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GRAND JURY SECRECY AND THE ADMINISTRATIVE AGENCY: BALANCING EFFECTIVE PROSECUTION OF WHITE COLLAR CRIME AGAINST TRADITIONAL SAFEGUARDS

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INTRODUCTION

Criminal prosecutions of businessmen and the enterprises they serve have occurred with increased frequency in the past several years. Prosecutions for violations of every conceivable regulatory statute have been brought. "Fraud Sections," which did not exist in most United States Attorneys' Offices a decade ago, not only now flourish but have been expanded in their activities and have been aptly redesignated as "Economic Crimes" units.¹

Administrative agencies, once thought to exist primarily to provide regulatory expertise and guidance to businessmen and corporate entities in congressionally selected areas, have emerged in recent years as the cutting edge for new concepts in criminal prosecutions—referred to as "white-collar crimes"—flowing from what previously were viewed as regulated economic activities. "White-collar" prosecutions are not aberrational and will continue at an accelerating rate. Congressional prodding will, in the next few years, cause the evaporation of any reluctance to prosecute businessmen for economic activities now criminalized.

On June 21, 1978, the Honorable John Conyers, Jr., Chairman of the Subcommittee on Crime of the Committee on the Judiciary of the United States House of Representatives, announced that his committee, concerned about the "general tolerance of white-collar crime," which he viewed as "the most serious, all-pervasive, insidious crime problem in America today," would institute "white-collar crime hearings which will last for at least the next 18 months."² Even more ominous for the American

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¹ Economic crime units have been or are being created in 27 United States Attorneys' Offices. *The New York Times*, July 15, 1979, at 29, col. 2.

² Hearings Before the House Subcomm. on Crime of the Comm. on the Judiciary, 95th Cong., 2d Sess. 1 (1978). Representative Conyers observed that "white-collar crime destroys the moral fabric of our cultural values." *Id.* He estimated that white-collar crime costs Americans roughly \$44 billion each year. When measurements of corporate antitrust violations were factored in, he "conservatively estimated" the figure to exceed \$200 billion annually. *Id.*

business community was one of the questions which Representative Conyers stated his committee would address: "What are the major white-collar crimes which the Congress, the Justice Department, the FBI and *and the regulatory agencies* should be paying special attention to?"³

The Supreme Court recently recognized with approval the congressional intent to involve regulatory agencies—a name which in the new era of white-collar prosecutions is rapidly becoming a euphemism—in the criminal prosecution of previously acceptable, or at least countenanced, economic activities. In the context of reversing a denial to enforce two IRS summonses,⁴ the Court stated that "Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined."⁵ The intertwining of the regulatory agency with the criminal process raises a number of serious problems for businessmen, corporate enterprises and their legal advisors, particularly in this era of governmentally mandated disclosures of corporate activities to regulatory agencies.

This article examines one of those problems: the concern all citizens, including members of congressional committees, have for balancing the public's interest in prosecuting white-collar crime against the traditional notions of grand jury secrecy. Underlying the questions raised in this area is the concept that an administrative agency may not resort to a grand jury to develop information for use in connection with civil or administrative actions.⁶ Specifically, the historical evolution of grand jury secrecy will serve as background for an analysis of the current judicial and legislative approach to the problem of whether or not, to what degree and with what safeguards, administrative agency personnel may be permitted to "participate"⁷ in grand jury proceedings. Several suggestions that emerge from this analysis indicate that the recent passion for prosecution of white-collar crime does not obliterate constitutionally guaranteed rights.

HISTORICAL CONTEXT

The history of the grand jury can be traced to the Middle Ages.⁸ Some

³ *Id.* at 2 (emphasis added). Representative Conyers's remarks left little doubt that his purpose was not to conduct post-mortem hearings for cases such as those involving "I.T.&T., Lockheed and Gulf Oil." Rather, his ultimate objective was "legislative reforms" designed to produce more "white-collar" prosecutions. *Id.* at 3.

⁴ *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978). LaSalle and its vice-president had successfully blocked enforcement of the Internal Revenue Service (IRS) summonses on the ground that the summonses had been issued to aid a criminal investigation. *Id.* at 304.

⁵ *Id.* at 309.

⁶ *See, e.g., United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

⁷ Administrative agency personnel "participation" in grand jury proceedings will be treated in its broadest sense; that is its use as Special Assistant United States Attorneys and for "office assistance" in the form of analyzing grand jury and other materials.

⁸ Our fascination with and fear of the grand jury has prompted authors and courts to discuss its genesis and the purpose for requiring that its deliberations remain secret. *See, e.g.,*

authority exists for arguing that the concept of an accusing body drawn from the citizenry traces its roots from ancient Athens, to the Saxons who settled in England in the fifth and seventh centuries and the Scandinavians of the eighth century.⁹ However, the generally accepted view is that the grand jury had its origins in the Assize of Clarendon issued by King Henry II in 1166.¹⁰ The Assize of Clarendon drew from the community persons who, under oath, and based upon their own knowledge, leveled accusations against their neighbors. The Crown called forth the Assize, which served by leave of the Crown, heard testimony, and deliberated in public, essentially as an investigative arm of the King.¹¹ In 1368, there appeared an accusing body called "le grande inquest," consisting of twenty-three persons empowered to hear witnesses and return accusations. This body adopted the policy of hearing witnesses and deliberating in secrecy.¹² Nevertheless, the wheels of justice turned slowly even in those ancient times. Not until 1681 did the true independence of the grand jury and the principle of grand jury secrecy become entrenched. In that year, a jury composed of men whose names have long since been forgotten, dared to defy the King. In the cases of the *Earl of Shaftesbury*, and *Stephen Colledge*,¹³ involving charges of treason, the King and his counsel insisted that the grand jurors conduct their proceedings in public. The grand jurors refused, successfully demanding that they be permitted to question witnesses without the presence of the Royal prosecutors.¹⁴ Adding insult to the

United States v. Procter & Gamble Co., 356 U.S. 677, 681-82, n.6 (1958); United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954); United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931); M. FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* (1975) [hereinafter cited as FRANKEL & NAFTALIS]; Lacey, *The Power of the Grand Jury*, ABA NATIONAL INSTITUTE ON REPRESENTING A CLIENT BEFORE THE GRAND JURY, 218 (1978) [hereinafter cited as Lacey]; Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965) [hereinafter cited as Calkins]. Note, *Administrative Agency Access to Grand Jury Materials Under Amended Rule 6(e)*, 29 CASE W. RES. L. REV. 295 (1978); Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162 (1975) [hereinafter cited as *Agency Access*]; Note, *Recent Developments in the Law of the Federal Grand Jury*, 1977 UTAH L. REV. 170.

