

THE CONSEQUENCES OF ENLISTING FEDERAL GRAND JURIES IN THE WAR ON TERRORISM: ASSESSING THE USA PATRIOT ACT'S CHANGES TO GRAND JURY SECRECY

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I. INTRODUCTION

The antiterrorism bill passed by Congress in the wake of the September 11 attacks, called the USA PATRIOT Act,¹ contains a subtle but important change to federal grand jury procedure as part of an effort to bring about increased coordination between law enforcement, national security, and defense efforts. Matters occurring before federal grand juries have historically been kept secret. Disclosure of grand jury materials has been permitted only to those directly involved in the enforcement of federal criminal law or by court order under sharply limited circumstances. The USA PATRIOT Act relaxes the secrecy rules to permit, for the first time, disclosures of grand jury material without a court order for purposes unrelated to the enforcement of federal criminal law. These changes have implications not only for the interests furthered by the secrecy provisions of grand jury procedure, but also for the larger question of the appropriate role and uses of federal grand juries.

II. A BRIEF HISTORY OF GRAND JURY AUTHORITY AND SECRECY

The history of grand jury secrecy and the interests

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1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

underlying the secrecy rules reflect a consistent theme: grand juries are exclusively intended for use in the investigation and prosecution of crimes. Any disclosure of grand jury material for a purpose other than direct criminal law enforcement requires a court order to be issued only upon a demonstration that there is a particularized and compelling need for such disclosure. Where exceptions to the general rule of secrecy have been carved out to recognize emerging challenges to law enforcement, these exceptions have been quite limited in scope. The exceptions have also been consistent in their use of judicial supervision to insure that disclosures are limited to circumstances that present a specific need that outweighs the need for secrecy.

The grand jury wields enormous investigative power. Grand jury secrecy is critical to the grand jury's investigative effectiveness, but secrecy also serves to minimize the harm that may be caused by grand jury investigations. Secrecy thus reflects the dual function of the grand jury, as both a shield protecting those accused of serious federal offenses, and a sword that can be wielded by the government to ferret out wrongdoing.

A. *The Scope of the Grand Jury's Authority*

Operating outside of the public eye, the grand jury is the most powerful investigative agency in the federal criminal justice system. During the investigative phase the grand jury serves many of the same functions as federal police agencies,² such as the F.B.I., but the grand jury wields significant powers not shared by the other investigative agencies. The federal grand jury can compel the cooperation of persons who may have information relevant to the matters it is investigating. Persons who may have such information can lawfully refuse to be interviewed by police agencies such as the F.B.I., but any

2. This is not the role highlighted in the Fifth Amendment, which provides the grand jury as a constitutionally mandated protection for the accused before he may be held to answer at trial. The Fifth Amendment 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, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." U.S. CONST. amend. V. The grand jury clause has been interpreted as applicable only in federal proceedings. See *Hurtado v. California*, 110 U.S. 516 (1884).

person can be subpoenaed to appear and testify under oath before a grand jury.³ If individuals who are subpoenaed fail to appear or refuse to answer questions, they may be held in contempt absent a valid claim of privilege.⁴ The contempt power gives the prosecution a powerful lever to compel cooperation, for a witness who refuses to testify can be held in custody for as long as eighteen months.⁵ Indeed, a recalcitrant witness who is released at the end of the grand jury's term may be subpoenaed to appear again before subsequent grand juries, where the process may repeat itself.⁶

The federal grand jury also has unparalleled access to documents and other property. Federal investigators who wish to examine real or documentary evidence must obtain either consent for a search or a search warrant based upon a showing of probable cause to believe that evidence of a crime will be discovered by the search authorized by the proposed warrant.⁷ Thus the owner of documents or other evidence has a right to privacy that cannot be breached without his consent unless the government establishes probable cause before a neutral magistrate.⁸ In contrast, the grand jury can subpoena the owner of documents or other evidence to present them to the grand jury—on pain of contempt—absent a valid claim of privilege.⁹ No showing of probable cause is required to sustain the grand

3. See generally SARA SUN BEALE, WILLIAM C. BRYSON, JAMES E. FELMAN & MICHAEL J. ELSTON, *GRAND JURY LAW AND PRACTICE* §§ 6:1-6:3 (2d ed. 1997) [hereinafter BEALE, *GRAND JURY LAW*].

4. See generally *id.* §§ 11:13-11:21.

5. 28 U.S.C. § 1826(a) (1994) provides that a witness may be confined until he complies with the court's order that he testify or provide documentary evidence, that the period of confinement may not exceed the grand jury's term, and in any event may not exceed eighteen months. The usual term for a grand jury is eighteen months, though its term may be extended for six months. See FED. R. CRIM. P. 6(g).

