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# Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight

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## Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight

The Fifth Amendment to the U.S. Constitution states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” This provision requires that a federal prosecutor, in order to charge a suspect with a serious federal crime, secure the assent of an independent investigative and deliberative body comprising citizens drawn from the jurisdiction in which the crime would be tried. Federal grand juries serve two primary functions: (1) they aid federal prosecutors in investigating possible crimes by issuing subpoenas for documents, physical evidence, and witness testimony; and (2) they determine whether there is sufficient evidence to charge a criminal suspect with the crime or crimes under investigation.

Traditionally, the grand jury has conducted its work in secret. Secrecy prevents those under scrutiny from fleeing or importuning the grand jurors, encourages full disclosure by witnesses, and protects the innocent from unwarranted prosecution, among other things. The long-established rule of grand jury secrecy is enshrined in Federal Rule of Criminal Procedure 6(e), which provides that government attorneys and the jurors themselves, among others, “must not disclose a matter occurring before the grand jury.” Accordingly, as a general matter, persons and entities external to the grand jury process are precluded from obtaining transcripts of grand jury testimony or other documents or information that would reveal what took place in the proceedings, even if the grand jury has concluded its work and even if the information is sought pursuant to otherwise-valid legal processes.

At times, the rule of grand jury secrecy has come into tension with Congress’s power of inquiry when an arm of the legislative branch has sought protected materials pursuant to its oversight function. For instance, some courts have determined that the information barrier established in Rule 6(e) extends to congressional inquiries, observing that the Rule contains no reservations for congressional access to grand jury materials that would otherwise remain secret. Nevertheless, the rule of grand jury secrecy is subject to a number of exceptions, both codified and judicially crafted, that permit grand jury information to be disclosed in certain circumstances (usually only with prior judicial authorization). Perhaps the most significant of these for congressional purposes are (1) the exception that allows a court to authorize disclosure of grand jury matters “preliminarily to or in connection with a judicial proceeding,” and (2) the exception, recognized by a few courts, that allows a court to authorize disclosure of grand jury matters in special or exceptional circumstances. In turn, some courts have determined that one or both of these exceptions applies to congressional requests for grand jury materials in the context of impeachment proceedings, though there is authority to the contrary.

Additionally, because Rule 6(e) covers only “matters occurring before the grand jury,” courts have recognized that documents and information are not independently insulated from disclosure merely because they happen to have been presented to, or considered by, a grand jury. As such, even if Rule 6(e) generally limits congressional access to grand jury information, Congress has a number of tools at its disposal to seek materials connected to a grand jury investigation.

Prior Congresses have considered legislation that would have expressly permitted a court to authorize disclosure of grand jury matters to congressional committees on a showing of substantial need. However, in response to such proposals, the executive branch has voiced concerns that the legislation would raise due-process and separation-of-powers issues and potentially undermine the proper functioning of federal grand juries. These concerns may have resulted in Congress declining to alter Rule 6(e). As a result, to the extent Rule 6(e) constrains Congress’s ability to conduct oversight, legislation seeking to amend the rules governing grand jury secrecy in a way that would give Congress independent access to grand jury materials may raise additional legal and pragmatic issues for the legislative branch to consider.

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## Introduction

The Fifth Amendment to the U.S. Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”<sup>1</sup> This provision requires that a federal prosecutor,<sup>2</sup> in order to charge a suspect with a serious<sup>3</sup> federal crime, secure the assent of an independent investigative and deliberative body comprising citizens drawn from the jurisdiction in which the crime would be tried.<sup>4</sup> Federal grand juries serve two primary functions: (1) they aid federal prosecutors in investigating possible crimes by issuing subpoenas for documents, physical evidence, and witness testimony; and (2) they determine whether there is sufficient evidence to charge a criminal suspect with the crime or crimes under investigation.<sup>5</sup>

Traditionally, the grand jury has done its work in secret.<sup>6</sup> Secrecy prevents those under scrutiny from fleeing or importuning the grand jurors, encourages full disclosure by witnesses, and protects the innocent from unwarranted prosecution, among other things. The long-established rule of grand jury secrecy is enshrined in Federal Rule of Criminal Procedure 6(e), which provides that government attorneys and the jurors themselves, among others, “must not disclose a matter occurring before the grand jury.” Accordingly, as a general matter, persons and entities external to the grand jury process are precluded from obtaining transcripts of grand jury testimony or other documents or information that would reveal “what took place” in the proceedings,<sup>7</sup> even if the grand jury has concluded its work and even if the information is sought pursuant to otherwise-valid legal processes.

At times, the rule of grand jury secrecy has come into tension with Congress’s power of inquiry when an arm of the legislative branch has sought protected materials pursuant to its oversight function.<sup>8</sup> For example, some courts have determined that the information barrier established in Rule 6(e) extends to congressional inquiries, noting that the Rule “contains no reservations in favor of . . . congressional access to grand jury materials” that would otherwise remain secret.<sup>9</sup>

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<sup>1</sup> U.S. CONST. amend. V. Exception is made for “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” *Id.*

<sup>2</sup> The grand jury requirement of the Fifth Amendment is one of the few provisions in the U.S. Constitution’s Bill of Rights that has not been applied to the states through the Fourteenth Amendment. *Hurtado v. California*, 110 U.S. 516, 534-35 (1884); *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010). Thus, although some states have developed their own constitutional provisions calling for grand jury indictment in felony cases or cases punishable by death or life imprisonment, *see, e.g.*, ALASKA CONST. art. I, § 8; FLA. CONST. art. I, § 15 (capital cases), the U.S. Constitution requires indictment only with respect to certain federal criminal prosecutions.

<sup>3</sup> *See* Fed. R. Crim. P. 7(a) (providing that felony offenses punishable by death or imprisonment for more than one year must be prosecuted by indictment).

<sup>4</sup> *See* 28 U.S.C. § 1861.

<sup>5</sup> *See* *United States v. Williston*, 862 F.3d 1023, 1031 (10th Cir. 2017) (“The grand jury functions as both a shield and a sword.”); 1 WRIGHT & LEIPOLD, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 101 (2008 & 2018 Supp.) (describing dual grand jury functions).

<sup>6</sup> *See* *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (“[W]e start with a long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.”).

<sup>7</sup> *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1383 (D.C. Cir. 1980).

<sup>8</sup> In one high-profile example, the House Judiciary Committee, in connection with the House’s consideration of whether to impeach President Nixon, sought to obtain a report prepared by the Watergate grand jury. *See In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1230 (D.D.C. 1974), *mandamus denied sub nom.* *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974).

<sup>9</sup> *In re Grand Jury Investigation of Uranium Industry*, 1979-2 Trade Cas. 78,639, 78,642 (D.D.C. 1979). As discussed

Nevertheless, the rule of grand jury secrecy is subject to a number of exceptions, both codified and judicially crafted, that permit grand jury information to be disclosed in certain circumstances (usually only with prior judicial authorization).<sup>10</sup> And because Rule 6(e) covers only “matters occurring before the grand jury,” courts have recognized that documents and information are not independently insulated from disclosure merely because they happen to have been presented to, or considered by, a grand jury.<sup>11</sup> As such, even if Rule 6(e) generally limits congressional access to grand jury information, Congress has a number of tools at its disposal to seek materials connected to a grand jury investigation.

This report begins with an overview of the standards governing—and exceptions applicable to—grand jury secrecy under Federal Rule of Criminal Procedure 6(e). The report also addresses whether and how the rule of grand jury secrecy and its exceptions apply to Congress, including the circumstances under which Congress may obtain grand jury information and what restrictions apply to further disclosures. Concluding this report is a discussion of past legislative efforts to amend Rule 6(e) in order to provide congressional committees with access to grand jury materials.

## Brief Overview of the Federal Grand Jury<sup>12</sup>

Federal law requires the various United States District Courts to order one or more grand juries to be summoned when the public interest requires.<sup>13</sup> Grand jurors must be “selected at random from a fair cross section of the community in the district or division wherein the court convenes,”<sup>14</sup> among other things. Grand jury panels consist of 16 to 23 members.<sup>15</sup>

After selection, the court swears in members of the grand jury;<sup>16</sup> names a “foreperson and deputy foreperson”;<sup>17</sup> and instructs the panel.<sup>18</sup> Federal grand juries sit until discharged by the court, but generally for no longer than 18 months, with the possibility of one six-month extension.<sup>19</sup>

The authority of a federal grand jury is sweeping, but it is limited to the investigation of possible violations of federal criminal law triable in the district in which it is sitting.<sup>20</sup> The grand jury may

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more fully *infra*, a few courts have found in Congress a “constitutionally independent legal right to” secret grand jury information in furtherance of “legitimate legislative activity,” notwithstanding the restrictions of Rule 6.

<sup>10</sup> See *infra* § Exceptions to Grand Jury Secrecy.

<sup>11</sup> E.g., *Senate of Commonwealth of P.R. v. Dep’t of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987) (“There is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers.”); cf. *In re Grand Jury Proceedings*, 851 F.2d 860, 866 (6th Cir. 1988) (“The general rule . . . must be that confidential documentary information not otherwise public obtained by the grand jury by coercive means is [rebuttably] presumed to be ‘matters occurring before the grand jury.’”).

<sup>12</sup> This section is largely drawn from CRS Report 95-1135, *The Federal Grand Jury*, by Charles Doyle.

<sup>13</sup> FED. R. CRIM. P. 6(a).

<sup>14</sup> 28 U.S.C. § 1861.

<sup>15</sup> FED. R. CRIM. P. 6(a), (f).

<sup>16</sup> SARA SUN BEALE, ET AL., GRAND JURY LAW AND PRACTICE, § 4:3 (2008 & 2017 Supp.).

<sup>17</sup> FED. R. CRIM. P. 6(c).

<sup>18</sup> BEALE, *supra* note 16, § 4:5.

<sup>19</sup> FED. R. CRIM. P. 6(g).

<sup>20</sup> *Brown v. United States*, 245 F.2d 549, 554-55 (8th Cir. 1957); *United States v. Brown*, 49 F.3d 1162, 1168 (6th Cir. 1995).

begin its examination even in the absence of probable cause or any other level of suspicion that a crime has been committed within its reach.<sup>21</sup>

The grand jury does not conduct its business in open court, nor does a federal judge preside over its proceedings.<sup>22</sup> The grand jury meets behind closed doors, with only the jurors, attorney for the government, witnesses, someone to record testimony, and possibly an interpreter present.<sup>23</sup>

The grand jury acts on the basis of evidence presented by witnesses called for that purpose. The attorney for the government will ordinarily arrange for the appearance of witnesses before the grand jury, will suggest the order in which they should be called, and will take part in questioning them.<sup>24</sup> The grand jury most often turns to the prosecutor for legal advice and to draft most of the indictments, which the grand jury returns.<sup>25</sup>

Grand jury witnesses usually appear before the grand jury under subpoena.<sup>26</sup> Subpoenas may be issued and served at the request of the panel itself,<sup>27</sup> although the attorney for the government usually arranges the case to be presented to the grand jury.<sup>28</sup> Unjustified failure to comply with a grand jury subpoena may result in a witness being held in contempt.<sup>29</sup> A witness who lies to a grand jury may be prosecuted for perjury or for making false declarations to the grand jury.<sup>30</sup>

Neither a potential defendant nor a grand jury target nor any of their counsel has any right to appear before the grand jury unless invited or subpoenaed.<sup>31</sup> Nor does a potential defendant, a grand jury target, or their counsel have any right to present exculpatory evidence or substantive objection to the grand jury.<sup>32</sup>

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<sup>21</sup> See *United States v. Williams*, 504 U.S. 36, 48 (1992) (recognizing that the grand jury may “investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not” (citations omitted)).

<sup>22</sup> See *United States v. Navarro*, 608 F.3d 529, 536 (9th Cir. 2010) (“All the judge does, unless a motion comes to him, is swear in and charge the grand jury before it begins its work, and days, weeks, or months later, receive the indictments it hands down. A district judge does not preside in or even enter the grand jury room. The only contact the grand jurors have with the court is the charge the judge gives before they begin, and the use of a room in the courthouse.”).

<sup>23</sup> FED. R. CRIM. P. 6(d).

<sup>24</sup> *United States v. Merrill*, 685 F.3d 1002, 1013 (11th Cir. 2012); *United States v. Wadlington*, 233 F.3d 1067, 1075 (8th Cir. 2000).

<sup>25</sup> *United States v. Sigma Intern, Inc.*, 196 F.3d 1314, 1323 (11th Cir. 1999) (“A prosecutor’s job is to present evidence of criminal activity to a grand jury. In so doing, the prosecutor may explain why a piece of evidence is legally significant . . .”); see generally BEALE, *supra* note 16, § 4:15.

<sup>26</sup> A subpoena is an order of the court demanding that an individual appear at one of its proceedings and produce evidence on a matter then under consideration. There are two kinds of subpoenas—subpoenas ad testificandum and subpoenas duces tecum. The first is simply a command to appear and testify; the second not only demands the witness’s presence at a certain time and place but also requires him to bring certain evidence with him. Federal law with regard to subpoenas in criminal cases is governed in large measure by Rule 17 of the Federal Rules of Criminal Procedure.

<sup>27</sup> See *United States v. Calandra*, 414 U.S. 338, 343 (1974) (noting that “[t]he grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate”).

<sup>28</sup> *Lopez v. Dep’t of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) (commenting that “the term ‘grand jury subpoena’ is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does”).

<sup>29</sup> See 28 U.S.C. § 1826(a) (governing civil contempt); 18 U.S.C. § 401 (governing criminal contempt).

<sup>30</sup> 18 U.S.C. § 1621 (governing perjury); 18 U.S.C. § 1623 (governing false declarations before grand jury).

<sup>31</sup> *United States v. Williams*, 504 U.S. 36, 51-54 (1992).

<sup>32</sup> *Id.*

There are four possible outcomes of convening a grand jury—(1) indictment;<sup>33</sup> (2) a vote not to indict;<sup>34</sup> (3) discharge or expiration without any action;<sup>35</sup> or (4) submission of a report to the court under certain circumstances.<sup>36</sup> A grand jury indictment may issue upon the vote of 12 of its members that probable cause exists to believe the accused committed the crime charged.<sup>37</sup>

## Overview of Grand Jury Secrecy

### Historical Underpinnings

“Since the 17th Century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye.”<sup>38</sup> An early justification for maintaining the secrecy of grand jury proceedings in England was to prevent suspected criminals from learning of an inquest and absconding.<sup>39</sup> By the late 17th century, legal scholars had begun to recognize the need for secrecy in most matters pertaining to grand jury inquiries—including the identities of subjects and witnesses, the evidence collected, and the plans and deliberations of the jury—in order to realize the additional aims of preserving juror independence, sussing out witness bias and mendacity, and allowing evidence to be fully developed.<sup>40</sup>

When the right to grand jury indictment crossed the Atlantic Ocean from England to the American colonies, the rule of grand jury secrecy came with it.<sup>41</sup> Prior to the adoption of the

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<sup>33</sup> FED. R. CRIM. P. 7(c)(1).

<sup>34</sup> *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986).

<sup>35</sup> FED. R. CRIM. P. 6(g).

<sup>36</sup> *United States v. Christian*, 660 F.2d 892, 902 (3d Cir. 1981).

<sup>37</sup> *United States v. Calandra*, 414 U.S. 338, 343 (1974). For more information on grand jury outcomes, as well as the law governing federal grand juries more generally, see CRS Report 95-1135, *The Federal Grand Jury*, by Charles Doyle.

<sup>38</sup> *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979) (citing Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 457 (1965)).

<sup>39</sup> See 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) (tracing grand jury secrecy from pre-colonial England through early American jurisprudence).

<sup>40</sup> *Id.* at 15 (citing JOHN SOMMERS, THE SECURITY OF ENGLISH-MENS LIVES, OR THE TRUST, POWER, AND DUTY OF THE GRAND JURYS OF ENGLAND 46-54 (London, Benjamin Alsop 1682)); see also Earl of Shaftesbury’s Trial, 8 How. St. Tr. 759, 771-74 (1681) (“[I]t is the opinion of the jury, that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it.”).

<sup>41</sup> *Costello v. United States*, 350 U.S. 359, 362 (1956). Some commentators have suggested that the grand jury right protected by the Fifth Amendment to the U.S. Constitution implicitly encapsulates grand jury secrecy. See Kadish, *supra* note 39, at 16. In dictum, the Supreme Court has appeared to agree with this view. See *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (“Undoubtedly the common-law protections traditionally associated with the grand jury attach to the grand jury required by [the Fifth Amendment]—including the requisite secrecy of grand jury proceedings.”); but see *Costello*, 350 U.S. at 363 (“An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.”). However, the Court has not squarely addressed the extent to which secrecy is constitutionally required, and indeed, courts have often recognized Congress’s power to modify or limit the scope of secrecy protections without mentioning any theoretical constitutional limits. *E.g.*, *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983) (acknowledging that a “breach” of grand jury secrecy may be “authorized” through “a clear indication in a statute or Rule”); see also *Bank of Nova Scotia v. United States*, 487 U.S. 250, 258-59 (1988) (recognizing violations of Rule 6(e) but separately noting that “no constitutional error occurred”); *cf.* *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D. Md. 1931) (“[N]one of the reasons for [secrecy] are founded upon an inherent right in the individual who is being investigated to the same constitutional safeguards that are unquestionably his when he is brought to trial for a given crime.”); 18 U.S.C. § 3331-33 (providing for empanelling of

Federal Rules of Criminal Procedure, the federal courts developed a fairly robust, though not unyielding, conception of grand jury secrecy at common law. Secrecy challenges most often arose in the context of criminal defendants' motions to dismiss their indictments on the grounds that the evidence considered by the grand jury could not justify the charges or that some type of misconduct had occurred.<sup>42</sup> Recognizing that these motions called for inspecting records of the proceedings before the grand jury, courts typically acknowledged that they had the discretionary power to permit such inspection "in the furtherance of justice" but found that the power should be "sparingly exercised" in light of the traditional rule of secrecy.<sup>43</sup> Thus, although a number of courts identified a theoretical imperative for "removing the veil of secrecy whenever evidence of what has transpired before [the jury] becomes necessary to protect public or private rights,"<sup>44</sup> courts often declined to engage in such unveiling based merely on a defendant's "general allegations" or a potential "fishing expedition."<sup>45</sup>

Nevertheless, when deemed "essential" to "the purposes of justice," some courts would consider evidence of what occurred before a grand jury to determine whether an indictment against a criminal defendant should be dismissed.<sup>46</sup> This unveiling apparently reflected an understanding that grand juries served not only an investigative function in furtherance of the governmental interest in law enforcement, but also as a "protector of citizens against arbitrary and oppressive governmental action."<sup>47</sup> Thus, as these decisions suggested, disclosure could be appropriate when continuing secrecy would be inconsistent with the citizen-protective function.

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"special grand jury" under certain circumstances and authorizing public release of special grand jury report when specific conditions are met).

<sup>42</sup> *E.g.*, *United States v. Am. Med. Ass'n*, 26 F. Supp. 429 (D.D.C. 1939). Some decisions also addressed government attempts to use grand jury testimony in litigation. *E.g.*, *In re Grand Jury Proceedings*, 4 F. Supp. 283, 283-85 (E.D. Pa. 1933).

<sup>43</sup> *United States v. Perlman*, 247 F. 158, 161 (S.D.N.Y. 1917); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) (finding disclosure "wholly proper where the ends of justice require it").

<sup>44</sup> *United States v. Farrington*, 5 F. 343, 346 (N.D.N.Y. 1881).

<sup>45</sup> *See Cox v. Vaught*, 52 F.2d 562, 563-64 (10th Cir. 1931); *United States v. Terry*, 39 F. 355, 358 (N.D. Cal. 1889) ("[A]n exception to the general rules of law, which forbid . . . a grand juror to disclose the proceedings of the jury, or to impeach its findings, will only be allowed in rare and extraordinary cases."); *see also Perlman*, 247 F. at 161; *American Medical Association*, 26 F. Supp. at 431; *United States v. Violon*, 173 F. 501, 502 (S.D.N.Y. 1909). Courts divided on the question of whether and to what extent grand jury information should remain secret after a grand jury's work had ended. Some courts viewed disclosure of grand jury materials as permissible once the grand jury concluded its proceedings and dissolved, *see Atwell v. United States*, 162 F. 97, 100 (4th Cir. 1908), a view that the Supreme Court appeared to agree with (at least when necessary to prevent injustice). *Socony-Vacuum*, 310 U.S. at 234 ("Grand jury testimony is ordinarily confidential. . . . But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."). However, other courts took the view that information about what occurred before the grand jury should remain secret indefinitely. *E.g.*, *In re April 1956 Term Grand Jury*, 239 F.2d 263, 272 (7th Cir. 1956) (distinguishing *Atwell* and concluding that "the safeguard of secrecy, in the interest of the public, continues even after the grand jury has completed its efforts").

<sup>46</sup> *E.g.*, *Farrington*, 5 F. at 347, and cases cited therein (recognizing the "justice" of "free disclosure" where it was "patent that the grand jury permitted themselves" to be improperly influenced).

<sup>47</sup> *United States v. Calandra*, 414 U.S. 338, 343 (1974); *see also Butterworth v. Smith*, 494 U.S. 624, 629 (1990) (noting the "equally important function" of "safeguard[ing] citizens against an overreaching [State] and unfounded accusations").