⁹ See EDWARDS, *THE GRAND JURY* 26 (1906) [hereinafter cited as EDWARDS]; J. EHRlich, BLACKSTONE 904 (1959) (stating that the constitution of the grand jury as well as the number of grand jurors, twenty-three with a majority of twelve, was fixed "so early as the laws of King Ethelred"); 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 312-27 (3d ed. 1922); J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND*, 184-86, 250-58 (1883) (cited in Calkins, *supra* note 8, at 456).

¹⁰ One commentator suggests that the Assize of Clarendon was the precursor of the petit jury rather than the grand jury which did not evolve until 1368. See EDWARDS, *supra* note 9. We shall leave to the academicians the resolution of such debates.

¹¹ See Calkins, *supra* note 8, at 456-57; FRANKEL & NAFTALIS, *supra* note 8, at 6-8.

¹² Calkins, *supra* note 8, at 457; Lacey, *supra* note 8, at 218.

¹³ FRANKEL & NAFTALIS, *supra* note 8, at 9-10.

¹⁴ Of course, the grand jurors were not yet common people but were "reelected from the gentlemen of the best figure in the country." In the *Stephen Colledge* case the grand jurors were 24 knights. EDWARDS, *supra* note 9, at 28.

Royal injury, the grand jurors refused to indict the defendants.¹⁵ The *Shaftesbury* and *Colledge* cases came to be recognized as bulwarks against the oppression and despotism of the Crown. The concept of grand jury proceedings being conducted in secrecy became a powerful factor in establishing the independence of the grand jury.

The English grand jury institution was brought by the colonists to America and incorporated into the Constitution by the ratification of the fifth amendment in 1791.¹⁶ The American constitutional grand jury was designed to serve the same purposes and to operate in substantially the same manner as its English progenitor.¹⁷ The American grand jury was created to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. In order to serve that function adequately the grand jury was made independent of the Executive and empowered to act in secrecy. It was not to be employed to elicit evidence in civil cases. Indeed, as Justice Douglas stated, "[i]f the prosecution were using that device, it would be flouting public policy."¹⁸

From our Nation's earliest days, the belief in grand jury secrecy has remained unchanged. The reasons often given for the need for grand jury secrecy are:

- 1) to prevent the escape of those whose indictment may be contemplated;
- 2) to insure the grand jury's freedom from outside influence in its deliberations;
- 3) to prevent persons subject to indictment or their friends from importuning the grand jurors;
- 4) to prevent subornation of perjury or tampering with the witness who may testify before the grand jury and later appear at the trial of those indicted by it;
- 5) to encourage free and untrammelled disclosures by persons possessing information with respect to the commission of crimes;
- 6) to protect an innocent accused who is exonerated from disclo-

¹⁵ Neither *Shaftesbury* nor *Colledge* escaped the Crown's wrath. The King arranged for the *Colledge Case* to be presented to a more hospitable grand jury, which returned a true bill. *Colledge* was convicted and executed. *Shaftesbury* fled the King's oppression to Holland where he remained until his death two years later. FRANKEL & NAFTALIS, *supra* note 8, at 10 n.2.

¹⁶ *United States v. Costello*, 350 U.S. 359, 362 (1956); *Ex parte Bain*, 121 U.S. 1, 10-11 (1887). The adoption of the grand jury system in our Constitution as the sole method for bringing felony criminal charges against our fellow citizens demonstrates the high place it holds in our society as an instrument of justice.

¹⁷ 350 U.S. at 362.

¹⁸ *United States v. Procter & Gamble Co.*, 356 U.S. at 683. Justices Harlan, Burton, and Frankfurter dissented from most of Justice Douglas's opinion. They joined him, however, in the view that the institution of a grand jury solely to develop evidence for use in civil cases is a misuse of the grand jury. *Id.* at 689. See *J.R. Simplot Co. v. United States*, 77-1 U.S. Tax Cas. (CCH) ¶ 9146 at 86,198 (9th Cir. 1976), *withdrawn as moot on other grounds*, 77-2 U.S. Tax Cas. (CCH) ¶ 9511 (9th Cir. 1977).

sure of the fact that he has been the subject of an investigation, and from the expense of standing trial where there was no probability of guilt.¹⁹

Originally, neither the Sovereign nor its agents could be present during the grand jury's deliberations. The erosion of this ideal is significant in analyzing the constitutional preservation of the tradition of grand jury secrecy. As fear of governmental coercion of grand jurors lessened, prosecutors began to appear in the grand jury room. The rule of secrecy was extended to them. Ostensibly, the prosecutor's presence in the grand jury proceeding was to assist in properly drawing the form of indictment desired by the grand jury. This rationale evolved in the nineteenth and twentieth centuries, however, to the point where today the presence of the government's representative is a commonly accepted right of the state.²⁰ Yet despite our liberality in permitting the presence of representatives of the government during grand jury examination of witnesses, two things remain clear. The grand jury has retained broad inquisitorial powers to enable it to perform its sole function of determining whether to institute criminal charges,²¹ and Congress has not granted to administrative agencies unrestrained inquisitorial power comparable to that of a grand jury. That kind of power should not be vested in the executive branch on an ongoing basis any more than our forebears were willing to vest it in, once having wrested it from, the Crown.²²

However, Congress has given administrative agencies limited power to decide whether to institute secret civil investigations of alleged violations of statutes entrusted to them. That power often includes deciding whom and what to investigate, and summoning citizens to appear before them and give testimony under oath.²³ At the same time, Congress has seen fit to criminalize certain types of economic activities, but has not shifted the prosecutorial responsibility to those with the "expertise." Therefore, the Department of Justice and the various United States Attorneys' Offices often need the "expertise" of the various administrative agencies' staffs to prosecute violators of these laws. When these criminal violations also are the subject of civil prosecutions by the administrative agencies, the stage is often set for the conduct of parallel proceedings²⁴ and for the use of

¹⁹ *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954). See *Dennis v. United States*, 384 U.S. 855 868-70 (1966); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958).

²⁰ Calkins, *supra* note 8, at 458.

²¹ See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958); *Costello v. United States*, 350 U.S. 359, 363-64 (1956).

²² See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1124 (E.D. Pa. 1976) (citing *Agency Access*, *supra* note 8, at 178-79).

²³ See, e.g., 15 U.S.C. §§ 77t, 78u (1976) (investigatory powers of Securities and Exchange Commission (SEC) under the Securities Act of 1933 and Securities Exchange Act of 1934, respectively).

²⁴ For a discussion of the problems attending parallel proceedings, see Hassett, *Ex Parte*

agency personnel by prosecutors to assist in grand jury proceedings. The issues of whether agency personnel should be so utilized, and what precautions should be taken to insure grand jury secrecy and to avoid even inadvertent subversion of the grand jury process have been the subject of much scholarly and judicial debate.²⁵ The recent amendments of Rule 6(e) of the Federal Rules of Criminal Procedure evidence congressional cognizance of the significance of these questions.

