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Tim A. Baker

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NOTES

GRAND JURY SECRECY v. THE FIRST AMENDMENT: A CASE FOR PRESS INTERVIEWS OF GRAND JURORS

“Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.”
—Former U.S. District Court Judge William Campbell

I. INTRODUCTION

A citizen who serves as a grand juror must take an oath, swearing to keep secret all matters that occur before the grand jury.¹ A breach of this oath may result in a contempt action.² Yet the extent of the secrecy prohibition is unclear. A grand juror receives no guidance from the oath taken regarding the duration of the secrecy requirement.³ Therefore the question arises when, if ever, may a grand juror discuss the proceedings with the

1. FED. R. CRIM. P. 6(e)(2) contains the general rule of grand jury secrecy followed by the federal courts. The majority of states have secrecy provisions modeled after the federal rule. The text of the oath has changed remarkably little since the 17th century. S. BEALE & W. BRYSON, 1 GRAND JURY LAW AND PRACTICE § 5:02, at 3 (1986) [hereinafter BEALE & BRYSON]. The oath taken by grand jurors in the federal system, which is similar to the oath prescribed by statute or rule in most states, reads as follows:

Do you, and each of you, solemnly swear that you shall diligently inquire into and make true presentment or indictment of all such matters and things as shall be given you in charge or otherwise come to your knowledge, touching your grand jury service; to keep secret the counsel of the United States, your fellows and yourselves; not to present or indict any person through hatred, malice or ill will; nor leave any person unpresented on unindicted through fear, favor, or affection, nor for any reward, or hope or promise thereof; but in all your presentments and indictments to present the truth, the whole truth, and nothing but the truth, to the best of your skill and understanding? If so, answer I do.

Id. at § 5:11.

2. *United States v. Stone*, 633 F.2d 1272, 1275 (9th Cir. 1979).

3. *See supra* note 1.

press?⁴

A survey of the conflicting case law on the issue almost certainly would leave a juror confused.⁵ Decisions have held both that secrecy is not limited by time and circumstance,⁶ and that secrecy is no longer necessary when the grand jury has been discharged and the accused apprehended.⁷ This confusion has produced an unacceptable chilling effect on the press' first amendment freedoms, since communication between the press and a grand juror could result in a contempt action.⁸ The solution is the formation of a judicial test that protects and balances the purposes and goals of grand jury secrecy and first amendment rights, and at the same time protects grand jurors and press members from contempt actions for secrecy violations.

Both the grand jury and the free press have aided the pursuit of justice. Operating in secret, the grand jury is a judicial tool uniquely capable of making investigations and bringing indictments.⁹ Thriving on publicity, the free press is an equally important feature of a justice-minded, democratic society. A free press helps to preserve the fairness of judicial proceedings and can report on abuses in the judicial system.¹⁰ The secrecy surrounding grand jury proceedings, however, has curtailed the press' ability to carry out its watchdog function. Grand jury secrecy is not absolute,¹¹ nor is freedom of speech.¹² But it is essential that the press knows what, if any, contact with grand jurors is permitted, so that the press may enjoy the full extent of its first amendment rights and thereby continue to keep a watchful eye on the judiciary.

4. The term "press," as used throughout this note, is not limited to newspapers and the reporters they employ. "Press" should be interpreted broadly and refers generally to all types of journalists in the media, including but not limited to radio and television reporters.

5. See *infra* notes 165-79 and accompanying text.

6. *United States v. American Medical Ass'n*, 26 F. Supp. 429, 430 (D.C. Cir. 1937).

7. *Atwell v. United States*, 162 F. 97 (4th Cir. 1908).

8. *United States v. Stone*, 633 F.2d 1272, 1275 (9th Cir. 1979).

9. No instrument other than the grand jury can so effectively cope "with organized crime, which cuts across state lines, conspiracies to overthrow the government of the United States, or alleged deviations from rectitude by those who have been entrusted by the government with public trust." *United States v. Smyth*, 104 F. Supp. 283, 290 (N.D. Cal. 1952). "As an engine of discovery against organized and far-reaching crime, the grand jury has no counterpart." *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933).

10. THE UNIVERSITY OF MASS. PRESS, MEDIA & THE FIRST AMENDMENT IN A FREE SOCIETY 210 (1973) [hereinafter MEDIA & THE FIRST AMENDMENT]. "There are two important reasons for allowing the press to report on courtroom proceedings. First, this activity is protected by the first amendment. Second, the press helps to preserve fairness of judicial proceedings, since scrutiny by news media may keep trial participants honest." *Id.*

11. *In re Grand Jury Matter*, 682 F.2d 61, 63 (3rd Cir. 1982). See also *infra* notes 119-29 and accompanying text.

12. *Schenck v. United States*, 249 U.S. 47 (1919); *Gitlow v. United States*, 268 U.S. 652 (1925).

In recognition of the utility of both free speech and the grand jury, the Constitution explicitly embraces each as a protection of liberty. The fifth amendment to the Constitution provides that "No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment of a grand jury."¹³ The grand jury originated in England¹⁴ and was adopted as part of the criminal justice process in the American colonies.¹⁵ Deeply rooted in the history of the grand jury is the concept of secrecy.¹⁶ Using a plain meaning interpretation of the federal secrecy requirement, all matters occurring before the grand jury are to be kept secret.¹⁷

On the other hand, the first amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹⁸ The protection of free speech and freedom of the press in the first amendment is vital for the successful operation of our democratic form of government.¹⁹ Recognizing these fundamental freedoms, the Supreme Court has extended constitutional protection beyond those situations envisioned by the framers of the Bill of Rights.²⁰ Following the Supreme Court's lead, most courts have imposed few restrictions on the press,²¹ re-

13. U.S. CONST. amend. V. The amendment states in full:

No 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 or in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

Despite the language of the fifth amendment, in 1859 Michigan became the first state to allow prosecutors to bring felony prosecutions by way of information rather than grand jury indictment. *W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE* 616 (1985) [hereinafter *LAFAVE & ISRAEL*]. This process of a judge finding probable cause rather than requiring grand jury indictment was upheld as a proper safeguard of the defendant's rights in *Hurtado v. California*, 110 U.S. 516 (1884).

14. R. YOUNGER, *THE PEOPLE'S PANEL* 1 (1963).

15. *LAFAVE & ISRAEL, supra* note 13, at 348.

16. *See supra* note 1. For additional discussion of the origins of grand jury secrecy, see *infra* notes 32-35, 57-61, and accompanying text.