## Federal Rule of Criminal Procedure 6(e)

### Background and Overview

“[T]he federal courts’ modern version” of the traditional rule of grand jury secrecy is established by Federal Rule of Criminal Procedure 6(e), in effect since 1946 and amended numerous times over the following 60 years.<sup>48</sup> The Supreme Court has recognized that Rule 6(e) simply “codifie[d]” the pre-existing common law requirement “that grand jury activities generally be kept secret,” an “integral part of [the United States] criminal justice system.”<sup>49</sup> An Advisory Committee Note reflects this understanding, making clear that the Rule “continues the traditional practice of secrecy . . . except when the court permits a disclosure.”<sup>50</sup>

Courts have identified five principal justifications underlying Rule 6(e)’s secrecy requirement:

1. to prevent the escape of those whose indictment may be contemplated;
2. to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
3. to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it;
4. to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
5. to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.<sup>51</sup>

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<sup>48</sup> *In re Grand Jury Subpoenas*, 454 F.3d 511, 521 (6th Cir. 2006). Creation of the Rules was authorized by Act of June 29, 1940, ch. 445, 54 Stat. 688, which gave the Supreme Court the power to prescribe general rules of criminal procedure prior to and including verdict or plea in criminal proceedings. The Attorney General was required to report the Rules to Congress before they could take effect. Pursuant to this authority, the Court established an “Advisory Committee” of practitioners that developed draft Rules for the Court’s consideration. The Court’s Rules were finalized and adopted in 1944, submitted to Congress in 1945, and became effective in 1946. See STAFF OF H.R. COMM. ON THE JUDICIARY, 114TH CONG., FEDERAL RULES OF CRIMINAL PROCEDURE VII (Comm. Print 2016).

<sup>49</sup> *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979).

<sup>50</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1944 adoption.

<sup>51</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). The genesis of these oft-repeated justifications appears to have been a pre-Rules district court opinion. See *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D. Md. 1931). In other cases, the Supreme Court has framed the justifications slightly differently:

First, 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 to 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 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.

*Douglas Oil*, 441 U.S. at 219. Not all of the identified justifications apply in every case; in particular, once a grand jury’s work has concluded, there is “no longer a need” to prevent the escape of targets or the importuning of grand jurors. *Butterworth*, 494 U.S. at 632-33. As described in more detail *infra*, the status of a grand jury proceeding may be relevant to whether a party seeking disclosure of otherwise-secret grand jury materials may obtain them under an exception to Rule 6(e) in a particular case. See *Douglas Oil*, 441 U.S. at 223 (“[A]s the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing

At the time of its adoption, Rule 6(e) ensured the secrecy of grand jury proceedings by authorizing “[d]isclosure of matters occurring before the grand jury” in only limited circumstances. First, such matters “other than [the jury’s] deliberations and the vote of any juror” automatically could be disclosed to “the attorneys for the government for use in the performance of their duties.”<sup>52</sup> Beyond this, “a juror, attorney, interpreter or stenographer”<sup>53</sup> could disclose matters occurring before the grand jury only with court authorization (1) “preliminarily to or in connection with a judicial proceeding,” or (2) “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.”<sup>54</sup>

Amendments to Rule 6(e) from 1966 to 2014 have sought, among other things, to align the Rule’s text with court-developed exceptions and clarifications that have sometimes extended beyond the literal terms of the version of the Rule in force at a given point in time.<sup>55</sup> The current iteration of Rule 6(e) establishes a general rule of secrecy by setting out a list of persons, including grand jurors and attorneys for the government, who “must not disclose a matter occurring before the grand jury” unless the Federal Rules of Criminal Procedure “provide otherwise.”<sup>56</sup> Rule 6(e) then “provide[s] otherwise” by listing complex exceptions to the prohibition. The exceptions generally fall into two categories: (1) disclosures permitted without judicial authorization, and (2) disclosures permitted with judicial authorization.<sup>57</sup>

In the first category, persons prohibited by the Rule from disclosing matters occurring before the grand jury may nevertheless disclose such matters (other than grand jury deliberations or grand juror votes) to an attorney for the government “for use in performing that attorney’s duty” and to non-attorney “government personnel” who are needed to help a government attorney enforce federal criminal law.<sup>58</sup> Government attorneys may also disclose such matters (1) to another federal grand jury; (2) to federal law enforcement, intelligence, protective, immigration, national defense, or national security officials *only* with respect to matters involving foreign intelligence or counterintelligence; and (3) to “any appropriate . . . government official” *only* with respect to matters involving threats of attack or intelligence gathering by foreign powers or threats of sabotage or terrorism.<sup>59</sup>

In the second category of exceptions, the court under whose auspices the grand jury was empaneled may authorize disclosure of a grand jury matter (1) preliminarily to or in connection

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justification.”).

<sup>52</sup> FED. R. CRIM. P. 6(e) (1946).

<sup>53</sup> The original version of Federal Rule of Criminal Procedure 6(d) established that only government attorneys, the witness under examination, “interpreters when needed,” and a stenographer could be present during grand jury sessions. FED. R. CRIM. P. 6(d) (1946). Only the jurors themselves could be present during grand jury deliberations or voting. *Id.* The current Rule 6(d) preserves these limitations largely without change, though it replaces “stenographer” with the more-modern “court reporter or an operator of a recording device” and clarifies that interpreters may also be present during deliberations or voting “to assist a hearing-impaired or speech-impaired juror.” FED. R. CRIM. P. 6(d)(1)-(2).

<sup>54</sup> FED. R. CRIM. P. 6(e) (1946). As discussed *infra*, the majority view is and has been that grand jury witnesses are not obligated to maintain secrecy with respect to their testimony under Rule 6. *See id.* (providing that “[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule”).

<sup>55</sup> *See In re* Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261, 1268 (11th Cir. 1984) (“Rule 6(e) has been repeatedly amended to incorporate subsequent developments wrought in decisions of the federal courts.”).

<sup>56</sup> FED. R. CRIM. P. 6(e)(2)(B).

<sup>57</sup> FED. R. CRIM. P. 6(e)(3).

<sup>58</sup> FED. R. CRIM. P. 6(e)(3)(A)(i)-(ii).

<sup>59</sup> FED. R. CRIM. P. 6(e)(3)(C)-(D).

with a judicial proceeding; (2) to a defendant who shows grounds may exist to dismiss the indictment because of something that occurred before the grand jury; or (3) at the request of the government, to a foreign court or prosecutor or to an “appropriate” state, state-subdivision, Indian tribal, military, or foreign government official for the purpose of enforcing or investigating a violation of the respective jurisdiction’s criminal law.<sup>60</sup>

Beyond the express terms of Rule 6(e), three circuits<sup>61</sup> and a number of district courts<sup>62</sup> have held that courts have inherent authority to disclose grand jury materials in situations where an enumerated Rule 6(e) exception is not otherwise applicable, though the authority may be exercised only in rare or special cases. Additional Rules and statutes also permit disclosure in particular circumstances.<sup>63</sup>

When a court-authorized disclosure is at issue, the person or entity seeking grand jury information must make a “strong showing of particularized need” that “outweighs the public interest in secrecy.”<sup>64</sup> If that showing is made, the court may authorize disclosure “at a time, in a manner, and subject to any other conditions that it directs.”<sup>65</sup>

The following sections of this report provide more detail on the various provisions of Rule 6(e).

### Persons Subject to Rule 6(e)

Rule 6(e)(2)(B) lists eight categories of persons who “must not disclose a matter occurring before the grand jury” unless an exception applies:

1. grand jurors;
2. interpreters;
3. court reporters;
4. operators of recording devices<sup>66</sup>;
5. persons who transcribe recorded testimony;
6. attorneys for the government;
7. government personnel needed to assist attorneys for the government;
8. persons authorized to receive grand jury materials under 18 U.S.C. § 3322.<sup>67</sup>

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<sup>60</sup> FED. R. CRIM. P. 6(e)(3)(E)(i)-(v).

<sup>61</sup> See *Carlson v. United States*, 837 F.3d 753, 756 (7th Cir. 2016); *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997); *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1268-69 (11th Cir. 1984).

<sup>62</sup> E.g., *In re Nichter*, 253 F. Supp. 3d 160, 165 (D.D.C. 2017).

<sup>63</sup> For example, Rule 6(e)(3)(A)(iii) cross-references 18 U.S.C. § 3322, which (1) permits government attorneys and personnel to disclose grand jury information to other government attorneys for use in enforcing the civil penalty provision of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) or other civil forfeiture provisions of federal law, and (2) permits court-authorized disclosure of grand jury information to certain regulatory personnel in connection with investigations of banking law violations on a showing of “substantial need.” 18 U.S.C. § 3322(a)-(b).

<sup>64</sup> *United States v. Sells Eng’g*, 463 U.S. 418, 443 (1983); *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979).

<sup>65</sup> FED. R. CRIM. P. 6(e)(3)(E).

<sup>66</sup> Rule 6(e)(1) requires that all grand jury proceedings other than deliberations and voting be “recorded by a court reporter or by a suitable recording device,” though unintentional failure to make a recording will not affect the validity of a prosecution. FED. R. CRIM. P. 6(e)(1). Recordings, court reporter notes, and transcripts prepared from the notes are retained by an attorney for the government unless the court orders otherwise. *Id.*

<sup>67</sup> FED. R. CRIM. P. 6(e)(2)(B). For a description of the persons authorized to receive grand jury materials under 18

In other words, the Rule generally imposes an obligation of secrecy on each person permitted to be present while the grand jury is in session, as well as certain persons given access to grand jury information.<sup>68</sup> Yet there is a notable exception to this general imperative: though a “witness being questioned” is authorized by Rule 6(d) to be present during grand jury proceedings (for obvious reasons), grand jury witnesses are not included on the list of persons precluded from disclosing grand jury matters. Viewed in conjunction with Rule 6(e)(2)(A)’s admonition that “[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B),”<sup>69</sup> the Rule by its plain terms does not obligate grand jury witnesses to maintain the secrecy of the proceedings or their testimony. An Advisory Committee note to the original adoption of Rule 6(e) supports this reading, stating that “[t]he rule does not impose any obligation of secrecy on witnesses.”<sup>70</sup> According to the note, such an obligation would constitute “an unnecessary hardship [that] may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.”<sup>71</sup> Court decisions generally have been in accord,<sup>72</sup> although a handful of courts have taken the position that an order requiring a witness to refrain from discussing grand jury matters may be entered in rare circumstances when justified by a compelling need.<sup>73</sup> Courts taking this position have relied on “inherent judicial power” to “protect the integrity of the grand jury process,” which the adoption of Rule 6(e) ostensibly did not undermine.<sup>74</sup>

Though a witness is ordinarily free to disclose grand jury information of which he is aware, witnesses cannot be *compelled* to disclose such information to investigation targets or in separate

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U.S.C. § 3322, See *supra* note 63.

<sup>68</sup> Rule 6(d) provides that “attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device” may be present “while the grand jury is in session,” though only the jurors and any necessary interpreters may be present during deliberations and voting. FED. R. CRIM. P. 6(d)(1)-(2).

<sup>69</sup> FED. R. CRIM. P. 6(e)(2)(A).

<sup>70</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1944 adoption.

<sup>71</sup> *Id.* The reference to “injustice” in the note may signal a recognition of First Amendment limitations on restricting a private person’s ability to “make a truthful statement of information he acquired on his own.” See *Butterworth v. Smith*, 494 U.S. 624, 636 (1990).

<sup>72</sup> *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983) (“Witnesses are not under the prohibition unless they also happen to fit into one of the enumerated classes.”); see also *In re Grand Jury Proceedings*, 814 F.2d 61, 69 (1st Cir. 1987) (“[A]n obligation of secrecy on witnesses was forbidden in these circumstances under all interpretations of the rule.”); *In re Grand Jury Investigation*, 610 F.2d 202, 217 (5th Cir. 1980) (“Rule 6(e) does not prevent disclosures by a witness who testifies before the grand jury.”); *Bast v. United States*, 542 F.2d 893, 896 (4th Cir. 1976) (“[W]e recognize that [Rule] 6 imposes no condition of secrecy on the witness.”).

<sup>73</sup> *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) (“[T]he rule’s phrasing can, and should, accommodate rare exceptions . . . .”); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1564 (11th Cir. 1989) (affirming authority to enter order based on compelling necessity); *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680-81 (8th Cir. 1986) (recognizing that policy of non-secrecy as to grand jury witnesses may be set aside based on “need for secrecy” that “outweighs the countervailing policy” and is shown with particularity); *In re Grand Jury Proceedings*, 17 F. Supp. 3d 1033, 1035-36 (S.D. Cal. 2013) (“Rule 6(e)(2)(A) does not preclude an order imposing nondisclosure in appropriate circumstances.”).

<sup>74</sup> *Grand Jury Proceedings*, 417 F.3d at 26; *Subpoena to Testify*, 864 F.2d at 1563. Relatedly, several courts have relied on their inherent “supervisory authority” over grand jury proceedings to conclude that they may *authorize* disclosure of grand jury materials in circumstances not addressed by Rule 6(e). *E.g.*, *Carlson v. United States*, 837 F.3d 753, 756 (7th Cir. 2016). These decisions are discussed in more detail *infra*.

proceedings.<sup>75</sup> Relatedly, courts have recognized that federal prosecutors may *request* (but not demand) that witnesses refrain from disclosing the existence of a subpoena or their testimony.<sup>76</sup>

Because Rule 6(e)'s language suggests that the list of persons prohibited from disclosing grand jury matters is exclusive,<sup>77</sup> unlisted third parties who obtain grand jury information—even from persons obligated to maintain grand jury secrecy—are also generally not required to keep the information secret.<sup>78</sup> That said, a court authorizing a disclosure under a Rule 6(e) exception may impose a condition that further disclosures not be made,<sup>79</sup> subject to First Amendment limitations.<sup>80</sup>

At least one court has observed that courts themselves are not included on the list of those who must refrain from “disclos[ing] a matter occurring before the grand jury” under Rule 6(e)(2)(B), interpreting this omission to mean that courts have inherent authority to release grand jury materials regardless of whether a textual exception to grand jury secrecy in Rule 6(e) otherwise applies.<sup>81</sup> This judicial “inherent authority” exception, which the Supreme Court has never

<sup>75</sup> *United States v. Bryant*, 655 F.3d 232, 239 (3d Cir. 2011) (quoting *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981)) (“[A] witness may of his own free will refuse to be interviewed by either the prosecution or the defense.”); *SEC v. Oakford Corp.*, 141 F. Supp. 2d 435, 437 (S.D.N.Y. 2001) (stating that a witness “may not be compelled to testify whether or not he has appeared and testified before a grand jury as to a particular matter” or disclose the substance of that testimony “absent a court order to do so”).

<sup>76</sup> *Bryant*, 655 F.3d at 238-39 (concluding that witness subpoenas “requesting nondisclosure and discretion on the part of witnesses” did not impermissibly “impose[] an obligation of secrecy”); *In re Grand Jury Proceedings*, 558 F. Supp. 532, 535 (W.D. Va. 1983) (“[T]he government may indicate to witnesses that it would prefer that they not discuss their testimony with third parties (apart from their own attorneys), although they may do so if they choose.”); *cf. In re Grand Jury Proceedings*, 814 F.2d at 70 (finding letter advising that disclosure “could seriously impede the investigation being conducted” imposed an impermissible obligation of secrecy). Conversely, witnesses have been permitted to receive, or at least review, transcripts of their own testimony after it is given, though they may be required to establish some degree of need. *E.g., In re Grand Jury*, 490 F.3d 978, 990 (D.C. Cir. 2007) (concluding witness may access transcript); *In re Grand Jury*, 566 F.3d 12, 18 (1st Cir. 2009) (holding witness must show particularized need to obtain transcript but less demanding standard applies to access and review).

<sup>77</sup> See FED. R. CRIM. P. 6(e)(2)(A) (indicating that “[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)”).

<sup>78</sup> See, e.g., *Dassault Sys., SA v. Childress*, 663 F.3d 832, 847 (6th Cir. 2011) (“The rule imposes no obligation of secrecy on persons or entities that are not included on [the] list.”); *Fund for Constitutional Gov’t v. Nat’l Archives & Records Serv.*, 656 F.2d 856, 870 n.33 (D.C. Cir. 1981) (“Rule 6(e)’s prohibition on disclosure applies only to individuals who have had access to that information by virtue of their relationship to the grand jury investigation or under another provision of the rule.”); *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 693 (N.D. Ga. 1998) (“Rule 6(e)(2), however, does not create a privilege to be invoked or waived by the Government, a defendant, or any other party when information makes its way into the hands of private citizens.”). One exception is that, by statute, financial institutions served with subpoenas for customer records in the course of grand jury investigations into certain crimes may not notify the customers of the subpoenas or any information furnished in response. See 12 U.S.C. §§ 3413(i), 3420(b).

<sup>79</sup> See FED. R. CRIM. P. 6(e)(3)(E) (stating that court may authorize disclosure “at a time, in a manner, and subject to any other conditions that it directs”). It is also possible that, depending on the circumstances, a third party who obtains and further discloses grand jury materials could be prosecuted for obstruction of justice or another federal crime. *United States v. Forman*, 71 F.3d 1214, 1220 (6th Cir. 1995) (“[O]ne who divulges grand jury materials but is not subject to Rule 6(e)(2) is still liable to prosecution under 18 U.S.C. § 1503 for obstruction of justice.”); *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985) (affirming convictions of theft of federal property and obstruction of justice); *Polypropylene Carpet*, 181 F.R.D. at 693 n.9 (“[I]t is true that, if a private party schemes to come into possession of grand jury documents surreptitiously for purposes that foil law enforcement efforts, the private party may be subject to prosecution for obstruction of justice.”).

<sup>80</sup> *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (holding that application of federal Wiretap Act to respondents’ disclosure of truthful information of public concern that had been illegally intercepted by a third party violated First Amendment).

<sup>81</sup> See *In re Application to Unseal Dockets Re: Indep. Counsel’s 1998 Investigation of President Clinton*, 308 F. Supp.

endorsed, is discussed in more detail *infra* in the section addressing exceptions to grand jury secrecy.

## Disclosure of Matters Occurring Before the Grand Jury

Rule 6(e) prohibits only “disclosure of matters occurring before the grand jury.” Accordingly, the Rule is not contravened unless something is “disclos[ed],” meaning that a person “with information about the workings of the grand jury . . . [has] reveal[ed] such information to other persons who are not authorized to have access to it under the Rule.”<sup>82</sup> Thus, mere *use* of grand jury information by a person who has already been legitimately exposed to it does not constitute “disclosure” within the meaning of Rule 6(e).<sup>83</sup>

A more difficult issue is determining what types of information or materials fall within the meaning of “matters occurring before the grand jury.” Though not defined in Rule 6(e), courts have tended to view the phrase as broadly encompassing anything that might reveal what took place in the grand jury room.<sup>84</sup> Clear examples include transcripts of proceedings and witness testimony, as well as written “summaries” or “discussions” of the proceedings or evidence presented.<sup>85</sup> Information about the composition and focus of the grand jury—including the identities of witnesses and jurors,<sup>86</sup> the targets and subjects of the investigation,<sup>87</sup> and even the dates and times a grand jury is in session<sup>88</sup>—are also covered by the Rule.

Particular challenges arise in the context of documents such as business records that have been subpoenaed or considered by the grand jury but do not on their face relate to the grand jury itself. In general, “[t]here is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers,”<sup>89</sup> and thus “[t]he mere fact that information [or documents have] been presented to the grand jury” does not bar independent disclosure in other proceedings.<sup>90</sup> For example, an agency or litigant may seek corporate records directly from a

3d 314, 324-25 (D.D.C. 2018) (“The district court is notably absent from this list of the persons bound by Rule 6(e)’s prohibition on disclosure.”).

<sup>82</sup> *United States v. John Doe, Inc. I*, 481 U.S. 102, 108 (1987).

<sup>83</sup> *Id.* at 107-11 (concluding that attorney who was involved in grand jury investigation could review information from investigation for purposes of filing subsequent civil complaint).

<sup>84</sup> *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1176 (10th Cir. 2006); *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997); *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1411 (9th Cir. 1993); *In re Grand Jury Subpoena*, 920 F.2d 235, 241 (4th Cir. 1990).

<sup>85</sup> *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1085 (9th Cir. 2014); *United States v. E. Air Lines*, 923 F.2d 241, 244 (2d Cir. 1991).

<sup>86</sup> *E.g.*, *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013).

<sup>87</sup> *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1564 (11th Cir. 1989); *see also In re Sealed Case No. 99-3091*, 192 F.3d 995, 1004 (D.C. Cir. 1999) (recognizing that matters include “what is likely to occur” before the grand jury, including “the strategy or direction of the investigation”); *In re Grand Jury Investigation*, 610 F.2d 202, 217 (5th Cir. 1980) (holding that Rule 6(e) applies to “disclosures of matters which will occur, such as statements which reveal the identity of persons who will be called to testify or which report when the grand jury will return an indictment”).

<sup>88</sup> *Murphy v. Exec. Office for U.S. Attorneys*, 789 F.3d 204, 211 (D.C. Cir. 2015); *see also Peltier v. FBI*, 218 F. App’x 30, 32 (2d Cir. 2007) (addressing dates of grand jury testimony).

<sup>89</sup> *Senate of Commonwealth of P.R. v. Dep’t of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987).