Once the traditional notion that representatives of the Sovereign could not be present during grand jury deliberations was weakened, both prosecutors and a second group of government agents—administrative agency personnel—marched into the grand jury room. The courts were then faced with the problem of determining and controlling the scope of these incursions into the previously sacrosanct environment of the grand jury.

Rule 6(e) of the Federal Rules of Criminal Procedure, originally promulgated in 1945, codified prior case law governing access to grand jury materials and implemented the tradition of grand jury secrecy.²⁶ The original version of Rule 6(e)²⁷ provided that:

[d]isclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the Court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. . . .²⁸

Pre-Trial Discovery: The Real Vice Of Parallel Investigations, 36 WASH. & LEE L. REV. 1049 (1979); Pickholz, *Parallel Enforcement Proceedings: Guidelines for the Corporate Lawyer*, 7 SEC. REG. L. J. 99 (1979).

²⁵ See, e.g., *In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *United States v. Dondich*, 460 F. Supp. 949 (N.D. Cal. 1978); *J. R. Simplot Co. v. United States*, 77-1 U.S. Tax Cas (CCH) ¶ 9146 (9th Cir. 1977). See generally *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976); *Capitol Indem. Corp. v. First Minn. Constr. Co.*, 405 F. Supp. 929 (D. Mass. 1975); *United States v. Doe*, 341 F. Supp. 1350 (S.D.N.Y. 1972); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971).

²⁶ See, *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1227 (D.D.C. 1974).

²⁷ Congress amended Rule 6(e) in April, 1977. See text accompanying notes 65-78 *infra*.

²⁸ The prohibitions against disclosure do not run to the witness since the tradition of grand jury secrecy stems from the desire to protect the grand jurors. Moreover, one who testifies before the grand jury should assume that his testimony ultimately will be disclosed to the defendant and may be required in any subsequent trial.

In the context of agency personnel appearing before grand juries as assistants to the prosecution, the logical interpretive question under Rule 6(e) became whether agency personnel are "attorneys for the government" to whom the Rule permitted disclosure of grand jury matters.

Rule 54(c) of the Federal Rules of Criminal Procedure defines Attorney for the Government to include "the Attorney General, an authorized assistant of the Attorney General, [or] a United States Attorney. . . ." Neither counsel for administrative agencies nor state, county or municipal attorneys have been viewed as "attorneys for the government."²⁹ Nevertheless, because grand juries frequently are involved in analyzing technical materials—particularly in "white-collar" criminal investigations—they, and the prosecutors, have developed the practice of turning to administrative agencies such as the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC) for expert assistance.

Agency personnel usually assist prosecutors conducting grand juries either as sworn Special Assistant United States Attorneys or by simply providing "office assistance" to the supervising Assistant United States Attorney. The designation of agency personnel as "special assistants" is now well-entrenched³⁰ and, because of certain safeguards imposed by the prosecutors,³¹ is less troublesome if the agency personnel are not the same

²⁹ See, e.g., Special Feb. 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973); *In re* Grand Jury Proceedings, 29 F.R.D. 151 (E.D. Pa. 1961), *aff'd* 309 F.2d 440, 443 (3d Cir. 1962); *In re* Grand Jury Investigation, 414 F. Supp. 74, 76 (S.D.N.Y. 1976); United States v. Daneals, 370 F. Supp. 1289, 1296-97 (W.D.N.Y. 1974). Arguably, even members of the Department of Justice's Civil Division and Assistant United States Attorneys assigned to local office civil divisions are not included within the definition of "attorneys for the government" for purposes of disclosing to them grand jury materials. *Capitol Indem. Co. v. First Minn. Constr. Co.*, 405 F. Supp. 929, 932 (D. Mass. 1975).

³⁰ See *United States v. Bazzano*, 570 F.2d 1120, 1125 n.7 (3d Cir. 1977), *cert. denied*, 436 U.S. 917 (1978); *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1118 (E.D. Pa. 1976); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971); *United States v. Anzelmo*, 319 F. Supp. 1106 (E.D. La. 1970) (disclosure to SEC attorney and accountant); *United States v. Culver*, 224 F. Supp. 419 (D. Md. 1963).

³¹ Currently, a Rule 6(e) disclosure by prosecutors to agency representatives assisting them follows a procedure consistent with the July 30, 1977 amendments to Rule 6(e). See text accompanying note 87 *infra*. The United States Attorney sends a letter to the appropriate agency or agent stating that certain grand jury material is being disclosed to the agent pursuant to Rule 6(e)(2)(A) subject to the limitations imposed by Rule 6(e)(2)(B). Subdivision (B) is quoted to the addressee with the admonition that the disclosed information may not be utilized by him or his agency "for any purpose other than assisting the attorney for the government in the performance of such attorney's duties to enforce the Federal criminal law." The addressee is further informed that, pursuant to amended Rule 6(e), his name has been or will be supplied to the district court as a person to whom disclosure was made. The agent is instructed that if it becomes necessary for him to discuss or disclose grand jury materials with other members of his agency, he is to provide the United States Attorney with their names so that this information can be reported to the court. Finally, the agent to whom disclosure is made is instructed to advise the United States Attorney promptly of the status of the investigative steps instituted by him based upon the grand jury materials disclosed to him. In addition, the United States Attorney also addresses a letter to the Chief Judge of the

individuals charged with prosecuting an on-going civil action.

The Attorney General's power to appoint Special Assistant United States Attorneys to conduct "any kind of legal proceeding . . . including grand jury proceedings" is granted by 28 U.S.C. § 515(a). That section was originally enacted in 1906³² in response to *United States v. Rosenthal*³³ where the Second Circuit held that only a United States Attorney or one of his assistants, but not a special assistant, could present matters to a grand jury. The House Committee Report indicated that the new legislation was in direct response to the *Rosenthal* decision:

[The *Rosenthal*] decision makes the proposed legislation necessary if the Government is to have the benefit of the knowledge and learning of its Attorney General and his assistants, or of such special counsel as the Attorney General may deem necessary to employ to assist in the prosecution of a special case, either civil or criminal. As the law now stands, only the district attorney has any authority to appear before a grand jury no matter how important the case may be and no matter how necessary it may be to the interests of the Government to have the assistance of one who is specially or particularly qualified by reasons of his peculiar knowledge and skill to properly present to the grand jury the question being considered by it.³⁴

One court has expressed the view that the powers implied by the broad language of 28 U.S.C. § 515(a) nevertheless are limited by factors unex-

district, advising the court that a Rule 6(e) disclosure has been made, indicating what alleged violations are being investigated, and naming the agency and person to whom disclosure has been made. See Lacey, *supra* note 8, at 228-29 (citing *United States v. Bazzano*, 570 F.2d 1120 (3d Cir. 1977)). This procedure, which does not require prior court approval or an adversary hearing, may not be totally satisfactory in certain instances. See text accompanying notes 79-85 *infra*.