6. See BEALE, *GRAND JURY LAW*, *supra* note 3, § 11:17.

7. For a general discussion of the requirements imposed by the Fourth Amendment, the concept of consent, and the meaning of probable cause, see WAYNE R. LAFAVE, JEROLD J. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* §§ 3.3, 3.10 (3d ed. 2000).

8. There is also an exception to the warrant requirement when exigent circumstances require an immediate search, *see id.* § 3.5(e), but this exception would not ordinarily be applicable when a prosecutor plans an investigation of criminal activity. More relaxed standards are also applicable in the cases of regulatory searches and inspections, *see id.* § 3.9, but again those standards would not ordinarily be applicable to the prosecutor planning a criminal investigation.

9. See BEALE, *GRAND JURY LAW*, *supra* note 3, § 11:17.

jury's subpoena for testimony or the production of evidence.¹⁰ To the contrary, the Supreme Court has recognized that a subpoena is constitutionally valid unless the subpoenaed party shows that there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation.¹¹

Although the privilege against self-incrimination applies in the grand jury, it does not prevent the government from compelling the cooperation of third parties. If a witness or the custodian of a document asserts a valid privilege, he may be provided with use and derivative use immunity, and then be required to comply with the subpoena to testify or produce evidence.¹²

Looking at the matter from the perspective of a witness (or target), the grand jury's investigative powers are subject to few limitations, and there are far fewer procedural protections available in a grand jury investigation than in an investigation conducted by any federal police agency.

B. *The Rule of Grand Jury Secrecy*

Along with the broad authority of grand juries to investigate crimes, there is a long-standing tradition of grand jury secrecy dating back to at least the seventeenth century.¹³ The common-law tradition of grand jury secrecy was adopted in the United States and was later codified in Federal Rule of Criminal Procedure 6(e).¹⁴ Rule 6(e) prohibits any disclosure of "matters occurring before the grand jury."¹⁵ Absent a court order, grand jury material may only be disclosed to "another federal grand

10. *See id.* § 6:3. A subpoena may, however, be quashed if compliance would be "unreasonable or oppressive." *See* FED. R. CRIM. P. 17(c).

11. *See* United States v. R. Enters., 498 U.S. 292 (1991). *See generally* BEALE, GRAND JURY LAW, *supra* note 3, § 6:21.

12. *See* BEALE, GRAND JURY LAW, *supra* note 3, §§ 7:1-7:6, 7:21.

13. *See id.* § 5:2.

14. *See id.*

15. FED. R. CRIM. P. 6(e)(2). The rule prohibits any grand juror, interpreter, stenographer, operator of a recording device, typist who transcribes recorded testimony, attorney for the government, or person to whom a disclosure is made under Rule 6(e)(3)(A)(ii) from disclosing any matters occurring before the grand jury. It does not prohibit grand jury witnesses from disclosing their own testimony.

jury,"¹⁶ "an attorney for the government for use in the performance of such attorney's duty,"¹⁷ and "such government personnel" as an attorney for the government deems necessary to assist the government attorney "in the performance of such attorney's duty to enforce federal criminal law."¹⁸ Where grand jury matters are disclosed to government personnel, those individuals are expressly forbidden to use the grand jury material for any other purpose than assisting the government attorney to enforce the federal criminal law.¹⁹ The government attorney must also advise the district court of the disclosure of grand jury materials and the names of the government personnel to whom the disclosures were made.²⁰

C. The Courts' Role in Supervising Grand Jury Secrecy

Disclosure of grand jury material to persons outside the circle of those directly involved in the grand jury's investigation has traditionally been supervised by the federal district courts. No one other than another federal grand jury, government attorneys, or personnel assisting them in enforcing the federal criminal law has been permitted access to grand jury material without first obtaining a court order supported by particularized findings that demonstrate a specific need for the information.

Prior to 1985, there were only two circumstances in which a district court had the authority to order disclosure of grand jury material. First, disclosure could be ordered "preliminarily to or in connection with a judicial proceeding"²¹ where a party was able to make a "strong showing of particularized need" for the grand jury materials.²² Requests for disclosure during a grand jury investigation are seldom granted.²³ Second, courts

16. FED. R. CRIM. P. 6(e)(3)(C)(iii).

17. FED. R. CRIM. P. 6(e)(3)(A)(i). This disclosure is limited to "those attorneys who conduct the criminal matters to which the materials pertain." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 427 (1983).

18. FED. R. CRIM. P. 6(e)(3)(A)(ii).

19. FED. R. CRIM. P. 6(e)(3)(B).

20. *See id.*

21. FED. R. CRIM. P. 6(e)(3)(C)(i). *See* BEALE, *GRAND JURY LAW*, *supra* note 3, § 5:9.

22. *Sells Eng'g*, 463 U.S. at 434. *See also* BEALE, *GRAND JURY LAW*, *supra* note 3, § 5:10.