17. *FED. R. CRIM. P. 6(e)(2)* imposes an obligation of secrecy on "all matters occurring before the grand jury."

18. U.S. CONST. amend I. The amendment states in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.*

19. D. BOGEN, *BULWARK OF LIBERTY: THE COURT AND THE FIRST AMENDMENT* 10 (1984).

20. *MEDIA AND THE FIRST AMENDMENT, supra* note 10, at 17. One obvious example is that first amendment protections have been expanded to cover the electronic media of radio and television, which did not exist when the first amendment was drafted. *Id.*

21. Sharp, *Postverdict Interrogation of Jurors by the Press: Is the First Amendment*

sulting in broad media access to judicial proceedings.²²

Freedom of expression, however, is not absolute, and the press has not enjoyed unchecked access to all judicial proceedings.²³ In particular, traditional press freedoms have receded when conflicts have arisen in connection with grand juries.²⁴ The secrecy requirements involved in grand jury proceedings have been used to prevent media access to grand jury matters.²⁵ The press does not have a clear first amendment right to interview grand jurors,²⁶ and this prohibition extends indefinitely after the grand jurors have been discharged. As one judge commented on Rule 6(e) of the Federal Rules of Criminal Procedure, "the law in this area is largely untested, certainly unsettled, and unclear in many respects."²⁷ The resulting chilling effect on the press hampers the media's ability to serve as a judicial watchdog and in turn tarnishes public support and confidence in the courts.

This note will discuss the conflict between the first amendment and the secrecy surrounding grand juries and analyze whether grand jury secrecy can validly be held to prohibit the media from interviewing grand jurors, particularly after the jury has been discharged. Further, this note will focus on the history, purposes, and origins of grand juries, the reasons for secrecy, whether these reasons justify total denial of press access, and the numerous abuses spawned by this secrecy requirement.²⁸ Also, this note will trace the growth of the free press, the related benefits and drawbacks of this growth, and the increasing acceptance of the press by the judiciary.²⁹ After exploring the overall conflict between press freedoms and grand jury secrecy, a modification of grand jury secrecy will be suggested that would allow for possible media interviews of grand jurors upon completion of grand jury proceedings.³⁰ Such a modification would refresh public confidence in the

Absolute?, 27 RES GESTAE 380, 384 (1984).

22. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). For a discussion of the facts and holding of *Nebraska Press Ass'n*, see *supra* notes 144-45.

23. *Id.*

24. Because of the secrecy provisions, the press is not allowed access to the grand jury room when proceedings are in session. Transcripts of proceedings are not made available to the press either. For a discussion of disclosure of grand jury transcripts, see generally *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958).

25. *United States v. Providence Tribune Co.*, 241 F. 524, 526 (D.R.I. 1917)(the press' acts of publishing information of what occurred before the grand jury, including information that certain persons were under investigation and the identification of witnesses, was punishable as contempt).

26. See *infra* notes 177-79 and accompanying text.

27. *United States v. Tager*, 506 F. Supp. 707, 709 (D. Kan. 1979)(Theis, C.J.).

28. See *infra* notes 32-45, 62-93 and accompanying text.

29. See *infra* notes 98-162 and accompanying text.

30. See *infra* notes 189-202 and accompanying text.

grand jury process,³¹ while also creating accountability in a system where it is long overdue.

II. HISTORY OF THE GRAND JURY

A. *Origins and Purpose*

The grand jury originated in England in 1166.³² Secrecy was not an element of the early grand juries. Rather, deliberations were open to the public, and the grand jury functioned solely in the interest of the Crown.³³ Not until 1368, under the name of *le graunde inquest*, did the grand jury adopt the custom of hearing witnesses in private.³⁴ This process developed largely to protect jurors and witnesses from royal officials displeased with the jury's outcome, not to aid the prosecution in its discovery of facts or to protect the prosecutor's case from disclosure.³⁵

The American grand jury is a direct descendant of this English institution.³⁶ This historical nexus is evidenced by the fact that many questions involving the modern grand jury are answered, at least in part, by looking to the historical role the grand jury played in England.³⁷ In England, accusations were initiated in two ways: either by the jurors themselves acting on the basis of their own knowledge, or by a representative of the Crown who produced witnesses to testify in support of a particular charge.³⁸ Under their power of presentment,³⁹ English grand juries could and did investigate

31. For a discussion of abuses in the grand jury process, see *infra* notes 83-93 and accompanying text.

32. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, at 456 (1965). According to LAFAVE & ISRAEL, *supra* note 13, at 347, "The grand jury commonly is traced back to the Assize of Clarendon, issued in 1166, although some historians find earlier antecedents in institutions utilized by the Anglo-Saxons, Normans, and even the Athenians. The assize was a crucial element in the efforts of Henry II to wrest the administration of justice away from the courts of the feudal barons." *Id.*

33. Calkins, *supra* note 32, at 456. Acting as a type of public prosecutor, the early grand jury was formed to augment the power of the crown. *Id.* at 457.

34. *Id.* at 457.

35. *Id.* at 456. Note that the fifth amendment, which contains the grand jury provision, does not mention secrecy. See *supra* note 13 for the entire text of the fifth amendment.

36. BEALE & BRYSON, *supra* note 1, § 1:01, at 1.

37. *Id.* For further discussion of this view, see *Blair v. United States*, 250 U.S. 273 (1919).

38. LAFAVE & ISRAEL, *supra* note 13, at 348.

39. Application of United Elec., Radio and Mach. Workers, 111 F. Supp. 858 (S.D.N.Y. 1953). A "presentment" is an accusation initiated by the grand jury and may be regarded as instructions to the prosecutor for an indictment. An "indictment" is an accusation, usually prepared by the prosecutor, which is endorsed by the grand jury when it finds a "true bill." *Id.* Both presentments and indictments are specific accusations of crime which are presented to the court. *Id.* at 863, n.13.

any matter that appeared to them to involve a violation of the law.⁴⁰ Despite its historical significance, however, the grand jury was abolished in England in 1933.⁴¹

The early function of American grand juries was to institute prosecutions for serious crimes in the colonies.⁴² In addition, grand juries became aware of the needs for reform, and occasionally they managed to stir public officials to action by issuing presentments.⁴³ Other early functions of grand juries helped to win public support for the grand jury system. For example, during the Revolutionary period the grand jury proved to be an effective means of preventing unpopular royal prosecutions, thus enhancing the jury's reputation as an important procedural safeguard.⁴⁴ As a result of the favorable experience of using grand juries during the Colonial and Revolutionary periods, the fifth amendment to the Constitution and similar provisions in many state constitutions were adopted containing grand jury provisions.⁴⁵