³² Act of June 30, 1906, Pub. L. No. 59-404, ch. 3935, 34 Stat. 816 (1906).

³³ 121 F.2d 862 (2d Cir. 1903).

³⁴ H.R. REP. NO. 2901, 59th Cong., 1st Sess. 2 (1906). Having expressed its disagreement with the holding in *Rosenthal*, the House Committee stated:

If such a law [permitting the appointment of Special Assistant United States Attorneys] is necessary to enable the Government to properly prosecute those who are violating its laws, it is no argument against it that some grand jury may be, perhaps, unduly influenced by the demands or importunities that may be made upon it by such special counsel. The same argument can as well be made against permitting a district attorney from attending a sitting of such jury.

There can be no doubt of the advisability of permitting the Attorney General to employ special counsel in special cases, and there can be no question that if he has been employed because of his special fitness for such a special case that the Government should have the full advantage of his learning and skill in every step necessary to be taken before the trial, including that of appearing before grand juries.

Id. See also *In re Subpoena of Alphonse Persico*, 522 F.2d 41, 56-60 (2d Cir. 1975); *United States v. Wrigley*, 520 F.2d 362, 365-67 (8th Cir.), *cert. denied*, 423 U.S. 987 (1975).

pressed in the statute.³⁵ One such limitation may be the prior experience of the specially appointed Assistant United States Attorney which might disqualify him from conducting a particular grand jury investigation.³⁶ The necessity for an agency attorney, appointed as a Special Assistant United States Attorney, to serve as both advocate and witness before the same grand jury would present another instance in which a limitation should be imposed upon the Attorney General's appointment power.

The Third Circuit recently sustained convictions for conspiracy, mail fraud and securities fraud notwithstanding the appearance before the grand jury of an SEC attorney in both his capacity as a Special Assistant United States Attorney and as a witness.³⁷ While noting that an agency attorney representing different agencies of the government is not engaged in the kind of conflict of interest proscribed by the ABA Standards Relating to the Prosecution Function—and to hold otherwise would frustrate intergovernmental cooperation in criminal prosecutions—the Third Circuit condemned the practice of an attorney serving both as a prosecutor and witness in grand jury proceedings. The court held that by implication the Code of Professional Responsibility's prohibition against a prosecutor's appearing as both counsel and a witness at trial applied to grand jury proceedings. The prosecutor required to appear as a witness before the grand jury, according to the Third Circuit, should likewise withdraw from the grand jury process.

With the advent in the 1930's of numerous regulatory agencies, each of which possessed an expertise deemed necessary to assist prosecutors and grand juries, came the beginning of serious questioning of the assistance procedure and more frequent examination by the courts of the constitutional and procedural problems created by such agency assistance. Beginning in the 1970's, regulatory agencies showed more inclination to refer economic violations of the statutes they administer for criminal prosecution, and prosecutors became more interested in developing those cases. The courts too began to reexamine the problems attendant to white-collar prosecutions. The judicial approach to the problem, exemplified in a series of district and circuit court decisions, led to congressional amendment of Rule 6(e) in July 1977.³⁸

*In re William H. Pflaumer & Sons, Inc.*³⁹ was the first of the cases that prompted the Rule 6(e) amendment. In *Pflaumer*, the district court denied the defendant petitioner's motion for a protective order in which he sought to prevent IRS agents from gaining access to materials he had turned over to the grand jury pursuant to subpoena. Interestingly, the United States Attorney admitted that there was no way to prevent the IRS agents from

³⁵ *In re Perlin*, 589 F.2d 260 (7th Cir. 1978).

³⁶ *Id.* at 264.

³⁷ *United States v. Birdman*, 602 F.2d 547 (3d Cir. 1979).

³⁸ See S. REP. No. 354, 95th Cong., 1st Sess. 6, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 529 [hereinafter cited as SENATE REPORT].

³⁹ 53 F.R.D. 464 (E.D. Pa. 1971).

using the facts and information they learned while providing technical assistance to the prosecutor and the grand jury after that assistance ended. Furthermore, the United States Attorney admitted that it would be improper for the IRS to utilize the information in connection with a civil tax prosecution.⁴⁰ Nevertheless, the court held that a protective order would not issue "so long as [the records] remain under the aegis of attorneys for the government."⁴¹ However, the court's ruling was made with reservations, since it was faced with the seemingly contrary authority of *In re Grand Jury Proceedings*.⁴² *Pflaumer* was unique because the record before the court did not demonstrate that the Government commenced the criminal proceeding merely to obtain evidence which it could not otherwise obtain, that the IRS appeared to be acting in "good faith" and that the United States Attorney retained supervision of the records. Moreover, the court manifested its concern for the implications of its holding by suggesting that the Supreme Court reevaluate Rule 6(e).⁴³ In the five years between the *Pflaumer* decision and the Supreme Court's amendment of Rule 6(e), the same district judge called upon to decide *Pflaumer* found himself confronted with *Robert Hawthorne, Inc. v. Director of Internal Revenue*.⁴⁴

The plaintiff in *Hawthorne* sought, alternatively, an injunction against continuation of a grand jury investigation as to it, or an order restraining an alleged breach of grand jury secrecy stemming from the disclosure of certain subpoenaed materials to the IRS pursuant to court order. The company also tried to recover certain of its corporate records then "repos[ing] in the offices of the IRS, though under the aegis of the United States Attorney."⁴⁵

The plaintiff's allegations of Rule 6(e) violations included the prosecutor's failure to adequately advise the IRS's employees of their limited

⁴⁰ *Id.* at 466-67.

⁴¹ *Id.* at 477. The rationale of the "aegis" requirement seems to be that it impresses upon the agency the limited nature and purpose of its access. See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1108 (E.D. Pa. 1976).

⁴² 309 F.2d 440 (3d Cir. 1962) (FTC attorneys denied free access to corporate documents to aid them in administrative investigation).

⁴³ 53 F.R.D. at 475-76. Even prior to the amendment of Rule 6(e), courts generally had permitted prosecutors to disclose grand jury materials to agency personnel assisting in the conduct of a grand jury investigation, or in preparation for trial, without requiring that the personnel be appointed a Special Assistant United States Attorney. See, e.g., *Coson v. United States*, 533 F.2d 1119, 1120-21 (9th Cir. 1976); *United States v. Evans*, 526 F.2d 701, 707 (5th Cir.), cert. denied, 429 U.S. 818 (1976); *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965); *United States v. Zirpolo*, 288 F. Supp. 993, 1015 (D.N.J. 1968), rev'd on other grounds, 450 F.2d 424 (3d Cir. 1971).