23. *See* BEALE, *GRAND JURY LAW*, *supra* note 3, § 5:10. Although disclosures during an investigation are rarely granted, if a witness before the grand jury later

are authorized to order disclosure of grand jury matters to a defendant "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."²⁴

The requirement that any party seeking grand jury material make an extraordinary showing of need reflects a strong commitment to the secrecy of grand jury proceedings. This requirement also reflects the federal courts' role as gatekeepers of grand jury information charged with responsibility to ensure that the interests furthered by the secrecy rules are not unduly eroded. In performing this gatekeeper function, the courts have focused on at least three distinct interests served by secrecy:

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 inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against the indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.²⁵

For these reasons, the Supreme Court has stated that it "must always be reluctant to conclude that a breach of this secrecy has been authorized."²⁶

The courts have been particularly hesitant to permit disclosure of grand jury information for any purpose other than the enforcement of criminal law. In *United States v. Sells Engineering*, the Supreme Court interpreted Rule 6(e) to prohibit the disclosure of grand jury materials to government attorneys for their use in civil litigation without both a showing of particularized need and a court order.²⁷ The Supreme Court premised its decision in part on a recognition that permitting the fruits of the grand jury's investigation to be disclosed for

testifies as a government witness at a trial, the government must disclose the witnesses' grand jury testimony to the defendant pursuant to the Jencks Act. 18 U.S.C. § 3500(b), (e)(3) (1994).

24. FED. R. CRIM. P. 6(e)(3)(C)(ii).

25. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979).

26. *Sells Eng'g*, 463 U.S. at 425.

27. *Id.* at 418.

purposes other than criminal prosecution poses a threat "to the integrity of the grand jury itself."²⁸ The Court explained that:

If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted 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.²⁹

The Court also recognized that "use of grand jury materials by Government agencies threatens to subvert the limitations applied outside the grand jury context on the Government's power of discovery and investigation."³⁰ As the Court explained, "there are few if any other forums in which a governmental body has such relatively unregulated power to compel other persons to divulge information or produce evidence."³¹ Other avenues of investigation and discovery by the government are more limited, and those limitations are imposed, the Court noted, "for sound reasons—ranging from fundamental fairness to concern about burdensomeness and intrusiveness."³² Giving government litigators or investigators "unlimited access to grand jury materials" would allow them to "subvert the limitations and procedural requirements" placed on them.³³ "In short," the Court stated, "if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of their task, the use of those powers ought to be limited as far as reasonably possible to the accomplishment of the task."³⁴

From 1985 to 1994, Congress tinkered with the grand jury secrecy rules on several occasions to expand the potential universe of those who may receive grand jury materials. Nearly all of these changes preserved the role of the courts in supervising the selected disclosure of information.

In 1985, Congress authorized the courts to order disclosure of

28. *Id.* at 432.

29. *Id.* The Court noted its concern that such grand jury misuse "would often be very difficult to detect and prove." *Id.*

30. *Id.* at 433.

31. *Id.*

32. *Id.*

33. *Id.* at 433-34.

34. *Id.* at 434-35.

grand jury materials to a state official “upon a showing that such matters may disclose a violation of state criminal law.”³⁵ The Notes of the Advisory Committee in connection with the amendment indicated that its intent was to address the problem that when federal grand juries developed evidence tending to show a violation of state criminal law, the information often could not “be communicated to the appropriate state officials for further investigation” because of the requirement of a showing of particularized need and a judicial proceeding.³⁶ The Committee stated that the “inability lawfully to disclose evidence of a state criminal violation—evidence legitimately obtained by the grand jury—constitutes an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws.”³⁷ Recognizing that the conduct of grand juries could be directly impacted by those to whom disclosure of its work product may be made, the Committee explicitly indicated that there was “no intention, by virtue of this amendment, to have federal grand juries act as an arm of the state.”³⁸

In reaction to the savings and loan and other banking failures in the 1980s, Congress in 1989 expanded the disclosure authority of courts. This legislation authorized courts to order disclosure of grand jury matters arising out of an investigation of banking law violations to a financial institution regulatory agency upon a showing that such agency had a “substantial need” for the information.³⁹ The 1989 law also expanded the circle of those permitted to share grand jury materials without a court order to include government attorneys in need of the information to enforce the civil penalty provisions of the new law or in connection with any federal civil forfeiture