These provisions have since been codified at both the federal and state levels. Rule 6 of the Federal Rules of Criminal Procedure embodies the concept of grand juries into the federal court system. Rule 6(a) states simply that "the court shall order one or more grand juries to be summoned at such times as the public interest requires."⁴⁶ Individual states have passed their own statutes to govern the existence and function of grand juries, and these statutes generally are modeled upon the federal rules.⁴⁷

In many respects the modern grand jury resembles its judicial ancestors, although jurors today are less independent and tend to rely more on the discretion of the critical actor in the grand jury process, the prosecuting attorney.⁴⁸ At common law, twenty-three persons traditionally were empaneled as grand jurors. Today the federal system allows the number of grand jurors to fluctuate between sixteen and twenty-three.⁴⁹ Twelve votes

40. R. YOUNGER, *supra* note 14.

41. Calkins, *supra* note 32, at 469. The grand jury was abolished by The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 1, largely for economic reasons, following a decline in the importance of the grand jury. *Id.* at 469 n.50.

42. BEALE & BRYSON, *supra* note 1, § 1:01, at 2.

43. R. YOUNGER, *supra* note 14, at 17.

44. BEALE & BRYSON, *supra* note 1, § 1:01, at 2.

45. *Id.*

46. The Advisory Committee's notes to Rule 6(a) emphasize that the rule vests in the court full discretion as to the number of grand juries to be summoned and as to the times when they should be convened. FED. R. CRIM. P. 6(a) advisory committee's note.

47. *See, e.g.*, IND. CODE ANN. §§ 35-34-2-1 to -15 (West 1986).

48. BEALE & BRYSON, *supra* note 1, § 6:02, at 4.

49. FED. R. CRIM. P. 6(g) governs the length of grand jury service. The rule states that generally no grand jury may serve more than 18 months, and during that period jurors may be excused either temporarily or permanently. *Id.*

are necessary for indictment in the federal system,⁵⁰ but the votes necessary for indictment by state grand juries vary.⁵¹ Technical rules of evidence are not followed,⁵² allowing the prosecutor more freedom to influence the outcome through the use of hearsay and other evidence potentially inadmissible at trial.⁵³ The grand jury still retains its traditional dual functions of investigating and indicting.⁵⁴ Attendance at grand jury proceedings generally is strictly limited by statute,⁵⁵ and no judge or other judicial officer presides over the daily operations of the grand jury. The lack of a judicial officer contributes to the modern grand jury's dependency on the prosecutor, since the prosecutor works closely with the grand jury on a day-to-day basis.⁵⁶

B. Secrecy and Its Abuse

The fifth amendment to the Constitution encompasses the requirement of indictment by grand jury, yet the amendment is silent on the issue of

50. FED. R. CRIM. P. 6(b)(2). Most American jurisdictions slowly have shifted toward smaller grand juries and allow for less than unanimous vote for indictment. LAFAVE & ISRAEL, *supra* note 13, at 359.

51. BEALE & BRYSON, *supra* note 1, § 2:04, at 23.

52. BEALE & BRYSON, *supra* note 1, § 1:06, at 32. Of course, state grand jury provisions may vary from the federal system.

53. *But see infra* note 56 (regarding the American Bar Association's standards of conduct for prosecutors). *See also* Costello v. United States, 350 U.S. 359 (1956) (holding a defendant could be required to stand trial, and a conviction could be sustained even if only hearsay evidence was presented to the grand jury that indicted him). The fact that the press may learn of this hearsay-type information later through interviews with grand jurors should not be considered when deciding whether to allow such interviews. This is because the press routinely is allowed to remain in the courtroom during criminal and civil trials and hear potentially inadmissible evidence entertained by the presiding judge outside the jury's presence.

54. BEALE & BRYSON, *supra* note 1, § 1:07, at 35. The "sword and shield" analogy often has been used to describe these two functions of the grand jury. The jury acts as a shield that protects the accused against unfounded and improperly motivated charges when the jury screens cases to determine whether sufficient evidentiary support exists for indictment. The grand jury acts as a sword that attacks criminal conduct when an investigation returns an indictment. *Id.*

55. For example, FED. R. CRIM. P. 6(d), which governs who may be present while a federal grand jury is in session, states:

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Id.

56. *See* American Bar Association, Standards for Criminal Justice, The Prosecution Function, Standard 3-36(b) (2d ed. 1982). The American Bar Association's Standards for the Prosecution Function states that the prosecutor "should not make statements or arguments in an effort to influence grand jury action in a manner that would be impermissible at trial before a petit jury." *Id.*

secrecy.⁵⁷ Nevertheless, grand jurors are sworn to secrecy.⁵⁸ Rule 6(e) of the Federal Rules of Criminal Procedure expressly imposes a secrecy obligation upon grand jurors, attorneys for the government, government personnel assisting the attorney for the government, and officers of the court.⁵⁹ No obligation of secrecy, however, may be imposed on any person except in accordance with this rule.⁶⁰ Individual states, with some modifications, generally follow the federal provisions, although three states have no specific secrecy provisions.⁶¹

Today there are four reasons generally put forth as to why the secrecy of grand jury proceedings should be guarded. First, grand jurors should be free from the apprehension that might result if jurors knew that their opinions and votes might later be disclosed.⁶² Second, secrecy could aid the state in securing willing witnesses if the witnesses are free from the apprehension that their testimony may be subsequently disclosed.⁶³ Third, providing the accused who actually is guilty with information about the grand jury proceedings might allow the accused to flee arrest,⁶⁴ suborn false testimony, or tamper with government witnesses.⁶⁵ Finally, secrecy can assure that a person falsely accused does not suffer public embarrassment if the grand jury refuses to indict and the nature of the investigation is not disclosed.⁶⁶

Despite the valid reasons for secrecy, grand jurors can have contact with the press without undermining these reasons or destroying the effectiveness of grand juries. In support of this proposition, it is notable that exceptions to grand jury secrecy currently in existence already make some disclosure possible.⁶⁷ For example, federal rules do not restrict disclosure of a witness's own grand jury testimony.⁶⁸ In addition, disclosure of grand jury transcripts is allowed where the need for such disclosure outweighs the public interest in secrecy.⁶⁹ In contrast to grand jurors, no obligation of secrecy

57. See *supra* note 13 (the entire text of the fifth amendment).

58. See *supra* note 1.

59. FED. R. CRIM. P. 6(e)(2).

60. *Id.*

61. BEALE & BRYSON, *supra* note 1, § 7:04, at 15. The states that have no specific secrecy provisions are Alabama, Connecticut, and New Hampshire. *Id.*

62. Calkins, *supra* note 32, at 458. See also *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958).

63. See *supra* note 62.

64. See *supra* note 62. Most likely this would occur where the accused learns through publicity of his indictment and, acting upon this knowledge, flees the jurisdiction before he can be apprehended.