<sup>90</sup> *Labow v. Dep’t of Justice*, 831 F.3d 523, 529 (D.C. Cir. 2016); *see also In re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304, 306 (8th Cir. 1988) (“Courts have consistently distinguished the request for documents generated independent of the grand jury investigation from the requests for grand jury minutes or witness transcripts.”); *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). This general rule also means that “information produced by criminal investigations paralleling grand jury investigations does not constitute matters ‘occurring before

company, and the company has no basis to claim that the records are insulated from disclosure simply because a federal grand jury separately has subpoenaed them.<sup>91</sup>

However, utilizing various (and sometimes conflicting) tests,<sup>92</sup> courts have acknowledged that independently generated documents presented to a grand jury may sometimes constitute “matters occurring before the grand jury” in a particular case if the context of a *request* would make production revelatory of the substance of the grand jury’s investigation. For instance, a request for “documents subpoenaed by the grand jury” might impermissibly call for disclosure of grand jury matters, as production “would reveal to the requester that [the documents] had been subpoenaed” and potentially suggest the focus of the grand jury’s investigation.<sup>93</sup> By contrast, a request for documents presented to a grand jury, when coupled with broader requests for “all evidence” or documents related to a factual matter, would not necessarily call for disclosure of grand jury matters if production would leave the requester unable to “determine *which* documents,” if any, “had been submitted to the grand jury.”<sup>94</sup> The framing of a particular request for documents, and the context in which the request is made, will thus impact whether documents presented to or obtained by a grand jury are considered “matters occurring before” it within the meaning of Rule 6(e).

One court has addressed the difficulty inherent in parsing when and to what extent documents subpoenaed or reviewed by a grand jury constitute grand jury “matters” by applying a presumption that “confidential documentary information not otherwise public obtained by the grand jury by coercive means” is covered by the Rule.<sup>95</sup> A party seeking disclosure may rebut the presumption, however, “by showing that the information is public or was not obtained through

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the grand jury’ if the parallel investigation was truly independent of the grand jury proceedings,” regardless of whether the grand jury gains access to the same information. *In re Grand Jury Subpoena*, 920 F.2d 235, 242 (4th Cir. 1990); *Anaya v. United States*, 815 F.2d 1373, 1380 (10th Cir. 1987) (“[R]evelation of information learned by other governmental agencies in a parallel investigation without disclosure of what had been submitted to the grand jury was not improper.”).

<sup>91</sup> *E.g.*, *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1383 (D.C. Cir. 1980); *United States v. Eastern Air Lines, Inc.*, 923 F.2d 241, 244 (2d Cir. 1991). For the same reason, information regarding witness interviews conducted by law enforcement agents does not necessarily constitute “matters occurring before the grand jury” even if the witnesses later testify before the grand jury. *See Dassault Sys., S.A. v. Childress*, No. 09-10534, 2012 WL 3109423, at \*3 (E.D. Mich. July 31, 2012).

<sup>92</sup> *See In re Doe*, 537 F. Supp. 1038, 1043 (D.R.I. 1982) (identifying four approaches). Several courts have looked to the effect that disclosure of particular documents would have, asking whether disclosure would “tend to reveal some secret aspect of the grand jury’s investigation.” *E.g.*, *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1177 (10th Cir. 2006); *Senate of P.R.*, 823 F.2d at 583; *In re Grand Jury Subpoena (United States v. Under Seal)*, 920 F.2d 235, 241 (4th Cir. 1990). A few other courts have focused on the purpose of the request at issue, deeming a document not subject to the Rule if it is “sought for its own sake—for its intrinsic value in furtherance of a lawful investigation—rather than to learn what took place before the grand jury.” *DiLeo v. CIR*, 959 F.2d 16, 19 (2d Cir. 1992) (quoting *In re Special March 1981 Grand Jury*, 753 F.2d 575, 578 (7th Cir. 1985)). It is not always clear whether or to what extent these approaches are distinct. *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1413 (9th Cir. 1993) (characterizing court decisions under both approaches as utilizing an “‘effect’ test”); *see also In re Optical Disk Drive Antitrust Litig.*, 801 F.3d 1072, 1077 (9th Cir. 2015) (comparing the “effect test” to the “pre-existing documents exception” and finding that they share “at least one characteristic”); *but see In re Grand Jury Proceedings*, 851 F.2d 860, 863 (6th Cir. 1988) (referring to purpose test as a “virtually *per se* rule” that almost always permits disclosure).

<sup>93</sup> *Labow*, 831 F.3d at 529; *see also Anaya*, 815 F.2d at 1379 (“[I]t is not the information itself, but the fact that the grand jury was considering that information which is protected by Rule 6(e).”).

<sup>94</sup> *Senate of P.R.*, 823 F.2d at 583; *see also Optical Disk Drive*, 801 F.3d at 1077 (“Production of all material responsive to the subpoena . . . would not establish that any or all of those materials were ever presented to the grand jury, much less shed light on its inner workings.”).

<sup>95</sup> *In re Grand Jury Subpoenas*, 454 F.3d 511, 522 (6th Cir. 2006) (quoting *In re Grand Jury Proceedings*, 851 F.2d 860, 866-67 (6th Cir. 1988)).

coercive means or that disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry.”<sup>96</sup> In practice, then, the showing required to rebut the presumption may result in an inquiry similar to that employed by other courts.<sup>97</sup>

In addition to the substance of grand jury matters themselves (e.g., transcripts of testimony), Rule 6(e) protects against the indirect revelation of grand jury matters in ancillary proceedings and filings, such as hearings or orders addressing claims of privilege or efforts to quash a subpoena. The Rule provides that the court must “close any hearing” and keep “[r]ecords, orders, and subpoenas relating to grand-jury proceedings” under seal “to the extent and as long as necessary” to prevent unauthorized disclosure of a grand jury matter.<sup>98</sup> Arguing that the public ordinarily has a First Amendment or common law right of access to criminal proceedings, members of the media have sometimes sought to obtain sealed records and orders notwithstanding these provisions, but multiple circuits have rejected such efforts.<sup>99</sup>

The prohibition on disclosure of matters occurring before a grand jury is indefinite—in other words, the veil of secrecy is not lifted merely because a grand jury has completed its investigation and either issued an indictment or declined to do so.<sup>100</sup> That said, because some of the “interests” underlying the rule of secrecy are “reduced” once a grand jury’s work is completed, the passage of time may be relevant to whether a court will authorize disclosure pursuant to a Rule 6(e) exception in a particular case.<sup>101</sup>

## Exceptions to Grand Jury Secrecy

Federal Rule of Criminal Procedure 6(e)(3) contains a series of “[e]xceptions” to the general rule of grand jury secrecy that permit disclosure of grand jury matters to specified persons or in certain situations. The exceptions fall into two general categories: (1) disclosures that may be made without judicial authorization<sup>102</sup> (though notice must in some cases be provided), and (2)

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<sup>96</sup> *Id.*

<sup>97</sup> Compare *id.* (permitting access to a subset of business records subpoenaed by a grand jury because “[t]he marginal increase in the risk that appellants could divine or reverse-engineer the grand jury’s investigative purpose . . . seems to us to be minimal at best”), with *Labow*, 831 F.3d at 529 (“The mere fact th[at] documents were subpoenaed fails to justify withholding under Rule 6(e),” as “the ‘touchstone’ is whether the information sought would reveal something about the grand jury’s identity, investigation, or deliberation.”).

<sup>98</sup> FED. R. CRIM. P. 6(e)(5)-(6).

<sup>99</sup> See, e.g., *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1088 (9th Cir. 2014) (“[T]here is no First Amendment public right of access to the filings and transcripts related to a motion to quash a grand jury subpoena while the grand jury investigation is ongoing.”); *In re Grand Jury Subpoena*, Judith Miller, 493 F.3d 152, 154 (D.C. Cir. 2007) (“First Amendment protections [do not] extend to ancillary materials dealing with grand jury matters[.]”); *United States v. Smith*, 123 F.3d 140, 150 (3d Cir. 1997) (“[T]here is no presumptive First Amendment right of access if the hearing, and related papers must be sealed under Rule 6(e)(5) and 6(e)(6)[.]”). As Rule 6(e)(5) recognizes, portions of a contempt proceeding that do not reveal substantive grand jury matters may be required to be made public. See FED. R. CRIM. P. 6(e)(5) (making Rule “[s]ubject to any right to an open hearing in a contempt proceeding”); *Index Newspapers*, 766 F.3d at 1091 (collecting cases).

<sup>100</sup> See, e.g., *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979) (“[T]he interests in grand jury secrecy . . . are not eliminated merely because the grand jury has ended its activities.”); *Murphy v. Exec. Office for U.S. Attorneys*, 789 F.3d 204, 211 (D.C. Cir. 2015) (“[T]here is no time limit on the secrecy of grand jury proceedings.”).

<sup>101</sup> *Douglas Oil*, 441 U.S. at 222-23. As explained *infra*, a person seeking court authorization for disclosure of grand jury materials must make a showing of need for the materials that “outweighs the public interest in secrecy.” *Id.* at 223.

<sup>102</sup> FED. R. CRIM. P. 6(e)(3)(A)-(D). Though these disclosures may, by definition, occur without court intervention, the scope of the exceptions in this first category has most often been the subject of court decisions where (1) a government attorney desires to make a disclosure in a marginal case and seeks judicial guidance on whether he may do so, e.g.,



disclosures that may be made only upon order of the court.<sup>103</sup> Certain statutes and Federal Rules of Criminal Procedure beyond Rule 6(e) also permit disclosure of grand jury information in particular circumstances.

## Disclosures Without Judicial Authorization

### *Disclosure to a Government Attorney*

Rule 6(e)(3)(A)(i) provides that disclosure of a grand jury matter “other than the grand jury’s deliberations or any grand juror’s vote” may be made without court authorization to “an attorney for the government for use in performing that attorney’s duty.”<sup>104</sup> The term “attorney for the government” is defined elsewhere in the Federal Rules of Criminal Procedure as, in relevant part, (1) the Attorney General “or an authorized assistant”; (2) a United States attorney or an authorized assistant; or (3) “any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.”<sup>105</sup> Thus, an “attorney for the government” under Rule 6(e)(3)(A)(i) encompasses attorneys within the United States Department of Justice, as well as local or federal agency attorneys that have been appointed to act as federal prosecutors.<sup>106</sup> Attorneys outside the Department of Justice who have not been so appointed, however, are excluded.<sup>107</sup>

Concerning the Rule’s limitation that disclosure to a government attorney be “for use in performing that attorney’s duty,” an Advisory Committee note states that attorneys are entitled to disclose “inasmuch as they may be present in the grand jury room during the presentation of evidence.”<sup>108</sup> The Supreme Court accordingly has determined that disclosure under the Rule “is

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United States v. Sells Eng’g, Inc., 463 U.S. 418, 421-22 (1983), or (2) a criminal defendant moves to dismiss his indictment on the grounds that improper disclosures of grand jury matters have been made, e.g., United States v. Tager, 638 F.2d 167, 168 (10th Cir. 1980).

<sup>103</sup> FED. R. CRIM. P. 6(e)(3)(E).

<sup>104</sup> FED. R. CRIM. P. 6(e)(3)(A)(i).

<sup>105</sup> FED. R. CRIM. P. 1(b)(1). The Rule also includes in its definition the Guam Attorney General or another person who Guam law authorizes to act in cases arising under Guam law. *Id.*

<sup>106</sup> See *Sells Eng’g*, 463 U.S. at 426 (“Attorney for the government” is defined . . . in such broad terms as potentially to include virtually every attorney in the Department of Justice.”); *United States v. Smith*, 324 F.3d 922 (7th Cir. 2003) (recognizing that state prosecutor who was duly appointed as an unpaid Special Assistant United States Attorney was “authorized” and thus within meaning of “attorney for the government”); *United States v. Reece*, 614 F.2d 1259, 1263 (10th Cir. 1980) (recognizing that Department of Agriculture attorney was authorized to appear before grand jury due to appointment as Special Assistant United States Attorney). The D.C. Circuit has held that a duly appointed independent counsel is an attorney for the government under Rule 6(e), meaning that he is subject to the obligation of secrecy. See *In re Cisneros*, 426 F.3d 409, 412 (D.C. Cir. 2005) (“As the independent counsel is an attorney for the government, any release of grand jury material by him, including his final report, falls within the protective provisions of Rule 6(e).”).

<sup>107</sup> *Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 567 (1983) (“Plainly Rule 6(e) does not permit the Attorney General of the United States to disclose any grand jury proceedings to a State attorney general unless he is directed to do so by a court.”); *United States v. Bates*, 627 F.2d 349, 351 (D.C. Cir. 1980) (“If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided.”); *Bradley v. Fairfax*, 634 F.2d 1126, 1131 (8th Cir. 1980) (“Case law suggests that a hearing officer employed by the Parole Commission is an attorney for the agency, not an attorney for the government within the meaning of [Rule] 6.”); *In re Perlin*, 589 F.2d 260, 267 (7th Cir. 1978) (collecting cases); *Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 896 (7th Cir. 1973) (“[T]his phrase has been construed to include only attorneys for the United States government and not municipal, county or state attorneys.”). As *Perlin* reflects, other attorneys may be considered “government personnel” entitled to disclosure depending on the circumstances. 589 F.2d at 267. The “government personnel” exception is discussed *infra*.

<sup>108</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1944 adoption.

limited to use by those attorneys who conduct the criminal matters to which the materials pertain.”<sup>109</sup> Accordingly, “every attorney (including a supervisor) who is working on a [particular] prosecution,” but not a related civil matter, “may have access to grand jury materials” underlying that prosecution.<sup>110</sup> And at least one court has taken a more expansive view, reading the Rule as permitting disclosure to “government attorneys conducting other criminal matters to which the materials disclosed are relevant,” even if such attorneys are located in a different jurisdiction than the empaneled grand jury.<sup>111</sup>

Once an attorney for the government has access to grand jury materials, he may use the materials as needed for the continued investigation and prosecution of the violations of federal criminal law to which they pertain, including in preparation for trial or during the examination of witnesses.<sup>112</sup> Disclosures not connected to such violations of federal criminal law, however, are prohibited.<sup>113</sup>

### ***Disclosure to Government Personnel***

Under Rule 6(e)(3)(A)(ii), disclosure of a grand jury matter, excluding grand jury deliberations and votes, may be made to “any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney’s duty to enforce federal criminal law.”<sup>114</sup> This provision was added to Rule 6(e) in 1977<sup>115</sup> to address the need of Justice Department attorneys “for active assistance from outside personnel” in the course of grand jury investigations, including “investigators from the F[ederal Bureau of Investigation], I[nternal Revenue Service], and other law enforcement agencies[,]” without the “time-consuming requirement of prior judicial interposition.”<sup>116</sup>

The term “government personnel” has been interpreted to extend to non-attorney government employees such as law enforcement agents and subject-matter experts,<sup>117</sup> as well as agency

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<sup>109</sup> *Sells Eng’g*, 463 U.S. at 427.

<sup>110</sup> *Id.* at 429 n.11 (emphasis omitted).

<sup>111</sup> *Impounded*, 277 F.3d 407, 413 (3d Cir. 2002). The “attorney for the government” exception appears to extend at least this far, given that a separate exception in the Rule (discussed *infra*) permits automatic disclosure by an “attorney for the government” to “another federal grand jury.” FED. R. CRIM. P. 6(e)(3)(C). As the court in *Impounded* pointed out, it would be anomalous if an attorney involved in one grand jury investigation could disclose grand jury matters to another grand jury but not to the attorneys appearing before the second grand jury. 277 F.3d at 414-15; *cf. Sells Eng’g*, 463 U.S. at 428 (rejecting proposition that “any Justice Department attorney is free to rummage through the records of any grand jury in the country, simply by right of office”).

<sup>112</sup> *E.g.*, *United States v. Garcia*, 420 F.2d 309, 311 (2d Cir. 1970) (“There has never been any question of the right of government attorneys to use grand jury minutes, without prior court approval, in preparation for trial and even to make them public at trial to the extent of referring to such minutes during the examination of witnesses.”). One prominent treatise has noted that “use in performing [an] attorney’s duty” can include certain disclosures that “are directly incidental to the preparation and presentation of the criminal case” in situations not otherwise contemplated by Rule 6(e). *See* BEALE, *supra* note 16, § 5:8.

<sup>113</sup> *Sells Eng’g*, 463 U.S. at 427.

<sup>114</sup> FED. R. CRIM. P. 6(e)(3)(A)(ii).

<sup>115</sup> The 1977 amendment did not specify whether the term “government personnel” extended beyond *federal* government personnel; the language was amended again in 1985 to make clear that it does. *See* FED. R. CRIM. P. 6(e) advisory committee’s note to 1985 amendments.

<sup>116</sup> *Sells Eng’g*, 463 U.S. at 436, 441 (quoting S. REP. NO. 95-354, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527, 531); *see also In re Grand Jury Proceedings*, 158 F. Supp. 2d 96, 107-15 (D. Mass. 2001) (examining legislative history in detail).

<sup>117</sup> *E.g.*, *United States v. Jones*, 766 F.2d 994, 1000 (6th Cir. 1985) (involving ATF agent); *In re Grand Jury Subpoenas*, 581 F.2d 1103, 1109 (4th Cir. 1978) (involving IRS agents); *SEC v. Everest Mgmt. Corp.*, 87 F.R.D. 100,

attorneys outside the Department of Justice who, because they have not been authorized to act as federal prosecutors, would not be entitled to disclosure under Rule 6(e)(3)(A)(i).<sup>118</sup> One question that has arisen is the extent to which employees of private entities that are controlled by or connected to the government may be considered “government personnel.” The few cases addressing this question have tended to find that purely private entities and contractors are excluded from the Rule,<sup>119</sup> though a “quasi-governmental entity” that has both public and private attributes may not be, “depending on the facts of the situation.”<sup>120</sup>

As the text of the Rule indicates, government personnel to whom disclosure of information is made may use that information only to assist government attorneys in enforcing federal criminal law.<sup>121</sup> Resultantly, disclosure to government personnel is constrained to an equal degree as disclosure to government attorneys under Rule 6(e)(3)(A)(i), that is, for use in the investigation and prosecution of criminal law violations—but not related civil matters—to which the information pertains.<sup>122</sup>

To balance the benefit of disclosure to government personnel as needed against the risk that secrecy will thereby be compromised, Rule 6(e)(3)(B) requires prosecuting attorneys to “promptly” provide the court that impaneled the grand jury with the names of all government personnel to whom a disclosure is made under Rule 6(e)(3)(A)(ii).<sup>123</sup> Though the text of this provision suggests that the names need only be provided *after* disclosure, the legislative history and an Advisory Committee note “contemplate[] that the names of such personnel will generally be furnished to the court before disclosure is made to them.”<sup>124</sup>

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106 (S.D.N.Y. 1980) (involving an SEC representative).

<sup>118</sup> *Sells*, 463 U.S. at 436 n.21 (“[T]he provisions of (A)(ii) apply as well to attorneys for government agencies outside the Justice Department, unless they are specially retained [by the department to act as prosecutors.]”); *In re Perlin*, 589 F.2d 260, 267 (7th Cir. 1978) (concluding that Rule evinces “Congressional support for interagency cooperation and the active participation of agency personnel, including agency attorneys, in grand jury proceedings”).

<sup>119</sup> *See, e.g., United States v. Tager*, 638 F.2d 167, 168 (10th Cir. 1980) (concluding that employees of investigative entity voluntarily funded and controlled by private insurance companies were not “government personnel”); *Grand Jury Proceedings*, 158 F. Supp. 2d at 115 (reading Rule as “excluding disclosure to private individuals regardless of whether the private individual’s use of the grand jury information is limited to assisting in the criminal investigation”); *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-175, 2016 WL 3255069, at \*2 (N.D. Cal. June 14, 2016) (finding that retained consultants were not “government personnel” where it was “undisputed that both individuals are private consultants who do not work for government or quasi-governmental entities, who were not exclusively working for the government on this case, and whose access to data was not controlled by the government”).

<sup>120</sup> *See United States v. Pimental*, 380 F.3d 575, 592, 594, 596 (1st Cir. 2004) (involving state insurance fraud board authorized by statute, partially governed by public officials, and funded by associations of private insurance carriers); *United States v. Lartey*, 716 F.2d 955, 964 (2d Cir. 1983) (involving former IRS agent who was de facto temporary government employee); *In re Disclosure of Matters Occurring Before a Grand Jury to the Litig. Tech. Serv. Ctr.*, No. 11-163, 2011 WL 3837277, at \*3-\*4 (D. Haw. Aug. 25, 2011) (involving litigation support facility owned by government but operated by private contractor).

<sup>121</sup> FED. R. CRIM. P. 6(e)(3)(B).

<sup>122</sup> *See Sells*, 463 U.S. at 442 (reading the “‘criminal-use’ limitation” as applying equally to government attorneys and personnel); *United States v. Bazzano*, 570 F.2d 1120, 1125 (3d Cir. 1977) (“[T]he F.B.I. agent cannot use the disclosed material in a manner which is not permissible for the Government attorney.”); *cf. In re Grand Jury Subpoenas*, 472 F.3d 990, 999 (8th Cir. 2007) (concluding criminal investigator properly made privy to grand jury information does not violate grand jury secrecy by being involved in concurrent civil investigation absent “evidence that the knowledge of matters before the grand jury held by the investigator has been put to use in some way other than to further the criminal investigation”).

<sup>123</sup> FED. R. CRIM. P. 6(e)(3)(B).