35. Pub. L. No. 98-473, § 215(f), 98 Stat. 1837, 2016 (1984); FED. R. CRIM. P. 6(e)(3)(C)(iv).

36. FED. R. CRIM. P. 6(e)(3)(C) advisory committee’s note (1985).

37. *Id.*

38. *Id.*

39. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 964, 103 Stat. 183, 505 (1989) (codified at 18 U.S.C. § 3322 (1994)). Although the original statute allowed disclosures only to “a financial institution regulatory agency,” a 1999 amendment permitted disclosures to state as well as federal regulatory agencies. See Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 740, 113 Stat. 1338, 1480-81 (1999) (codified at 18 U.S.C. § 3322 (Supp. 1999)).

provision.⁴⁰

A second expansion of the courts' authority to order disclosure of grand jury material occurred through the passage of the International Antitrust Enforcement Assistance Act of 1994.⁴¹ This statute authorized courts to permit disclosure of grand jury material relating to violations of foreign antitrust law to a "foreign antitrust authority" upon a showing of particularized need.⁴²

There have also been several unsuccessful efforts to expand the disclosure provisions pertaining to grand jury materials. One proposed expansion would have permitted disclosure of grand jury materials concerning a federal health care offense to an attorney for the government for "use in any investigation or civil proceeding related to health care fraud."⁴³ A second proposal would have allowed disclosure of grand jury material to the Securities and Exchange Commission where the information involved conduct that might violate federal securities laws.⁴⁴ Although disclosure of grand jury information would no doubt have assisted the SEC and the agencies that regulate federal health care programs, presumably this need was deemed insufficient to justify erosion of the wall of secrecy surrounding grand jury proceedings.

III. THE USA PATRIOT ACT

The USA PATRIOT Act represents a marked departure from past changes to grand jury secrecy rules. The Act permits disclosure, without court order, to a long list of federal agencies

40. FIRREA §964(a), 103 Stat at 505 (codified at 18 U.S.C. § 3322(a) (1994)). As originally enacted, § 3322 limited the disclosures under this provision to "grand jury information concerning a banking law violation" and limited the purpose of disclosure to enforcement of the civil penalty and civil forfeiture provisions of FIRREA. § 964(a), 103 Stat. at 505-506. In 2000, however, an amendment to that provision eliminated the requirement that the disclosed grand jury information concern a banking violation and permitted disclosure in connection with "any civil forfeiture provision of Federal law," rather than only in connection with civil forfeitures under FIRREA. *See* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 10, 114 Stat. 202, 217 (2000).

41. 15 U.S.C. §§ 6201-12 (1994).

42. *Id.* § 6204(2).

43. H.R. CONF. REP. NO. 104-350, pt. 2, at 1185 (1995). The proposal passed both the House of Representatives and the Senate, but was eliminated from the final bill in conference. *See id.*

44. *See* S. REP. NO. 101-337, at 4 (1990).

with duties unrelated to law enforcement. Although the material disclosed must relate to foreign intelligence or counterintelligence, the USA PATRIOT Act defines those terms with considerable breadth. The Act thus deserves careful scrutiny with an eye toward both erosion of the traditional secrecy afforded to grand jury proceedings, and the potential that the changes made by the Act could threaten "the integrity of the grand jury itself."⁴⁵

The Act changes the secrecy rules by amending the disclosure provisions of Rule 6(e)(3)(C) to permit disclosure of grand jury matters involving "foreign intelligence or counterintelligence . . . or foreign intelligence information . . . to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties."⁴⁶ The Act requires that "[w]ithin a reasonable time after" a disclosure under the new provision, "an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made."⁴⁷

Both the Act and amended rule define the term "foreign intelligence" by reference to the National Security Act of 1947 to include "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons."⁴⁸ The term "counterintelligence" is likewise defined by reference to the National Security Act, as "information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist

45. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 432 (1983).

46. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001*, Pub. L. No. 107-56, § 203(a)(1), 115 Stat. 272, 279 (2001). Although the Act includes a "sunset" provision, under which the changes made by the act will end on December 31, 2005, the amendments to the grand jury disclosure rules are specifically excepted from the sunset provision. *Id.* § 224(a), 115 Stat. at 295.

47. *Id.* § 203(a), 115 Stat. at 278.

48. 50 U.S.C. § 401a(2) (1994), *referenced by* § 203(a)(1), 115 Stat. at 278.

activities.”⁴⁹ The USA PATRIOT Act itself broadly defines “foreign intelligence information” to include:

- (I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—
 - (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
 - (cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (II) information, whether or not coming from a United States person, with respect to a foreign power or foreign territory that relates to—
 - (aa) the national defense or the security of the United States; or
 - (bb) the conduct of the foreign affairs of the United States.⁵⁰

The statute does not list all of the federal agencies to which disclosure would be permitted under the amended rule, but a non-exhaustive list of such agencies would likely include the Federal Bureau of Investigation, the Drug Enforcement Administration, the Secret Service, the Postal Inspection Service, the United States Marshals Service, the Customs Service, the Internal Revenue Service, the Bureau of Alcohol, Tobacco, and Firearms,⁵¹ the Office of the Director of Central Intelligence, the Central Intelligence Agency, the National Intelligence Council, the National Security Agency, the Defense Intelligence Agency, the Central Imagery Office, the National Reconnaissance Office, the national intelligence offices within the Department of Defense, the intelligence elements of the Army, Navy, Air Force, Marine Corps, Department of Treasury, and Department of Energy, the Bureau of Intelligence

49. *Id.* § 401a(3), referenced by § 203(a)(1), 115 Stat at 278.