⁴⁴ 406 F. Supp. 1098 (E.D. Pa. 1976).

⁴⁵ *Id.* at 1103. Documents that have been removed from the physical custody and control of a United States Attorney should not be deemed to remain under his "aegis." To so deem them, thereby lending credibility to the belief that they were still not subject to, or were at least less susceptible to, misuse, simply ignores the true nature of human activity. An unjustifiable risk of abuse thus is imposed on the affected party (as well as the concept of grand jury secrecy).

access to grand jury materials, to swear them to secrecy, and to advise them that the materials must remain under the aegis of the United States Attorney. The plaintiff also charged that subpoenaed documents had been delivered directly to the IRS, rather than to the United States Attorney or the grand jury room, and that the IRS retained the documents. Finally, plaintiff took exception to the United States Attorney's failure to directly supervise the activities of the IRS agents and to his failure to even learn the names of the IRS agents working on the case.⁴⁶

Although dismissing the plaintiff's claims for lack of factual support, the court voiced its concern "as to the manner in which the Rule 6(e) orders were implemented in this case and apparently in general." Since the "sole authority cited by the parties as a frame of reference for determining compliance with a Rule 6(e) order" was the court's earlier decision in *Pflaumer*, the court determined that "further judicial explication" was proper as well as necessary.⁴⁷ The court then set forth its "suggestions" regarding the proper procedure to be followed when agency personnel are granted access to grand jury materials.

1) There should be a strict showing of necessity before any request for the interpretive assistance of the administrative agency is granted.⁴⁸

2) The agency personnel should be sworn to secrecy and comprehensive written instructions should be given to them and to their supervisors making clear the limited nature of the agency's access to the materials.⁴⁹

3) The United States Attorney should certify to the court that the grand jury records have been segregated from general agency files, and secured and marked as grand jury records.⁵⁰

4) The United States Attorney should keep a Rule 6(e) docket. It would contain recordations of a general description of the investigation as set forth in the Rule 6(e) application, the identity of all agency personnel with access to the relevant material and their relevant supervisors, and the identity of the Assistant United States Attorney supervising the investigation. Particular grand jury materials would be generally identified, and the dates on which they were received and first considered would be noted. Finally, the Rule 6(e) docket would indicate the date on which the administrative agency's technical assistance terminated.⁵¹

The *Hawthorne* court believed itself powerless to impose its "suggestions" on the United States Attorney, except in the case before it. It viewed its supervisory power over the grand jury "[as] repos[ing] in the entire Court and not in a single judge."⁵² The court's timidity seems to ignore the facts that the court summons the grand jury, the court's clerk

⁴⁶ *Id.* at 1103 n.3.

⁴⁷ *Id.* at 1104.

⁴⁸ *Id.* at 1125 n.49.

⁴⁹ *Id.* at 1125-26.

⁵⁰ *Id.* at 1126.

⁵¹ *Id.* at 1127.

⁵² *Id.* at 1128.

works closely with the United States Attorney to schedule matters before the court⁵³ and that the United States Attorney is an officer of and subject to the control of the court.⁵⁴

Perhaps the reluctance of district courts to directly confront procedures and practices of prosecutors derives from our judiciary's tradition of refraining from assuming too great a role in the actual conduct of a trial. Unfortunately, this tradition appears to have led to the judiciary's withdrawal from active direction of grand jury proceedings, which, in turn, has diminished respect for and trust in the grand jury as a bulwark between the citizen and the Government.⁵⁵

The *Hawthorne* court had submitted its earlier order in *Pflaumer* to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.⁵⁶ The court decided to do so with its decision in *Hawthorne* as well.⁵⁷

Soon after *Hawthorne* was decided, the Ninth Circuit confronted a similar issue in *J. R. Simplot Co. v. United States*,⁵⁸ in which the petitioner challenged the civil use of grand jury materials which had been shown to twenty-four IRS agents assisting the grand jury. The *Simplot* opinion, written by Judge Hufstедler, put the brakes on agency access to grand jury materials, even for the purpose of rendering technical assistance. If followed in other circuits, and had Congress not amended Rule 6(e),⁵⁹ *Simplot's* holding would have substantially curtailed, if not totally prevented, access to grand jury materials by agency personnel. Judge Hufstедler began her opinion by observing forcefully that "the grand jury is a constitutional entity under court supervision, not a tool available for Executive branch purposes."⁶⁰ Moreover, she stated that the reason for its exist-

⁵³ *Id.* at 1105. *Accord*, *J.R. Simplot Co. v. United States*, 77-1 U.S. Tax Cas. (CCH) ¶ 9146 at 86,197 (9th Cir. 1976) ("the grand jury is a constitutional entity under court supervision, not a tool available for Executive branch purposes").

⁵⁴ 406 F. Supp. at 1126.

⁵⁵ The *Hawthorne* court made even more disquieting observations. It expressed the view that the grand jury and "the grand jurors themselves do play *some* role in the decision making process." *Id.* at 1119 (emphasis added). Moreover, the court believed that its "findings of fact fairly and substantially support[ed] the claim that the grand jury is essentially controlled by the United States Attorney and is his prosecutorial tool." *Id.* Justice Douglas has also commented that the grand jury "is now a tool of the Executive" in the eyes of the general public. *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

⁵⁶ 406 F. Supp. at 1121.

⁵⁷ *Id.* at 1126 n.54. The Advisory Committee on Criminal Rules, in its January 31, 1973 Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts recommended amending Rule 6(e). The Advisory Committee suggested adding the phrase: "For purposes of this subdivision, attorneys for the government includes those enumerated in rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." *Id.* at 1121.

⁵⁸ 77-1 U.S. Tax Cas. (CCH) ¶ 9146 (9th Cir. 1976).

⁵⁹ See text accompanying notes 66-78 *infra*.