65. See *supra* note 62.

66. See *supra* note 62.

67. See *infra* notes 166-76 and accompanying text.

68. *In re Grand Jury Investigation*, 610 F.2d 202, 217 (5th Cir. 1980). It should be noted, however, that unlike grand jurors, witnesses are not sworn to secrecy.

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

may be imposed upon grand jury witnesses. Witnesses may be interviewed by the press or others after their appearance before the grand jury and repeat what they said or relate any knowledge they have on the subject of inquiry.⁷⁰ Thus, allowing the press to interview grand jurors would not be the first blow to grand jury secrecy, but instead would merely be a widening of permissible disclosures, which is not prohibited by the Constitution.

A second argument against these secrecy justifications is made through an analogy between grand jurors and ordinary trial or "petit jurors."⁷¹ Many of the concerns given for imposing secrecy on grand jury proceedings, such as the need to avoid juror apprehension and to secure willing witnesses, have been addressed in the trial jury setting. The press has been granted widespread access to most judicial proceedings,⁷² and trial jurors are increasingly subjected to postverdict interviews.⁷³ Obviously, this judicial access makes it possible for the press to interfere with the administration of justice.⁷⁴ Grand jurors, however, should not feel any more apprehension from publicity than do ordinary trial jurors. The functions of grand jurors are limited to investigation and indictment.⁷⁵ Unlike petit jurors, grand jurors never assess liability, determine damages, or convict defendants. More serious consequences can result when a petit jury returns a verdict against a defendant, such as a lengthy prison term or even capital pun-

70. *In re Vescovo Special Grand Jury*, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979). Of course a distinction exists in that the witnesses, unlike the grand jurors themselves, are not decision makers.

71. A petit jury, or trial jury as it is more commonly known, is the ordinary jury of up to twelve people, selected for the trial of a criminal or civil matter. BLACK'S LAW DICTIONARY 768 (5th ed. 1979). The analogy between grand juries and petit juries is not infallible. Differences between the two juries obviously exist. One important difference is that petit juries are supposed to hear only admissible evidence against those whom there is sufficient, credible evidence to bring an indictment. But potentially embarrassing, inadmissible evidence may be revealed during a petit jury trial, and the press may publish any scrap of information it can learn. R. HOLSINGER, MEDIA LAW 252 (1987). In addition, not all trials result in convictions. By analogy, this weakens the argument in favor of prohibiting grand jury interviews, since publication of information concerning the innocent accused already occurs in the petit jury setting.

72. Sharp, *supra* note 21, at 384. Any general injunction against postverdict interrogation of jurors must be approached "with the greatest care and caution in light of the First Amendment free press values involved." *Id.* at 385.

73. Note, *Public Disclosure of Jury Deliberations*, 96 HARV. L. REV. 886, 887 (1983).

[S]oliciting from jurors the inside story of their deliberations seems more widespread today than ever before. Postverdict requests by litigants to interview jurors are granted in a small but growing number of cases. More strikingly, the media—buoyed by recent decisions affirming the legitimacy of their presence in the courtroom—continue to test the limits of their right to gather and print news about all aspects of the judicial system, including the deliberation of juries.

Id.

74. See *infra* note 141 and accompanying text.

75. See *supra* note 54 and accompanying text.

ishment. Thus, any apprehension felt by grand jurors should not exceed the apprehension felt by trial jurors, who routinely are subjected to postverdict interviews.

Attempting to justify grand jury secrecy from the defendant's viewpoint, such as the protection of individuals groundlessly accused, is unconvincing.⁷⁶ Grand jury secrecy is not designed for the benefit of the defendant.⁷⁷ In England, the argument that the grand jury might protect the accused from oppression was not convincing enough to keep the grand jury from being abolished.⁷⁸ In America, the press routinely reports on individuals named in lawsuits or charged with criminal offenses, despite the fact that many of these actions do not result in the assessment of liability or a criminal conviction.⁷⁹ Perhaps this reporting occurs partly because our judicial system is founded on the concept that everyone is innocent until proven guilty.⁸⁰ A grand jury indictment is nothing more than an accusation.⁸¹ Obviously some individuals ignore this concept. When all considerations are taken into account, however, the attempted protection of falsely accused individuals is insufficient to warrant maintaining such a hard line on secrecy that press interviews of grand jurors are forever prohibited.

Critics of the grand jury argue that secrecy requirements are only minimally effective because of the many loopholes and exceptions to the requirements, and they contend that even where secrecy is effective, it can stifle public awareness of grand jury practices.⁸² One of the major reasons for advocating press access to grand jurors is to combat the well-documented and numerous instances of abuse that strict secrecy has produced.⁸³ The grand jury, often esteemed as a bulwark of freedom, is commonly and unethically manipulated by prosecutors in order to benefit his or her own personal motives.⁸⁴

76. See *infra* notes 180-85 and accompanying text.

77. *Howard v. State*, 60 Ga. 229, 4 S.E.2d 418, 423 (1939).

78. Every day, for example, American newspapers print stories about individuals who have been arrested, despite the fact that the person has been convicted of nothing and is presumed innocent until proven guilty. More specifically, many newspapers print "police records," a brief listing of the names and addresses of people arrested the previous day, as well as the initial charge involved.

79. See generally ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* (1947).

80. WIGMORE ON EVIDENCE § 2511, at 530 (1981).

81. *United States v. Remington*, 191 F.2d 246, 252 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952).

82. LAFAYE & ISRAEL, *supra* note 13, at 356. It must be kept in mind that this note does not advocate removing the secrecy element from grand jury proceedings. Rather, the thrust of the argument is that grand jury secrecy needs to be clarified to avoid creating an absolute ban to media interviews of grand jurors once jurors have fulfilled their grand jury functions.