50. USA PATRIOT Act § 203(a)(1), 115 Stat. at 279 (2001).

51. The listed agencies are among those identified in NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 6-8 (3d ed. 2000) as federal law enforcement agencies. The authors indicate that in total, “[t]here are over 50 major federal law enforcement agencies” and “there are as many as 200 federal agencies today that have some criminal enforcement role.” *Id.* at 6. For instance, there are “criminal law enforcement personnel functioning within the Department of Agriculture, the Department of Labor, the Department of the Interior, the Securities and Exchange Commission, and the Food and Drug Administration.” *Id.* at 8.

and Research of the Department of State;⁵² the Immigration and Naturalization Service, and the newly-created Office of Homeland Security and Homeland Security Council.⁵³

IV. THE IMPACT OF THE USA PATRIOT ACT ON GRAND JURY SECRECY

An assessment of the USA PATRIOT Act should consider its likely impact on the interests protected by grand jury secrecy, the need for disclosure, and the role of the courts in supervising disclosure. Although it is difficult to assess with precision the incremental impact of these provisions, some damage to the interests traditionally served by grand jury secrecy, especially reputational interests, may occur. In our view, the need for disclosure of foreign intelligence and counterintelligence information would in some instances outweigh these harms. These conclusions support the amendment of Rule 6 to allow some disclosure, but they do not support the USA PATRIOT Act's failure to include judicial supervision of the disclosures.

A. The Potential for Harm to the Interests Protected By Grand Jury Secrecy

As noted in Part II, grand jury secrecy serves several different functions: encouraging witnesses to come forward and testify fully, preventing leaks to targets who might flee or obstruct the grand jury's investigation, and protecting reputational interests.

Will witnesses be less likely to be forthcoming if they know that a wide range of federal officials may have access to their testimony relating to foreign intelligence or counterintelligence? A traditional justification for grand jury secrecy has been that witnesses may be reluctant to come forward or testify fully out of fear of retribution from those against whom they testify. These concerns are certainly relevant to the investigation of terrorist activities. Any witnesses with knowledge of terrorist activities might reasonably fear retribution if their testimony were publicly revealed. Witnesses

52. The foregoing are among the agencies identified in the National Security Act as being within the "intelligence community." 50 U.S.C. § 401a (1994).

53. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001).

who provide information detrimental to other members of tight-knit immigrant communities might fear both reprisals and general hostility if their testimony were known. Similarly, some foreign nationals might be reluctant to testify freely about matters occurring in their home countries if they fear that officials from their home country would obtain their testimony through cooperation with American intelligence agencies that receive the information pursuant to the USA PATRIOT Act. The ability to guarantee secrecy to such prospective witnesses might well encourage their testimony, and broad exceptions to secrecy might deter the witnesses.

Because there are already a number of exceptions to grand jury secrecy, however, the difficult question is whether the additional exceptions provided in the USA PATRIOT Act will make a material difference in the attitudes and conduct of lay witnesses. This seems doubtful; an explanation of the current exceptions to secrecy would be quite technical, and likely beyond the understanding of most lay witnesses. For that reason, it seems likely that the incremental added impact on witnesses from the possible disclosure of their testimony to various intelligence and defense agencies will be small. If grand jury testimony were ultimately leaked back to persons against whom testimony had been given, to a given immigrant community, or to officials in a witness's home country, however, it seems likely that further cooperation by that witness, or others who learn of the disclosures, would be greatly diminished. In that respect, then, the protection of grand jury information *after* disclosure may be more critical than the amendment of Rule 6(e) to permit such disclosure.

Similarly, it is doubtful that the USA PATRIOT Act will have a significant effect on the second interest furthered by secrecy—the risk that targets will flee or try to influence the grand jury improperly. These harms can occur only when the targets of the investigation actually learn of the information disclosed. There is no reason to believe that the agencies now entitled to disclosure under the USA PATRIOT Act would be inclined to share the grand jury information with the targets of the grand jury's investigation. Although the danger of leaks increases with the number of agencies that receive the information, the danger can be reduced if receiving agencies take appropriate measures to keep the information confidential

to the maximum extent possible. Here again, the protection of grand jury information *after* disclosure is critical. Although no information has been provided regarding the steps the agencies intend to take to protect the information in question, most of the agencies are likely already attuned to the interests concerned here: preventing the targets of antiterrorist investigations from learning about and thwarting the government's investigation.

