1999

Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket

Daniel Richman
Columbia Law School, drichm@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship
Part of the Criminal Law Commons

Recommended Citation
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/750

This Essay is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact donnelly@law.columbia.edu.
GRAND JURY SECRECY:
PLUGGING THE LEAKS IN AN EMPTY BUCKET

Daniel C. Richman*

Although people can quarrel about the significance or reliability of Independent Counsel Kenneth Starr’s investigative findings, no one can deny that his investigation produced new law. We now know that the attorney-client privilege survives the death of the client,1 that government lawyers may not rely on that privilege to shield communications from their “client” relating to criminal misconduct,2 and that there is no “protective function privilege” (at least not yet).3 While bringing some clarity to certain areas, the Independent Counsel’s investigation also highlighted the confused state of the law relating to Rule 6(e)’s grand jury secrecy provisions.4

Emblematic of the confusion was the reaction to Starr’s interview with Steven

---

* Associate Professor, Fordham University School of Law. Between 1987 and 1992, I was an Assistant United States Attorney in the Southern District of New York. Since then I have served as a consultant for the Office of the Inspector General of the Justice Department, but nothing here directly relates to that work. Thanks to Alex Bowie, Mike Bromwich, Jerry Lynch, Julie O’Sullivan, Dave Sklansky, and Bill Stuntz for their generous and valuable assistance.

2. See In re Bruce R. Lindsey (Grand Jury Testimony), 148 F.3d 1100 (D.C. Cir.), cert. denied, 119 S. Ct. 466 (1998) (holding that there is no attorney-client privilege protecting communications between the President and government lawyers).
4. Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part,

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.
(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to (i) an attorney for the government for use in the performance of such attorney’s duty; and (ii) such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney’s duty to enforce federal criminal law.

FED. R. CRIM. P. 6(e).
After avowing that his office "'never discussed grand jury proceedings,'" Starr conceded that he and his deputy regularly gave "background" interviews to reporters, but noted that "'it is definitely not grand jury information, if you are talking about what witnesses tell FBI agents or us before they testify before the grand jury or about related matters.'"  

Brill's article took Starr to task:

In fact, there are court decisions (including one in early May from the Washington D.C. federal appeals court with jurisdiction over this Starr grand jury) that have ruled explicitly that leaking information about prospective witnesses who might testify at a grand jury, or about expected testimony, or about negotiations regarding immunity for testimony, or about the strategy of a grand jury proceeding all fall within [Rule 6(e)].

The White House also seized on Starr's apparent confession, announcing that it "raise[d] grave concerns about Mr. Starr's entire investigation." Other commentators soon came to Starr's defense, however, noting that the law is not at all clear on these points. 

The scope of Rule 6(e)'s secrecy requirement is uncertain on other issues as well. For example, should documents produced to the grand jury under the compulsion of subpoena be considered "matters occurring before the grand jury" within the meaning of the rule? More than sixteen years ago, one district court observed: "There is an abundance of cases which address this question with a striking lack of unanimity." And this lack of unanimity continues today.

---

6. Id.
7. Id. (emphasis in original).
8. Id.; see In re Motions of Dow Jones & Co., 142 F.3d 496, 499-500 (D.C. Cir. 1998) ("'[M]atters occurring before the grand jury'—includes not only what has occurred and what is occurring, but also what is likely to occur. Encompassed within the rule of secrecy are 'the identities of witnesses or jurors, the substance of testimony' as well as actual transcripts, 'the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'") (quoting SEC v. Dresser Indus., 628 F.2d 1368, 1382 (D.C. 1980) (en banc)); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981)).
Why is Rule 6(e) doctrine so unsettled on these and other basic issues? Two quick answers spring to mind, one relating to the norms established by the rule; the other, to the process by which those norms are articulated.

Rule 6(e) does not establish a general regime of investigative secrecy for prosecutors and law enforcement agents. It addresses only what occurs "before the grand jury." As a matter of physical reality, however, the only thing that clearly occurs before a grand jury is testimony by a live witness, and sometimes the introduction of exhibits. Just about everything else generally occurs in a prosecutor's office or out in the field: deliberations about what investigations the grand jury will pursue, and which witnesses and documents will be subpoenaed in its name; interviews of potential witnesses conducted with an eye to deciding whether they will actually be brought before the grand jury, and receipt and review of documents obtained via grand jury subpoena. Particularly when prosecutors simultaneously develop a case in the grand jury and pursue other investigative options without using the grand jury, the language of Rule 6(e) provides all too little guidance as to what the government's secrecy obligations are. Left to their own devices in defining the fiction of what occurs "before" the grand jury, courts unsurprisingly reach different conclusions.

The second challenge to coherence in Rule 6(e) comes from the ways in which litigation over the rule arises. The bitter debate touched off by Starr's "admissions" to Steven Brill highlights a more general point. The main reason why the White House and its allies were so quick to seize on Starr's comments was that, in the absence of a confession by a law enforcement source (or, even less likely, a reporter with no interest in being a future beneficiary of leaked information) leaks are virtually impossible to prove. Because of these proof problems, courts considering leak allegations rarely have the kind of factual record they would need to refine their doctrinal distinctions, and are tempted, in the absence of anyone to sanction, to read Rule 6(e) broadly. In a very different line of cases—those involving efforts by the government or a private party to use Rule 6(e) as a shield to prevent the use of grand jury material in civil litigation—courts will have a more complete record (albeit one usually provided ex parte), but the price of secrecy

13. See In re Grand Jury Proceedings, 851 F.2d at 863 ("It is common ground that testimony before a grand jury is always... a 'matter' " within the meaning of Rule 6(e)).
14. The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22, which requires that certain subpoenaed bank records actually be presented to the grand jury, id. at § 3420(a)(1), highlights how subpoenaed documents may be treated in the absence of such a statutory requirement.
15. After the Brill article, Starr issued a statement that "disputed none of the quotations in the article," but avowed that Brill had "recklessly and irresponsibly charged the Office of Independent Counsel with improper contacts with the media. These charges are false." Clymer, supra note 9, at A1.
16. See David Firestone, Steven Brill Strikes a Nerve in the News Media, N.Y. TIMES, June 20, 1998, at A7 ("One of the few things that most reporters regard as sacred is the protection of their sources... ").
may be unfairness in the civil litigation. The shifting equities and institutional interests in these two very different contexts surely present a challenge to courts trying to harmonize Rule 6(e) law.

