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**The Cover:** During the dog days of summer, a police K-9 shares an ice cream cone with a youngster. Photo courtesy of Joe Riplinger, Norfolk, Virginia, Police Department.

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# *The Federal Grand Jury*

## *Exceptions to the Rule of Secrecy (Part I)*



By  
AUSTIN A. ANDERSEN

### AN HISTORICAL PERSPECTIVE

**T**he modern grand jury was foreshadowed in feudal England during the 12th century, when King Henry II created the Assize of Clarendon in order to shift the power to prosecute from the Church to the Crown.<sup>1</sup> Under the Assize, prosecutions were initiated through an inquiry made by a body of 12 laymen, who resided in the vicinity of the crime, to determine if persons suspected of robbery, murder, or theft should be reported to the royal sheriff. The

accused could plead guilty, deny the charges, or submit to the "ordeal by water."<sup>2</sup> Under the third option, defendants were innocent if they sank after being lowered by rope into a body of water; if they floated, however, they were found guilty.<sup>3</sup> Based on the harshness of this procedure, there is little doubt that the grand jury was initially intended to be an instrument of inquisition rather than a bulwark against despotism.

Although the Assize was designed to augment secular authority rather than to safeguard individuals

from unfounded accusations, the practice of using persons from the locale of the crime to determine whether charges should be lodged against a member of the community eventually provided a measure of insulation against royal abuse of the criminal justice system. In order to serve as a "shield" to protect individuals from the prosecutive "sword" of the government, the grand jury gradually gained independence from the King by adopting the practice of hearing witnesses in private and swearing to an oath to keep the proceedings secret.<sup>4</sup>

Part I of this article discusses the transplantation of grand jury secrecy to the United States and examines the underlying policy for secrecy concerning matters occurring before Federal grand juries. It also analyzes exceptions to the rule of secrecy that are of importance to law enforcement officers and notes those instances when State and local police officers may gain access to information derived from Federal grand jury investigations. Part II explores the difficulties commonly encountered in complying with the secrecy requirement and in defining grand jury material and its disclosure.

### EVOLUTION OF THE MODERN GRAND JURY

Viewed as protection from autocratic oppression, the grand jury, deliberating beneath a veil of secrecy, was widely accepted in American communities during the colonial rule of George III. These local juries not only enabled the colonists to refuse to prosecute political opponents of the British but also afforded a means of protecting citizens against persecution by partisan zealots.<sup>5</sup> After the United States achieved independence from Britain, the use of grand juries was enshrined in the fifth amendment of the Constitution, which begins, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...."<sup>6</sup> The language of the fifth amendment, however, does not make the institution of a grand jury incumbent upon the States. Moreover, the Supreme Court has held that the procedure in which a neutral judge finds probable cause to charge and arrest is a

sufficient safeguard of a defendant's rights.<sup>7</sup> Therefore, States, unlike the Federal Government, remain free to proceed with felony prosecutions by means other than grand jury indictments. Nevertheless, most States have incorporated into their constitutions provisions for grand juries—as well as grand jury secrecy<sup>8</sup>—which often closely resemble the Federal model.<sup>9</sup> It is ironic that despite its historical significance, the grand jury in England was abolished as a cost-cutting measure in 1933.<sup>10</sup>

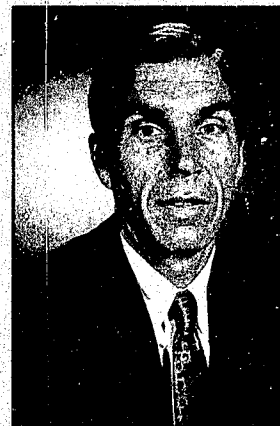
Although the fifth amendment is silent on the issue of secrecy, the practice was continued at common law<sup>11</sup> until 1945, when Congress codified Federal grand jury practice, including secrecy and its exceptions, in Rule 6(e) of the Federal Rules of Criminal Procedure (F.R.C.P.). Rule 7, F.R.C.P., specifies that when the grand jury is used, an offense punishable by death must be prosecuted by indictment. It also states that an offense punishable by imprisonment for more than 1 year must be prosecuted by indictment, unless waived, in which case, it may be prosecuted by information; any other offense may be prosecuted by indictment or information.