⁶⁰ 77-1 U.S. Tax Cas. (CCH) ¶ 9146 at 86,197 (citing *Agency Access*, *supra* note 8, at 175-84.) See also *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp.

ence is not served, and the power it possesses for "massive intrusions upon freedom and privacy"⁶¹ is not justified, if used in aid of a civil case. Indeed, the court stated, "[s]uch use is in itself an abuse of the grand jury."⁶²

The court then went on to enunciate "principles" relative to the use of agency personnel in connection with grand jury proceedings. Judge Hufstedler suggested that the district courts draw "guidelines" to maintain the secrecy of the grand jury, and recommended "the thoughtful approach taken in" the *Hawthorne* case.⁶³ Specifically, the court stated that before disclosure of grand jury material is made to agency personnel, "the Government must show the necessity for each particular person's aid rather than showing merely a general necessity for assistance."⁶⁴ According to Judge Hufstedler, "absent an explanation for the failure to use qualified personnel within the Justice Department, the Government cannot carry its burden of showing that outside personnel are necessary."⁶⁵ Two additional requirements were viewed by the *Simplot* court as so basic to the preservation of values served by grand jury secrecy that they should be explicitly stated:

- (1) on appropriate request, the agency must identify the source of its information in a civil case that was preceded by a grand jury investigation in which its personnel were used to assist the prosecutor in presenting a case to the grand jury; and
- (2) upon a motion to suppress in the civil proceeding, the agency bears the burden of proving an independent source for the information.⁶⁶

Clarifying its words, and removing their onerous impact, the court observed that it intended to require no more than the type of hearing to which the Government presently must submit when it seeks to use evidence in a grand jury investigation which is allegedly inadmissible because it was secured through an allegedly unlawful act.⁶⁷

AMENDED RULE 6

The *Hawthorne* and *Simplot* courts were wrestling with the real problem of balancing traditional grand jury secrecy against what the United States Senate called the "increasing need on the part of Government attor-

1219, 1222 (D.D.C. 1974) (grand jury frequently has been characterized as an adjunct or arm of the judiciary).

⁶¹ 77-1 U.S. Tax Cas. (CCH) ¶ 9146 at 86,198 (citing *Agency Access*, *supra* note 8, at 177).

⁶² 77-1 U.S. Tax Cas. (CCH) ¶ 9146 at 86,198.

⁶³ *Id.* at 86,199 n.17. The court also suggested that the Department of Justice prescribe guidelines "regarding civil use by its employees" of grand jury materials as a means to "prevent analogous abuses." *Id.* at 86,199 n.16.

⁶⁴ *Id.* at 86,198.

⁶⁵ *Id.*

⁶⁶ *Id.* at 86,199.

⁶⁷ *Id.* at 86,199 n.18; *see* 18 U.S.C. § 3504 (1976).

neys to make use of outside expertise in complex litigation."⁶⁸ The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and the Supreme Court itself, soon began to consider the concerns expressed by the judiciary.⁶⁹

On April 26, 1976, the Supreme Court proposed an amendment to Rule 6(e) to take effect on August 1, 1976,⁷⁰ which was delayed by Congress until August 1, 1977.⁷¹ The Supreme Court's proposed amendment⁷² engendered congressional concern that the proposed clarification allowing administrative agency assistance to grand jury proceedings might lead to an abuse of the grand jury's powers.

The House and Senate Committees considering the proposed amendments to Rule 6(e) emerged from their deliberations with different views.⁷³ The House rejected the Supreme Court's proposed amendment⁷⁴ because, in its view, the "proposed substantive changes will not clarify the present situation and may even lead to further unclarity."⁷⁵ It was "feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case."⁷⁶ The House also expressed concern that "[t]his would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedures otherwise available to them."⁷⁷

The Senate, recognizing the divergent interests of grand jury secrecy and governmental access to expert assistance,⁷⁸ favored the Supreme Court's proposal. Judicial decisions, including *Simplot* and *Hawthorne*, which the Senate viewed as "highly restrictive of the use of government

⁶⁸ SENATE REPORT, *supra* note 38, at 6, [1977] U.S. CODE CONG. & AD. NEWS at 529.

⁶⁹ See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1121 (E.D. Pa. 1976).

⁷⁰ COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. No. 464, 94th Cong., 2d Sess. 1-2 (1970); H.R. REP. No. 195, 95th Cong., 1st Sess. 2 (1977) [hereinafter cited as HOUSE REPORT].

⁷¹ Act of July 8, 1976, Pub. L. No. 94-349, 90 Stat. 822 (1976).

⁷² The Supreme Court's proposal adopted the amendatory language contained in the January 31, 1973 Preliminary Draft prepared by the Advisory Committee on Criminal Rules. See note 57 *supra*.

⁷³ Compare HOUSE REPORT, *supra*, note 70, with SENATE REPORT, *supra* note 38.

⁷⁴ HOUSE REPORT, *supra* note 68, at 5.

⁷⁵ *Id.* at 5, n.9.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.* Representative Wiggins disagreed with his colleagues about their concerns over disclosures of grand jury materials. He found "no reason for a barrier of secrecy to exist between the facets of the criminal justice system which we all depend on to enforce the criminal laws." According to Representative Wiggins, preventing disclosures between Government agents investigating violations of federal criminal law would neither serve the policies underlying grand jury secrecy nor prevent the feared abuses of disclosure. *Id.*

⁷⁸ SENATE REPORT, *supra* note 38, at 6. The Senate's Report incorporated Representative Wiggins' argument that disclosure barriers amounted to walls between different facets of the same criminal justice system. *Id.*

experts,"⁷⁹ particularly concerned the Senate. The Senate version, ultimately adopted as Amended Rule 6(e), states in pertinent part:

(1) GENERAL RULE. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government,⁸⁰ or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(2) EXCEPTIONS.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any 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 as are deemed necessary by 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 disclosed, with the names of the persons to whom such disclosure was made.⁸¹

The Senate appeared sanguine that with its amendment to Rule 6(e) it had removed the restrictions on use of government experts imposed by cases like *Simplot* and *Hawthorne* while facilitating "resolution of subsequent claims of improper disclosure." Speedy resolution of disputes would be achieved through disclosure to the district court of the names of government personnel designated to assist the attorney for the government and the limitations the Rule placed on the government personnel's use of grand jury material.⁸² Its Report also evidenced the Senate's satisfaction that,

⁷⁹ *Id.* at 7, n.10.

⁸⁰ Amended Rule 6(e) did not change the definition of "attorneys for the government" found in Rule 54(c) of the Federal Rules of Criminal Procedure. See text accompanying note 29 *supra*.

⁸¹ Act of July 30, 1977, Pub. L. No. 95-78, § 2, 91 Stat. 319 (1977) (emphasis added).

⁸² SENATE REPORT, *supra* note 38, at 7-8.

although not expressly required by the rule, "the names of [agency personnel to whom disclosure was contemplated] will generally be furnished to the court before disclosure is made to them."⁸³

Subsequent decisions have viewed amended Rule 6(e) as overturning the *Simplot* and *Hawthorne* line of cases. Courts have looked upon amended Rule 6(e) as sanitizing the appearance of an agency attorney before the grand jury once he is appointed a Special Assistant United States Attorney. The cases present the view that the amendment indicates "the continuing Congressional support for interagency cooperation and the active participation of agency personnel, including agency attorneys, in grand jury proceedings."⁸⁴ However, neither those cases nor the legislative history of amended Rule 6(e) satisfies the objections and concerns previously expressed by the courts and targets of grand jury investigations.⁸⁵

The Senate Committee echoed the concerns expressed during the hearings on the proposed amendment to Rule 6(e), that to require a "necessity hearing" would "burden" the government unnecessarily since "civil misuse can be raised in subsequent civil proceedings."⁸⁶ The Senate Committee, however, missed the point.