These reasons have considerable explanatory power. However, the controversy over Starr's conduct, and other disputed issues of 6(e) law, reflect a more fundamental problem: the absence of a clear idea why a special regime of grand jury secrecy is necessary. Confronting this problem means not only exploring the uses and misuses of investigative information, but also asking uncomfortable questions about who really is benefited by the existence of such a regime.

I. INVESTIGATIONS INSIDE THE GRAND JURY AND OUT

In the federal system, prosecution of all felonies must proceed by indictment (in the absence of a waiver). All felony cases therefore must be presented to a grand jury. But the nature of the grand jury's involvement with these cases varies greatly. Roughly speaking, there are two kinds of cases: those in which the grand jury does not play an important investigative role, and those in which it does (if only as a source of authority).

Although hard empirical evidence is not available, the first category probably includes the majority of federal criminal cases. Were one to review the grand jury minutes in these cases, one would likely find the elicitation of hearsay testimony from one or more government agents, followed by a request that the grand jury return an indictment along the lines suggested by the prosecutor. The process usually does not take very long, and just about always ends in the voting of a true

18. See Beale, et al., supra note 12, § 5:1, at 5-4:

For prosecutors, grand jury secrecy is a double-edged sword. On the one hand, most prosecutors seek to minimize the extent to which they must provide pretrial discovery of their case to the defense. That interest compels prosecutors to urge a narrow interpretation of the principles of grand jury secrecy, and a narrow construction of the statutory and court-made exceptions to those principles. On the other hand, it is often in prosecutors' interest to divulge information obtained through the grand jury process to parties not privy to the grand jury proceedings. . . . On those occasions, prosecutors find themselves urging a broad interpretation of the exceptions to the principles of grand jury secrecy.

Id.

19. See U.S. Const., amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."); Fed. R. Crim. P. 7(a) (codifying the rule that felony prosecutions commence with an indictment).

20. Here, as in an number of other places in this essay, the support for the text's proposition comes from an amalgam of personal experience, anecdote, and deduction. Would that it were otherwise. But perhaps the greatest cost of grand jury secrecy rules is the lost opportunity for systematic study of the body.

21. The government may present hearsay evidence to the grand jury, see Costello v. United States, 350 U.S. 359, 363 (1956), and will often do so, because it facilitates the presentation of a seemless case, limits the burden on non-government witnesses, and limits the effectiveness of cross-examination should the out-of-court declarants later testify at trial. These are not necessarily good reasons, see Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 Cornell L. Rev. 260, 292 n.157 (1995), but they are reasons just the same.
Cases within this first category can differ greatly in the extent of prosecutorial involvement prior to the grand jury presentation. Some investigations—often in the narcotics or organized crime areas—will have required prosecutorial involvement at an early stage, for instance, in order to obtain authorization for electronic surveillance. Most, though, will have been conducted by a law enforcement agency without the assistance of a prosecutor, to whom the case will be presented only when the agency cannot go further on its own. Regardless of when a prosecutor enters the picture, however, the important thing about these investigations is that they will have been conducted without the coercive power of the grand jury. Physical evidence will have been seized (pursuant to warrant or via an investigative stop) or proffered. Some potential testimonial sources will have provided information voluntarily—victims, concerned citizens, obliging institutions (which can themselves benefit from having good relations with law enforcers). Other sources will have complied only after some level of coercion has been exerted. The coercion can be from a non-governmental entity, such as an employer whose fear of corporate (or personal) sanctions leads it to put pressure on its employees. But there are also direct governmental methods of coercion. Sometimes, law enforcement or regulatory agencies will have invoked administrative subpoena power. The most important source of governmental coercion in these cases, however, comes from the power to threaten prosecution (for either the crime being investigated or some other crime, related or unrelated). This is the source of pressure that results in cooperation agreements, "no pros letters" and other such arrangements that promise leniency, or better, in exchange for information and, sometimes, testimony.

In sum, when a grand jury's role in a case is limited to authorizing formal charges, the government has a broad range of investigative options that allow it to

22. See id., at 274-75 (giving statistics regarding true bills); see also BLANCHE DAVIS BLANK, THE NOT SO GRAND JURY: THE STORY OF THE FEDERAL GRAND JURY SYSTEM 31-42 (1993) (giving federal grand juror's account of typical matters that came before her panel); id. at 37 (discussing variety of case she dubs the "fifteen minute wonder"); Fred A. Bernstein, Note, Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury, 69 N.Y.U. L. Rev. 563, 573 (1994) (citing one prosecutor who put his "record" at "[f]ifteen indictments in 45 minutes").


obtain information from both the most obliging witnesses (e.g. victims) and those who, because of criminal exposure, might otherwise be the least obliging. If, however, a potential witness is either unwilling or unable to cooperate with the inquiry, and cannot be credibly threatened with prosecution, a federal prosecutor will lack the ability to compel disclosure on her own. Unlike their cousins across the Atlantic in Britain’s Serious Frauds Office, federal prosecutors do not have their own subpoena power, at least as a general matter. They therefore must turn to the grand jury not only for authorization of formal charges, but as a “source” of coercive power.