Rule 6(a), F.R.C.P., vests in the U.S. district court full discretion to order one or more grand juries summoned as required by the public interest. The Federal grand jury is composed of 16 to 23 jurors, with 12 votes needed for an indictment.<sup>12</sup> A prosecuting attorney, rather than a judge or jury member, presides over the daily operations. Rules of evidence are not applicable, allowing the prosecutor the freedom to use evidence which may not be ad-

missible at trial to obtain an indictment, or true bill.<sup>13</sup> All proceedings, except the deliberation and voting of the jurors, must be recorded, and any recordings, notes, or transcripts are placed in the custody of the attorney for the government. The indictment is normally returned to a Federal magistrate in open court, but it may be sealed until the defendant is located and arrested.<sup>14</sup>

In part, secrecy of the grand jury is achieved by placing limitations on who may be a participant. Rule 6(d) restricts attendance at grand jury proceedings to attorneys for the government, the witness

“  
...the proper  
functioning of  
the grand jury  
system depends  
on secrecy of the  
proceedings....  
”



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under examination, interpreters when needed, and a stenographer or operator of a recording device. No provision is made for the presence of an attorney for either the defendant or a witness giving testimony. While a witness' attorney may not be present inside the grand jury room, the witness may consult with the attorney outside the room at any time, either before or in the course of responding to questions.<sup>15</sup>

The general rule of secrecy, as set forth in Rule 6(e)(2), F.R.C.P., forbids a grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made by the attorney for the purpose of assisting in the enforcement of Federal criminal law, from disclosing "matters occurring before the grand jury" (a term courts often use interchangeably with "grand jury material"), except as otherwise provided for in the rules.<sup>16</sup> A knowing violation of the rule is punishable as a contempt of court.<sup>17</sup>

### REASONS FOR GRAND JURY SECRECY

According to the U.S. Supreme Court, the general policy which justifies the rule of secrecy is the grand jury's need for freedom to pursue its "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."<sup>18</sup> Requiring a wide latitude of inquiry and virtual independence from external distraction, the grand jury has been described by the Supreme Court in 1919 as "a grand inquest, a body with powers of investigation and inquisition, the

scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."<sup>19</sup>

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In recognizing that the proper functioning of the grand jury system depends on secrecy of the proceedings, the Supreme Court, in *United States v. Proctor & Gamble*, provided even more specific reasons for the rule of secrecy in 1958:

- "To prevent the escape of those whose indictment may be contemplated;
- 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;
- 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;

- to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- 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>20</sup>

In 1983, the Supreme Court identified three types of danger associated with the disclosure, absent a court order, of grand jury information concerning a criminal proceeding to government attorneys for use in related civil proceedings:

- Disclosure increases the risk of inadvertent or illegal further release of information to unauthorized persons and thus may threaten the willingness of witnesses to testify fully and candidly;
- It threatens the integrity of the grand jury process itself if there is a tendency for the government to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely;
- The use of grand jury materials by government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the government's

powers of discovery and investigation.<sup>21</sup>

## EXCEPTIONS TO THE RULE OF SECRECY

The exceptions to the rule of secrecy specifically set forth in the text of Rule 6(e), F.R.C.P., are categorized according to the reason for disclosure. Under the appropriate circumstances, they provide various investigative options for Federal and State law enforcement officers to gain access to grand jury material.