If the grand jury is to remain a bulwark against threatened oppression and retain its respected position among the populace, justice cannot be measured in terms of expediency and "burdens" on the government or the court system. Fundamental principles must be preserved. Justice must be done in fact as well as in appearance. Furthermore, as the former Chief Judge of the United States Court of Appeals for the Second Circuit has observed, the right to challenge an allegedly improper disclosure upon appeal in a civil case, in practical terms, is meaningless. The secrecy is

⁸³ *Id.* at 8.

⁸⁴ *In re Perlin*, 589 F.2d 260, 267 (7th Cir. 1978). See also *United States v. Dondich*, 460 F. Supp. 849, 857-58 (N.D. Cal. 1978) (approving the appearance before the grand jury of the SEC attorney responsible for a concluded civil action after his appointment as a Special Assistant United States Attorney); *United States v. Birdman*, 602 F.2d 547, 563 (3d Cir. 1979).

⁸⁵ Indeed, the concern that administrative agencies may gain insights they previously lacked by virtue of the participation of their employees in grand jury proceedings seems to have been confirmed adversely to those subject to grand jury proceedings. The Senate Report made clear that:

[t]here is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a Court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions.

SENATE REPORT, *supra* note 38, at 7 n.12 (footnote omitted).

⁸⁶ See SENATE REPORT, *supra* note 38, at 7 n.12. See also *Coson v. United States*, 533 F.2d 1119, 1120 (9th Cir. 1976); Hearings on H.R. 5864 Before Subcomm. on Criminal Justice of the Comm. on the Judiciary, 95th Cong., 1st Sess. 56 (1977).

gone. A subsequent determination that the release of grand jury information was improper will not undo the damage to the principle of secrecy.⁸⁷

Nevertheless, subparagraph (2)(A)(ii) of amended Rule 6(e) leaves to the "attorney for the government" the determination of when and to what extent he finds it necessary to secure the assistance of agency personnel. The government is not required to certify to the court that the assistance is required or that it cannot be secured from within the Department of Justice.⁸⁸ In short, a "necessity hearing" is *not* required. Subjects of grand jury investigations are left to trust in the "good faith" of the government, a solution that neither satisfies them nor adequately addresses the problem. The courts are not precluded by amended Rule 6(e) from issuing discretionary orders, in the exercise of their general supervisory powers over the grand jury, embodying the types of restrictions referred to in *Simplot* and *Hawthorne* but not incorporated in the amendment.⁸⁹

PROCEDURES FOR ASSURING SECRECY

By this late date in our jurisprudence it is clear that the Legislative, Judicial and Executive branches of our Government are in agreement that the complex nature of white-collar criminal prosecutions requires the technical assistance of experts from administrative agencies. We do not challenge that perception. Indeed, we concur with it.

Despite the current political rhetoric deprecating and demeaning the federal employee, the overwhelming majority of administrative agencies and their personnel are extremely able, dedicated public servants desiring to perform their jobs in a productive, lawful manner. The agencies do not exhibit a conscious effort or desire to violate the law, in fact or in spirit, or to trample on the rights of citizens. To the average citizen, however, the

⁸⁷ *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1080-81 (2d Cir. 1974) (Lumbard, J., dissenting).

⁸⁸ One of the authors was counsel in an action in which the lack of a requirement that the government certify the need for a particular expert was graphically illustrated. The Assistant United States Attorney argued that a member of a foreign police organization was a necessary witness before the grand jury to provide the jurors with his accounting expertise. The court expressed its disbelief that the government could not find an accounting expert within itself, or among the general citizenry. Although the foreign police organization was investigating one of the targets of the grand jury, the expert was permitted access to information gathered by the grand jury. Other than restricting the witness from making notes from or copies of documents shown to him, the court stated that it was powerless to prevent the grand jury from calling the foreign police official.

⁸⁹ See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. at 1125-28. More recently, Chief Justice Burger proposed further amendments to Rule 6(e) which, if enacted, would recaption Rule 6(e)(1) to read "General Rule of Secrecy." The amendment would require that "all proceedings" before the grand jury, except when it is deliberating or voting, "be recorded stenographically or by electronic device." Moreover, the amendment specifically provides that "if a 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." COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. Doc. No. 112, 96th Cong., 1st Sess. 16, 63-66 (1979).

"bureaucracy" is a seemingly massive, faceless and nameless web of individuals. This lack of intimacy between the government and its citizens, and the manner in which it carries out its functions, necessitates that the citizenry be comforted by the existence of procedures designed to assure that basic protections and safeguards are in place and administered for the preservation of rights deemed essential by all citizens. In the context of agency assistance to grand juries, these procedures could be created with relative ease, thereby guaranteeing that prosecutors, and agency personnel providing technical assistance to grand juries, comply with the fundamental requirement of secrecy.

Administrative agencies that refer matters to the Attorney General for possible criminal prosecution, or provide personnel to assist in white-collar criminal prosecutions, should establish separate units whose sole function would be to provide whatever technical assistance prosecutors and grand juries require.⁹⁰ Personnel in those units should be segregated from other law enforcement functions of the agency. Agency personnel assigned to investigate possible civil or administrative violations should not be assigned to assist prosecutors and grand juries unless civil actions have been concluded⁹¹ or a determination made not to pursue a civil remedy. On those infrequent occasions when failure to assign knowledgeable agency personnel involved with a civil investigation would result in the running of a criminal statute of limitations, the same personnel could be assigned to assist in the criminal proceeding provided certain additional precautions were taken. For example, at the time such agency personnel are assigned to assist with the criminal proceedings, the agency and the United States Attorney might submit to the court in charge of the grand jury a sworn statement describing the need for assignment of the particular individuals, the nature and status of the civil investigation, a list of all documentary and testimonial evidence gathered to that date in the civil matter, and a statement of what further investigative steps are contemplated. The court could then seal the certification until such time as it might become necessary, on a motion to suppress evidence in a subsequent civil prosecution, for the agency to demonstrate that it did not improperly benefit from the grand jury investigation.⁹² Additionally, there is no logical reason to

⁹⁰ The IRS and SEC have established special technical assistance units. However, because of inadequate budgets and personnel shortages persons in those units occasionally are assigned to civil or administrative cases in addition to their other duties. Consequently, the possibility of overlapping functions exists, thereby decreasing the efficacy of the agencies' corrective efforts.

⁹¹ See *United States v. Dondich*, 460 F. Supp. 849, 856-57 (N.D. Cal. 1978).