83. See *infra* notes 84-93 and accompanying text.

84. NATIONAL LAWYERS GUILD, *REPRESENTATION OF WITNESSES BEFORE FEDERAL*

Fueling this frequent abuse is the fact that grand jury misconduct is extremely difficult to detect and prove,⁸⁵ at least partly because of secrecy. Any conduct that exceeds the limits set by the Constitution, statutes, case law, or court rules is an abuse of the function of the grand jury.⁸⁶ Recognizing the potential for abuse, Supreme Court Justice Douglas included in a dissent former U.S. District Court Judge William Campbell's telling statement: "Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."⁸⁷ Thus, secrecy is a tempting invitation to prosecutors to indict whomever they choose and thereby make a mockery of justice.⁸⁸

Recognizing these problems, the Supreme Court has stated that the Constitution should not tolerate the transformation of the grand jury into an instrument of oppression.⁸⁹ This warning has not stopped the abuses.⁹⁰

GRAND JURIES, National Lawyers Guild, § 12.1, at 2 (1987) [hereinafter REPRESENTATION OF WITNESSES]. For example, the grand jury is particularly subject to abuse by public office holders during periods of political dissent. *Id.* at n.3.

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

86. REPRESENTATION OF WITNESSES, *supra* note 84, § 12:1, at 3.

87. *United States v. Mara*, 410 U.S. 19, 23 (1973)(Douglas, J., dissenting)(quoting former U.S. District Court Judge William Campbell). Justice Douglas' dissent was especially critical of the grand jury, which in *Mara* was used to compel the target of a grand jury investigation to furnish handwriting samples or be held in contempt of court. *Id.* at 19.

88. *M'Kinney v. United States*, 199 F. 25, 31 (8th Cir. 1912)(Sanborn, J., dissenting). Judge Sanborn's dissent is a stinging condemnation of the abuse of grand jury secrecy. The dissent states in part:

It is a serious thing for any man be indicted for an infamous crime. Whether innocent or guilty he cannot escape the ignominy of the accusation, the dangers of perjury and error at his trial, the torture of suspense and the pains of imprisonment, or the burden of bail. The secrecy in any judicial procedure is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their enemies. If malicious, ambitious, or over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead of that protection of "the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion, or private enmity," which it was primarily designed to provide, may become an engine of oppression and a mockery of justice.

Id.

89. *United States v. Dionisio*, 410 U.S. 1, 12 (1972)(holding the grand jury could require targets of its investigation to submit voice samples for comparison with other evidence in the possession of the grand jury).

90. For examples of this abuse, see generally REPRESENTATION OF WITNESSES, *supra* note 84, § 12.4-13.4 (1987). Typical of the abuses listed therein is what occurred in *United States v. Smith*, 687 F.2d 147 (6th Cir. 1982). In *Smith*, two targets of a grand jury investigation were subpoenaed by the prosecutor without the grand jury's knowledge. The prosecutor told the targets, who were not represented by counsel, that if they provided handwriting samples voluntarily they would not be required to testify before the grand jury. After providing the handwriting samples, both witnesses were indicted and later convicted. An appeal of the convictions on the ground that the prosecutor was guilty of abuse was unsuccessful. *Id.* at 152.

For example, grand jury investigations have been used to intimidate witnesses.⁹¹ Perhaps this is partly why the grand jury process has been criticized as nothing more than a "rubber stamp" for the prosecutor's conclusions of guilt.⁹² Even the Supreme Court, despite its warnings, is not blameless for the failings of the grand jury system. Faced with a case that could have sent a message to abusive prosecutors, the Supreme Court instead held that a grand jury indictment based exclusively on hearsay was valid.⁹³

With its broad investigative powers, however, the grand jury is seen as an important tool in the enforcement of state and federal criminal laws.⁹⁴ Perhaps because of this sweeping power there is mounting support for significant changes in traditional grand jury procedure.⁹⁵ "Critics of the grand jury contend that major changes are necessary to strike the proper balance between individual liberty and effective law enforcement."⁹⁶ Accordingly, there has been a clear trend on the part of the courts and legislatures to relax the rigid rules of secrecy.⁹⁷

III. PRESS FREEDOMS AND JUDICIAL PROCEEDINGS

A. *The Growth and Importance of the Free Press*

Freedom of speech is the heart of individual liberty⁹⁸ and was described by Justice Cardozo as "the matrix, the indispensable condition of nearly every other form of freedom."⁹⁹ The press embodies the liberty of

Allowing press interviews of grand jurors would subject prosecutors' actions to public scrutiny, and thus could curb the questionable prosecutorial conduct that occurred in *Smith*, as well as other documented cases of serious misconduct.

91. *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952).

92. *LAFAVE & ISRAEL*, *supra* note 13, at 356.

93. *Costello v. United States*, 350 U.S. 359 (1956) (holding a grand jury indictment based on credible hearsay is not subject to challenge).

94. *BEALE & BRYSON*, *supra* note 1, § 1:09, at 39.

95. Reform proposals include: requiring grand jury witnesses to be advised of their right to counsel and their privilege against self-incrimination; affording grand jury witnesses the right to counsel during grand jury proceedings; limiting evidence that can be presented to the grand jury; and limiting the grand jury's subpoena power. *Id.*

96. *Id.*

97. *LAFAVE & ISRAEL*, *supra* note 13, at 362. For example, grand jury transcripts are more available today than in the past. Also, distinctions are now recognized between disclosures after indictment and discharge of the jury, and disclosures that could affect future investigations. Further, in weighing the need for disclosure, courts and legislators now emphasize the criminal defendant's need to obtain information that might point to acquittal. *Id.*

98. *J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW* 830 (3rd ed. 1986) [hereinafter *CONSTITUTIONAL LAW*].

99. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Justice Cardozo is but one of many justices who commented on the importance of free speech. Justice Black, dissenting in

free speech unlike any other American institution. Without a free, informed, and educated electorate, which the free press provides, democracy cannot function.¹⁰⁰ The increased protection afforded the press throughout history has protected individuals from governmental oppression and produced a more democratic system of government.¹⁰¹ The Constitution, it has been said, was designed to keep government "off the backs of the people."¹⁰² By allowing for critical comment of the government, the free speech and press provisions of the first amendment do just that.