<sup>124</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1977 enactment; S. REP. NO. 95-354, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527, 531; *see also United States v. Hogan*, 489 F. Supp. 1035, 1038 (W.D. Wash. 1980) (“The

The attorney who provides the court with the names of government personnel to whom disclosure has been made must also “certify” that he has “advised” those personnel “of their obligation of secrecy” under Rule 6(e).<sup>125</sup> Added in 1985, this requirement stemmed from concern that, particularly with respect to state and local government personnel who “otherwise would likely be unaware of th[e] obligation[,]” disclosure could result in “inadvertent breach[es] of grand jury secrecy” if personnel were not expressly advised to keep the information secret.<sup>126</sup>

### *Disclosure to Another Grand Jury*

Rule 6(e)(3)(C) permits an attorney for the government to disclose “any grand jury-matter to another federal grand jury” without court authorization.<sup>127</sup> The Advisory Committee note to the Rule’s 1983 addition reflects practical reasons for the exception: courts already “permitted such disclosure in some circumstances” despite the absence of a specific provision to that effect, and secrecy would “be protected almost as well by the safeguards at the second grand jury proceeding . . . as by judicial supervision of the disclosure of such materials.”<sup>128</sup> In other words, when materials from one grand jury are disclosed to a second grand jury, “secrecy is not thereby compromised, since the second grand jury is equally under Rule 6’s requirement of secrecy.”<sup>129</sup>

Courts have held that the exception allows grand jury materials to be transferred not only to “successor”<sup>130</sup> grand juries within the same judicial district, but to grand juries in other jurisdictions pursuing separate investigations as well.<sup>131</sup>

### *Disclosure of Intelligence and National Security Information*

Two of the most recent, and unique, exceptions to grand jury secrecy in Rule 6(e) permit disclosure of certain information to specified government officials based on the *subject matter* of that information.<sup>132</sup> First, as part of the USA PATRIOT Act of 2001,<sup>133</sup> Congress amended Rule 6(e) to allow an attorney for the government to disclose any grand jury matter involving **foreign intelligence, counterintelligence, or foreign intelligence information** to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security official

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disclosure of the names of the Government personnel to whom grand jury testimony is to be released should ordinarily be made prior to the time of disclosure.”).

<sup>125</sup> FED. R. CRIM. P. 6(e)(3)(B).

<sup>126</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1985 amendments.

<sup>127</sup> FED. R. CRIM. P. 6(e)(3)(C).

<sup>128</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments (quoting *United States v. Malatesta*, 583 F.2d 748, 753 (5th Cir. 1978)).

<sup>129</sup> *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 425 n.7 (1983).

<sup>130</sup> The Rule facilitates the practice of seeking an indictment from a successive grand jury if the prosecutor cannot secure an indictment from the original grand jury during its term. *See* FED. R. CRIM. P. 6(g) (providing for 18-month term with possibility of a six-month extension); *United States v. Contenti*, 735 F.2d 628, 630 (1st Cir. 1984); *United States v. Plaskett*, No. 07-60, 2008 WL 444552, at \*4 (D.V.I. Feb. 4, 2008).

<sup>131</sup> *In re Grand Jury Subpoenas Duces Tecum*, Aug. 1986, 658 F. Supp. 474, 480 (D. Md. 1987); *see also* *Impounded*, 277 F.3d 407, 414 (3d Cir. 2002) (noting that the provision reflects a “desire to expedite and facilitate the use of one grand jury’s information by other grand juries investigating other crimes,” without geographical limitation). Prior to adoption of the amendment, there was at least some authority disapproving of transfers between grand juries in different districts without court authorization. *See In re Grand Jury Investigation of Banana Indus.*, 214 F. Supp. 856, 858-59 (D. Md. 1963).

<sup>132</sup> *See* FED. R. CRIM. P. 6(e)(3)(D).

<sup>133</sup> Pub. L. No. 107-56, 115 Stat. 272 (2001).

to assist the official receiving the information in the performance of that official's duties."<sup>134</sup> The terms "**foreign intelligence**" and "**counterintelligence**" are respectively defined in a separate statute as

information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities," and "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>135</sup>

The Rule itself defines the term "**foreign intelligence information**" as

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

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

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

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.<sup>136</sup>

The Intelligence Reform and Terrorism Prevention Act of 2004<sup>137</sup> added another exception, allowing an attorney for the government to disclose any grand jury matter "involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent" to "any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities."<sup>138</sup>

As commentators have noted, these contemporary exceptions are fairly expansive in that they allow prosecutors to unilaterally disclose grand jury materials to persons not involved in the prosecution of federal crimes based on definitions that could arguably encompass a "broad range of information."<sup>139</sup> In this sense, the exceptions appear to be a significant departure from the traditional practice of strictly limiting dissemination of grand jury materials.<sup>140</sup> In recognition of the potentially expansive application of the new exceptions, the Rule stipulates that any official to

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<sup>134</sup> FED. R. CRIM. P. 6(e)(3)(D).

<sup>135</sup> 50 U.S.C. § 3003.

<sup>136</sup> FED. R. CRIM. P. 6(e)(3)(D)(iii).

<sup>137</sup> Pub. L. No. 108-458 § 6501, 118 Stat. 3638 (2004).

<sup>138</sup> FED. R. CRIM. P. 6(e)(3)(D).

<sup>139</sup> Lori E. Shaw, *The USA Patriot Act of 2001, the Intelligence Reform and Terrorism Prevention Act of 2004, and the False Dichotomy Between Protecting National Security and Preserving Grand Jury Secrecy*, 35 SETON HALL L. REV. 495, 511 (2005).

<sup>140</sup> *Id.*

whom a disclosure is made “may use the information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.”<sup>141</sup> Additionally, with respect to state, local, Indian tribal, and foreign government officials, Rule 6(e) provides that they may “use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.”<sup>142</sup> Finally, within a “reasonable time after” any disclosure is made under Rule 6(e)(3)(D), an attorney for the federal government must file a sealed notice with the court indicating that “such information was disclosed” and identifying “the departments, agencies, or entities to which the disclosure was made.”<sup>143</sup>

Despite the facial breadth of the recently added exceptions, it does not appear that they have yet been subject to substantial judicial scrutiny or interpretation.<sup>144</sup> At least one commentator, however, has anticipated that a constitutional challenge is inevitable, given the degree to which the exceptions impact grand jury secrecy (and thus potentially undermine the Fifth Amendment’s grand jury requirement).<sup>145</sup>

## Disclosures with Judicial Authorization

### *Disclosure Related to a Judicial Proceeding*

Federal Rule of Criminal Procedure 6(e)(3)(E)(i) permits a court to authorize disclosure of a grand jury matter “preliminarily to or in connection with a judicial proceeding.”<sup>146</sup> This exception, which has been part of the Rule since its inception in 1946, is one of the most frequently litigated.

An oft-cited definition of the term “judicial proceeding” comes from an early U.S. Court of Appeals for the Second Circuit<sup>147</sup> opinion: “[A]ny proceeding determinable by a court, having for

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<sup>141</sup> FED. R. CRIM. P. 6(e)(3)(D)(i). Though the “limitations” on unauthorized disclosure are unclear from the text of the Rule, one commentator has noted that the provision “appears to impose . . . the same secrecy obligations that apply to the government attorney who disclosed it to the official.” 2 DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 22:3 (2d ed. 2012 & 2016 Supp.); *but see* 2 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 17:8 (2d ed. 2006 & 2017 Supp.) (viewing the reference as “hav[ing] little meaning” because there are no “limitations within Rule 6(e) that would apply to federal officials receiving information pursuant to Rule 6(e)(3)(D)”).

<sup>142</sup> FED. R. CRIM. P. 6(e)(3)(D)(i). The Attorney General has issued guidelines requiring, among other things, that grand jury information identifying U.S. persons be labeled as such. *See* Memorandum from the Attorney Gen. to Heads of Dept. Components, Guidelines for Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information Identifying United States Persons 2 (Sept. 23, 2002), <https://www.dni.gov/index.php/ic-legal-reference-book/guidelines-for-disclosure-of-grand-jury-and-electronic-wire-and-oral-interception-information-identifying-united-states-persons>. And although the language in Rule 6(e) is permissive, separate guidelines make disclosure mandatory (subject to the possibility of some use limitations imposed by the disclosing attorney for the government). *See* Memorandum from the Attorney Gen. to Heads of Dept. of Just. Components & Heads of Fed. Depts’ & Agencies with L. Enforcement Resps., Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation 2 (Sept. 23, 2002), <https://www.dni.gov/index.php/ic-legal-reference-book/guidelines-regarding-disclosure-to-the-director-of-central-intelligence-and-homeland-security-officials-of-foreign-intelligence-acquired-in-the-course-of-a-criminal-investigation>.

<sup>143</sup> FED. R. CRIM. P. 6(e)(3)(D)(ii).

<sup>144</sup> *See* BRENNER & SHAW, *supra* note 141, §§ 17:8-9 (noting that the exceptions have “yet to be tested in the courts”).

<sup>145</sup> Shaw, *supra* note 139, at 496 (“Constitutional challenges are almost certain.”). As explained in note 41, *supra*, it is unclear whether grand jury secrecy is encapsulated in the Fifth Amendment’s grand jury requirement.

<sup>146</sup> FED. R. CRIM. P. 6(e)(3)(E)(i).

<sup>147</sup> This report references a significant number of decisions by federal appellate courts of various regional circuits. For

its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.”<sup>148</sup> Criminal and civil litigation qualify as judicial proceedings,<sup>149</sup> but so too may quasi-judicial matters such as impeachment proceedings and certain disciplinary hearings.<sup>150</sup> Purely administrative or nonjudicial investigations or hearings, on the other hand, typically do not qualify.<sup>151</sup>

One question that has arisen is whether the grand jury investigation itself is a “judicial proceeding” such that a court may permit materials generated by the investigation to be disclosed for use in connection with those proceedings. Answering this question in the affirmative would, for example, allow an expert witness to review grand jury material prior to testifying before the grand jury. Some courts have concluded either that a grand jury investigation is a judicial proceeding for these purposes or that it is “preliminary” to a judicial proceeding—the criminal trial that would follow indictment.<sup>152</sup> Consistent with this approach, said criminal trial generally has been viewed as a judicial proceeding permitting disclosure of materials from the underlying grand jury,<sup>153</sup> though there is authority to the contrary.<sup>154</sup> Conversely, courts have rejected the argument that a proceeding instituted primarily or solely to *obtain* grand jury materials can itself

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purposes of brevity, references to a particular circuit in the body of this report (e.g., the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit.

<sup>148</sup> *Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958); see *In re Grand Jury 89-4-72*, 932 F.2d 481, 484 (6th Cir. 1991) (referring to the definition from *Rosenberry* as “[t]he most commonly relied upon” and collecting cases).

<sup>149</sup> E.g., *In re Grand Jury Proceedings*, 654 F.2d 268, 271-72 (3d Cir. 1981) (involving state criminal trial).

<sup>150</sup> See *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1*, Miami, 833 F.2d 1438, 1440 (11th Cir. 1987) (noting lower court ruling and party agreement that “within the meaning of the rule a Senate impeachment trial qualifies as a ‘judicial proceeding[.]’”); *In re Barker*, 741 F.2d 250, 254 (9th Cir. 1984) (involving quasi-judicial disciplinary proceedings); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1230 (D.D.C. 1974), *mandamus denied sub nom.* Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974) (involving impeachment proceedings).

<sup>151</sup> See *Bradley v. Fairfax*, 634 F.2d 1126, 1129 (8th Cir. 1980) (determining that parole revocation hearings are not judicial proceedings); *In re Grand Jury 89-4-72*, 932 F.2d 481, 485 (6th Cir. 1991) (concluding that bar disciplinary proceedings do not qualify where authority to discipline attorneys is completely delegated to a privately funded board of laypersons and attorneys); *In re Grand Jury Proceedings*, 309 F.2d 440, 444 (3d Cir. 1962) (holding that ex parte administrative proceeding related to Federal Trade Commission cease and desist order is not a judicial proceeding).

<sup>152</sup> E.g., *In re Grand Jury*, 490 F.3d 978, 986 (D.C. Cir. 2007) (noting it “makes sense” that a grand jury investigation is a judicial proceeding “given that the district court itself convenes and supervises the grand jury proceedings,” and it also “may be considered ‘preliminary’ to a judicial proceeding—namely, preliminary to a possible criminal trial.”); *United States v. Mayes*, 670 F.2d 126, 129 (9th Cir. 1982) (“[I]t seems clear that grand jury proceedings are at least preliminary to a judicial proceeding.”). Courts have not been unanimous in this view, however. See, e.g., *United States v. Tager*, 638 F.2d 167, 171 (10th Cir. 1980) (“The grand jury proceedings themselves from which information is sought to be revealed are not the ‘judicial proceeding’ contemplated by” the Rule.); *In re Nov. 1992 Special Grand Jury*, 836 F. Supp. 615, 618 (N.D. Ind. 1993) (same).

<sup>153</sup> *Mayes*, 670 F.2d at 129; *United States v. Rodriguez*, 380 F. Supp. 2d 1041, 1058 (D.N.D. 2005).

<sup>154</sup> One court has noted that applying the “judicial proceeding” exception to the criminal trial authorized by the grand jury’s indictment would render superfluous the separate Rule 6(e) exception for a defendant seeking to dismiss the indictment, “as the first exception would always encompass the second.” *United States v. Loc Tien Nguyen*, 314 F. Supp. 2d 612, 616 (E.D. Va. 2004); see also *United States v. Bunty*, 617 F. Supp. 2d 359, 372 (E.D. Pa. 2008) (agreeing with *Nguyen*). There is also some tension between the view that a court may authorize disclosure in this context and the Jencks Act provision that transcripts of witness testimony not be released until after the witness has testified on direct examination. See *United States v. Diaz*, No., 2006 WL 1806161, at \*3 (N.D. Cal. June 29, 2006) (suggesting view that disclosure may be authorized under “judicial proceeding” exception “does not come to grips with the express prohibition in the Jencks Act”); but see *United States v. Ferguson*, 844 F. Supp. 2d 810, 828 (E.D. Mich. 2012) (alluding to Sixth Circuit view that Jencks Act prohibition does not apply to grand jury testimony).

be considered the “judicial proceeding” needed to justify disclosure, recognizing that such a reading of the exception would be circular and “rule-swallowing.”<sup>155</sup>

With respect to the “preliminarily to or in connection with” requirement, the Supreme Court has said that the relevant inquiry is the *use* for which the grand jury information is being requested: “the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated.”<sup>156</sup> Thus, “it is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is . . . likely to emerge . . . . If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure . . . is not permitted.”<sup>157</sup> What this limitation on the exception means is that a request for grand jury materials pursuant to a preliminary inquiry or investigation does not come within the scope of the exception where the prospect of a judicial proceeding stemming from the investigation is merely speculative.<sup>158</sup> That said, an administrative or other investigative inquiry may be considered “preliminar[y]” to a judicial proceeding if “a clear pathway exists” between that process “and the judicial process and the ultimate judicial role is a very substantial one.”<sup>159</sup>

### *Disclosure to Defendant on Showing of Ground to Dismiss Indictment*

Rule 6(e)(3)(E)(ii) permits a court to order disclosure “at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.”<sup>160</sup> Along with the “judicial proceeding” exception, this exception is the only other mechanism for seeking court authorization to disclose grand jury materials that has been in the Rule since its inception in 1946.<sup>161</sup>

There is a strong “presumption of regularity” in grand jury proceedings,<sup>162</sup> and thus a defendant requesting court authorization for disclosure under this exception carries a heavy burden in seeking to make the requisite showing. First, dismissal of an indictment itself is a remedy only for misconduct before the grand jury that “amounts to a violation of one of those ‘few, clear rules which were carefully drafted and approved by [the Supreme] Court and by Congress to ensure the integrity of the grand jury’s functions’”—such as violations of Rule 6 or certain statutory

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<sup>155</sup> *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 72 (D.C. Cir. 1983); *see also* *McDonnell v. United States*, 4 F.3d 1227, 1248 (3d Cir. 1993); *In re Applications for Orders Directing the Review or Release of Certain Grand Jury Testimony of Mario Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973); *cf. In re Cisneros*, 426 F.3d 409, 413 (D.C. Cir. 2005) (recognizing court function in determining whether to release independent counsel report is a “judicial proceeding”).

<sup>156</sup> *United States v. Baggot*, 463 U.S. 476, 480 (1983).

<sup>157</sup> *Id.*

<sup>158</sup> *See id.* (concluding Internal Revenue Service investigation to determine civil tax liability was not “preliminar[y] to or in connection with” judicial proceeding “because the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels”); *Grand Jury 89-4-72*, 932 F.2d at 485 (determining that possibility of eventual, discretionary court review did not make nonjudicial disciplinary process “preliminary to” a judicial proceeding).

<sup>159</sup> *In re Dec. 1988 Term Grand Jury Investigation*, 714 F. Supp. 782, 784 (W.D.N.C. 1989) (collecting cases); *see also Grand Jury No. 81-1*, 833 F.2d at 1440 (noting lower court ruling and party agreement that “a House impeachment inquiry is ‘preliminary to’” judicial proceeding in the form of “the Senate trial”); *Mayes*, 670 F.2d at 129 (finding it clear that grand jury proceedings are preliminary to the judicial proceeding that is the criminal trial); *cf. Bradley*, 634 F.2d at 1129 (expressing reluctance to include determinations of agencies merely because their “decisions are subject to judicial review”).

<sup>160</sup> FED. R. CRIM. P. 6(e)(3)(E)(ii).

<sup>161</sup> *See* FED. R. CRIM. P. 6(e) (1946).

<sup>162</sup> *Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974) (quoting *United States v. Hamling*, 481 F.2d 307, 313 (9th Cir. 1973)).



provisions establishing prosecutorial standards of conduct.<sup>163</sup> For example, indictment dismissal may be warranted where the prosecutor secures the indictment by actively misleading the grand jury about key evidence,<sup>164</sup> but mere failure to present evidence favorable to the defendant will not justify dismissal.<sup>165</sup>

Second, to make the requisite showing that one of the above-mentioned grounds exists, the defendant must do more than make “conclusory or speculative allegations of misconduct.”<sup>166</sup> Rather, the defendant must identify a factual basis for inferring that misconduct warranting indictment dismissal has occurred.<sup>167</sup> At least one court has described this as an “exceedingly high burden.”<sup>168</sup> For this reason, courts rarely grant requests by defendants under Rule 6(e)(3)(E)(ii), as “a defendant often can make the necessary showing only with the aid of the [very] materials he seeks to discover.”<sup>169</sup> Defendants have, at times, pointed out this conundrum, but courts have not been particularly sympathetic.<sup>170</sup>

### *Disclosure to a Foreign Court or Prosecutor*

Under Rule 6(e)(3)(E)(iii), a court “at the request of the government” may authorize disclosure of a grand jury matter “when sought by a foreign court or prosecutor for use in an official criminal investigation.”<sup>171</sup> This provision was added to the Rule as part of the Intelligence Reform and Terrorism Prevention Act of 2004,<sup>172</sup> and appears to have been intended to address uncertainty as

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<sup>163</sup> *United States v. Williams*, 504 U.S. 36, 46 & n.6 (1992) (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O’Connor, J., concurring in judgment)); see *United States v. Skelos*, No. 15-CR-317, 2018 WL 2849712, at \*1-\*2 (S.D.N.Y. June 8, 2018) (noting that “the ability of courts to dismiss grand jury indictments” is “severely limited”). A defendant must also show that he was actually prejudiced by a non-constitutional error in a grand jury proceeding. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

<sup>164</sup> See *United States v. Naegele*, 474 F. Supp. 2d 9, 12 (D.D.C. 2007) (recognizing that case was “exceedingly rare” example of adequate showing that indictment dismissal could be warranted, where prosecutor procured testimony that a statement of financial affairs had been signed under oath and filed with court while knowing there was no signature page on file).

<sup>165</sup> See, e.g., *United States v. Finn*, 919 F. Supp. 1305, 1327 (D. Minn. 1995) (“The rule is well-settled that a defendant may not challenge an Indictment on the ground that evidence favorable to a defendant had not been presented to the Grand Jury.”).

<sup>166</sup> *Naegele*, 474 F. Supp. 2d at 10; see also *United States v. Leung*, 40 F.3d 577, 582 (2d Cir. 1994) (rejecting “speculations about possible irregularities” as “insufficient”); *United States v. Warren*, 16 F.3d 247, 253 (8th Cir. 1994) (agreeing that “a bare allegation that the records are necessary to determine if there may be a defect in the grand jury process” is insufficient); *United States v. Lisinski*, 728 F.2d 887, 894 (7th Cir. 1984) (rejecting “unsupported speculation”); *United States v. George*, 839 F. Supp. 2d 430, 437 (D. Mass. 2012) (noting that provision is “not an invitation to engage in ‘fishing expeditions’ for misconduct in grand jury proceedings”).

<sup>167</sup> See *Leung*, 40 F.3d at 582 (requiring “concrete allegations of Government misconduct”); *United States v. Bruno*, 159 F. Supp. 3d 311, 322-23 (E.D.N.Y. 2016) (rejecting request for *in camera* review where defendant lacked “solid and specific evidentiary basis” for misconduct); see also *United States v. Sitzmann*, 74 F. Supp. 3d 128, 138 (D.D.C. 2014); *United States v. Bunty*, 617 F. Supp. 2d 359, 372 (E.D. Pa. 2008).

<sup>168</sup> *United States v. Tajideen*, 319 F. Supp. 3d 445, 473 (D.D.C. 2018), *appeal docketed*, No. 18-3059 (D.C. Cir. Aug. 27, 2018).

<sup>169</sup> *United States v. Mechanik*, 475 U.S. 66, 80 (1986) (Marshall, J., dissenting).

<sup>170</sup> E.g., *United States v. Bennett*, 702 F.2d 833, 836 (9th Cir. 1983) (dismissing defendant’s “assertion that he has no way of knowing whether prosecutorial misconduct occurred” absent discovery of grand jury transcripts); *United States v. McElroy*, 392 F. Supp. 2d 115, 117 (D. Mass. 2005) (rejecting argument that “there is no way [defendants] can test whether the government acted properly unless they are provided with the discovery sought,” because “[t]he rule clearly puts the burden on the defendant to make a preliminary showing”).