Because of the limitations placed on prosecutorial power, investigations will be pursued “in” the grand jury primarily in two sorts of situations. One occurs when potential witnesses are legally obliged to keep information secret in the absence of legal compulsion. The other occurs when potential witnesses are reluctant to come forward in the absence of subpoenae—either because they would prefer not to give the government information, or because they would prefer not to be seen doing so voluntarily—but are not so reluctant that they will be willing to perjure themselves or go into contempt.

Given the available options, it is not hard to see why a great many investigations involving violent crimes or relatively low-level narcotics trafficking (without money laundering) occur outside the grand jury. In these cases, the non-official sources of information tend to be either obliging eyewitnesses or people who can be credibly threatened with criminal prosecution. It is also not surprising that the

27. Under the Criminal Justice Act 1987 the director of the Serious Fraud Office may investigate any suspected offence that appears on reasonable grounds to involve serious or complex fraud. The SFO may issue a notice requiring attendance of persons to answer questions. It is a criminal offence not to answer questions without a reasonable excuse.


Those who dismiss the grand jury as a rubber stamp for prosecutors and who would, but for its constitutional basis, eliminate it in the federal system often forget that the alternative, with respect to the grand jury’s investigative functions is more likely to be not judicial supervision but prosecutorial subpoena power. See William J. Campbell, Eliminate the Grand Jury, 64 J. Cium. L. & Criminology 174, 180 (1973) (suggesting that grand juries be eliminated, and that their subpoena power be given to prosecutors).

29. Strictly speaking, the coercive power underlying a grand jury subpoena comes from a court, not the grand jury itself. See United States v. Williams, 504 U.S. 36, 48 (1992) (“[T]he grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required.” (citing Brown v. United States, 359 U.S. 41, 49 (1959))). The point is, though, that a prosecutor can invoke compulsory processes in the grand jury’s name that she could not obtain in her own right.


31. A grand jury subpoena will also generally be the only mechanism by which a prosecutor can obtain the testimony of a witness who invokes a valid Fifth Amendment privilege against self-incrimination. See 18 U.S.C. §§ 6001-6003 (1998) (setting out procedures for grants of immunity and compulsion orders).
greatest use of grand juries as investigative tools is in the white collar area, where potential witnesses frequently operate within an institutional context that both requires the threat of legal sanction as a means of obtaining testimony, and takes that threat seriously. Indeed, even when the government can show probable cause to support a search warrant, it will frequently proceed via subpoena in a white-collar case. This forbearance arises in part out of courtesy for opposing counsel, but it also is based on enforcers’ confidence that this level of compulsion will be sufficient, given the targets and the nature of the evidence involved.

II. INVESTIGATIVE SECRECY

There are, of course, good reasons for keeping all investigative information secret pre-indictment (and after, too), regardless of the extent to which the inquiry has been pursued in the grand jury. Some of these reasons give enforcers (prosecutors and agents) powerful institutional incentives for maintaining secrecy. Premature disclosure of investigative data—identity of targets, nature of allegations, nature of proof—can lead targets to flee, destroy evidence, intimidate or deter witness, create phony evidence, and otherwise impede investigations. Even disclosures that do not trigger obstructionary behavior can impede the government’s investigatory powers by drying up information sources that rely on the promise or assumption of confidentiality. So compelling are these concerns that they have been successfully used in the federal system to justify not merely a regime of investigative secrecy pre-indictment, but also a regime of minimal discovery post-indictment.

Premature disclosure of investigative data can have other adverse consequences of which enforcers might (regrettably) be somewhat less mindful. As an FBI agent once noted: “There can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the

32. Organized crime cases are not so easily categorized. Some, of the family feud variety, for instance, may look much like other violent crime cases. Probes into mob infiltration of “legitimate” business, on the other hand, will have much in common with white collar cases.

33. Proceeding by subpoena, rather than search warrant, will draw defense counsel into the process of sifting through documents, a process that might otherwise be quite onerous for a prosecutor in a white-collar case involving cartloads of documents. This involvement can make a prosecutor’s life much easier, particularly when she has confidence in counsel’s integrity, and the cost—materials withheld based on aggressive invocations of privilege—will not be obvious.

34. An indictment does not end Rule 6(e)’s rule of secrecy. See, e.g., Hiss v. Dep’t of Justice, 441 F. Supp. 69, 71 (S.D.N.Y. 1977) (denying historians access to materials from grand jury investigation conducted thirty-years earlier); see also Benjamin Weiser, Request for Hiss Grand Jury Records, N.Y. TIMES, Dec. 16, 1998, at B5. However, my interest in investigative leaks leads me to focus only on pre-indictment secrecy.

35. Not all of the defensive measures a target might take are necessarily illegal. See KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 5 (1985) (stating that “central theme of the white-collar crime defense function” is effort of defense attorney “to keep potential evidence out the government’s reach by controlling access to information”).

36. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 844 (2d ed. 1992) (stating that “[t]he Federal Rules model... provides the standard for the narrowest range of prosecution disclosure...”).
subject of an FBI investigation.\textsuperscript{37} Such disclosures can threaten the privacy and reputations of information sources as well.