A truly democratic society could not function without a free press because the cornerstone of a democratic society is the proposition that decisions are based on full and open discussion of all points of view.¹⁰³ A free press provides the medium for such communication. This open exchange of ideas is not limited to praise for public officials, but necessarily includes critical public commentary. The first amendment creates a sanctuary around the citizen's beliefs,¹⁰⁴ whether these beliefs rain praise on government or send a storm of public protest crashing against it. Honest and accurate criticism of the government produces a greater public good in a democracy than false respect fostered by suppression.¹⁰⁵ As noted by Justice Brandeis in *Whitney v. California*, one of the benefits derived from free speech is a safety valve for society, whereby the cathartic release of speaking out against the government helps curtail violent revolt.¹⁰⁶

The American press, however, had humble beginnings, and has not always enjoyed such freedom to criticize. Indeed, Colonial America did not attempt to liberalize free speech even within its own communities.¹⁰⁷ Even

Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U.S. 287 (1941), made the analogy, "Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body." *Id.* at 301-02. United States Supreme Court Justices obviously are not the only people who have championed the causes of the free press. John Milton, a blind poet and English literary giant, advocated freedom of the press in his famous speech addressed to Parliament in *Areopagitica*. *Areopagitica*, composed in 1644, became the classic literary defense in English of intellectual liberty and freedom of publication. J. MILTON, *AREOPAGITICA AND OF EDUCATION* ix (G. Sabine ed. 1951).

100. Levy and Young, *Foreward* to H. NELSON, *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT* vii (1967).

101. Supreme Court Justice Hugo Black, concurring in the famous libel case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), echoed the words of Thomas Jefferson by writing: "I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials." *Id.* at 297.

102. W. DOUGLAS, *POINTS OF REBELLION* 6 (1970).

103. D. BOGEN, *supra* note 19, at 30.

104. W. DOUGLAS, *supra* note 102, at 3.

105. D. BOGEN, *supra* note 19, at 26.

106. *Whitney v. California*, 274 U.S. 357 (1927)(Brandeis, J., concurring).

107. *CONSTITUTIONAL LAW*, *supra* note 98, at 832. The communities of Colonial America have been described as scattered, "closed enclaves," where persons of similar beliefs would settle and together would oppress views that conflicted with their own. *Id.*

after the celebrated trial of New York printer John Peter Zenger in 1735,¹⁰⁸ the threat of prosecution under the doctrine of seditious libel¹⁰⁹ did not vanish.¹¹⁰ The suppressive Alien and Sedition Acts, passed in 1798¹¹¹ did not expire until 1801.¹¹² Yet despite a revival of acts in the early 1900s similar to the Alien and Sedition Acts,¹¹³ a steady trend has developed toward increasing press freedoms. The extent of these freedoms is a matter of constantly evolving law.¹¹⁴ As a result of this evolution, there is greater freedom of the press today than at any time in our nation's history.¹¹⁵

In order to protect our society, press freedoms should be staunchly defended, and the trend toward expanding these freedoms should continue. One obvious area for expansion is to allow the press the right to interview grand jurors. In light of the abuses grand jury secrecy has produced,¹¹⁶ allowing these interviews would be consistent with one of the fundamental purposes of freedom of expression and freedom of the press, which is to serve as a watchdog against government abuse.

B. Judicial Acceptance of the Press

Difficult constitutional questions have arisen when the press has attempted to pursue its fundamental watchdog purposes, particularly in the context of press access to the courtroom.¹¹⁷ These problems, however, generally have been overcome in favor of the media.¹¹⁸ The attempt to balance

108. John Peter Zenger was the last person to be prosecuted for seditious libel in the colonies. *Id.* Zenger's prosecutions resulted from a series of articles he published that criticized the governor of New York. *Id.* Andrew Hamilton defended Zenger on the notion that truth should be a defense to libel. *Id.* The defense was unsuccessful, though Hamilton's compelling argument convinced the jury to acquit his client. *Id.*

109. Seditious libel is the common law crime "committed by words or writings that do not amount to treason but are nonetheless critical of government officials or their policies." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 861 (2d ed. 1988).

110. *Id.*

111. TRIBE, *supra* note 109, at 861.

112. *CONSTITUTIONAL LAW*, *supra* note 98, at 834. An enlightening history of the Sedition Act of 1798 is given by Justice Brennan in *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-79 (1964). The act made it a crime, punishable by a \$5,000 fine and five years in prison, for all false, scandalous and malicious writings or utterances against the government. *Id.* at 273. President Jefferson eventually pardoned those convicted and sentenced under the act and remitted their fines. *Id.* at 276.

113. For an excellent chronology of freedom and restraint, see generally H. NELSON, *supra* note 100. According to the chronology, under the Espionage Act of 1917 and other related legislation, almost 2,000 people were prosecuted, resulting in nearly 900 convictions.

114. *MEDIA & THE FIRST AMENDMENT*, *supra* note 10, at 4.

115. W. HACHTEN, *THE SUPREME COURT ON FREEDOM OF THE PRESS* 306 (1st ed. 1968).

116. See *supra* notes 83-93 and accompanying text.

117. See *infra* notes 140-41, 154-57.

118. See *infra* notes 145, 157-59.

a defendant's right to a fair trial against a newspaper's right to report on that trial has resulted in few restrictions being imposed on this right of press access.¹¹⁹ By necessity, this general right of access includes a right to attend most judicial proceedings.¹²⁰ Traditional judicial openness normally is not limited to the trial proper, but extends to various ancillary proceedings, including pretrial hearings.¹²¹ Judicial openness also does not stop at the conclusion of a judicial proceeding. For example, the press may be allowed to interview trial jurors following their discharge from jury duty.¹²² The Supreme Court never has held that the press and public may be affirmatively prohibited from putting questions to petit jurors after trial.¹²³ The Supreme Court, however, never has addressed the issue in the context of the grand jury.

The right of access to judicial proceedings historically has been based on two constitutional foundations—the first and sixth amendments.¹²⁴ In cases before the Supreme Court, the first amendment argument has been persuasive, whereas the sixth amendment argument has been rejected.¹²⁵ The Supreme Court recognizes that news gathering is an activity protected by the first amendment.¹²⁶ This protection also extends to a newspaper's right to publish information it has gathered.¹²⁷ The Supreme Court is by no means alone in its belief that the media has a first amendment right to attend and publish information regarding judicial proceedings. Legal writers and judges alike have taken the position that the first amendment provides a right to attend judicial hearings.¹²⁸ A right of attendance comports

119. Sharp, *supra* note 21, at 384.

120. *Id.*

121. Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 (1978).