<sup>171</sup> FED. R. CRIM. P. 6(e)(3)(E)(iii).

<sup>172</sup> Pub. L. No. 108-458 § 6501, 118 Stat. 3638 (2004).

to whether a foreign criminal investigation could be considered “preliminar[y] to . . . a judicial proceeding” within the meaning of that separate exception.<sup>173</sup> With the 2004 addition, the Rule now expressly recognizes that government attorneys may seek court authorization to disclose materials for use in the course of a foreign criminal investigation, rather than having to separately subpoena the same documents in order to provide them to foreign prosecuting authorities.<sup>174</sup>

### ***Disclosure for State, Foreign, or Military Law Enforcement***

Closely related to the exception for court-authorized disclosures to foreign courts and prosecutors, Rule 6(e)(3)(E)(iv) permits a court, “at the request of the government” and upon a showing by the government that a grand jury matter “may disclose a violation of State, Indian tribal, or foreign criminal law,” to order disclosure of a grand jury matter “to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law.”<sup>175</sup> Rule 6(e)(3)(E)(v) extends the same exception to “an appropriate military official” for enforcement of “military criminal law under the Uniform Code of Military Justice.”<sup>176</sup>

Before these exceptions were adopted in 1985,<sup>177</sup> non-federal law enforcement officials could obtain federal grand jury materials for purposes other than federal law enforcement only with court authorization pursuant to the exception permitting disclosure “preliminarily to or in connection with a judicial proceeding.”<sup>178</sup> The judicial proceeding exception proved to be “of limited practical value” in such circumstances,<sup>179</sup> however, given the requirement that there be some “identifiable litigation”<sup>180</sup> to which the disclosure related; where state or other non-federal officials were not already aware of the facts tending to show a violation of the relevant jurisdiction’s criminal law, there would likely be no “pending or anticipated”<sup>181</sup> judicial proceeding prior to disclosure that would justify such disclosure under the “judicial proceeding” exception.<sup>182</sup>

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<sup>173</sup> See *In re Baird*, 668 F.2d 432, 434 n.3 (8th Cir. 1982) (assuming without deciding “that the phrase ‘judicial proceeding’ includes a criminal trial conducted in a foreign country”); see also *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 123-24 (2d Cir. 1982); Shaw, *supra* note 139, at 522 n.167 (noting that the addition “clarified that at least some foreign proceedings qualify as ‘judicial proceedings’ under Rule 6”).

<sup>174</sup> See H.R. Rep. No. 107-534, at 11-12 (2002) (noting that although existing legal mechanisms allow foreign prosecutors and investigating courts to seek evidence in the United States, and U.S. prosecutors actively assist them, “the rule as currently written does not expressly authorize courts to order disclosure” even “when the Government makes an appropriate showing to the court (i.e., a showing similar to that required for disclosure of grand jury material in a domestic proceeding”).

<sup>175</sup> FED. R. CRIM. P. 6(e)(3)(E)(iv).

<sup>176</sup> FED. R. CRIM. P. 6(e)(3)(E)(v).

<sup>177</sup> The 1985 amendment was limited to state and local officials, with subsequent amendments extending the exceptions to foreign, Indian tribal, and military officials for enforcement of their respective jurisdictions’ criminal laws. See FED. R. CRIM. P. 6(e) advisory committee’s note to 2002 amendments.

<sup>178</sup> FED. R. CRIM. P. 6(e)(3)(E)(i).

<sup>179</sup> BEALE, *supra* note 16, § 5:11.

<sup>180</sup> *United States v. Baggot*, 463 U.S. 476, 480 (1983).

<sup>181</sup> *Id.*

<sup>182</sup> As recognized in the Advisory Committee note to the 1985 amendments, another perceived barrier to information-sharing between law enforcement officials across jurisdictions was the “particularized need” requirement read into the Rule by the Supreme Court. See *Illinois v. Abbott & Assoc.*, 460 U.S. 557 (1983). The stringency of the Supreme Court’s standard prompted the inclusion in the 1985 amendment of the requirement that the government attorney seeking court authorization for disclosure show only that the grand jury information at issue “may disclose a violation of State, Indian tribal, or foreign criminal law.” See FED. R. CRIM. P. 6(e) advisory committee’s note to 1985 amendments (indicating that evidence tending to show a violation of state law often “cannot be communicated to the

According to an Advisory Committee note, “[t]his inability lawfully to disclose evidence of a [non-federal] criminal violation—evidence legitimately obtained by the grand jury”—was perceived as “an unreasonable barrier to the effective enforcement” of criminal law across jurisdictions.<sup>183</sup> Thus, pursuant to the exceptions, courts may now permit disclosure to a non-federal official “when an attorney for the government so requests and makes the requisite showing.”<sup>184</sup> Department of Justice guidelines require that federal prosecutors request and receive internal authorization to apply for a court order under these exceptions before doing so.<sup>185</sup>

With respect to which officials are “appropriate” within the meaning of the Rule, the Department of Justice takes the position that the term “shall be interpreted to mean any official whose official duties include enforcement of the . . . criminal law whose violation is indicated in the matters for which disclosure authorization is sought.”<sup>186</sup> The few court decisions construing the term appear to take a similar view.<sup>187</sup>

### *Courts’ Inherent Authority to Order Disclosure*

The Supreme Court has said that where a statute “explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”<sup>188</sup> As discussed above, Rule 6(e) provides that a matter occurring before a grand jury must not be disclosed “[u]nless these rules provide otherwise.”<sup>189</sup> Rule 6(e) then explicitly “provide[s] otherwise” by granting authority to courts to order disclosure of grand jury matters in particular, enumerated circumstances.<sup>190</sup> Thus, based solely on Rule 6(e)’s text and general principles of statutory construction, it would seem that courts can authorize disclosure of grand jury matters only if one of the express exceptions in Rule 6(e) applies. Some courts have appeared to agree with this proposition, at least in the abstract.<sup>191</sup>

Nevertheless, a number of federal courts have determined that the list of court-authorized exceptions in Rule 6(e) is not exclusive, and that courts have “inherent authority” to permit disclosure of grand jury information and materials in circumstances not expressly provided for in the Rule.<sup>192</sup> Courts in this camp have pointed to various justifications for recognizing such extra-textual judicial authority to breach grand jury secrecy, including that

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appropriate state officials for further investigation” because, among other things, “state officials who might seek this information must show particularized need”). The “particularized need” requirement is discussed in more detail *infra*.

<sup>183</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1985 amendments.

<sup>184</sup> *Id.*

<sup>185</sup> Assistant United States Attorneys must seek prior authorization from the United States Attorney or a delegated supervisor, and prosecutors within a litigating division of the Department of Justice must seek prior authorization from the Assistant Attorney General of that division or a delegate. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-11.260 (2018), <https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.260>.

<sup>186</sup> *Id.*

<sup>187</sup> See *United States v. Velez*, 344 F. Supp. 2d 329, 331 (D.P.R. 2004) (holding that recipient is “appropriate” where he “ha[s] the authority to investigate and prosecute criminal cases against individuals or entities implicated in the grand jury materials”).

<sup>188</sup> *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980).

<sup>189</sup> FED. R. CRIM. P. 6(e)(2)(B).

<sup>190</sup> See generally FED. R. CRIM. P. 6(e)(3)(E).

<sup>191</sup> See *United States v. McDougal*, 559 F.3d 837, 841 (8th Cir. 2009) (suggesting that disclosure would not be permitted “[a]bsent a contention that [a] request fell under one of the enumerated exceptions to the grand jury secrecy requirement”).

<sup>192</sup> *Carlson v. United States*, 837 F.3d 753, 766-67 (7th Cir. 2016); *In re Craig*, 131 F.3d 99, 102 (2d Cir. 1997) (citing

- courts have always had supervisory authority over the grand juries that they impanel, which historically included the discretion to determine when grand jury materials should be released;<sup>193</sup>
- the advent of the Federal Rules of Criminal Procedure did not eliminate a court’s supervisory authority as a general matter, meaning that courts may still take certain actions that are consistent with, though not explicitly authorized by, the Rules;<sup>194</sup>
- Rule 6(e)(2)(B)’s list of persons who are prohibited from disclosing a matter occurring before the grand jury does not include the court itself;<sup>195</sup>
- Rule 6(e)(3)(E)’s list of circumstances in which a court “may” authorize disclosure does not indicate that those circumstances are exclusive, and the presence of limiting language elsewhere in Rule 6 suggests its absence in (e)(3)(E) was intentional;<sup>196</sup> and
- the history of the Rules and Advisory Committee notes indicates that Rule 6(e) was meant to be responsive to and reflective of common exceptions that courts developed of their own volition over time.<sup>197</sup>

Fearing that an exception to grand jury secrecy not textually constrained could undermine secrecy writ large, courts recognizing their “inherent authority” to release grand jury materials in situations not governed by Rule 6(e) have generally cabined the exercise of such authority to “special” or “exceptional” circumstances.<sup>198</sup> Though a determination that such circumstances exist is “highly discretionary and fact sensitive,” factors that courts have considered include

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*In re Biaggi*, 478 F.2d 489, 494 (2d Cir. 1973)); *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1268 (11th Cir. 1984); *In re Nichter*, 253 F. Supp. 3d 160, 165 (D.D.C. 2017); see also *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir. 2006) (positing that relief “may be proper under the court’s inherent authority” but declining to rule on the issue). Two other Circuits have appeared to take inconsistent views on the issue without squarely ruling on it. Compare *McDougal*, 559 F.3d at 840 (“[C]ourts will not order disclosure absent a recognized exception to Rule 6(e).”) and *In re Sealed Case*, 250 F.3d 764, 768 (D.C. Cir. 2001) (indicating that disclosure is “prohibited” absent an express exception in Rule 6(e)), with *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680 (8th Cir. 1986) (recognizing inherent authority of court to impose disclosure limitations on witness “in an appropriate case” despite lack of authority in Rule 6(e)) and *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (expressing “general agreement” with lower court ruling that, among other things, court had inherent authority to permit release of grand jury materials). A case currently before the D.C. Circuit may resolve the legal ambiguity in that circuit. See *McKeever v. Sessions*, No. 17-5149 (D.C. Cir. June 26, 2017) (oral argument held Sept. 21, 2018); CRS Legal Sidebar LSB10201, *Do Courts Have Inherent Authority to Release Secret Grand Jury Materials?*, by Michael A. Foster.

<sup>193</sup> E.g., *Carlson*, 837 F.3d at 762.

<sup>194</sup> E.g., *id.* at 763; *Grand Jury Materials*, 735 F.2d at 1268 (“[T]he rule is not the true source of the district court’s power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court[.]”).

<sup>195</sup> *In re Petition to Unseal Dockets Related to Indep. Counsel’s 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 324-25 (D.D.C. 2018), *appeal docketed*, No. 18-5142 (D.C. Cir. May 17, 2018).

<sup>196</sup> E.g., *id.* at 325.

<sup>197</sup> E.g., *Craig*, 131 F.3d at 102 (noting that “the origins of Rule 6(e)” indicate that it “reflects rather than creates the relationship between federal courts and grand juries”); see also *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959) (indicating that Rule 6(e) is “but declaratory” of the principle that “disclosure [is] committed to the discretion of the trial judge”).

<sup>198</sup> See *Craig*, 131 F.3d at 102 (“Rule 6(e) governs almost all requests for the release of grand jury records,” but “there are certain ‘special circumstances’ in which release of grand jury records is appropriate even outside of the boundaries of the rule.”); *Carlson*, 837 F.3d at 766 (acknowledging that supervisory authority may only be employed “as needed to

- the identity of the party seeking disclosure;
- whether the defendant to the grand jury proceeding or the government opposes the disclosure;
- why disclosure is being sought in the particular case;
- what specific information is being sought for disclosure;
- how long ago the grand jury proceedings took place;
- the current status of the principals of the grand jury proceedings and that of their families;
- the extent to which the desired material—either permissibly or impermissibly—has been previously made public;
- whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and
- the additional need for maintaining secrecy in the particular case in question.<sup>199</sup>

The circumstances in which courts have most often ordered disclosure of grand jury materials using their inherent authority have involved matters of significant public or historical interest related to grand jury proceedings that have long since concluded.<sup>200</sup> For instance, one district court in the District of Columbia recently unsealed certain dockets associated with the 1998 investigation into the relationship between former President Clinton and a White House intern, citing the length of time that had elapsed and the substantial public interest in the information.<sup>201</sup>

Although the trend appears to be in favor of recognizing a court’s extra-textual inherent authority to release grand jury materials, at least in exceptional circumstances, there is some reason to question whether the Supreme Court would agree that this authority exists if faced squarely with the question. Setting aside the text of Rule 6(e) and the general principles discussed above, the Supreme Court in recent years has expressed “reluctan[ce] to invoke the judicial supervisory

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ensure the proper functioning of a grand jury”); *Grand Jury Materials*, 735 F.2d at 1269 (“[C]ourts must adhere to Rule 6(e) in ‘garden variety’ petitions for grand jury disclosure. The rule was intended to provide a reliable statement of the law in this area, and would be rendered meaningless if departures were freely sanctioned. We assume that courts are not empowered to act outside Rule 6(e) in other than exceptional circumstances consonant with the rule’s policy and spirit.”).

<sup>199</sup> *Craig*, 131 F.3d at 106; see also *President Clinton*, 308 F. Supp. 3d at 326 (relying on *Craig* factors). Other courts have simply applied the “particularized need” balancing test, described *infra*, which includes consideration of factors that substantially overlap with those listed in *Craig*. See *Grand Jury Materials*, 735 F.2d at 1272-73.

<sup>200</sup> *E.g.*, *President Clinton*, 308 F. Supp. 3d at 327 (concluding that, because grand jury proceedings “took place two decades ago” and disclosure would “satisfy the substantial public interest in learning more about” impeachment proceedings, factors weighed “heavily in favor of disclosure”); *In re Kutler*, 800 F. Supp. 2d 42, 50 (D.D.C. 2011) (finding that “undisputed historical interest in the requested records” related to Watergate scandal far outweighed the need to maintain secrecy); *In re Am. Historical Ass’n*, 49 F. Supp. 2d 274, 295-97 (S.D.N.Y. 1999) (permitting disclosure of decades-old grand jury materials based on “sustained and widespread historical interest” in the case); *but see Grand Jury Materials*, 735 F.2d at 1272 (authorizing disclosure to committee of materials from grand jury that recently indicted a judge because a statute expressly authorized the committee to investigate judicial misconduct).

A related but distinct principle recognized by some courts is that although there is generally no time limit on grand jury secrecy, *see, e.g.*, *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979), the passage of time and the steady drip of grand jury information into the public domain can at some point cause such information to lose the protection of Rule 6(e). *E.g.*, *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1138, 1140 (D.C. Cir. 2006). This principle does not appear to be expressly reliant on a court’s “inherent authority” to disclose grand jury materials, but rather recognizes the “common-sense proposition that secrecy is no longer ‘necessary’” within the meaning of Rule 6(e) “when the contents of grand jury matters have become public.” *Id.* (quoting FED. R. CRIM. P. 6(e)(6)).

<sup>201</sup> *President Clinton*, 308 F. Supp. 3d at 327.

power as a basis for prescribing modes of grand jury procedure,” as the grand jury’s status as an independent constitutional fixture “suggest[s] that any power federal courts may have to fashion” such procedures “is a very limited one[.]”<sup>202</sup> These statements have led one treatise to refer to the existence of judicial inherent authority to release grand jury materials beyond the terms of Rule 6(e) as “exceedingly doubtful.”<sup>203</sup>

### ***Showings Required for Court Authorization to Disclose Grand Jury Matters***

Although Rule 6(e) enumerates the contexts in which a court is *authorized* to order disclosure of grand jury matters, courts have had to grapple with determining what standard governs the exercise of a court’s discretion to order disclosure in a particular case—that is, the showing a requester must make in order for a court to agree that releasing grand jury material is warranted under one of the exceptions for court-authorized disclosure in Rule 6(e).

The Supreme Court has said that “disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy,” and “the burden of demonstrating this balance” rests on the party seeking disclosure.<sup>204</sup> Put differently, the secrecy of grand jury proceedings “must not be broken except where there is a compelling necessity,” and the “instances when that need will outweigh the countervailing policy” of secrecy “must be shown with particularity” by the requester.<sup>205</sup>

From these general principles has emerged the standard that Rule 6(e) “require[s] a strong showing of particularized need for grand jury materials before any disclosure will be permitted.”<sup>206</sup> The Supreme Court announced the contours of this so-called “particularized need” standard in the context of the “judicial proceeding” exception to Rule 6(e), explaining that “[p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.”<sup>207</sup>

When the cases describing the “particularized need” standard were decided, the only Rule 6(e) exceptions permitting a court to authorize disclosure of grand jury matters were (1) the “judicial proceeding” exception, and (2) the exception for a defendant upon showing grounds to dismiss the indictment. As the number of Rule 6(e) exceptions permitting court-authorized disclosure has grown over time, however, one question that has arisen is whether and how the Supreme Court’s

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<sup>202</sup> *United States v. Williams*, 504 U.S. 36, 50 (1992); *see also Carlisle v. United States*, 517 U.S. 416, 425-26 (1996) (holding that court may not use inherent supervisory power to fashion rules that circumvent or conflict with Federal Rules of Criminal Procedure); *United States v. Baggot*, 463 U.S. 476, 479 (1983) (referring to Rule 6(e) exception as “an affirmative limitation on the availability of court-ordered disclosure of grand jury materials”). It is notable that the trial court in *Baggot* had authorized disclosure pursuant to its inherent authority, but the Supreme Court affirmed the Court of Appeals’ ruling that disclosure was improper because the circumstances did not meet Rule 6(e)’s “judicial proceeding” exception. *See id.* Thus, although the Supreme Court did not address the court’s inherent authority to order release of grand jury materials in *Baggot*, at least one court has viewed *Baggot* as “impl[ying] that the exceptions in Rule 6(e) are the only authority for disclosure of grand jury materials and that disclosure is improper where not explicitly authorized by Rule 6(e).” *In re Elec. Surveillance*, 596 F. Supp. 991, 1001 (E.D. Mich. 1984), *abrogated by In re Grand Jury* 89-4-72, 932 F.2d 481 (6th Cir. 1991).

<sup>203</sup> BRENNER & SHAW, *supra* note 141, § 18:2.

<sup>204</sup> *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979).

<sup>205</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

<sup>206</sup> *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443 (1983).

<sup>207</sup> *Douglas Oil*, 441 U.S. at 222.

“particularized need” standard applies outside of the “judicial proceeding” context in which it was announced. Courts have typically recognized that the general requirement imposed on a requester to show a need for the grand jury materials at issue extends to *any* exception authorizing court-ordered disclosure.<sup>208</sup> This requirement, whether given the appellation “particularized need” or not, will obligate a person seeking court authorization for disclosure to show some factual exigency outweighing the interest in secrecy, which will vary depending on the precise exception being invoked. Thus, for example and as discussed above, a defendant seeking an order authorizing disclosure under Rule 6(e)(3)(E)(ii) must be able to present a factual basis for inferring that misconduct that would warrant dismissal of the indictment has occurred, and a government attorney seeking authorization under Rule 6(e)(3)(E)(iv) must show that the grand jury matter for which disclosure is sought may disclose a violation of State, Indian tribal, or foreign criminal law.<sup>209</sup> Likewise, courts addressing whether to authorize release of grand jury materials pursuant to their inherent authority engage in “a nuanced and fact-intensive assessment” of whether the need for the materials is greater than the need to maintain secrecy.<sup>210</sup>

<sup>208</sup> See, e.g., *United States v. McDougal*, 559 F.3d 837, 840-41 (8th Cir. 2009) (describing Rule 6(e) exceptions and pronouncing that “[a] request for disclosure that falls under one of these specified exceptions must also contain a ‘showing of particularized need for grand jury materials’ before disclosure becomes appropriate”); *In re Craig*, 131 F.3d 99, 104 n.5 (2d Cir. 1997) (noting that although “the *Douglas Oil* test cannot be carried over directly to ‘special circumstances’ cases” because “the *Douglas Oil* test’s first prong presumes use of the grand jury material in a subsequent judicial proceeding[], it serves as a useful aid to guide [the] inquiry” into whether circumstances beyond those contemplated in Rule 6(e) warrant court-ordered disclosure); *In re Grand Jury Testimony*, 832 F.2d 60, 62 (5th Cir. 1987) (“Rule 6(e) provides certain exceptions, and case law has established that a district court may properly order release of grand jury materials where a party demonstrates with particularity a ‘compelling necessity’ for the materials.”); *In re Am. Historical Ass’n*, 49 F. Supp. 2d 274, 283 (S.D.N.Y. 1999); but see BRENNER & SHAW, *supra* note 141, § 18:7 (asserting that “[p]articularized need only controls disclosure under Rule 6(e)(3)(E)(i)” but noting the “similarity between” that standard and the standard for disclosure under Rule 6(e)(3)(E)(ii)).