Notwithstanding these compelling arguments for secrecy, there are corresponding reasons why enforcers might want to leak or otherwise disclose investigative data in particular cases.\textsuperscript{38} Because leaks are so hard to prove, any effort to canvas rationales is bound to rest on hypothetical or anecdote. But some basic possibilities emerge. Sometimes, disclosure—whether through the press or through more targeted means—will actually further an investigation. Selective disclosure of investigative information can place members of a targeted enterprise in a non-custodial "prisoner's dilemma," giving each person reason to fear that one or more of his comrades will race to the prosecutor's office to betray him in exchange for leniency, and therefore giving him reason to get there first.\textsuperscript{39} Disclosure can also prod non-culpable people into providing new information, by triggering memories, or by merely assuring them that the government is pursuing a case. Information can even serve as a sort of currency. Leaks to the media in one case can help foster the sort of "working relationship"\textsuperscript{40} that leads reporters to reciprocate with information in another case.

The desire to advance an investigation is not the only institutional reason enforcers might have to disseminate investigative information. Prosecutors or law enforcement agencies may find it politically desirable to assure the public that a particular target or crime is being investigated, to deter others from pursuing the kind of conduct being investigated, to show appropriators that they are getting their money's worth—in short, to justify their existence without waiting for charges to be brought and disposed of.\textsuperscript{41} It is worth noting that, to the extent

\textsuperscript{38} The problem is not limited to the law enforcement context. See SISSELA BOK, SECRETS 217 (1982) (noting that "[w]ith modern governments guarding vast amounts of information, much of it inaccessible to the public or actively kept secret, and with the media eager to circulate newsworthy revelations to vast audiences, the leak... has become an important tool of governing."); Note, Keeping Secrets: Congress, The Courts, and National Security Information, 103 HARV. L. REV. 906, 911 (1990) (observing that "administration officials selectively release some information in order to generate needed public support for administration policies, or to satisfy more parochial bureaucratic or personal motives").
\textsuperscript{39} See Richman, supra note 26, at 89-91; see also WILLIAM POUNDSTONE, PRISONER'S DILEMMA 118 (1992); William Glaberson, Fast, Says Prosecutor to Reporter; I'm All Ears, Is the Reply, N.Y. TIMES, June 24, 1998, at A22 ("A startling news report can signal the strength of a case and persuade a defendant to testify against others. In the insider trader cases that rocked Wall Street in the 1980's, a drumbeat of news reports appeared to help persuade traders and investment bankers to turn on one another."); United States v. Friedman, 854 F.2d 535, 582 (2d Cir. 1988) (finding evidence that "the government persistently leaked information about the grand jury proceedings to the press... both to induce the cooperation of potential witnesses and to supplant state prosecutorial efforts in a bureaucratic turf fight").
\textsuperscript{40} Scott M. Matheson, Jr., The Prosecutor the Press, and Free Speech, 58 FORDHAM L. REV. 865, 889 (1990) (stating that "[a]ttributes may... be motivated by a desire to establish and foster a satisfactory working relationship with the press").
\textsuperscript{41} See also Glaberson, supra note 39 (according to some former prosecutors, "mid-level prosecutors or investigators... may hope to goad superiors to be more aggressive in an investigation or to make their agencies look good").
pre-indictment leaks can be seen as an institutional effort to collect on the capital created by enforcement activity, agencies, whose conspicuous involvement in a case often ends when arrests are made, may have greater motivation to leak than prosecutors, who will take center stage during all phases of the adjudicatory process. Enforcers might have uglier institutional motives as well—a desire to enhance the likelihood of a future conviction by tainting a jury pool, or to impose a reputational penalty on a target regardless of a trial’s outcome.

Enforcers may also leak information for reasons that have nothing to do with furthering the interests (or perceived interests) of their government offices or agencies. Self-interest is quite enough. Prosecutors seeking political advance may want to burnish their image in the press. Others might want the publicity that will help them “secure private sector legal employment and clients sometime in the future,” or that will simply enhance their community status. Law enforcement agents might be a little more immune to this economic temptation, since there is less of a private market for them to cash in on publicity (though the recent proliferation of top drawer investigative firms may be changing this).

III. SECRECY REGULATION

One response to the risks that the public good of investigative security will be frittered away for inappropriate, or even private, purposes would be to develop a robust legal regime for regulating the release of all investigative information—a regime that would articulate clear norms and establish some clear and effective enforcement mechanism(s) for them. This, we have not done at all.

In the extreme case where pre-trial disclosure of information can plausibly be said to threaten the integrity of the trial, a defendant can seek to change venue or, should he be convicted, can challenge the fairness of his trial.

42. See Matheson, supra note 40, at 889 (“Defense lawyers especially may suspect that an overzealous prosecutor comments publicly to increase the probability of conviction by influencing prospective jurors.”).
43. Id. at 888; Glaberson, supra note 39 ("In some cases, prosecutors are able to enhance their crime-fighting image by reassuring the public that troubling cases are being investigated.”).
44. Matheson, supra note 40, at 889.
46. See FED. R. CRIM. P. 21(a) (providing for change of venue “if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial” in the district); see also United States v. Bailey, 112 F.3d 758, 769-70 (4th Cir.), cert. denied, 118 S. Ct. 240 (1997); United States v. Edmond, 52 F.3d 1080, 1099 (D.C. Cir. 1995).
47. The standard for overturning a conviction on grounds of prejudicial pretrial publicity can be quite high, however. See Patton v. Yount, 467 U.S. 1025, 1035 (1984) (holding that constitutional requirement of impartiality does not require that jurors be ignorant of facts and issues of a case, but only that they not have such fixed opinions that they cannot impartially judge the defendant’s guilt); see also United States v. Croft, 124 F.3d 1109, 1115-16 (9th Cir. 1997) (stating that prejudice is presumed “when the adverse publicity is so pervasive and inflammatory that the jurors cannot be believed when they assert that they can be impartial”); United States v. Smith-Bowman, 76 F.3d 634, 637 (5th Cir. 1996) (finding that defendant failed to demonstrate that “prejudicial publicity rendered” it impossible “to obtain an impartial jury”).
While the standards for relief on these claims are quite high, the possibility of success might well have some minimal deterrent effect on pre-trial investigative disclosures. These standards, however, certainly do not provide any protection to individuals who have the bad fortune to be tarred by investigative leaks, but the good fortune not to be indicted.