The third interest served by grand jury secrecy is protecting the reputations of those investigated but not prosecuted. Although it is difficult to assess the precise danger the USA PATRIOT Act presents to this interest, there is reason to think that problems may arise. Unlike federal prosecutors, agencies not traditionally involved in the enforcement of criminal law may lack a full appreciation of the need to be sensitive to the reputational interests of those implicated by grand jury information who are ultimately found not to have engaged in wrongdoing. Moreover, this interest is less central to the agencies' own investigative missions than the other interests noted above. It should also be noted that even in the law enforcement context it is not unusual for third parties to suffer reputational harm as a result of information revealed by witnesses who are not subject to the rules of secrecy regarding their own testimony before the grand jury. Thus the reputational interests protected by grand jury secrecy may be the most likely to suffer as a result of the increased disclosure authorized by the USA PATRIOT Act.

B. The Need for Disclosure

The threat to the interests furthered by secrecy must be weighed against the need for disclosure of the information in question. If a federal prosecutor examining a witness in a grand jury learns of an imminent threat to national security, the need for disclosure of that information would clearly outweigh the need for secrecy. Under at least some circumstances, therefore, disclosures of the kind authorized by the USA PATRIOT Act would be desirable. For example, the disclosure in grand jury proceedings of a plot to assassinate the Chief Executive of Pakistan, General Pervez Musharraf, would not constitute a federal crime (assuming that the plot involved only Pakistanis acting in Pakistan), but it would present a clear threat to the

national security of the United States. Given the danger that might be posed if Pakistan's nuclear weapons fell into the wrong hands, there is a strong justification for providing this information to national defense and national security officials. The national interest will, at least in some instances, clearly outweigh the potential harm that might flow from making an exception to the rule of grand jury secrecy, especially if disclosure is limited and accompanied by an effort to protect the information disclosed and to minimize any potential harm.

C. The Courts' Role In Supervising Disclosure of Foreign Intelligence or Counterintelligence Information

Assuming that Congress was justified in determining that the need for disclosure of foreign intelligence or counterintelligence information outweighs the need for secrecy in some instances, it is more difficult to see why the disclosures should be permitted without judicial approval. The House version of the USA PATRIOT Act authorized disclosure only with a court order,⁵⁴ but this provision was absent from the Senate version and was omitted from the final legislation.

Obtaining judicial approval for the disclosures authorized by the USA PATRIOT Act would not be burdensome. If a grand jury investigation uncovers information relating to foreign intelligence or counterintelligence, the government should have no difficulty in identifying a "particularized need" for the disclosure to agencies identified in the USA PATRIOT Act. Because grand jury proceedings occur in the courthouse under the general supervision of the district court, it should generally be possible to obtain judicial approval very quickly if necessary. Similarly, security concerns do not seem to have much bite in this context. By definition, the situation covered by the amendment of Rule 6(e) is one in which the information in question has already been disclosed in recorded proceedings under the supervision of the court. Although the rules of grand jury secrecy generally protect the record of the proceedings, these records are certainly open to the supervising court. It is thus difficult to see what harm could result from requiring a court order authorizing disclosure to intelligence, protective, immigration, national defense, or national security officials,

54. H.R. REP. NO. 107-236(I) (2001), 2001 WL 1205861, at *30.

particularly because such an order could be sealed if necessary. Court supervision of the disclosures would thus not frustrate the purposes of the USA PATRIOT Act.

The tradition of judicial review of grand jury disclosures suggests two reasons to be troubled by the omission of such protections in the USA PATRIOT Act. First, judicial approval is the only mechanism available to ensure that the disclosures actually fall within the ambit of the new exception created by the USA PATRIOT Act. In the absence of a requirement for judicial approval, only the government officials who provide or receive the information will know the substance of any disclosures. Although the Act provides for after-the-fact notice to the court that a disclosure has been made to a particular agency,⁵⁵ this is quite different from a requirement of a judicial finding that the information in question falls within the Act's definition of foreign intelligence or counterintelligence information, and that the government has demonstrated a particularized need for its disclosure. Absent judicial review of requests for disclosure, there is no way to test what material falls within the new exception to grand jury secrecy, and even the deliberate disclosure of grand jury information falling outside the exception added by the USA PATRIOT Act would seldom, if ever, be discovered.

