court's strong position against freely allowing disclosure of such information. Limiting the broad scope of the exception would better accommodate the policies and bring the Congressional amendment more in line with the views expressed by the Supreme Court in *Procter*, *Sells*, *Doe*, and *Williams*.<sup>120</sup>

There are several things Congress should do to limit the scope of the new amendment. First, the receiving agencies should develop procedures to ensure that grand jury information is kept confidential to the greatest extent possible, and to sensitize those dealing with grand jury material to the need for preserving secrecy. Congress can easily outline these procedures. This would parallel what the Court has done in grand jury disclosure disputes.<sup>121</sup> For instance, the Supreme Court has often explained that any disclosure of grand jury information must be limited to a specific function; disclosure cannot be wholesale.<sup>122</sup>

Another safeguard that Congress can implement is allowing the Patriot Act's sunset provision to apply to the grand jury exception. Although the Act includes a sunset provision, under which the changes made by the Act will end on December 31, 2005, the

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<sup>120</sup> See *supra* text accompanying notes 82-112.

<sup>121</sup> See *supra* Part VI for a discussion on *Sells* and *Williams*.

<sup>122</sup> See *id.*

amendments to the grand jury disclosure rules are specifically excepted from the sunset provision.<sup>123</sup> The notices required by Rule 6(e)(3)(c)(iii) (instead of plenary judicial approval) will provide Congress with a way to assess whether the exception is operating in a functional way. By reviewing the notices filed by government attorneys seeking disclosure, Congress can give itself the opportunity to ensure that the exception is not leading to grand jury abuses against which the Supreme Court has been vigilant.

Another area requiring improvement is the Patriot Act's failure to designate particular agencies that can have access to the information stemming from grand jury investigations. Allowing "federal law enforcement agencies" with access to grand jury material is overbroad. This is completely inimical to the Supreme Court's requirement that disclosures requests be granted only by a strict showing of a "particularized need."<sup>124</sup> Indeed, "there are over 50 major federal law enforcement agencies"<sup>125</sup> and "there are as many as 200 federal agencies today that have some criminal enforcement role."<sup>126</sup> For instance, there are "criminal law enforcement personnel functioning within the Department of Agriculture, the Department of Labor, the Department of the Interior, the

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<sup>123</sup> See Patriot Act § 224(a), 115 Stat. at 295.

<sup>124</sup> Indeed, "federal law enforcement agency" would cover the Federal Bureau of Investigation, the Drug Enforcement Administration, the Secret Service, the Postal Inspection Service, the United States Marshals Service, the Customs Service, the Internal Revenue Service, the Bureau of Alcohol, Tobacco, and Firearms,

<sup>125</sup> See NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 6-8 (3d Ed. 2000).

<sup>126</sup> *Id.* At 6.

Securities and Exchange Commission, and the Food and Drug Administration.”<sup>127</sup>

Specifically defining the agencies that become privy to grand jury information would better accommodate the Supreme Court’s policy-emphasis on grand jury secrecy.

## V. CONCLUSION

Morton Halperin, testifying on behalf of the Center for National Security Studies, noted that the proposals “concerning the sharing of information on Americans with the intelligence community,” represent a “sea change in laws that have been on the books for thirty years” segregating domestic law enforcement and the intelligence community.<sup>128</sup> The criticism of this departure in the law has centered on the lack of adequate supervision and the overbroad manner in which grand jury information can be accessible.<sup>129</sup>

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<sup>127</sup> *Id.* at 8. The list can potentially get even longer: The following are among the agencies identified in the NATIONAL SECURITY ACT as being within the “intelligence community:” 50 U.S.C. § 401a (1994). the Office of the Director of Central Intelligence, the Central Intelligence Agency, the National Intelligence Council, the National Security Agency, the Defense Intelligence Agency, the Central Imagery Office, the National Reconnaissance Office, the national intelligence offices within the Department of Defense, the intelligence elements of the Army, Navy, Air Force, Marine Corps, Department of Treasury, and Department of Energy, the Bureau of Intelligence and Research of the Department of State. 50 U.S.C. § 401a (1994).

<sup>128</sup> *See* Legislative Proposals in the Wake of September 11, 2001 Attacks: Before the Permanent Select Comm. on Intelligence of the United States Senate, 107th Cong. (Sept. 24, 2001) (statement of Morton H. Halperin, Chair, Advisory Board, Center for National Security Studies).

<sup>129</sup> *See, e.g.,* Legislative Proposals in the Wake of September 11, 2001 Attacks: Before the Permanent Select Comm. on Intelligence of the United States Senate, 107th Cong. (Sept. 24, 2001) (testimony of Jerry Berman, Executive Director, Center for Democracy and Technology). Mr. Berman was particularly concerned that the proposal “required no showing of need and included no standard of supervisory review or approval.” *Id.* *See also,* Civil Rights and Anti-Terrorism Efforts: Before the United States Senate Judiciary Comm. Subcomm. on the Constitution, Federalism, and Prop. Rights, 107th Cong. (Oct. 3, 2001) (testimony of Dr. Morton H. Halperin, Senior Fellow, the Council on Foreign

This paper has suggested the adoption of several provisions that would curtail the potential abuses of wide grand jury disclosure, while simultaneously maintaining the vitality of the exception as an effective law enforcement mechanism. This paper proposed three revisions to the current rule: limiting the agencies that have access to grand jury information, enacting guidelines limiting the purposes and uses of the information, and enacting a sunset provision such that Congress may reassess the utility of the new exception in due time. Enacting these three proposals would better reconcile the Patriot Act exception with the Supreme Court’s strong policy emphasis on grand jury secrecy.

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Relations and Chair, Advisory Board, Center for National Security Studies). Dr. Halperin also urged restricting the kind of information that could be disclosed to foreign intelligence officials, limiting disclosure to officials “directly involved in a terrorism investigation, and “marking and safeguarding any disclosed information.” *Id.*