Government lawyers are also bound by ethics rules that, in their most recent formulation, provide (with certain stated exceptions):

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.48

These rules can be asserted against prosecutors and, at least in theory, can lead to disciplinary proceedings against them.49 But they rarely (if ever) do—perhaps because bar authorities properly expect the government to regulate its own shop.50 Their status regrettably may therefore be more hortatory than compulsory.

48. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1997). The Model Code of Professional Responsibility provides, with respect to statements made prior to the filing of charges:

A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

1. Information contained in the public record.
2. That the investigation is in progress
3. The general scope of the investigation, including a description of the offense and, if permitted by law, the identity of the victim.
4. A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
5. A warning to the public of any dangers.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(A) (1994).

49. All federal prosecutors are members of some bar, and are amenable to regulation in that capacity. Absent further legislative action, they will also be "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where [they] engage... in [their] duties," under the "Citizens Protection Act of 1998," which was recently passed as part of the 1999 budget legislation. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. 105-277 § 801 (to be codified at 28 U.S.C. § 530B) (1998); see also Congress Enacts Statute that Subjects Federal Prosecutors to State Laws and Rules, 64 CRIM. L. REP. (BNA) No. 4, at 70-72 (Oct. 28, 1998). The possibility that Charles Bakaly III, Starr's press spokesman, might face disciplinary action in addition to criminal prosecution for his alleged leaks, has been noted. Loose Lips, LEGAL TIMES, Mar. 15, 1999, at 3.

50. See Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 ST. THOMAS L. REV. 69, 90 (1995) (observing that "even when state authorities learn of accusations of prosecutorial wrongdoing, they are likely to decline to investigate as a matter of discretion"). Federal prosecutors are also subject to discipline by district court disciplinary committees, but these authorities "view the state processes as the ordinary mechanism for dealing with wrongdoing by federal litigators, including federal prosecutors." Id. at 84.
What regulatory regime, then, has the Federal Government imposed on its enforcers? The only rules broadly covering all forms of investigative information can be found in the Justice Department’s Manual. A provision therein flatly bars “components and personnel of the Department” from “respond[ing] to questions about the existence of an ongoing investigation or comment[ing] on its nature or progress, including such things as the issuance or serving of a subpoena, prior to the public filing of the document.”

The Manual goes on to provide, however:

In matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare, comments about or confirmation of an ongoing investigation may need to be made. In these unusual circumstances, the involved investigative agency will consult and obtain approval from the United States Attorney or Department Division handling the matter prior to disseminating any information to the media.

As the recent controversy about Kenneth Starr demonstrated, this proviso introduces a substantial degree of vagueness into the Department’s regime. Moreover, even were the Manual’s regulations clear, their effectiveness would still be open to question, since they are “intended for internal guidance only,” and “do not create any rights enforceable in law or otherwise by any party.” Although aggrieved parties are free to complain to the Department, investigation and discipline are internal matters, handled, for the most part, by its famously opaque Office of Professional Responsibility (“OPR”).

Only one category of investigative data has been given a separate statutory secrecy regime to supplement the Justice Department’s internal scheme: grand jury material within the scope of Rule 6(e).

52. Id. at § 1-7.530(B).
54. DEP’T OF JUSTICE MANUAL, supra note 51, § 1-7.001.

Because OPR’s investigations and reports are, for the most part, kept secret, it is impossible to assess the extent of its efforts to enforce departmental regulations regarding investigative secrecy. Of course, some OPR inquiries are less secret than others. See, e.g., David Johnston & Dan Van Natta, Jr., Reno Considering Separate Counsel for Starr Inquiry, N.Y. TIMES, Feb. 19, 1999 at A1; David Johnston & Dan Van Natta, Jr., Inquiry to Ask Whether Reno was Mislaid by Starr’s Office, N.Y. TIMES, Feb. 10, 1999 at A1.

disclosure of testimony before the grand jury, and of information identifying the targets of a grand jury’s inquiry, or the witnesses who have testified, or who are expected to testify. To the extent that the government’s use of the grand jury simply supplements other investigatory options, the protection offered by Rule 6(e) to targets and others is quite limited. Materials obtained through the execution of a search warrant, for example, do not become “matters occurring before the grand jury” simply because the government thereafter presents them to a grand jury. But where the government pursues an investigation chiefly through the use of the grand jury’s subpoena power, as it often does in white-collar cases, Rule 6(e) provides a heightened security classification for the entire inquiry.

Rule 6(e)’s categorical limitations on investigative disclosures are not only substantially different from those in the Department’s own regulations—lacking the large “community reassurance” loophole—but they also are accompanied by an enforcement mechanism that the Department’s regulations lack. Rule 6(e) specifically provides that a violation of its secrecy obligations is punishable as civil or criminal contempt of court, and “the courts have recognized that that remedy is an appropriate one.”

Although there remains some dispute whether Rule 6(e) creates an independent private cause of action or merely puts a district court under a duty to proceed upon an aggrieved party’s complaint, the provision has uniformly been read to permit a private party to initiate judicial review of the government’s conduct, upon making some threshold showing.

records obtained from financial institutions which overlaps with, and in some respects, goes beyond Rule 6(e). See Beale, Et Al., Supra note 12, § 5:14, at 5-81 to 5-84.

57. See, e.g., United States v. Smith, 123 F.3d 140, 154-55 (3d Cir. 1997) (holding Rule 6(e) applicable even after initial disclosure of protected grand jury testimony); Durham v. Dep’t of Justice, 829 F. Supp. 428, 432 (D.D.C. 1993) (holding grand jury testimony subject to Rule 6(e) requirements).