Second, in the absence of a requirement for judicial approval, the government will not have to demonstrate a need for disclosure that justifies an exception to the general principle of grand jury secrecy. The Act does not require *any* showing of need for the information. Requiring a court order prior to disclosure would ensure that disclosure occurs only where the information is needed, and that need outweighs any harms to the interests served by grand jury secrecy. Without prior judicial involvement, there is a risk that disclosure will become routine. If that occurs, there are more likely to be individual cases in which the interests served by secrecy are undermined, and, more generally, the sanctity of grand jury information will be eroded over time.

55. See *supra* note 47 and accompanying text.

V. AN UNINTENDED IMPACT OF THE USA PATRIOT ACT: THE POTENTIAL FOR EXPANDING THE USE OF GRAND JURIES

Although there are concerns that the disclosure of grand jury materials permitted by the USA PATRIOT Act could undermine some of the interests promoted by grand jury secrecy, those concerns would not outweigh the need for the use of the information under some circumstances—particularly if, as we suggest, judicial approval were a prerequisite. The availability of disclosure, however, also raises an important issue not directly addressed by Rule 6: the unintended expansion of the scope of federal grand jury investigations. As the Supreme Court recognized in *Sells Engineering*,⁵⁶ once prosecutors know that they can use the information gathered by the grand jury for a particular purpose, they may be “tempted to manipulate the grand jury’s powerful investigative tools to root out additional evidence” for that purpose, or even “to start or continue a grand jury enquiry where no criminal prosecution seems likely.”⁵⁷

A backdoor expansion of the scope of grand jury investigations would be problematic because the enormous investigative powers wielded by the grand jury and the relatively limited rights possessed by witnesses and targets have been tailored exclusively for the purpose of criminal law enforcement. In other contexts, such as civil litigation or foreign intelligence, the powers given to government investigators, the rights of those being investigated, and the balance between the two may be quite different. A grand jury investigation can be extremely intrusive, and witnesses have fewer rights than they would in other proceedings.

If Congress were to face the issue directly, it is doubtful whether it would pass a proposal explicitly authorizing federal grand juries to investigate any and all matters relevant to “foreign intelligence or counterintelligence.” The USA PATRIOT Act defines these terms broadly, going far beyond terrorist activities. For example, these terms encompass “information, whether or not coming from a United States person, with respect to a foreign power or foreign territory that

56. 463 U.S. 418 (1983). For a discussion of *Sells*, see *supra* notes 27-34 and accompanying text.

57. *Id.* at 432.

relates to . . . the conduct of the foreign affairs of the United States."⁵⁸ Should the grand jury—backed by the power of contempt—be able to compel witnesses to disclose information and documents regarding the diplomatic strategies of other countries? What if the issue relates solely to trade or economic concerns?

Further, to the extent that other government officials become accustomed to receiving grand jury materials more frequently, will they press prosecutors to employ the grand jury's power to ferret out other information even if it does not fall within the parameters of the USA PATRIOT Act (but is related to other information that does fall within the Act)? For example, will Immigration and Naturalization Service employees press federal prosecutors to employ the grand jury to seek information relevant to the immigration status of given individuals? Would they do this when it is relevant to "national defense or security"? What if the information related to the agent's duties under the Immigration Act but not to either "foreign intelligence or counterintelligence."⁵⁹

Given the grand jury's unmatched investigative powers, the Supreme Court was wise to recognize the temptation that any new exception to grand jury secrecy will pose for those conducting grand jury investigations. The breadth of the terms "foreign intelligence" and "counterintelligence," and the extensive list of those who now have access to grand jury information, raise the real danger that an unplanned and unauthorized expansion will occur in the scope of the matters investigated by grand juries.

Few if any means exist to challenge such an expansion, or even to learn whether it is occurring. The general rule of grand jury secrecy leaves the press and public with almost no available information about grand jury investigations. No reporter, interest group, or member of the public may attend the proceedings to get an overview, and even after the fact, no information is made available to the public regarding the subject and scope of the grand jury's investigation, the names of those called as witnesses, or the results of the investigation

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

59. See *supra* notes 46-53 and accompanying text.

(although any resulting indictments are normally filed in open court).⁶⁰ The only sources who can lawfully provide information about grand jury proceedings to the public are witnesses, because they alone are not bound by grand jury secrecy.⁶¹ But witnesses have information only about their own testimony. They generally have little insight into the overall course of the grand jury's investigation, and, perhaps more importantly, witnesses have no right to challenge the grand jury's jurisdiction.⁶²

The potential for misuse of the grand jury is especially troubling in view of the absence of any requirement for judicial approval of foreign intelligence and counterintelligence information under the USA PATRIOT Act. As the Supreme Court has recognized, "the usual difficulty in detecting grand jury abuse" diminishes when the parties "seeking disclosure must go before a court and demonstrate a particularized need prior to the disclosure, and when, as part of that inquiry, the district court may properly consider whether the circumstances disclose any evidence of grand jury abuse."⁶³