### Witnesses

By failing to mention witnesses in the categories of persons—jurors, interpreters, stenographers, typists, attorneys—expressly prohibited from disclosing matters occurring before the grand jury, Rule 6(e) eradicated the previous practice of some Federal districts of swearing witnesses to oaths of secrecy.<sup>22</sup> Making this exception unequivocal is the admonition that “[no] obligation of secrecy may be imposed on any person except in accordance with this rule.”<sup>23</sup> The basis for this exception in the Federal system is the elimination of any potential for hardship created by the inability of a witness to reveal testimony to counsel retained to protect the witness’ interests.<sup>24</sup> Attempts by government attorneys or other government personnel to muzzle witnesses concerning their testimony before the Federal grand jury have generally been construed by the courts as unwarranted and illegal obligations of secrecy.<sup>25</sup>

Relieving witnesses from the obligation of secrecy lessens to a degree the control of the prosecutor by allowing prospective defendants,

or targets, some opportunity to learn the direction of the investigation. Therefore, a number of States have enacted statutes prohibiting a witness from ever disclosing testimony given before a State grand jury. Recently, the Supreme Court held that insofar as a State law prohibits witnesses from disclosing their own testimony *after* the term of the grand jury has ended, that law violates the first amendment to the U.S. Constitution.<sup>26</sup> While the grand jury is in session, however, the Court suggested that the State’s interests in preserving grand jury secrecy may outweigh the competing first amendment right of freedom of speech.<sup>27</sup>

### Attorneys for the Government

Rule 6(e)(3)(A)(i) provides an exception to the rule of secrecy for “an attorney for the government for use in the performance of such

assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of the United States Attorney.”<sup>28</sup> The definition does not include attorneys for Federal agencies.<sup>29</sup> Although the prosecuting attorney for the government has access to the transcript of matters occurring before the grand jury, the ability to disclose this material to others is limited by the remaining exceptions set forth in Rule 6(e). Rule 6(e)(3)(C)(iii), for instance, allows disclosure by an attorney for the government to another Federal grand jury. This exception implies the ability of one government attorney to disclose grand jury information to another government attorney who is engaged in the enforcement of criminal law.

However, a government attorney may not under this exception make a discretionary disclosure of

“**Attempts...to muzzle witnesses concerning their testimony before the Federal grand jury have generally been construed by the courts as unwarranted and illegal obligations of secrecy.**”

attorney’s duty to enforce federal criminal law.” This exception is based on the prosecutor’s practical need to know what evidence is before the grand jury, as well as the grand jury’s need for the prosecutor’s assistance and guidance in its investigation. An attorney for the government is defined as “the Attorney General, an authorized as-

grand jury material to another government attorney for use in a related *civil* proceeding.<sup>30</sup> Instead, civil attorneys must seek disclosure of such information only “when so directed by a court preliminarily to or in connection with a judicial proceeding.”<sup>31</sup> Such court-ordered disclosures are made upon a showing of “particularized need” or

“compelling necessity,” with the primary purpose of the disclosure being to assist in the “preparation or conduct of a judicial proceeding.”<sup>32</sup>

tion and does not require a court order. Such disclosure is, however, subject to the following three restrictions:

court with the names of persons on the disclosure list<sup>36</sup> but also to certify that each person was advised of the obligation of secrecy, it seems clear that assisting personnel must seek the authority of the government attorney in order to make a further disclosure of materials identified as matters occurring before a grand jury.

“**...defendants are entitled to a pre-trial disclosure of any recorded statements made by them before the grand jury which relate to the offense charged.**”

#### **Disclosure to Domestic Law Enforcement Agencies**

It is often desirable for Federal and State authorities to cooperate in investigations where jurisdictions overlap, such as organized crime or political corruption. Therefore, Rule 6(e) was amended in 1985 to allow Federal prosecutors to disclose Federal grand jury matters to the personnel of law enforcement agencies of “a state or subdivision of a state” when the assistance of such personnel would be beneficial to the Federal investigation.<sup>37</sup> This disclosure is governed by the discretion of the government attorney and is subject to the same restrictions that are applicable to Federal personnel assisting the attorney. That is, *all* officers receiving such material must be advised of the obligation of secrecy and the name of each individual to whom disclosure is made must be promptly provided to the court.<sup>38</sup>