58. See, e.g., In re Grand Jury Subpoena, 103 F.3d 234, 239 n.5 (2d Cir. 1996) (holding names of witnesses and targets covered by Rule 6(e)); In re Eyecare Physicians of Am., 100 F.3d 514, 519 (7th Cir. 1996) (elaborating on the consequences of disclosure of witness names).

59. See In re Grand Jury Subpoena, 920 F.2d 235, 241 (4th Cir. 1990) (holding that separately obtained search warrants coincident with grand jury investigation did not constitute “matters occurring before the grand jury”).

60. Beale, Et Al., Supra note 12, § 5:4, at 5-14.

61. Compare In re Sealed Case, No. 98-3077, 151 F.3d 1059, 1069 (D.C. Cir. 1998) (Starr leak allegations) (“[A] proceeding to enforce the secrecy mandate of Rule 6(e)(2) is civil in nature and may be initiated by a private plaintiff.”), and Blalock v. United States, 844 F.2d 1546, 1550 (11th Cir. 1988) (“[I]n holding that a target may seek civil contempt sanctions for a violation of Rule 6(e)(2), Lance stands for the proposition that a target may bring suit for injunctive relief against the individuals subject to Rule 6(e)(2) and may invoke the district court’s contempt power to coerce compliance with any injunctive order the court grants.”) (citing In re Grand Jury, 610 F.2d 202 (5th Cir. 1980) (concerning Bert Lance)), with Finn v. Schiller, 72 F.3d 1182, 1189 (4th Cir. 1996) (“Because the victim of a breach of grand jury secrecy cannot bring suit on his or her own behalf, the district court has an inherent duty to preserve the integrity of Rule 6 by instituting contempt proceedings when presented with a prima facie case of a violation”), and McQueen v. United States, 5 F.Supp.2d 473, 483 (S.D.Tex. 1998) (stating grand jury target has no independent private right of action for damages or even equitable relief for a Rule 6(e) violation).

62. See, e.g., In re Sealed Case, No. 98-3077, 151 F.3d at 1067-68 (describing what prima facie case must entail).

Dismissal of an indictment will rarely be an available remedy for a Rule 6(e) violation. See Bank of Nova
Faced with President Clinton’s leak allegations against Kenneth Starr’s office, the D.C. Circuit recently had occasion to set out the procedural steps of a district court’s Rule 6(e) contempt inquiry. Once an aggrieved party has satisfied its burden of establishing a prima facie case that grand jury materials were improperly released, the government must come forward with evidence to rebut that showing. If, after an in camera review, the court determines that the government’s ex parte submission is insufficient to rebut the prima facie case, or if a violation is conceded, “the district court may proceed to find that a Rule(e)(2) violation has occurred and determine the appropriate remedy.” If the court “finds that it cannot make an adequate determination as to whether a violation of the rule has occurred, or if the district court cannot identify with certainty the individual or individuals responsible, further proceedings may be appropriate.” The Circuit suggested that a special master could be appointed for this task—a suggestion that the district court supervising Kenneth Starr’s grand jury soon adopted.

If nothing else, the procedural costs that an aggrieved party can inflict on the government through Rule 6(e) leak allegations are considerable. The costs are particularly high because, in contrast to most pre-trial claims, these allegations will often call for a personal response by prosecutors and agents forced to defend their integrity before a district judge who may have a keen interest in pursuing contemptuous conduct. Of course, procedural costs are really all that we are talking about. Leak investigations, even those conducted by experts with the best of intentions, are notoriously quixotic (in large part because investigators are generally barred from pursuing the recipient of a leak and have to content themselves with trying to identify the unnamed “government source”). Procedural costs may be enough, though. The point is not that the Rule 6(e) enforcement scheme is any more effective than the Justice Department’s own scheme of internal policing at identifying, punishing, and deterring leakers. But, unlike the departmental secrecy regulations, Rule 6(e) makes a court into the gatekeeper for leak inquiries, and may actually require a judicial inquiry to be launched if a party can make out a prima facie case. In the hands of a deep-pocketed private party, of the sort that is most likely to be involved in a sustained grand jury investigation, Rule

---

63. In re Sealed Case, No. 98-3077, 151 F.3d at 1075.
64. Id. at 1076.
65. Id.; see, e.g., United States v. King, 94 Cr. 455 (LMM), 1995 U.S. Dist. LEXIS 4222, at *3 (S.D.N.Y. Apr. 4, 1995) (finding record “insufficient” for determining whether Rule 6(e) violation occurred or even whether a “Department of Justice investigation” should be ordered, court required prosecutors to question and obtain affirmations from departmental personnel regarding alleged grand jury leaks).
67. See, e.g., In re Sealed Case, No. 98-3077, 151 F.3d at 1067; Barry v. United States, 865 F.2d 1317, 1321 (D.C. Cir. 1989); In re Grand Jury Investigation, 610 F.2d 202, 220 (5th Cir. 1980) (concerning Bert Lance).
6(e) can thus be a potent weapon.\(^{68}\)

Though one may have one’s suspicions, it is impossible to determine whether the possibility of Rule 6(e) inquiries actually results in a superior degree of informational security\(^{69}\) for grand jury investigations or whether that provision simply gives interested private parties a tactical weapon against the government that alters the balance of power more generally. What is clear, however, is that this avenue—whether of relief, deterrence, or procedural warfare—is open only to those aggrieved by a disclosure from a grand jury investigation, and is therefore one more open to white collar defendants than other defendants.