The potential for a backdoor expansion of the grand jury's investigative jurisdiction is also problematic because it may increase the risk that the national defense and security institutions will be inappropriately involved in domestic affairs. Domestic law enforcement operates in a legal and constitutional culture that gives substantial weight to the rights of individuals. The relation of the government to its citizens is shaped by the constitutional requirement that the government respect each citizen's constitutional rights. The intelligence and military communities operate in a far different context than domestic law enforcement, and their institutional cultures and values have been shaped by their roles. Foreign powers, their agents, and their armies have no constitutional rights

60. See FED. R. CRIM. P. 6(f) (providing indictments "shall be returned . . . in open court").

61. BEALE, GRAND JURY LAW, *supra* note 3, § 5:5.

62. See *id.* § 9:24. The courts generally reason that a witness has no standing to object to the grand jury's inquiry. The only person who can challenge the grand jury's jurisdiction is a defendant the grand jury has indicted. There will ordinarily be no defendants indicted if the grand jury's jurisdiction expands in the fashion noted above, precisely because the investigation will probe matters unrelated to criminal violations.

63. *United States v. John Doe, Inc.*, 481 U.S. 102, 114-15 (1987).

comparable to the rights identified by the Fourth, Fifth, and Sixth Amendments. In general, therefore, federal law has precluded the military from taking part in domestic law enforcement,⁶⁴ and has drawn a sharp distinction between domestic and foreign intelligence surveillance.⁶⁵ These limitations have been intended to reduce the likelihood that the military and foreign intelligence communities will erode the rights of American citizens. Particularly in the absence of judicial review, and in a context where the process operates in secret, arming these communities with the powers of the grand jury is highly problematic.

VI. CONCLUSION

The new exceptions to grand jury secrecy authorized by the USA PATRIOT Act are part of an effort to coordinate our law enforcement, defense, and national security efforts. The September 11 terrorist attacks challenge the neatness of our historical distinction between crime and war. That distinction is illustrated by contrasting the bombing of the federal building in Oklahoma City with the bombing of Pearl Harbor. The former was clearly a crime while the latter was just as clearly an act of war. The attacks on the World Trade Center and the Pentagon do not fit cleanly into either category. While the attacks violated a host of federal criminal provisions, there is an additional quality to them that calls for a response beyond the return of an indictment. At the same time, because these were not the acts of a foreign state with a clearly defined military objective, describing the attacks as an act of war strains our traditional use of that term.

The blurring of the line between crime and war can be expected to result in a blurring of the line between law enforcement and national defense. Combating the newly emerging face of terrorism will require increased coordination between police officers, intelligence agents, and the armed

64. The Posse Comitatus Act, 18 U.S.C. § 1385 (1994), makes it a crime to willfully use any part of the Army or the Air Force "as a posse comitatus or otherwise to execute the laws." For a general discussion of the Posse Comitatus Act, see ABRAMS & BEALE, *supra* note 51, at 370-83, and W. Kent Davis, *Swords Into Plowshares: The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61 (1998).

65. See generally William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1 (2000).

forces. Given our historical aversion to the involvement of foreign intelligence and the military in domestic affairs, however, we must carefully evaluate the organization of this newly combined law enforcement/national defense force. One of the critical meeting points in the organization of this new combined force is the federal grand jury.

A good case can be made for an exception permitting the disclosure of some grand jury materials regarding foreign intelligence and counterintelligence to federal agencies responsible for matters such as national security, immigration, and military defense, even though creating another exception to the principle of grand jury secrecy may bring about some harm. Steps are needed, however, to minimize harm to the interests served by secrecy. First, disclosures should be limited to those authorized by Rule 6, and to instances where a need for the material outweighs the need for secrecy. The traditional means for ensuring that disclosures meet these standards is the requirement of prior judicial approval, and Rule 6 should be amended to extend the requirement of judicial approval to the disclosures authorized by the USA PATRIOT Act. Second, the receiving agencies should develop procedures to ensure that grand jury information is kept confidential to the greatest extent possible, and to sensitize those dealing with grand jury material to the need for preserving secrecy.

Equally important, there is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury's investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury's awesome powers should not be unwittingly extended to a much wider range of issues. Here, as in the case of preserving secrecy, the requirement of judicial approval for the release of foreign intelligence and counterintelligence information is the key. Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury's investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop

information for unauthorized purposes.

To preserve the traditional values of grand jury secrecy—which serve important law enforcement values—and to keep grand juries within lawful bounds, an amendment to Rule 6 requiring judicial approval would be an important complement to the exceptions to grand jury secrecy authorized by the USA PATRIOT Act.