<sup>209</sup> With respect to this and the other exceptions contained in Rules 6(e)(3)(E)(iii) and (v) permitting a court to authorize disclosure for state, local, and foreign law enforcement purposes, there is some indication from the Advisory Committee that the exceptions were needed because the Supreme Court’s “particularized need” requirement was stymieing useful information-sharing for law enforcement purposes across jurisdictions. See FED. R. CRIM. P. 6(e) advisory committee’s note to 1985 amendments (indicating that evidence tending to show a violation of state law often “cannot be communicated to the appropriate state officials for further investigation” because, among other things, “state officials who might seek this information must show particularized need”). This justification for the newer exceptions has prompted some commentators, as well as the Department of Justice, to take the position that the requisite showing for the exceptions is less stringent. See BRENNER & SHAW, *supra* note 141, § 18:8 (citing U.S. DEP’T OF JUSTICE, FEDERAL GRAND JURY PRACTICE 197 (1993)) (asserting that it is “not necessary” to show particularized need, but a “substantial need,” such as the need to prosecute or investigate felony offenses, is required by Department policy). To the extent this position recognizes that the government need not show “possible injustice in another judicial proceeding” to obtain a disclosure order pursuant to the exceptions for grand jury matters that may disclose a violation of another jurisdiction’s criminal law, the position is likely correct (though the showing that the material may disclose such a violation, whether framed as a “particularized need” or not, must still be made). But see 15 U.S.C. § 6204 (establishing that a foreign antitrust authority “with respect to which a particularized need” for antitrust evidence is shown “shall be considered to be an appropriate official” within meaning of Rule 6(e)(3)(E)(iv)). This position seems more tenuous with respect to the exception for disclosure to a foreign court or prosecutor “for use in an official criminal investigation” under Rule 6(e)(3)(E)(iii), however, as that exception appears to establish only that such foreign investigations are to be considered preliminary to judicial proceedings (making disclosure appropriate for the same reasons, and subject to the same showing, as the “judicial proceeding” exception). See H.R. Rep. No. 107-534, at 11-12 (2002) (noting that the exception was intended to remedy the fact that “the rule as currently written does not expressly authorize courts to order disclosure” even “when the Government makes an appropriate showing to the court (i.e., a showing similar to that required for disclosure of grand jury material in a domestic proceeding”).

<sup>210</sup> See, e.g., *In re Kutler*, 800 F. Supp. 2d 42, 47-48 (D.D.C. 2011); see *supra* § Courts’ Inherent Authority to Order Disclosure.

Courts considering whether a “particularized need” exists in a given case have emphasized that although the standard is “highly flexible,”<sup>211</sup> a showing of “mere relevance, economy, and efficiency will not suffice” to meet it.<sup>212</sup> Thus, the inquiry often focuses on the contemplated use of the materials at issue and whether alternative channels exist to obtain them.<sup>213</sup> In the context of judicial proceedings, the need to impeach or refresh the recollection of a witness is a well-recognized and valid need, so long as the need is “real” and not merely a “bald assertion[.]”<sup>214</sup> Other needs that courts have found valid include (1) to substantiate malicious prosecution allegations based on prosecutorial and witness misconduct;<sup>215</sup> (2) to rehabilitate a witness at trial after he has been impeached on cross-examination;<sup>216</sup> and (3) to avoid stymieing an investigation of official improprieties.<sup>217</sup> On the other hand, the mere desire to discover what evidence the grand jury considered has been held to be insufficient.<sup>218</sup>

Consistent with the flexible and fact-dependent nature of the “particularized need” inquiry, the Supreme Court has said that “as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.”<sup>219</sup> Thus, factors courts consider in weighing need against the interest in secrecy may include (1) the nature of the materials sought;<sup>220</sup> (2) whether the requester is a government official or a private party;<sup>221</sup> (3) the time that has elapsed between the grand jury proceedings and

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<sup>211</sup> *Sells Eng’g*, 463 U.S. at 445.

<sup>212</sup> *E.g.*, *Pizzuti v. United States*, 809 F. Supp. 2d 164, 194 (S.D.N.Y. 2011).

<sup>213</sup> *See, e.g.*, *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1442 (11th Cir. 1987) (recognizing particularized need to “conduct[] a full and fair impeachment inquiry”); *In re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304, 308 (8th Cir. 1988) (noting that requested documents were “unavailable through any other channel of discovery”); *Lucas v. Turner*, 725 F.2d 1095, 1102 (7th Cir. 1984) (plaintiffs failed to demonstrate that “the information contained therein could not have been obtained through normal discovery channels”).

<sup>214</sup> *In re Grand Jury Testimony*, 832 F.2d 60, 63 (5th Cir. 1987); *see Douglas Oil*, 441 U.S. at 222 n.12 (recognizing that “the typical showing of particularized need arises” when a litigant seeks to impeach, test the credibility of, or refresh the recollection of a witness).

<sup>215</sup> *Anilao v. Spota*, 918 F. Supp. 2d 157, 177 (E.D.N.Y. 2013).

<sup>216</sup> *United States v. McMahon*, 938 F.2d 1501, 1505 (1st Cir. 1991).

<sup>217</sup> *Application of U.S. for Order Pursuant to Provisions of Rule 6(e), Fed. Rules of Criminal Procedure*, 505 F. Supp. 25, 27 (W.D. Pa. 1980).

<sup>218</sup> *See United States v. Haire*, 103 F.3d 697, 699 (8th Cir. 1996) (concluding that where defendant received transcripts of grand jury testimony of witnesses who testified at trial, desire to discover substance of statements of other “potential witnesses” was not a particularized need).

<sup>219</sup> *Douglas Oil*, 441 U.S. at 223.

<sup>220</sup> *In re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304, 306 (8th Cir. 1988) (“Courts have consistently distinguished the request for documents generated independent of the grand jury investigation from the request for grand jury minutes or witness transcripts[.]”).

<sup>221</sup> *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 445 (1983) (recognizing that although particularized need standard applies to government officials, “the standard itself accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case. For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public”).



the request for disclosure;<sup>222</sup> and (4) whether, in the case of witness testimony or documents, the witness objects to disclosure.<sup>223</sup>

## Disclosures Authorized by Another Statute or Rule

Despite the general presumption of grand jury secrecy established by Federal Rule of Criminal Procedure 6(e), other federal statutes and procedural rules sometimes permit (or even mandate) disclosure of grand jury information in particular circumstances. These statutes and rules are explicit in their limited retraction of grand jury secrecy, as they must be, for the Supreme Court has made clear that it “will not infer” that Congress has exercised its power to modify the secrecy requirement unless Congress has “affirmatively express[ed] its intent to do so.”<sup>224</sup>

First, Rule 6(e) itself explicitly cross-references 18 U.S.C. § 3322,<sup>225</sup> part of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which authorizes government attorneys and personnel who are privy to grand jury information to disclose that information, without a court order, to any other government attorney for use in enforcing the civil penalty provisions of FIRREA or “in connection with any civil forfeiture provision of Federal law.”<sup>226</sup> In other words, in the specified circumstances, Section 3322 acts as a statutory exception to the rule that government attorneys and personnel may not disclose grand jury matters for use in separate civil proceedings without a court order.<sup>227</sup> The statute also establishes other specific circumstances in which a court may order disclosure of grand jury matters: during an investigation of a “banking law violation,”<sup>228</sup> a court may direct disclosure “to identified personnel of a Federal or State financial institution regulatory agency” for use “in relation to any matter within the jurisdiction of such regulatory agency” or “to assist an attorney for the government to whom matters have been disclosed” under the statute.

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<sup>222</sup> *Anilao v. Spota*, 918 F. Supp. 2d 157, 179 (E.D.N.Y. 2013) (noting that “the passage of time erodes many of the justifications for continued secrecy” (quoting *In re Craig*, 131 F.3d 99, 107 (2d Cir. 1997))); *United States v. Ferguson*, 844 F. Supp. 2d 810, 829 (E.D. Mich. 2012) (“Th[e] need for secrecy is reduced when a grand jury’s functions are ended.”).

<sup>223</sup> *In re Exec. Sec. Corp.*, 702 F.2d 406, 409 (2d Cir. 1983) (finding it “highly significant” that witness agreed to the release of his testimony).

<sup>224</sup> *Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 572-73 (1983). Thus, statutes such as the Clayton Act, which requires the Attorney General “to the extent permitted by law” to provide a state attorney general with “any investigative files or other materials” that may be relevant to state enforcement of the antitrust laws, do not create further exceptions to Rule 6(e). *See id.*; 15 U.S.C. § 15f(b). Similarly, the Freedom of Information Act (FOIA), which generally requires government agencies to make their records available to the public on request unless disclosure is “specifically exempted” by statute (among other things), does not override grand jury secrecy, as Rule 6(e) is treated as a statute that “specifically exempt[s]” grand jury materials from disclosure. *See* 5 U.S.C. § 552(a)(3)(A), (b)(3); *Labow v. Dep’t of Justice*, 831 F.3d 523, 529 (D.C. Cir. 2016) (Rule 6(e) “is a qualifying statute under Exemption 3”); *Rugiero v. Dep’t of Justice*, 257 F.3d 534, 549 (6th Cir. 2001) (“[C]ourts have unanimously held that Rule 6(e) . . . constitutes a statute under section 552(b)(3) of the FOIA so that an agency may withhold grand jury materials.”).

<sup>225</sup> *See* FED. R. CRIM. P. 6(e)(3)(A)(iii) (providing that disclosure of a grand jury matter may be made to “a person authorized by 18 U.S.C. § 3322”).

<sup>226</sup> 18 U.S.C. § 3322(a).

<sup>227</sup> *Id.* § 3322(b)(1). And although, as discussed *infra*, court-ordered disclosure of grand jury information ordinarily requires a strong showing of particularized need for the information, FIRREA allows a court to authorize these banking-law-related disclosures on a showing of “substantial need.” *Id.* § 3322(b)(2).

<sup>228</sup> A “banking law violation” is defined as “a violation of, or a conspiracy to violate” sections 215, 656, 657, 1005, 1006, 1007, 1014, 1344, 1956, 1957, or 1341 or 1343 (affecting a financial institution) of title 18 of the U.S. Code, or “any provision of subchapter II of chapter 53 of title 31” of the U.S. Code. *Id.* § 3322(d)(1).

In addition, Federal Rule of Criminal Procedure 16 requires that a criminal defendant be given access to any grand jury testimony he has given relating to the charged offense.<sup>229</sup> With respect to the grand jury testimony of other witnesses, Federal Rule of Criminal Procedure 26.2 and the Jencks Act require that such testimony be provided to the defendant only *after* the witness in question has testified on direct examination at trial.<sup>230</sup> Disclosure is limited to grand jury testimony that “relate[s] to the subject matter of the [trial] testimony of the witness.”<sup>231</sup> The purpose of these limitations is to balance a defendant’s right to confront his accusers using information that may impeach their testimony with the need to protect government files “from unnecessary and vexatious fishing expeditions by defendants.”<sup>232</sup>

## Disclosure Mechanics and Review

Federal Rules of Criminal Procedure 6(e)(3)(F) and (G) address the procedures for seeking court-authorized disclosure of grand jury materials for use in connection with another judicial proceeding.<sup>233</sup> A party seeking disclosure must file a petition in the district “where the grand jury convened.”<sup>234</sup> If the petition is filed by “the government,”<sup>235</sup> the court may—but is not required to—hear the matter *ex parte*.<sup>236</sup> Otherwise, the petitioner must provide notice of the petition to

<sup>229</sup> FED. R. CRIM. P. 16(a)(1)(B)(iii). This requirement extends as well to organizational defendants where the government contends that the person giving grand jury testimony was legally able to bind the organization. *See* FED. R. CRIM. P. 16(a)(1)(C).

<sup>230</sup> *See* 18 U.S.C. § 3500(a)-(b), (e)(3); FED. R. CRIM. P. 26.2(a), (f)(3). The same requirement applies to suppression and certain other hearings. FED. R. CRIM. P. 12(h), 26.2(g).

As originally enacted, it was unclear whether the Jencks Act applied to grand jury testimony, leading the Supreme Court to conclude that disclosure of witness testimony to a defendant for use at trial was governed by the ordinary requirements of Rule 6(e). *See* *Dennis v. United States*, 384 U.S. 855, 872 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). Partially in response, Congress amended the statute in 1970 to make clear that a defendant is entitled to the relevant grand jury testimony of witnesses against him once they have testified at trial, but not before. *See* *United States v. Liuzzo*, 739 F.2d 541, 544 (11th Cir. 1984); *cf.* *United States v. Short*, 671 F.2d 178, 185-86 (6th Cir. 1982).

<sup>231</sup> 18 U.S.C. § 3500(b).

<sup>232</sup> *United States v. Carter*, 613 F.2d 256, 261 (10th Cir. 1979) (internal quotation marks omitted).

<sup>233</sup> FED. R. CRIM. P. 6(e)(3)(F)-(G). Where grand jury materials are sought by the criminal defendant that was the target of the grand jury’s inquiry, a motion in the criminal case may be made. *See In re Grand Jury Proceedings*, 785 F.2d 593, 593-94 (8th Cir. 1985).

<sup>234</sup> FED. R. CRIM. P. 6(e)(3)(F). The purpose of this filing requirement is to secure the participation of “the grand jury’s supervisory court” in “reviewing such requests, as it is in the best position to determine the continuing need for secrecy.” FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments.

<sup>235</sup> It is unclear whether “the government” is limited to an “attorney for the government” within the meaning of other provisions of Rule 6(e)—that is, a prosecuting attorney within the Department of Justice—or whether it extends more broadly to governmental petitioners such as legislative committees. *See In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1447 (11th Cir. 1987) (Guy, J., concurring in part and dissenting in part) (arguing that “government” refers only to Department of Justice attorneys and that the court erred by proceeding *ex parte* when the requester was a congressional committee). The legislative history indicates that the purpose of allowing *ex parte* government petitions is to “preserve, to the maximum extent possible, grand jury secrecy,” S. REP. NO. 95-354, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527, 532, suggesting the narrower interpretation.

<sup>236</sup> An *ex parte* proceeding is one in which the adverse party is not given notice or an opportunity to be heard on the matter at hand. *Ex Parte*, BLACK’S LAW DICTIONARY (10th ed. 2014).

The Advisory Committee note contemplates that a court should be able to decide whether to proceed *ex parte* “based upon the circumstances of the particular case,” pointing out that an *ex parte* proceeding “is much less likely to be appropriate if the government acts as petitioner as an accommodation to, e.g., a state agency.” FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments. At least one court has held that when the government files a petition

(1) an attorney for the government, (2) the parties to the judicial proceeding for which disclosure of the grand jury materials is sought, and (3) “any other person whom the court may designate.”<sup>237</sup> The court must “afford a reasonable opportunity” to these persons “to appear and be heard.”<sup>238</sup>

Challenges arise when the judicial proceeding for which grand jury materials are sought is pending in a different judicial district than the district where the grand jury convened, as the latter court may be ill-suited to decide the disclosure question. The Supreme Court addressed this situation in *Douglas Oil Co. v. Petrol Stops Northwest*,<sup>239</sup> and the Court’s conclusions have essentially been adopted in Rule 6(e)(3)(G). The Rule provides that unless the court in which the petition is filed—that is, the court in the district where the grand jury convened—“can reasonably determine whether disclosure is proper,” it must transfer the matter to the district where the separate judicial proceeding is pending for determination.<sup>240</sup> This provision reflects “a preference for having the disclosure issue decided by the grand jury court,” while recognizing that that court may be unable to reach a decision because it “will have no first-hand knowledge of the litigation in which the transcripts allegedly are needed, and no practical means by which such knowledge can be obtained.”<sup>241</sup>

To facilitate resolution by the transferee court, the grand jury court must transmit to the transferee court “the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy.”<sup>242</sup> The first requirement “facilitate[s] timely disclosure if it is thereafter ordered” and assists the transferee court “in deciding how great the need for disclosure actually is.”<sup>243</sup> The Rule does not require transmittal of the grand jury material if it is impracticable to do so, as, for example if the material is “exceedingly voluminous.”<sup>244</sup> The requirement of a written evaluation of the need for continuing secrecy recognizes that the grand jury court “is in the best position to assess the interest in continued grand jury secrecy in the particular instance,” and it is thus “important that the court which will now have to balance that

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for disclosure on behalf of a private litigant, it must give the requisite notice unless it “makes a specific showing of the need to make the disclosure *ex parte*.” *United States v. Nix*, 21 F.3d 347, 352 (9th Cir. 1994); *see also In re Grand Jury Proceedings (Roe)*, 153 F. Supp. 2d 403, 407 (S.D.N.Y. 2001) (recognizing that where another party is “the real party in interest, he should be the Petitioner, in which case the Petition would be required to be made on notice”).

<sup>237</sup> FED. R. CRIM. P. 6(e)(3)(F).

<sup>238</sup> FED. R. CRIM. P. 6(e)(3)(F). The attorney for the government in the district where the grand jury convened is included so that he may represent “the public interest in secrecy.” FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments. Inclusion of parties to the other judicial proceeding recognizes that “release of the transcripts to their civil adversaries could result in substantial injury to them.” *Id.* Finally, the catch-all allowance for “any other” court-designated person recognizes that those who provided the information to the grand jury that is the subject of the petition and those who were investigated by the grand jury, among others, may have an interest in the matter. *Id.*

<sup>239</sup> 441 U.S. 211 (1979).

<sup>240</sup> FED. R. CRIM. P. 6(e)(3)(G). Transfer may be initiated *sua sponte* or at the request of any party to the disclosure proceeding. FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments.

<sup>241</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments (quoting *Douglas Oil*, 441 U.S. at 226). Thus, when the court where the petition is filed has “sufficient knowledge to determine whether disclosure” is proper, it need not transfer the matter to the court where the judicial proceeding is pending. *See, e.g., In re Grand Jury Investigation*, 55 F.3d 350, 356 (8th Cir. 1995).

<sup>242</sup> FED. R. CRIM. P. 6(e)(3)(G).

<sup>243</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments. Consistent with this requirement, the court may view the materials in camera in making the disclosure determination. *E.g., United States v. Gatto*, 746 F. Supp. 432, 481-82 (D.N.J. 1990).

<sup>244</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments (quoting *In re 1975-2 Grand Jury Investigation*, 566 F.2d 1293 (5th Cir. 1978)).

interest against the need for disclosure receive the benefit of the [grand jury] court’s assessment.”<sup>245</sup>

Upon transfer, the same persons specified in Rule 6(e)(3)(F) must be given a reasonable opportunity to appear and be heard.<sup>246</sup> The transferee court then makes the ultimate decision whether to disclose “based on its own determination of the need for disclosure and the transferring court’s evaluation of the competing need for continued secrecy.”<sup>247</sup>

Generally, a court’s order regarding disclosure under Rule 6(e) is immediately appealable.<sup>248</sup> Because the determination of whether “particularized need” exists to justify disclosure in a given case is highly fact-specific and discretionary,<sup>249</sup> an appellate court’s review will be under the deferential “abuse of discretion” standard.<sup>250</sup>

## Establishing and Remediating Violations of Grand Jury Secrecy

A knowing violation of Rule 6, including the obligation of secrecy, “may be punished as a contempt of court.”<sup>251</sup> Though not explicit in the Rule, courts have held that both criminal and civil contempt may be imposed, meaning that the remedy may include imprisonment, monetary

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<sup>245</sup> FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments.

<sup>246</sup> FED. R. CRIM. P. 6(e)(3)(G). The requirement applies even if the interested parties specified in the rule were previously heard before the court that ordered transfer. FED. R. CRIM. P. 6(e) advisory committee’s note to 1983 amendments.

<sup>247</sup> *In re Moore*, 776 F.2d 136, 137 (7th Cir. 1985). As discussed elsewhere in this report, any hearing and filings must be closed and sealed to the extent necessary to protect grand jury secrecy. See *supra* § Disclosure of Matters Occurring Before the Grand Jury; FED. R. CRIM. P. 6(e)(4)-(5). If the court determines that disclosure is warranted, it may impose restrictions or limitations on such disclosure. See FED. R. CRIM. P. 6(e)(3)(E) (providing that court may authorize disclosure “at a time, in a manner, and subject to any other conditions that it directs”).

<sup>248</sup> See 28 U.S.C. § 1291 (providing that courts of appeals have jurisdiction over appeals from “all final decisions of the district courts of the United States); *United States v. Campbell*, 294 F.3d 824, 827 (7th Cir. 2002) (collecting cases); *In re Barker*, 741 F.2d 250, 252 (9th Cir. 1984) (recognizing order granting disclosure was appealable because it conclusively resolved the only issue in an independent judicial proceeding). Appeals of Rule 6(e) disclosure orders may not be immediately appealable when the defendant seeks disclosure in the criminal proceeding following grand jury indictment, as some courts have treated a disclosure order in this context as an interlocutory order respecting discovery that may be appealed only after final judgment. See *In re 1985 Grand Jury Proceedings*, 785 F.2d 593, 595 (8th Cir. 1985) (indicating that order on motion filed by targets of grand jury investigation was “clearly not a final judgment on the merits of the litigation”); *State of Illinois v. F.E. Moran, Inc.*, 740 F.2d 533, 535 (7th Cir. 1984), *superseded by rule on other grounds as stated in In re United States*, 398 F.3d 615 (7th Cir. 2005) (“If the petition is filed in the federal criminal proceeding that follows indictment by the grand jury, the order granting or denying the petition is an interlocutory order respecting discovery and cannot be appealed under 28 U.S.C. § 1291[.]”). In any event, a writ of mandamus—an extraordinary remedy through which a superior court directly impels a lower court to take or refrain from taking some action—may still be available. See *FDIC v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990) (concluding discovery order regarding disclosure of grand jury matters was interlocutory but recognizing availability of mandamus).

<sup>249</sup> *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979) (“[A] court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion.”).

<sup>250</sup> *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1081 (9th Cir. 2014).