⁹² The IRS already has instituted procedures to protect itself against claims that it benefited from its participation in grand jury proceedings. The IRS's internal manual for agents states:

[t]o prevent doubt about the origins of information available for civil use, information in the possession of the Service prior to receipt by Service personnel of any grand jury information must be identified by preparing comprehensive records, with appropriate indexes and descriptions, of such information as to the moment

require supervisors of agency personnel assigned to assist grand juries to swear an oath of secrecy. Those supervisors need not know the nature of the information being developed by the grand jury. Their sole need, as supervisors, is to be kept advised by the prosecutors that the personnel detailed to provide technical assistance are, in fact, appearing for work and are performing in a satisfactory professional manner. Also, agency personnel need not be authorized to receive, or maintain at the agency's offices, documents subpoenaed in the name of or received by the grand jury, transcripts of statements made before the grand jury, or notes thereof. Notes, digests of testimony, and similar "work product" given to or made by agency personnel assisting in grand jury proceedings should remain in the custody of the United States Attorney. The assigned personnel should be provided with work accommodations by the United States Attorney whom they are assigned to assist. This procedure would also obviate the need for metaphysical arguments as to whether documents located at an agency's offices are under the "aegis" of the prosecutor and have remained secure from unauthorized review.

United States Attorneys requiring the assistance of agency personnel should advise the supervising court of the names of such personnel and the reasons their assistance is necessary.⁹³ Agency personnel should be sworn to secrecy and given comprehensive written instructions describing standards for their proper conduct, particularly with regard to their obligation to preserve grand jury secrecy.⁹⁴ An additional written admonishment might be a directive that information learned by the agency personnel is not to be revealed to colleagues or supervisors and that any request by such persons should be reported immediately to the Assistant United States Attorney supervising the grand jury investigation.

If the agency assistant is the same individual conducting a parallel civil proceeding, he should be required to so advise the Assistant United States Attorney. The court should be informed of the investigative steps being taken in the civil investigation, and a certificate should be provided to the

preceding receipt. Thereafter, any related information obtained by the Service totally apart from grand jury information should similarly be recorded and its independent source identified.

Cited in Note, *Administrative Agency Access To Grand Jury Material Under Amended Rule 6(e)*, 29 CASE W. RES. L. REV. 295, 313 n.117.

⁹³ See text accompanying notes 81-83 *supra*. The Senate Report accompanying amended Rule 6(e) does not require a "necessity" hearing. Decisions rendered under the old Rule required an adversary hearing before an order pursuant to the Rule was issued. See, e.g., *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960); *In re Grand Jury Investigation*, 414 F. Supp. 74, 76-77 (S.D.N.Y. 1976) (ex parte application by SEC for disclosure of grand jury materials denied and considered on renewal with notice to defendant).

⁹⁴ There is no basis on which to distinguish the applicability of protective procedures when an agency representative merely renders "office assistance," such as analyses of documents, as opposed to being sworn in a Special Assistant United States Attorney. The dangers of abuse exist in both situations and both require additional procedural safeguards.

court attesting to the fact that neither leads nor information derived from the grand jury proceeding have been, or will be, employed in advancing the civil inquiry. United States Attorneys should adopt the practice of prohibiting delivery of grand jury subpoenaed records either to the agency personnel at their agency's offices or to the Assistant United States Attorney at his offices. The records should be delivered directly to the grand jury where the owner or a custodian of those records would be required to submit to examination to determine what procedures were followed to insure full compliance with the subpoena and that the records are genuine and authentic.⁹⁵

Finally, a Rule 6(e) docket should be prepared and maintained. The docket should indicate the dates documents are received, where they are stored, and the identity of persons having access to the grand jury materials. If copies of the materials were made, the number of copies made and to whom such copies were given should be recorded. A list of materials that were received and used by the agency personnel, the date the assistance terminated, and a certificate by the administrative agency personnel that they did not disclose any grand jury information to their supervisors or anyone else not involved in that particular investigation, except when ordered to do so by the court should complete the Rule 6(e) docket.

Counsel for persons requested to provide information to a grand jury should consider the merits of insisting upon a Rule 6(e) order and the creation of a Rule 6(e) docket. At the least, such an application would secure from the Government a list of all Government personnel to whom grand jury information is to be disclosed and effectively would require the Government to justify the use of agency personnel. Moreover, such an application permits the court, in the exercise of its general supervisory powers over the grand jury,⁹⁶ to impose any number of the above suggestions that it deems appropriate since grand jury records are records of the court.⁹⁷ Counsel also should seek an agreement whereby documents received by the grand jury or the United States Attorney, any information contained therein, and even the fact of their existence, will not be given or communicated to other agencies. Regardless of whether an indictment has been returned, an attorney should ask for an order requiring that he receive notice before a Rule 6(e) order is granted during or after the grand jury proceeding.⁹⁸ Lastly, counsel should request an order directing the

⁹⁵ The requirement that the producing party testify, in addition to assuring compliance with procedural safeguards, has the ancillary benefit of impressing upon the witness the seriousness of his role in the grand jury process and the need for his candid testimony.

⁹⁶ See *J.R. Simplot Co. v. United States*, 77-1 U.S. Tax Cas. (CCH) ¶ 9146 (9th Cir. 1977); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1104-07 (E.D. Pa. 1976); text accompanying notes 44-67 *supra*.

⁹⁷ *United States v. Procter & Gamble Co.*, 356 U.S. 677, 685 (1957) (Whittaker, J., concurring).

⁹⁸ By requesting that he be given notice before a Rule 6(e) order issues, and that the notice be given whether or not an indictment results, an attorney may successfully preclude disclosure of documents to agency personnel for their "intrinsic value." This justification for

United States Attorney supervising the grand jury proceeding to provide to the court, at the time an indictment is returned, a certificate in which he and any agency personnel assisting him attest that they have complied with all the conditions imposed by the court.⁹⁹

CONCLUSION

Amended Rule 6(e) is intended to clarify prior case law interpreting its predecessor section and to enumerate certain standards of conduct in connection with what is generally agreed to be the necessary assistance of agency personnel in grand jury proceedings. However, the amended Rule fails to address a number of concerns, including the public's perception of the fairness of the procedure. The potential for abuse, or at least misunderstanding, in the application of the Amended Rule exists. To the extent that even misunderstandings abound, the entire criminal process suffers from a lack of public trust. The suggestions and comments made here, if adopted, will alleviate some of the problems and assuage a number of the concerns.

disclosure has been accepted by federal courts in the past. *See, e.g.,* United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960).

⁹⁹ *See generally*, Cys & Rezneck, *The Sharing of Information Among Government Entities During Parallel Grand Jury and Administrative Agency Investigations*, in ABA NATIONAL INSTITUTE ON PARALLEL GRAND JURY INVESTIGATIONS: THE CRIMINAL AND CIVIL IMPLICATIONS FOR CORPORATIONS AND THEIR OFFICERS (1978).