IV. RATIONALES FOR GRAND JURY SECRECY

The fact that a particular avenue of relief is reserved for defendants who, for the most part, tend to be from more advantaged sectors of the population is not in itself evidence of any unfairness, of course. It does, however, suggest the need for an inquiry into the rationales for this effective discrimination. Why should matters “occurring before the grand jury” effectively have a higher effective security classification than other investigative data? Or, put differently, why should there be a legislative effort to set rules (however under-enforced) in this area, but not others?

There is a short answer to these questions. Rule 6(e) merely codified “the long tradition of conducting grand jury proceedings in secret.”\(^{70}\) The historical response is not sufficient, however. Even if one takes grand jury secrecy as a given, one can still wonder why no there has been no parallel legislative effort to ensure secrecy by statute outside the grand jury context.

In *Douglas Oil Co. v. Petrol Oil Stops Northwest*,\(^ {71}\) the Supreme Court had occasion to set out the rationales for grand jury secrecy:

1. To prevent the escape of those whose indictment may be contemplated; 2. 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


\(^{69}\) See Roma W. Theus, II, “Leaks” in Federal Grand Jury Proceedings, 10 ST. THOMAS L. REV. 551, 553 (1998) (“Although there is ‘theoretically’ a mechanism available that will permit the identification and termination of ‘leaks,’ the mechanism is seldom effective.”); see also Illinois v. F.E. Moran, Inc., 740 F.2d 533, 539 (7th Cir. 1984) (Posner, J.) (“So little is kept secret nowadays that... witnesses, jurors, or prosecutors probably have no expectations of long-term secrecy.”).

The perceived risk of leaks became so high during Kenneth Starr’s investigation that the Drudge Report stated: “Starr and his deputies have been secretly taking depositions from many witnesses who do not want the ‘publicity of the grand jury.’ ” Matt Drudge, Drudge Report, Sept. 7, 1998 <http://www.drudgereport.com/matt.htm>.

\(^{70}\) Beale, et al., supra note 12, § 5:2, at 5-5.

\(^{71}\) 441 U.S. 211 (1979).
GRAND JURY SECRECY

jurors; (3) to prevent subordination of perjury or tampering with the witness who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled 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.\(^7\)

What is most noteworthy (for my purposes) about most of these rationales is that few turn on the degree to which an investigation has been conducted in the grand jury. While they certainly justify a broad regime of investigative secrecy, they thus do not justify a heightened scrutiny for grand jury leaks in particular. Were, for example, information that enforcers were pursuing an inquiry with search warrants, physical surveillance, or cooperating accomplices to leak out, a guilty target would be equally liable to flee, obstruct the investigation, or "importune" the grand jurors who will have to be impaneled to consider whether he should be indicted. And an innocent target would suffer equal obloquy. Yet in such a case, an aggrieved party could not complain under Rule 6(e), and would have to resort to the Justice Department's internal processes.

This is not to say that a case can't be made for giving grand jury proceedings a higher security classification. The level of coercion inherent in a grand jury subpoena is extraordinary, and we allow many worthy causes to be swept before it—privacy,\(^7\) freedom of the press,\(^7\) even executive privilege.\(^7\) Perhaps the government should have some special obligation to protect a witness subject to such coercion against the unwelcome disclosure of his testimony, and should have a special duty of care with respect to this data that protects potential targets as well.\(^7\) There are, however, some flaws in this rationale. The person who, under threat of criminal charges or termination of employment, cooperates with the government in an investigation centered outside the grand jury has also been coerced, in a sense. Indeed, he probably was threatened with far more serious charges than civil (or criminal) contempt. Why isn't he owed a similar duty of care? And what about the person who gives information without having been subpoenaed, because she knows the government has coercive subpoena power?

---

72. Id. at 219 n.10 (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)).
73. See United States v. Dionisio, 410 U.S. 1, 9 (1973) (holding subpoena to appear before a grand jury "is not a 'seizure' in the Fourth Amendment sense.").
76. The compulsion rationale argues for treating the interview that a witness has with a prosecutor before going into the grand jury as falling within the scope of Rule 6(e), if the witness would not have voluntarily met with the prosecutor in the absence of a grand jury subpoena. See, e.g., In re Spec. Feb. 1975 Grand Jury (Baggot), 662 F.2d 1232, 1240 (7th Cir. 1981) (holding that a preliminary interview can be subject to Rule 6(e)), aff'd, 463 U.S. 476 (1983).
A focus on compulsion *per se* as a secrecy rationale thus has its limits. After all, we rarely recognize the right to confidentiality of people compelled to give testimony at criminal trials, however embarrassing the subject matter may be. But the public interest in open trials may be a trump here. Moreover, once other features of a grand jury appearance are considered, the compulsion argument has a lot more force. The testimony a subpoenaed witness will be obliged to give will not be bound by the relevance limits of a trial. Nor will a judge preside at a proceeding in which the witness may be “questioned vigorously, maybe even browbeaten, without counsel present.” These circumstances might well combine to make a grand jury witness more vulnerable to injury, and more deserving of protection, than someone who merely visits a prosecutor’s office, or testifies at a trial presided over by a judge. For similar reasons, the leaking of sworn grand jury testimony given in a formal proceeding may inflict special harm on those named in it.

One might also make something of a structural argument: The agent or prosecutor who leaks, say, search warrant information for his own private ends has surely breached a fiduciary duty to the government. Yet when he leaks in order to accomplish some law enforcement end (“tickling a wire,” defending the government against unfair criticism, etc.), and may even have been authorized to leak by a superior, there arguably is no such breach. The same cannot be said when the leak is of information obtained via grand jury subpoena, however. As the Supreme Court has noted, the grand jury “belongs to no branch of the institutional government, serving as a kind of buffer or referee between the Government and the people.” Of course, this rhetoric masks a reality of prosecutorial domination. Having so often profited from the fiction of grand jury independence, however, enforcers should not be heard to complain when the fiction is asserted to justify imposing a heightened secrecy duty on them.