Courts have held that “judicial proceedings” do not include tax audits or preliminary agency investigations.<sup>33</sup>

#### **Government Personnel Assisting the Attorney for the Government**

Rule 6(e)(3)(A)(ii) permits disclosure by the attorney for the government of matters occurring before the grand jury to government personnel assisting the attorney in the performance of duties to enforce Federal criminal law.<sup>34</sup> This exception provides the most common method of access to grand jury material by Federal investigators; assistance to the attorney generally consists of investigation or analysis in support of the grand jury’s efforts. Disclosure to government personnel assisting the attorney includes not only Federal but also State and local government employees, but only for the purpose of enforcing Federal criminal statutes (as opposed to use in civil, administrative, or internal agency matters).

Disclosure under this exception is made at the attorney’s discre-

- Any person to whom matters are disclosed cannot use that grand jury material for any other purpose other than to assist the attorney in matters concerning the enforcement of Federal criminal law;
- The attorney must promptly provide the district court before which the grand jury was empaneled with a list of the names of all persons to whom disclosure has been made;
- The attorney must certify that each person on the list has been advised of the obligation of secrecy.<sup>35</sup>

An issue often arising under this exception is whether a government employee who lawfully obtains grand jury material to assist a government attorney may divulge that material to other government personnel working on the same, related, or unrelated Federal criminal investigations. Because the conditions of this exception require the attorney not only to provide the

The 1985 amendment to Rule 6(e) also made it possible for a government attorney to disclose to an appropriate official of a State or subdivision of a State evidence developed during a grand jury investigation which relates to a violation of *State* law. It is important to note, however, that this disclosure<sup>39</sup> is accomplished by an order of the court rather than the discretion of



the attorney. Unlike the conditions for disclosure to personnel assisting the attorney in a Federal prosecution, disclosure of matters relating to a violation of State law will be made "in such manner, at such time, and under such conditions as the court may direct."<sup>40</sup>

### Disclosure to the Defendant

Upon order of the court, disclosure of grand jury material may be made pursuant to a request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment based on matters which occurred before the grand jury.<sup>41</sup> In addition, Rule 16(a)(1)(A), F.R.C.P., mandates that upon request, defendants are entitled to a pre-trial disclosure of any recorded statements made by them before the grand jury which relate to the offense charged. Finally, a defendant may have access to transcripts of grand jury testimony of witnesses for the government after they have testified on direct examination in the trial of the case.<sup>42</sup>

Part II of this article will examine the difficulties encountered in disseminating grand jury material to foreign police agencies and in defining grand jury material and its disclosure.

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<sup>7</sup> *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>8</sup> Only three States (Alabama, Connecticut, and New Hampshire) have no specific secrecy provision, S. Beale & W. Bryson 1 Grand Jury Law and Practice 7:04 at 15.

<sup>9</sup> Note "Grand Jury Secrecy v. The First Amendment: A Case for Press Interviews of Grand Jurors," 23 Valparaiso Univ. Law Rev. 559, 560-561 (1989).

<sup>10</sup> *Id.* at 564.

<sup>11</sup> See e.g., *In Re Grand Jury Proceedings*, 4 F.Supp. 283, 284-5 (E.D. Pa. 1933).

<sup>12</sup> Rule 6(a)(1), F.R.C.P.

<sup>13</sup> See Beale & Bryson, *supra* note 8 at 1:06, at 32.

<sup>14</sup> Rule 6(e)(4), F.R.C.P.; this provision allows law enforcement officers to locate and arrest indicted individuals who are apt to flee upon learning the details of a public indictment.

“  
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 ”

<sup>15</sup> See, e.g., *In Re Taylor*, 567 F.2d 1183 (2d Cir. 1977); see also, Waller, "An Introduction of Federal Grand Jury Practice," 61 Wisconsin Bar Bulletin 17, 19 (1988).