122. See generally Sharp, *supra* note 21; Note, *supra* note 73.

123. Note, *supra* note 73, at 900. Though this statement refers only to petit jurors, a like view could be taken in regard to grand jurors, due to the similarities of the two. *United States v. Smyth*, 104 F. Supp. 283, 294 (N.D. Cal. 1952). For a further comparison of the roles of petit and grand juries, see *supra* notes 54, 71-73.

124. Note, *Peering Into the Courtroom: An Analysis of the Public Interest*, 15 VAL. U.L. REV. 371, 372 (1981).

125. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); see also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (Stevens J., concurring).

126. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). The court noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.*

127. *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977).

128. See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (holding the right to attend criminal trials is implicit in guarantees of the first amendment); *United States v. Cianfrani*, 573 F.2d 835, 862 (3d Cir. 1978) (Gibbons, J., concurring) (holding there is a first amendment right of access to judicial proceedings); *State ex rel. Dayton Newspapers v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976) (holding that a court order excluding the press from a judicial hearing on motions to suppress evidence, and prohibiting newspapers from publishing news reports of what would transpire at the hearing abridged the freedom of the press on constitutional grounds); G. Fenner & J. Koley, *The Rights of the Press and the Closed Court Criminal Proceeding*, 57 NEB. L. REV. 442, 454 (1978); Note, *Trial Secrecy*

with the informational policies of the first amendment.¹²⁹

As previously noted, the sixth amendment¹³⁰ also has been used, though less successfully, as the basis for providing the media with access to the courtroom.¹³¹ The unfavorable experience of secret trials¹³² resulted in the sixth amendment guarantee of an accused's right to an open trial.¹³³ Read literally, however, the sixth amendment guarantee of a public trial applies only to the accused, not to the press or to the public.¹³⁴ Indeed, more recent Supreme Court decisions have specifically rejected the use of the sixth amendment as a basis for public right of access to judicial proceedings.¹³⁵

The accused, however, is not the only party interested in the fair administration of justice. Other societal interests exist that require open trials,¹³⁶ including protecting the integrity of the trial and guarding against partiality on the part of the court.¹³⁷ Anything that impairs the open nature

and the First Amendment Right of Public Access to Judicial Proceedings, 91 HARV. L. REV. 1899 (1978).

129. Note, *supra* note 121, at 1314.

130. U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

131. See *supra* notes 124-25 and accompanying text.

132. Secret trials have been blamed for improper convictions, as in the style of the Spanish Inquisition, as well as causing the general public to lose confidence in the judicial system. The sixth amendment guarantee of an open trial was motivated by unfavorable experiences with secret trials. Note, *The "Right" to Observe Trials—Its Source and Vindication*, 31 IND. L.J. 377, 380 (1956).

133. *Id.*

134. Note, *supra* note 124, at 373.

135. See *supra* note 125. In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Court explained that there is no doubt that the sixth amendment permits and even presumes open trials as a norm. *Id.* However, the Court concluded history is insufficient to show the Framers of the sixth amendment intended to create a constitutional right in strangers to attend judicial proceedings (a pretrial proceeding in *Gannett*). *Id.* The sixth amendment, the Court said, was intended only to confer upon the accused an explicit right to demand a public trial. *Id.*

136. As the Court noted in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the open process of justice can serve an important prophylactic purpose for a community feeling outrage after a shocking crime occurs. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571.

137. *Gannett Co. v. DePasquale*, 443 U.S. 368, 427 (1979). Other societal interests in the public trial found by the Court in *Gannett* to exist separately from, and at times in opposition to, the interests of the accused include: the protection against perjury; the possibility that publicity might cause unknown witnesses to make themselves known; deciding criminal prose-

of judicial proceedings threatens to undermine the public confidence and impede the ability of the courts to function.¹³⁸ Based on these ideas and concerns, the first amendment, and the fears that led to the drafting of the sixth amendment, can be used to provide the media with a solid constitutional basis for obtaining access to the judicial arena.¹³⁹

This increased judicial acceptance enjoyed by the press is reflected in several significant Supreme Court cases. Each of these cases illustrates the extent to which the courts have gone to protect press access to the legal system.¹⁴⁰ The difficulty lies in balancing the press' rights of access against the defendant's right to a fair trial, in that the zealous and inflammatory publicity the press sometimes produces can cause unfavorable results, among them potential juror bias resulting in reversals of convictions.¹⁴¹ De-

cutions on truthful and complete records; allowing the public to scrutinize the performance of police and prosecutors in the conduct of public judicial business; and education. *Id.* at 427-28.

138. *Gannett*, 443 U.S. at 429.

139. *See generally* *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978)(Gibbons, J., concurring). In *Cianfrani*, the court stressed the need to find a right of access on broader grounds than the sixth amendment alone. Justice Gibbons suggests that a right of access exists in the federal common law implied from the first amendment. *Id.* at 862.

140. *See generally* *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)(holding that the trial judge in a rape and murder trial could not constitutionally close all but three days of six weeks of voir dire to protect privacy interests of prospective jurors). *But see infra* note 141 and accompanying text. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)(holding as a violation of the first amendment a statute that required exclusion of the press and the public from trials for specified sexual offenses involving victims under the age of 18, during testimony of that victim); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980)(holding that absent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)(overturning a court order in a multiple murder case that had restrained the news media from publishing or broadcasting facts "strongly implicative" of the defendant, such as confessions and admissions).

141. *See* *Sheppard v. Maxwell*, 384 U.S. 333 (1966)(excessive and prejudicial publicity resulted in reversal of the defendant's conviction for murder); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979)(holding that the press did not have an affirmative right of access to a pretrial proceeding of a murder prosecution); *Estes v. Texas*, 381 U.S. 532 (1965)(holding that the televising over petitioner's objections of the courtroom proceedings of petitioner's criminal trial for swindling was inherently invalid as infringing the fundamental right to a fair trial); *Rideau v. Louisiana*, 373 U.S. 723 (1963)(holding it was a denial of due process of law to refuse the request for a change of venue after the community had been exposed repeatedly and in depth to the spectacle of the petitioner, arrested on kidnapping, armed robbery and murder charges, personally confessing in detail to the crimes with which he later was charged); *Irvin v. Dowd*, 366 U.S. 717 (1961)(holding that the defendant's conviction was void, due to the extreme publicity, including alleged confessions, surrounding his arrest for six murders); *Marshall v. Untied States*, 360 U.S. 310 (1959)(holding that exposure of some jurors during trial to newspaper articles concerning prior convictions of the defendant for practicing medicine without a license when the trial court had refused to permit the prosecution to introduce such evidence was so prejudicial as to entitle the defendant to a new trial). In *Sheppard*, the Supreme Court reversed the conviction of a doctor who had been found guilty of murdering his wife. *Sheppard*, 384 U.S. at 333. The Court held that the trial judge failed to properly protect the jurors,

spite these concerns, the Supreme Court has held that there was no per se constitutional prohibition against radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused.¹⁴²