---

77. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7 (1986) (noting that the “right to an open public trial is a shared right of the accused and the public”); Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 310-11 (1977) (holding press could not be enjoined from reporting on eleven-year-old when reporters legitimately obtained information).


80. Judge Friendly observed that the tradition of grand jury secrecy rests, in part, on the interest of a witness against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant or where he may have been subjected to prosecutorial brow-beating without the protection of counsel; [and] the similar interests of other persons who may have been unfavorably mentioned by grand jury witnesses or in questions of the prosecutor.

In re Biaggi, 478 F.2d 489, 491 (2d Cir. 1973).


82. I owe this point (and many others) to Jerry Lynch.

These arguments for a regime targeting only grand jury leaks do have some force, at least when considered together. But the realities that limit the investigative use of grand juries chiefly to settings in which institutions and entities respond to the moderate coercion of a subpoena should force us to confront some tough questions: Does it make sense to have a system that in effect shows a special solicitude for targets and witnesses in white collar cases? Aren’t these, in fact, the cases where, in the face of efforts by well-financed lawyers to impede information collection, the government is most in need of options that might include the selective dissemination of investigative data? One can also argue that the need for prosecutors to defend an investigation to the public while it is on-going is likely to be greater in white-collar than in other contexts. After all, white collar targets are far better able to marshal support in the press and elsewhere than other targets—support that may impede the progress of an investigation and/or sway the potential jury pool.

And, because white-collar crimes are more likely to be malum prohibitum than malum in se, targets find it easier to defend their alleged conduct, or at least argue that it ought not be pursued criminally.

V. JUSTIFYING DISPARATE TREATMENT

Having suggested what a debate on grand jury secrecy might look like, I have no intention of resolving these questions. I wish only to note that no such debate has ever occurred. Two possible explanations for this silence come to mind. One is that the current rules, however historically contingent, are basically right. Perhaps the theoretical justifications for a regime that gives special avenues of relief to the victims of grand jury leaks, but not to those aggrieved by other sorts of investigative leaks, are compelling. Or maybe, irrespective of these theoretical points, we simply think that grand jury targets and witnesses are more worthy of protection because they exist within institutional frameworks that respond to the moderate level of coercion offered by grand jury subpoenae. Because of their standing, these people suffer greater reputational losses when coerced testimony or targeting is disclosed. Maybe they are even more likely to be the subject of investigative leaks, since their status gives the media more of a reason to seek out such information,

84. See Mann, supra note 35; Pamela S. Karlan, Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel, 105 Harv. L. Rev. 670, 671 (1992) (“[T]he decision to retain counsel, particularly when it antedates the initiation of formal criminal proceedings and involves an ongoing attorney-client relationship, may in fact be integrally related to the successful commission and concealment of the crime itself.”); cf. David Luban, Are Criminal Defenders Different?, 91 Mich. L. Rev. 1729, 1765 (1993) (arguing that ethical arguments justifying aggressive defense tactics against powerful state may not fully extend to “the high-priced hired guns”).

85. One has only to look at the efforts of Michael Milken, Leona Helmsley, and President Clinton. See, e.g., Steve Johnson, Where There’s a Hard Sell, There’s a Publicist, Chi. Trib., Apr. 24, 1989, at 1; John Riley, Pro-Milken Propaganda: While Lawyers Build a Courtroom Case, PR Experts Polish His Tarnished Image, Newsday, May 15, 1989, City Bus. sec., at 1.
and their non-violent proclivities make enforcers less worried about investigative security.

The other explanation would, if at all true, be far more troubling: that Rule 6(e)’s statutory secrecy regime, and the absence of a similar regime outside the grand jury context (or even a debate about whether one is needed) reflect the difference in the political clout of the affected individuals and entities.\footnote{\textit{See Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757 (1999) (exploring political economy of federal criminal law).}} The parties with the political power to demand investigative secrecy have been given some assurances in that direction in the form of Rule 6(e). Everyone else has to settle for vague departmental regulations. With its questionable focus on what happens in the grand jury, Rule 6(e) has thus obviated the need for a general discussion about what secrecy rules should govern prosecutors across the board, and how they should be enforced.

Were legislators to think about the first principles of investigative secrecy, and ask whether the same arguments used to justify Rule 6(e) can also be made outside the grand jury context, the process would be fruitful. One result might be the enactment of a statutory regime for purely prosecutorial investigations that would complement Rule 6(e). Such legislation would also strengthen Rule 6(e) by making it hard for enforcers to claim that an investigative leak was based on information obtained via say, a search warrant, as opposed to a grand jury subpoena.\footnote{\textit{See James A. Rothschild, The Erosion of Grand Jury Secrecy: Using Search Warrants to Avoid Restrictions on the Disclosure of Documentary Evidence for Civil Purposes, 7 Crim. Justice, No. 3, at 23 (Fall 1992).}}

Regardless of what legislation is produced, open debate on investigative secrecy would serve another purpose as well. Enforcement of any secrecy rules will always be difficult. As President Nixon discovered, even the most zealous plumbers will rarely be able to fix leaks or identify leakers. Our experience with Rule 6(e) has not suggested otherwise, and, unless we start polygraphing reporters (something I am not recommending), it is not likely to do so in the future. Real improvement in investigative security will likely come only if prosecutors and agents internalize secrecy norms better, and thereby make enforcement less necessary. Perhaps sustained legislative attention might at least accomplish that, by requiring enforcers, legislators, and other interested parties to spell out what interests need to be protected, and why.