<sup>16</sup> Rule 6(e)(2), F.R.C.P.

<sup>17</sup> *Id.*

<sup>18</sup> *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

<sup>19</sup> *Blair v. United States*, 250 U.S. 273, 282 (1919).

<sup>20</sup> 356 U.S. 677, 681 n.6 (1958), quoting from *United States v. Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954), quoting from *United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D.C. Md. 1931). The passage is later referred to in *United States v. Sells Engineering, Inc.*, 103 S. Ct. 3133, 3140 (1983).

<sup>21</sup> *Sells Engineering*, *supra* note 20, at 3142-3143; and *United States v. John Doe, Inc.*, 107 S. Ct. 1656, 1663-64 (1987).

<sup>22</sup> See Notes of Advisory Committee on Rules, Note to Subdivision (e), Rule 6, F.R.C.P.

<sup>23</sup> Rule 6(e)(2), F.R.C.P.

<sup>24</sup> *Supra* note 22.

<sup>25</sup> See, e.g., *In Re Grand Jury Summoned October 12, 1970*, 321 F.Supp. 238 (N.D. Ohio 1970); *United States v. Radetsky*, 535 F.2d 556 (10th Cir. 1976); *In re Vescovo Special Grand Jury*, 473 F.Supp. 1335 (C.D. Cal. 1979).

<sup>26</sup> *Butterworth v. Smith*, 110 S.Ct. 1376 (1990).

<sup>27</sup> *Id.*

<sup>28</sup> Rule 54(c), F.R.C.P.

<sup>29</sup> *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962).

<sup>30</sup> *Sells Engineering*, *supra* note 20, at 3140.

<sup>31</sup> Rule 6(e)(3)(C)(i), F.R.C.P. Use of this exception is not limited to government attorneys; any party to a judicial proceeding may petition the court to release grand jury material in the interests of justice. This exception existed at common law as well. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940), the Court noted that after the grand jury's work in complete, "disclosure is wholly proper where the ends of justice require it."

<sup>32</sup> *United States v. Baggot*, 103 S.Ct. 3140, 3164 (1983).

<sup>33</sup> *Id.* at 3166. See also, *Bradley v. Fairfax*, 634 F.2d 1126 (8th Cir. 1980) (disclosure denied for parole revocation hearing); *United States v. Bates*, 627 F.2d 349 (D.C. Cir. 1980) (disclosure denied for agency investigation.)

<sup>34</sup> Rule 6(e)(3)(A)(ii), F.R.C.P.

<sup>35</sup> Rule 6(e)(3)(B), F.R.C.P.

<sup>36</sup> See Notes on Advisory Committee on Rules, 1985 Amendment, Rule 6(e)(3)(A)(ii) which states, in part, "...because not all federal government personnel will otherwise know of this obligation [secrecy], the giving of the advice and certification thereof is required as to all persons receiving disclosure...."

<sup>37</sup> Rule 6(e)(3)(A)(ii), F.R.C.P.

<sup>38</sup> *Supra* note 36.

<sup>39</sup> Rule 6(e)(3)(c)(iv), F.R.C.P.

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

<sup>41</sup> Rule 6(e)(3)(c)(iv), F.R.C.P.

<sup>42</sup> 18 U.S.C. 3500.

### Footnotes

<sup>1</sup> Helmlolz, "The Early History of the Grand Jury and the Canon Law," 50 U. of Chi. Law Rev. 613 (1983).

<sup>2</sup> Kuh, "The Grand Jury 'Presentment': Foul Blow or Fair Play?," 55 Columbia Law Rev. 1103, 1106 (1955).

<sup>3</sup> *Id.* at 1107.

<sup>4</sup> The oath appeared as early as 1600. See Brown, "The Witness and Grand Jury Secrecy," 11 American Journal of Criminal Law 169, 170-171 (1983).

<sup>5</sup> *Id.* at 170-171.

<sup>6</sup> U.S. Const. amend V.

*Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*