<sup>251</sup> FED. R. CRIM. P. 6(e)(7). Violation of any guidelines jointly issued by the Attorney General and the Director of National Intelligence is punishable as a contempt of court to the same extent. *Id.*

sanctions, or equitable relief.<sup>252</sup> In limited circumstances, an indictment may also be dismissed<sup>253</sup> or evidence suppressed.<sup>254</sup> For example, where the government unilaterally disclosed a defendant's grand jury testimony in a separate civil forfeiture proceeding to establish probable cause for seizure of the defendant's car, one court suggested that suppression of the testimony could be necessary to "protect the integrity of the grand jury system."<sup>255</sup>

Courts disagree on whether the contempt provision of Rule 6 establishes a private right of action based on an alleged violation of grand jury secrecy.<sup>256</sup>

A party seeking one of the remedies noted above will be required to establish a *prima facie* case that a violation of grand jury secrecy has occurred.<sup>257</sup> This showing will ordinarily require some basis to infer that the source of any leaked grand jury information was one prohibited under Rule 6(e), and the court may consider evidence submitted to rebut the allegation of wrongdoing.<sup>258</sup> If a *prima facie* case is established, the court will hold an evidentiary hearing in which the alleged source of the unauthorized disclosure (typically the government) will bear the burden of "attempt[ing] to explain its actions."<sup>259</sup> For instance, the movants in one case made a *prima facie* showing that an independent counsel breached grand jury secrecy by submitting to the court "various news articles indicating that information relating to grand jury proceedings or witnesses was obtained from sources associated with the" independent counsel's office.<sup>260</sup> The court thus recognized that the independent counsel would be called upon to attempt to rebut the inferences drawn from the news articles by submitting evidence (potentially including affidavits, documents,

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<sup>252</sup> *Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996); *Barry v. United States*, 865 F.2d 1317, 1321-23 (D.C. Cir. 1989); see 18 U.S.C. § 401 (delineating circumstances in which criminal contempt may be utilized); cf. *Blalock v. United States*, 844 F.2d 1546, 1553 (11th Cir. 1988) (Tjoflat, J., specially concurring) (expressing view that Rule 6 contempt provision simply applies criminal contempt statute to wrongful disclosure of grand jury matters); *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1202 (E.D. Mich. 1990) (reading provision as permitting only criminal contempt remedy). Improper disclosure of grand jury matters may also subject the discloser to prosecution for obstruction of justice in certain circumstances. *E.g.*, *United States v. Brenson*, 104 F.3d 1267, 1275-80 (11th Cir. 1997) (involving grand juror who disclosed confidential information to target of investigation).

<sup>253</sup> *United States v. Williams*, 504 U.S. 36, 46 (1992) ("[T]he supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions[.]" (internal quotation marks omitted)); *United States v. Friedman*, 854 F.2d 535, 584 (2d Cir. 1988) ("A betrayal of grand jury secrecy . . . jeopardizes the defendant's right to a fair trial before a petit jury."). A breach of grand jury secrecy will not warrant dismissal of the indictment unless the defendant was actually prejudiced by the breach. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 253-54 (1988).

<sup>254</sup> *United States v. Thomas*, 736 F.3d 54, 66 (1st Cir. 2013) (recognizing theoretical availability of suppression of evidence in "severe cases"); *United States v. Coughlan*, 842 F.2d 737, 740 (4th Cir. 1988).

<sup>255</sup> *Coughlan*, 842 F.2d at 740.

<sup>256</sup> See *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1069 (D.C. Cir. 1998) (recognizing that proceeding to enforce Rule 6(e) "is civil in nature and may be initiated by a private plaintiff"); *Blalock*, 844 F.2d at 1551 (recognizing binding authority that "a target may bring suit for injunctive relief against the individuals subject to Rule 6(e)(2)"); *In re Grand Jury Investigation*, 610 F.2d 202, 214 (5th Cir. 1980) (addressing requisite showing to support private party's petition for contempt sanctions); but see *Finn*, 72 F.3d at 1189 (holding that although contempt may be criminal or civil, Rule creates no private cause of action); *Grand Jury Investigation (90-3-2)*, 748 F. Supp. at 1203 ("By its terms, the rule grants no private rights to any identifiable class of persons.").

<sup>257</sup> *Sealed Case No. 98-3077*, 151 F.3d at 1067; *United States v. Rioux*, 97 F.3d 648, 662 (2d Cir. 1996); *Barry*, 865 F.2d at 1321.

<sup>258</sup> *Rioux*, 97 F.3d at 662; *Blalock*, 844 F.2d at 1551; see *Sealed Case No. 98-3077*, 151 F.3d at 1068 n.7 ("The articles submitted need only be susceptible to an interpretation that the information reported was furnished by an attorney or agent of the government.").

<sup>259</sup> *Sealed Case No. 98-3077*, 151 F.3d at 1068.

<sup>260</sup> *Id.*

or live testimony) to show either that the information disclosed to the media did not constitute “matters occurring before the grand jury” or that the source of the information was not the government.<sup>261</sup>

An order denying a defendant’s motion to dismiss the indictment based on a violation of Rule 6(e) is not immediately appealable,<sup>262</sup> and any error may be considered harmless if the defendant is subsequently convicted.<sup>263</sup>

## Grand Jury Secrecy and Congressional Oversight

As the discussion of grand jury secrecy and Federal Rule of Criminal Procedure 6(e) above reflects, no exception to the general rule of secrecy explicitly authorizes disclosure of grand jury matters to Congress, either by agreement or pursuant to a congressional subpoena. Nevertheless, a few courts have addressed the applicability of Rule 6(e) and its exceptions to congressional requests for information, including in the course of committee investigations and preliminary to impeachment proceedings. At a minimum, these decisions indicate that Congress may be able to obtain grand jury materials by invoking a Rule 6(e) exception before a court under certain circumstances. Congress has also previously considered legislation that would have expressly permitted a court to authorize disclosure of grand jury matters to congressional committees, though the congressional-access provision ultimately did not become law.

This section of the report addresses the circumstances in which Congress may obtain and disseminate grand jury materials under Rule 6(e) as it is presently construed;<sup>264</sup> it then addresses legal issues to consider if Congress seeks to create a new Rule 6(e) exception for congressional committees.

### Congressional Investigative Authority

Congress generally has broad authority to obtain information for oversight and investigative purposes. The power of Congress to conduct investigations is “inherent in the legislative process,”<sup>265</sup> and such power is “as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”<sup>266</sup> As a corollary, the “[i]ssuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate.”<sup>267</sup> Beyond

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<sup>261</sup> *Id.* at 1075. The court suggested such evidence might include information reflecting what actually occurred before the grand jury, the identities of any employees with access to the disclosed information, and/or evidence reflecting general policies concerning press contacts, among other things. *Id.*

<sup>262</sup> *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989).

<sup>263</sup> See *United States v. Wilkes*, 662 F.3d 524, 537 (9th Cir. 2011) (“[G]rand jury leaks are the kind of non-structural errors that are rendered harmless by the trial jury’s verdict.”).

<sup>264</sup> A discussion of executive privilege and other potential independent limitations on the investigative or law enforcement materials that Congress may obtain in certain situations is beyond the scope of this report. For more information, see Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559 (2002).

<sup>265</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>266</sup> *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 504 n.15 (1975) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)).

<sup>267</sup> *Id.* at 504.

subpoenas, Congress has exercised its power of inquiry through less formal means, such as by submitting letter requests for information.<sup>268</sup>

Congressional inquiries are broadly protected from judicial scrutiny. Provided that a committee's investigation is authorized and conducted pursuant to a valid legislative purpose, the Speech or Debate Clause<sup>269</sup> of Article I of the Constitution creates "an absolute bar to [judicial] interference."<sup>270</sup>

## Application of Grand Jury Secrecy to Congressional Disclosures

Pursuant to its broad authority to investigate, Congress has on several occasions sought grand jury information based on legislative interest in particular executive branch activities, either through letters or subpoenas to executive branch officials<sup>271</sup> or through petitions filed with the court.<sup>272</sup> Faced with these legislative efforts to obtain otherwise-secret grand jury materials, courts have reached conflicting conclusions as to whether the rule of grand jury secrecy enshrined in Rule 6(e) applies to disclosures to Congress at all.

Relying on an apparently novel conception of the "authority of Congress under the Speech or Debate Clause," two courts have held that Congress has a "constitutionally independent legal right" to obtain documents in furtherance of "legitimate legislative activity" regardless of whether the documents disclose matters occurring before a grand jury.<sup>273</sup> First, in *In re Grand Jury Investigation of Ven-Fuel*, the chairman of the Subcommittee on Oversight and Investigations of the House of Representatives' Committee on Interstate and Foreign Commerce petitioned a district court for an order authorizing disclosure of documents presented to a federal grand jury in Florida in the course of its investigation of possible criminal conduct by a company called Ven-Fuel, Inc.<sup>274</sup> The court recognized that the subcommittee's request implicated "the powers and operations of the coequal, but interdependent, branches of the federal government . . . over theoretical fault lines," but concluded there was no "direct conflict" because the subcommittee's legitimate legislative purpose in seeking the documents meant that it was "entitled to disclosure" regardless of grand jury secrecy rules.<sup>275</sup>

Ten years after the decision in *Ven-Fuel*, the issue of congressional access to grand jury materials came before a different court in connection with the potential impeachment of a federal judge.<sup>276</sup> The judge had been indicted for conspiring to solicit a bribe to influence a judicial decision,

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<sup>268</sup> E.g., *In re Request for Access to Grand Jury Materials* Grand Jury No. 81-1, Miami, 833 F.2d 1438, 1445 (11th Cir. 1987) ("Although in the instant case the Committee requested rather than subpoenaed records, this Court should grant such access to the House as will not violate our privileges or constitutional powers.").

<sup>269</sup> U.S. CONST. art. I, §6, cl. 1.

<sup>270</sup> *Eastland*, 421 U.S. at 503.

<sup>271</sup> See *In re Grand Jury Impanelled* Oct. 2, 1978 (79-2), 510 F. Supp. 112, 113-14 (D.D.C. 1981).

<sup>272</sup> *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1300 (M.D. Fla. 1977).

<sup>273</sup> *Ven-Fuel*, 441 F. Supp. at 1307; see also *In re Grand Jury Proceedings of Grand Jury No. 81-1* (Miami), 669 F. Supp. 1072, 1075 (S.D. Fla. 1987), *aff'd*, 833 F.2d 1438 (11th Cir. 1987); cf. *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1226 (D.D.C. 1974), *mandamus denied sub nom. Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (concluding that delivery of grand jury report to House committee considering impeachment was "eminently proper, and indeed, obligatory" where the report was "a proper concern" of the committee and need was "not disputed").

<sup>274</sup> 441 F. Supp. at 1302.

<sup>275</sup> *Id.* at 1307.

<sup>276</sup> See *Grand Jury No. 81-1* (Miami), 669 F. Supp. at 1073.

causing the House of Representatives to introduce a resolution calling for his impeachment.<sup>277</sup> The resolution was referred to the House Committee on the Judiciary, which subsequently requested that the district court deliver all records of the grand jury that had indicted the judge.<sup>278</sup> The judge objected, but the district court concluded that the committee was entitled to the records for several reasons, one of which was that, in accordance with *Ven-Fuel*, a “congressional investigation relating to the impeachment of a federal judge” falls within the authorized legislative activities “embraced” by the Speech or Debate Clause.<sup>279</sup>

Criticizing the decision in *Ven-Fuel*, other courts have sharply disagreed with the conclusion that the Speech or Debate Clause provides a basis to ignore grand jury secrecy when Congress is the requester. In *In re Grand Jury Investigation of Uranium Industry*,<sup>280</sup> for instance, the Senate Judiciary Committee petitioned a court for an order authorizing disclosure of documents in the possession of the Department of Justice related to its investigation of the uranium industry.<sup>281</sup> The committee’s interest in the documents apparently stemmed from the fact that an expansive grand jury investigation conducted by the department’s Antitrust Division had yielded no indictments.<sup>282</sup> In seeking court-ordered disclosure of the grand jury materials, the committee asserted, among other things, that it was not required to establish the applicability of a Rule 6(e) exception or make a showing of particularized need because the Speech or Debate Clause entitled it to the materials.<sup>283</sup> The court, however, considered “the suggestion that Rule 6(e) does not apply to disclosures to Congress” to be “[un]acceptable.”<sup>284</sup> The court noted that Rule 6(e) “contains no reservations in favor of Congress” and rejected the *Ven-Fuel* court’s suggestion that the Speech or Debate Clause may be “used as a sword to enable Congress to penetrate an otherwise secret function of one of the other branches.”<sup>285</sup> While, in the court’s view, the Clause would protect Congress from collateral interference if it were attempting to “acquire materials which it has a legal right to obtain,” the Clause would not sanction expansion of Congress’s legal rights “to manufacture a new right to obtain grand jury materials” that could be affirmatively employed.<sup>286</sup>

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<sup>277</sup> *Id.* at 1073-74.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 1075. The court also determined, among other things, that disclosure was proper pursuant to “the power of impeachment that the Constitution vests in the House of Representatives,” which includes “the power to obtain evidence” through means contemplated by the Constitution’s Necessary and Proper Clause. *Id.* at 1074-75. It does not appear that any other courts have expressly relied on the impeachment power as an independent basis to disregard Rule 6(e) and the rule of grand jury secrecy. *Cf. June 5, 1972 Grand Jury*, 370 F. Supp. at 1226 (“[R]ather than injuring separation of powers principles, the [Grand] Jury sustains them by lending its aid to the House in the exercise of that body’s constitutional jurisdiction [over impeachment].”). Some courts have, however, concluded that an impeachment inquiry is preliminary to a “judicial proceeding” within the meaning of Rule 6(e)(3)(E)(i) or that impeachment is a sufficiently exceptional circumstance to warrant disclosure pursuant to a court’s inherent authority. These bases for disclosure of grand jury matters to Congress in connection with impeachment are discussed *infra* in their respective sections.

<sup>280</sup> 1979-2 Trade Cas. 78,639 (D.D.C. 1979).

<sup>281</sup> *Id.* at 78,640.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 78,641-42.

<sup>285</sup> *Id.* at 78,642.

<sup>286</sup> *Id.* See also *In re Grand Jury Impaneled Oct. 2, 1978* (79-2), 510 F. Supp. 112, 116 (D.D.C. 1981) (denying congressional committee request for grand jury materials “to fulfill its oversight responsibilities” because no Rule 6(e) exception applied); William E. Weinberger, *Congressional Access to Grand Jury Transcripts*, 33 STAN. L. REV. 155, 167-68 (1980) (“[T]he speech or debate clause protects congressional use of compulsory process to obtain only those



As the court in *Uranium Industry* recognized, the *Ven-Fuel* decision’s reliance on the Speech or Debate Clause as a font of constitutional authority permitting congressional access to grand jury materials finds little support in the broader case law on the Clause. Though the Clause functions to *protect* congressional activity, including lawful use of the subpoena power, from judicial interference when such activity is challenged by a third party,<sup>287</sup> courts have not viewed the Clause to constitute a sword that Congress may use to affirmatively seek judicial authorization for disclosure of information in the possession of a coordinate branch.<sup>288</sup> That said, the extent to which the rule of grand jury secrecy applies more generally along the “theoretical fault line[]”<sup>289</sup> that exists between executive branch activity and Congress’s Article I investigative authority remains unsettled.<sup>290</sup> It is worth noting in this regard that although Congress’s power to obtain information for legitimate legislative purposes is broad, it is not limitless.<sup>291</sup>

Though no federal appellate courts have spoken directly to the issue,<sup>292</sup> decisions addressing the now-lapsed independent counsel statute appear to lend some support to the position that Congress enjoys no special constitutional solicitude in obtaining otherwise-secret grand jury materials. That statute required a duly appointed independent counsel to file a pre-termination “final report” with the court “setting forth fully and completely a description of the work of the independent counsel,” and the statute permitted the court to release “to the Congress, the public, or any appropriate person, such portions of [the] report . . . as the division of the court considers appropriate.”<sup>293</sup> In several decisions considering whether to authorize such release of independent counsel reports to Congress and the public, the D.C. Circuit has recognized that Rule 6(e) applies to an independent counsel, meaning that “any release of grand jury material” in the final report authorized by statute “falls within the protective provisions” of the Rule unless an exception applies.<sup>294</sup> Nevertheless, the court has read a provision of the independent counsel statute permitting a court to authorize disclosure of the report as establishing a “judicial proceeding” such that release of the report may fall within that exception to Rule 6(e).<sup>295</sup> Pursuant to the exception, the court has proceeded to consider multiple factors in deciding whether to authorize

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materials to which it has a legal right.”).

<sup>287</sup> See *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) (explaining that the Clause “shields Congressmen from suit to block a Congressional subpoena”).

<sup>288</sup> See *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 129 (D.C. Cir. 1977) (“Congress’ investigatory power is not, itself, absolute.”).

<sup>289</sup> *Ven-Fuel*, 441 F. Supp. at 1307.

<sup>290</sup> For additional information on the scope of the Speech or Debate Clause, see CRS Report R45043, *Understanding the Speech or Debate Clause*, by Todd Garvey.

<sup>291</sup> See *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.”); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (“Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights.”).

<sup>292</sup> The Eleventh Circuit affirmed the district court’s decision in *Grand Jury No. 81-1, Miami* on the ground that the disclosure of materials to a House committee contemplating impeachment fell within the exception for disclosures “preliminarily to or in connection with a judicial proceeding.” See 833 F.2d 1438, 1446 (11th Cir. 1987). The appellate court did note, however, that “[d]eference to principles of comity” would “not entail simply giving the House any materials it requests,” but would be “a factor to be weighed in favor of disclosure when making the Rule 6(e) analysis.” *Id.* at 1445.

<sup>293</sup> 28 U.S.C. § 594(h)(1)-(2).

<sup>294</sup> *In re Cisneros*, 426 F.3d 409, 412 (D.C. Cir. 2005).

<sup>295</sup> *In re Espy*, 259 F.3d 725, 729 (D.C. Cir. 2001); see also *In re North*, 16 F.3d 1234, 1244 (D.C. Cir. 1994).

the report's release.<sup>296</sup> In other words, rather than finding an independent constitutional entitlement to grand jury material when faced with the question of whether to authorize the release to Congress of a report containing such material, the D.C. Circuit has simply applied Rule 6(e).<sup>297</sup> It could be argued, however, that because these cases did not involve a congressional subpoena, the court was not faced with a direct exercise of Congress's constitutional power of inquiry.

The Department of Justice, for its part, agrees that it may release grand jury material to Congress in response to a subpoena only to the extent that disclosure is permitted under Rule 6(e).<sup>298</sup> It takes the opposite position from the *Ven-Fuel* court with respect to separation-of-powers implications when Congress requests grand jury material: in the department's view, recognizing a congressional "independent right of access" to grand jury material would amount to "legislative encroachment into the Executive's exclusive authority to enforce the law."<sup>299</sup>

## Requests for Materials Not Constituting Grand Jury Matters

Assuming that Rule 6(e) does apply to congressional requests, it is clear that Congress may nevertheless obtain materials that do not constitute "matters occurring before the grand jury" within the meaning of the Rule.

Rule 6(e) protects from disclosure only those materials that "tend to reveal some secret aspect of the grand jury's investigation."<sup>300</sup> Thus, where a congressional committee has an interest in the subject matter of an ongoing grand jury investigation, the committee may be able to obtain most, if not all, of the same evidence the grand jury is considering from other sources.<sup>301</sup>

For instance, although the court in *Ven-Fuel* viewed Congress as constitutionally entitled to disclosure of documents that had been presented to a grand jury, the court also determined that the documents were not necessarily cloaked in secrecy under Rule 6(e) in the first instance.<sup>302</sup> And while not all courts may take such a narrow view of grand jury "matters,"<sup>303</sup> the principle

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<sup>296</sup> *Cisneros*, 426 F.3d at 415.

<sup>297</sup> *Id.* It is worth noting that the court's consideration of whether to release to Congress a report containing grand jury material in *Cisneros* was cursory, with the court merely acknowledging that the subject of the report was "a matter within the responsibility and concern of the Congress." *Id.* The court also authorized the report at issue to be delivered to Congress inclusive of a section that it found should not be disclosed to the public. *Id.* Thus, the court arguably did view Congress's constitutional role as uniquely deserving of consideration in determining whether disclosure was appropriate; but the court did not conclude, as the *Ven-Fuel* court did, that Rule 6(e) and its exceptions were irrelevant.

<sup>298</sup> U.S. Dep't of Justice, Office of Legal Counsel, *Congressional Subpoenas of Department of Justice Investigative Files*, 8 U.S. Op. Off. Legal Counsel 252, 259-60 (1984).

<sup>299</sup> U.S. Dep't of Justice, Office of Legal Counsel, *Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Congressional Committees*, 9 U.S. Op. Off. Legal Counsel 86, 87 (1985).

<sup>300</sup> *Lopez v. Dep't of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) (quoting *Senate of the Commonwealth of P.R. v. Dep't of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987)); see *supra* § Disclosure of Matters Occurring Before the Grand Jury.

<sup>301</sup> Congress could, for example, subpoena grand jury witnesses, who are not obligated to maintain the secrecy of grand jury proceedings. See *supra* § Persons Subject to Rule 6(e).

<sup>302</sup> *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1303-04 (M.D. Fla. 1977); see also *In re Senate Banking Comm. Hearings*, 19 F.R.D. 412 (N.D. Ill. 1956) (authorizing disclosure to Senate Banking Committee of documents shown to grand jury because "when the fact or document is sought for itself, independently, rather than because it was stated before or displayed to the grand jury, there is no bar of secrecy").

<sup>303</sup> See *In re Grand Jury Subpoenas*, 454 F.3d 511, 522 (6th Cir. 2006) (applying rebuttable presumption that non-public documents obtained by grand jury by coercive means are secret).

that “[t]here is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers” is a well-recognized one.<sup>304</sup>

## Applicability of Rule 6(e) Exceptions to Congress

Although no exception to grand jury secrecy explicitly encompasses disclosures to Congress, a few of the exceptions could apply to Congress in particular situations, which are discussed below in turn.

### Disclosures to Congress Without Judicial Authorization

#### *Members of Congress as Government Personnel*

As discussed, Rule 6(e) permits disclosure of grand jury matters, excluding grand jury deliberations and votes, to “any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney’s duty to enforce federal criminal law.”<sup>305</sup>

The term “government personnel” is not defined in the Rule,<sup>306</sup> and the provision’s legislative history reflects a concern with information-sharing between federal prosecutors and federal law enforcement officers or agency subject-matter experts who were needed to understand certain issues in complex cases.<sup>307</sup> That said, during the hearings on the proposed amendments that added the exception, there was some testimony indicating that the breadth of the term “government personnel” could mean that “even Members of Congress or the military” would be included.<sup>308</sup>

It is thus possible that a Member of Congress, or congressional staff, could be considered “government personnel” to whom disclosure could be made without a court order under this exception.

Any such disclosure, however, would be exceedingly circumscribed in light of the exception’s other requirements. First, disclosure would be at the discretion of the attorney for the government, and would be limited to a situation in which the attorney believed that the Member or staff was needed to assist the attorney in enforcing federal criminal law.<sup>309</sup> Second, the Member or staff to whom disclosure was made could use the grand jury information only for the same purpose, that is, to assist the attorney in prosecuting the federal crimes to which the information related.<sup>310</sup>

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<sup>304</sup> Senate of Commonwealth of P.R. v. Dep’t of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987); *see also, e.g.*, United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960) (acknowledging that Rule 6(e) does not “foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury”).

<sup>305</sup> FED. R. CRIM. P. 6(e)(3)(A)(ii).

<sup>306</sup> An Advisory Committee note indicates that the term “includes, but is not limited to, employees of administrative agencies and government departments.” FED. R. CRIM. P. 6(e) advisory committee’s note to 1977 amendments. Although there is reason to think that employees of government “agencies” and “departments” would be limited to the executive branch, *see* Hubbard v. United States, 514 U.S. 695, 715 (1995) (concluding that agencies and departments do not include the judiciary), the fact that the Advisory Committee viewed government personnel as extending *beyond* agency and department employees suggests that Members of Congress could be included.

<sup>307</sup> *See generally In re Grand Jury Proceedings*, 158 F. Supp. 2d 96, 107-15 (D. Mass. 2001).

<sup>308</sup> *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong. 149 (1977) (testimony of Bernard J. Nussbaum, Esq.).

<sup>309</sup> *See* FED. R. CRIM. P. 6(e)(3)(A)(ii).

<sup>310</sup> FED. R. CRIM. P. 6(e)(3)(B).

Third, the Member or staff would be obligated to maintain the secrecy of the information and could further disclose it only in accordance with Rule 6(e).<sup>311</sup>

As such, even assuming Members of Congress or congressional staff fall within the meaning of “government personnel,” the exception would not permit Congress to seek grand jury materials for broader independent investigative or legislative purposes.

### ***Congressional Access to Intelligence and National Security Information***

Rule 6(e)(3)(D) permits an attorney for the government to disclose, among other things, any grand jury matter involving threats of attack or intelligence gathering by foreign powers or threats of sabotage or terrorism to “any appropriate federal . . . government official” (among others).<sup>312</sup> Similar to the exception for “government personnel,” the Rule does not define the term “appropriate . . . government official.” Nonetheless, other statutory provisions suggest that the term “government official” could be construed to include a Member of Congress.<sup>313</sup> As with the “government personnel” exception, however, disclosure under this exception would be limited: only grand jury information pertaining to the specified subject matter would be available, at the discretion of the attorney for the government, and the Member receiving the information could use it “only as necessary in the conduct of [her] official duties subject to any limitations on the unauthorized disclosure of such information.”<sup>314</sup>

### **Disclosures to Congress with Judicial Authorization**

#### ***Congressional Activities as “Judicial Proceedings”***

Rule 6(e)’s “judicial proceeding” exception may also be relevant to Congress. As previously described, the Rule provides that a court may authorize disclosure of a grand jury matter “preliminarily to or in connection with a judicial proceeding,”<sup>315</sup> with the term “judicial proceeding” generally contemplating some necessary resort to the judicial system.<sup>316</sup> Two courts have determined that a congressional committee’s request for grand jury materials pursuant to its ordinary investigative and oversight functions does not qualify under this exception, as the possibility that “the actions it is investigating may wind up in the courts if wrongdoing is uncovered” is “too remote to trigger the Rule 6(e) exception.”<sup>317</sup> By contrast, where a congressional committee has sought grand jury materials in connection with the contemplated impeachment of a specific public official, several courts have recognized that court-ordered disclosure may be available pursuant to the “judicial proceeding” exception.<sup>318</sup> Under this view,

<sup>311</sup> FED. R. CRIM. P. 6(e)(2)(B)(vii).

<sup>312</sup> FED. R. CRIM. P. 6(e)(3)(D).

<sup>313</sup> See 18 U.S.C. § 201 (defining “public official” to include Members of Congress for purposes of criminal bribery provision); *but see* 18 U.S.C. § 1116(b)(3) (defining “foreign official” to mean executive-equivalent officers, among others, for purposes of criminal homicide provision).

<sup>314</sup> FED. R. CRIM. P. 6(e)(3)(D)(i).

<sup>315</sup> FED. R. CRIM. P. 6(e)(3)(E)(i).

<sup>316</sup> *E.g.*, *In re Grand Jury 89-4-72*, 932 F.2d 481, 485 (6th Cir. 1991) (concluding the possibility of eventual, discretionary court review did not make nonjudicial disciplinary process “preliminary to” a judicial proceeding).

<sup>317</sup> *In re Grand Jury Investigation of Uranium Industry*, 1979-2 Trade Cas. 78,639, 78,643-45 (D.D.C. 1979); *see also In re Grand Jury Impanelled Oct. 2, 1978 (79-2)*, 510 F. Supp. 112, 114 (D.D.C. 1981) (citing *Uranium Industry* for the proposition that a Senate “Subcommittee’s general oversight proceedings do not constitute a ‘judicial proceeding’”).

<sup>318</sup> *See In re Request for Access to Grand Jury Materials Grand Jury No. 81-1*, Miami, 833 F.2d 1438, 1440 (11th Cir. 1987) (noting in case where House Judiciary Committee sought materials for impeachment inquiry that lower court

though “impeachment proceedings before Congress . . . are not by a ‘court,’”<sup>319</sup> a “contemplated trial” in the Senate is still “very much a judicial proceeding.”<sup>320</sup>

A committee seeking court-authorized disclosure on the basis of this exception must establish a “particularized need” for the materials at issue, which requires a showing that the need outweighs the public interest in secrecy.<sup>321</sup> In the context of impeachment, courts have concluded that a congressional committee’s need is sufficient to warrant disclosure, at least where the grand jury’s work has concluded.<sup>322</sup> Nevertheless, given that mere “relevance” or “efficiency” is generally insufficient<sup>323</sup> to establish a particularized need for grand jury materials, the context of the request and the materials at issue could influence whether a committee can show such a need.<sup>324</sup>

### ***“Inherent Authority” to Release Grand Jury Materials to Congress***

As discussed, some federal courts have recognized that courts have “inherent authority” to order the release of grand jury information in “special” or “exceptional” circumstances, regardless of whether an explicit Rule 6(e) exception would otherwise apply.<sup>325</sup>

One lower court has relied on this inherent authority over grand jury matters, among other things, to authorize the release to the House Judiciary Committee of a report prepared by the grand jury investigating the alleged—and potentially impeachable—improprieties of President Nixon.<sup>326</sup> The

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held and parties agreed that “a Senate impeachment trial qualifies as a ‘judicial proceeding’” and “a House impeachment inquiry is ‘preliminary to’ the Senate trial”); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1230 (D.D.C. 1974), *mandamus denied sub nom. Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (considering whether to transmit grand jury report to House Judiciary Committee and concluding that it would be “incredible” to view a police disciplinary investigation, but not “a proceeding of so great import as an impeachment investigation,” as a judicial proceeding); *see also Uranium Industry*, 1979-2 Trade Cas. at 78,644 (distinguishing a case involving impeachment).

<sup>319</sup> *Grand Jury Materials*, 735 F.2d at 1271.

<sup>320</sup> *Uranium Industry*, 1979-2 Trade Cas. at 78,644; *see also In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072, 1075-76 (S.D. Fla. 1987) (“There can be little doubt that an impeachment trial by the Senate is a ‘judicial proceeding’ in every significant sense and that a House investigation preliminary to impeachment is within the scope of the Rule.”). There is, however, dictum suggesting a contrary view. *See In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1271 (11th Cir. 1984) (suggesting that a congressional committee’s impeachment inquiry may “not [be] ancillary to a ‘judicial proceeding,’ in the strict sense”).

<sup>321</sup> *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979).

<sup>322</sup> *See Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1442 (11th Cir. 1987) (concluding that the “interest in conducting a full and fair impeachment inquiry” was sufficient, especially given that the events took place years ago); *June 5, 1972 Grand Jury*, 370 F. Supp. at 1229-30 (considering that grand jury had concluded its work and President did not object as factors in determination of whether disclosure was appropriate); *see also Application of U.S. for Order Pursuant to Provisions of Rule 6(e), Federal Rules of Criminal Procedure*, 505 F. Supp. 25, 27 (W.D. Pa. 1980) (recognizing entitlement to disclosure “where petitioner demonstrated that state investigations of official improprieties would be stymied”).

<sup>323</sup> *Pizzuti v. United States*, 809 F. Supp. 2d 164, 194 (S.D.N.Y. 2011).

<sup>324</sup> *See Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (“The sufficiency of the Committee’s showing of need has come to depend . . . entirely on whether the subpoenaed materials are critical to the performance of its legislative functions.”); *but cf. In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1273 (11th Cir. 1984) (viewing requirement that petitioner “must exhaust other means of securing the relevant information before being granted access” to grand jury materials “inappropriate” in context of petition by investigating committee of the judiciary because of committee’s “unique investigatory mission and the necessity that, when the investigation is over, the public [will] be assured that it was complete”).

<sup>325</sup> *See supra* § Courts’ Inherent Authority to Order Disclosure.

<sup>326</sup> *June 5, 1972 Grand Jury*, 370 F. Supp. at 1228 (“The Court can see no justification for a suggestion that th[e] codification [in Rule 6(e)] of a ‘traditional practice’ should act, or have been intended to act, to render meaningless an

D.C. Circuit essentially affirmed that decision, expressing “general agreement” with the lower court decision.<sup>327</sup>

Another court has also relied on its inherent authority to order the release of the records of a grand jury that had indicted a federal judge to an investigating committee of the judiciary, relying on the “exceptional circumstance[.]” that the “question under investigation”—whether a federal judge should be recommended for impeachment or otherwise disciplined—was “of great societal importance.”<sup>328</sup> Recognizing that the investigating committee still was required to show a sufficient need for the grand jury materials, the court concluded such a showing had been made (and was not outweighed by the interest in secrecy) because (1) the investigating committee was composed of federal judges who were acting pursuant to express statutory authority; (2) the grand jury investigation and trial of the judge had already concluded; and (3) only by “examining all of the record” could the committee “determine the true state of the evidence for or against the charge.”<sup>329</sup>

Assuming a court adopts the inherent authority view of Rule 6(e) based on the above decisions, it is possible that a court would be willing to authorize the disclosure of grand jury materials to a congressional committee pursuant to the court’s inherent authority.<sup>330</sup> Precedential support for disclosure is strongest in the context of an impeachment inquiry (assuming the court did not view such an inquiry as being “preliminar[y] to . . . a judicial proceeding”).<sup>331</sup> It is less certain that an “inherent authority” disclosure order would be available to a congressional petitioner when not tied to a contemplated impeachment proceeding. In an appropriately “exceptional” situation, a court could be amenable to exercising its inherent authority to order the release of grand jury information in the face of a pressing congressional request. The outcome would depend in large part on whether Congress could establish a sufficiently weighty need for the materials, which would implicate a variety of circumstantial factors.<sup>332</sup>

## Limitations on Further Disclosure by Congress

Once grand jury materials find their way into the possession of a Member or committee of Congress, the question arises as to what limits exist on further dissemination of those materials. As previously discussed, Federal Rule of Criminal Procedure 6(e) imposes an obligation of secrecy only on specified persons, of which Congress (or, more generally, a recipient of grand jury information pursuant to the “judicial proceeding” or “inherent authority” exceptions) is not one.<sup>333</sup>

That said, Rule 6(e) does explicitly make court-authorized disclosures “subject to any . . . conditions that [the court] directs.”<sup>334</sup> It is thus conceivable that in ordering the release of grand

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historically proper function of the grand jury by enjoining courts from any disclosure of reports in any circumstance.”).

<sup>327</sup> *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974).

<sup>328</sup> *Grand Jury Materials*, 735 F.2d at 1269-70.

<sup>329</sup> *Id.* at 1272-75.

<sup>330</sup> This option would not be available in a jurisdiction where binding precedent forecloses authorizing disclosures outside of the exceptions contained in Rule 6(e). As noted previously, the D.C. Circuit is currently considering a case that could settle the issue with respect to federal courts in the District of Columbia, unless or until the Supreme Court decides to weigh in. *See McKeever v. Sessions*, No. 17-5149 (D.C. Cir. June 26, 2017).

<sup>331</sup> *See supra* notes 326-29.

<sup>332</sup> *See supra* § Courts’ Inherent Authority to Order Disclosure.

<sup>333</sup> *See supra* § Persons Subject to Rule 6(e).

<sup>334</sup> FED. R. CRIM. P. 6(e)(3)(E)(i).

jury information, a court could impose a requirement that the information not be further distributed. However, such a requirement would be in tension with the Constitution’s Speech or Debate Clause in the case of Congress, at least where further dissemination occurs in the course of legitimate legislative activity, as the Clause prevents a court from blocking disclosure of information in Congress’s possession in such a circumstance.<sup>335</sup> In any event, courts will “presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties,”<sup>336</sup> though a court may consider the extent to which Congress has taken specific precautions to protect against further dissemination of grand jury materials in deciding whether disclosure is appropriate.<sup>337</sup>

## Legal Considerations for Congress

Past Congresses, faced with potential limitations on the ability to obtain grand jury materials, have considered legislation that would amend Federal Rule of Criminal Procedure 6(e) to, among other things, permit a court to authorize disclosure of grand jury matters “upon a showing of substantial need”<sup>338</sup> to “any committee of Congress . . . for use in relation to any matter within the jurisdiction of such . . . congressional committee.”<sup>339</sup>

A bill to this effect was introduced during the 99th Congress, prompting the Department of Justice’s Office of Legal Counsel to issue a memorandum opinion “strongly oppos[ing] any provision that would permit Congress independently to petition the courts for Rule 6(e) material.”<sup>340</sup> In the Office’s view, such a provision would “codify legislative encroachment into the Executive’s exclusive authority to enforce the law.”<sup>341</sup> In other words, the Office took the position that creating a mechanism for Congress to obtain grand jury materials from the court, without any opportunity for interposition by the executive branch, would be inconsistent with the

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<sup>335</sup> See *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (“A court may not block disclosure of information in Congress’s possession, at least when the disclosure would serve a valid legislative purpose.”); *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1*, Miami, 833 F.2d 1438, 1446 (11th Cir. 1987) (acknowledging that “what the Committee does *after* disclosure is outside of [the court’s] jurisdiction” because the “Speech and Debate Clause prevents [the court] from questioning Congress about actions taken in the impeachment process”); see also *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (holding that Members of Congress were immune from suit over inclusion of confidential information in report and distribution of report to other Members “for legislative purposes”). This is not to say, however, that *public* dissemination of grand jury materials would necessarily be protected, see *Gravel v. United States*, 408 U.S. 606, (1972) (holding that arrangement for private publication of the Pentagon Papers was not protected “speech or debate”), or that Congress or a committee itself could not impose sanctions for leaks of grand jury information in accordance with its own rules.

<sup>336</sup> *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978).

<sup>337</sup> *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1230 (D.D.C. 1974), *mandamus denied sub nom. Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (noting that the committee had “taken elaborate precautions to insure against unnecessary and inappropriate disclosure of [the] materials” and finding “no basis on which to assume that the Committee’s use of [them] will be injudicious”).

<sup>338</sup> “Substantial need” is a less demanding standard than “particularized need” in that it does not require a showing that the grand jury materials at issue cannot be obtained through other avenues. See *BRENNER & SHAW, supra* note 141, § 18:9 (citing 135 CONG. REC. S2396 (daily ed. Mar. 8, 1989); S. REP. NO. 101-337 (1990)).

<sup>339</sup> S. 1562, 99th Cong. § 5 (as introduced, Aug. 1, 1985).

<sup>340</sup> U.S. Dep’t of Justice, Office of Legal Counsel, *Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Congressional Committees*, 9 U.S. Op. Off. Legal Counsel 86, 87 (1985).

<sup>341</sup> *Id.*

Constitution's separation of powers and would invite "legislative pressures" that would interfere with prosecutorial discretion and due process of law.<sup>342</sup>

The Senate Judiciary Committee held a hearing on the legislation and a similar bill as to their impacts on Rule 6(e) and grand jury disclosure practices, during which the bill's sponsor, Senator Charles Grassley, expressed concern that Rule 6(e) had been "utilized by the Justice Department as a shield against legitimate congressional inquiry."<sup>343</sup> The Senator pointed out that the bill did not provide "automatic congressional access to grand jury information," but rather allowed "congressional committees[,] in performance of their constitutional duty to oversee the executive agencies, an opportunity to demonstrate to the court a 'substantial need' for access[.]"<sup>344</sup>

An Associate Deputy Attorney General reiterated in testimony the Department of Justice's position that the provision for congressional access "would raise substantial constitutional concerns in terms of separation of powers as to where the enforcement authority lies; due process issues in terms of fairness and the application of decisionmaking with respect to criminal prosecutions; as well as the issue of opening the door for raising concerns about potential political influence or persuasion upon criminal prosecutions."<sup>345</sup> He did point out, however, that the department had "accommodate[d] requests from particular congressional committees for investigative materials on an ad hoc basis by appropriate application to the courts, and subject to necessary protective conditions," which it would continue to do.<sup>346</sup>

In separate testimony, representatives of the American Bar Association and the National Association of Criminal Defense Lawyers argued that the provision under consideration could violate the separation-of-powers doctrine and undermine the "fundamental tradition of grand jury secrecy" by "subvert[ing] the purpose of the grand jury" to legislative ends.<sup>347</sup>

An attorney with expertise on the subject of congressional access to information also testified at the hearing and expressed the view that a bill permitting a court to provide grand jury materials to a congressional committee "with legitimate oversight functions would not violate separation-of-powers principles."<sup>348</sup> However, he believed that Congress should have access to grand jury materials only "in very limited circumstances" and suggested that an amendment to Rule 6(e) "should instruct a Federal court to weigh congressional needs against grand jury secrecy requirements in determining whether to grant access."<sup>349</sup> In the attorney's view, this weighing would include consideration of whether the committee could acquire sufficient information from non-grand-jury sources, whether the grand jury proceedings for which information was sought had terminated or were ongoing, and whether the committee had "in place special provisions to

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<sup>342</sup> *Id.* at 87-88. The Office also pointed out that the proposed legislation had the potential to impact executive privilege claims by effectively "handing over" privilege disputes to the courts "for their frequent adjudication." *Id.* at 92.

<sup>343</sup> *Grand Jury Disclosure: Hearing on S. 1562 and S. 1676 Before the S. Comm. on the Judiciary, 99th Cong. 2* (1985) (statement of Sen. Charles E. Grassley).

<sup>344</sup> *Id.* at 3.

<sup>345</sup> *Id.* at 12 (statement of Jay B. Stephens, Assoc. Deputy Attorney Gen., Dep't of Justice).

<sup>346</sup> *Id.* at 26.

<sup>347</sup> *See id.* at 57 (statement of Peter F. Vaira, Vice-Chairperson, ABA Section of Crim. Justice, Grand Jury Comm.); *id.* at 66 (statement of David W. Russell, President, Nat. Assoc. of Crim. Defense Lawyers).

<sup>348</sup> *Id.* at 46 (statement of James Hamilton, Attorney, Ginsburg, Feldman & Bress).

<sup>349</sup> *Id.* at 39.



protect the confidentiality of grand jury material.”<sup>350</sup> The attorney did not view the provision under consideration, as written, to be adequate in light of the considerations he identified.<sup>351</sup>

Ultimately, the bill was reported out of committee with the changes to Rule 6(e), including the congressional-access provision, excised, and it does not appear that the legislation was further pursued.<sup>352</sup> Consequently, ambiguity remains regarding the relationship between grand jury secrecy and congressional access to grand jury materials. As the debate in the 99th Congress reflects, any change to the Rule could raise potentially difficult constitutional, interpretive, and policy questions. In any event, should Congress desire to create further exceptions to the secrecy framework beyond Rule 6(e), the Supreme Court has instructed that it must “affirmatively express its intent to do so.”<sup>353</sup>

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<sup>350</sup> *Id.* at 39-40.

<sup>351</sup> *Id.* at 40.

<sup>352</sup> S. 1562, 99th Cong. (as reported by S. Comm. on the Judiciary, July 28, 1986).

<sup>353</sup> *Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 572-73 (1983).