While the question of accessibility to the courtroom often is couched in terms of the press' first amendment rights, the first amendment generally does not guarantee the press a constitutional right of special access to information not available to the public generally.¹⁴³ Yet the trend shown in recent cases decided by the Supreme Court has been to hold in favor of open courtrooms. Because many of these cases involved the media, a growing acceptance of the press by the judiciary is evident. For example, in *Nebraska Press Ass'n v. Stuart*¹⁴⁴ the Court held that pretrial publicity, even pervasive, adverse publicity, does not inevitably lead to an unfair trial.¹⁴⁵ In *Gannett v. DePasquale*,¹⁴⁶ the Supreme Court noted that while the sixth amendment guarantees a criminal defendant the right to a public trial, it does not guarantee the right to compel a private trial.¹⁴⁷

A year after deciding *Gannett*, the Supreme Court held in *Richmond Newspapers v. Virginia*¹⁴⁸ that absent an overriding interest¹⁴⁹ articulated in the findings, the trial of a criminal case must be open to the public.¹⁵⁰ In

defendants and witnesses from the enormous publicity generated by the celebrated case. *Id.* Typical of some of the tabloid-style headlines that appeared in the papers were: "Blood Is found In Garage;" "New Murder Evidence Is Found, Police Claim;" and "Dr. Sam Faces Quiz At Jail on Marilyn's Fear Of Him." *Id.* at 342. Yet even the *Sheppard* decision states that a responsible press "has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Id.* at 350. The court went on to mention the press' "impressive record of service over several centuries." *Id.*

142. *Chandler v. Florida*, 449 U.S. 560 (1981). *But see* *Estes v. Texas*, 381 U.S. 532 (1965)(reaching a different conclusion on a similar issue of media coverage and the defendant's objections thereto).

143. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

144. 427 U.S. 539 (1976).

145. *Id.* at 554. In *Nebraska Press Ass'n*, the Court threw out an order by the trial court, modified by the state supreme court, that restrained the media from publishing or broadcasting accounts of confessions or admissions made by the defendant charged with multiple murders. *Id.* at 539. The order also prohibited publication of other facts "strongly implicative" of the defendant. *Id.* at 568.

146. 443 U.S. 368 (1979).

147. *Id.* at 382. But note that the general holding of the case was that orders excluding members of the public and the press from pretrial suppression hearings, and temporarily denying access to a transcript of the suppression hearing, when done to insure the defendant a fair trial, do not violate the press' rights under the first and fourteenth amendments. *Id.*

148. 448 U.S. 555 (1980).

149. The court in *Richmond Newspapers* declined to define exactly what constitutes an "overriding interest." *Id.* at 581. The Court said it had no reason to define the circumstances in which all or parts of a criminal trial may be closed to the public, but explicitly stated that the press' first amendment rights of access are not absolute. *Id.* at 582 n.18.

150. *Id.* at 581. In *Richmond Newspapers*, the Court reversed an order by the trial

reviewing the historical public access to trials,¹⁵¹ the Court stressed that openness is important to assure a proper functioning trial.¹⁵² Openness gives the assurance that proceedings are conducted fairly to all concerned, and it discourages perjury, misconduct of participants, and decisions based on secret bias or partiality.¹⁵³

With the press thus receiving greater access to the courthouse, the Supreme Court in 1982 decided *Globe Newspaper Co. v. Superior Court*,¹⁵⁴ holding that to justify the exclusion of the press and public from criminal trials, the state must show that closure is necessitated by a compelling governmental interest¹⁵⁵ and is narrowly tailored¹⁵⁶ to serve that interest.¹⁵⁷ More recently, the Court extended first amendment protections even further in *Press-Enterprise Co. v. Superior Court*,¹⁵⁸ holding that the guarantees of open criminal proceedings also apply to voir dire examinations.¹⁵⁹

court judge that excluded the press and the public from the defendant's murder trial.

151. It should be noted that a key distinction between petit and grand juries is this historical openness. Thus, the evolution of press interviews of petit jurors is in accord with the open nature of these proceedings. In contrast, grand juries operate in secret. This distinction, though important, should not be sufficient to undermine the arguments for press access to grand juries. In fact, an historical analysis arguably supports the case for grand jury access. When grand juries originated in England, the proceedings were open to the public, and the adoption of secrecy was designed more to protect the grand jury from the government than to promote the government's interest. See *supra* notes 33-35 and accompanying text. Furthermore, the fifth amendment, the source of the American grand jury, does not contain a secrecy requirement. For the entire text of the fifth amendment, see *supra* note 13.

152. *Richmond Newspapers*, 448 U.S. at 578.

153. *Id.* at 569.

154. 457 U.S. 596 (1982).

155. A compelling governmental interest has been defined by the Supreme Court as the "highest form of interest." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1978). This is a difficult test to meet. For example, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court held that the state interest of protecting the privacy right of a rape victim was insufficient to prohibit a newspaper from publishing the rape victim's name. *Id.* at 497.

156. A measure is narrowly tailored when there exists no less drastic means to achieve the intended purpose. The Supreme Court in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), held a mandatory closure order overbroad, and instead required the trial court to use a case-by-case approach. *Id.* at 609. Such an approach, the Court reasoned, ensures that the constitutional right of the press and the public will not be restricted except where absolutely necessary to protect the state's interest. *Id.* Such an approach necessarily gives the press an opportunity to be heard. *Id.* at 609 n.25.

157. *Id.* at 607. In *Globe*, the Court found a Massachusetts statute violated the first amendment. The statute required trial judges, at trials for specified sexual offenses involving victims under the age of 18, to exclude the press and the public from the courtroom during testimony of that victim. The Court held the "flat ban" provisions of the statute unconstitutional and instead required a "case-by-case" analysis. *Id.* at 610-11.

158. 464 U.S. 501 (1984). This case, referred to as *Press-Enterprise I*, must be distinguished from *Press-Enterprise v. Superior Court*, 106 S. Ct. 2735 (1986), referred to as *Press-Enterprise II*.

159. *Id.* In *Press-Enterprise I*, the trial judge was reversed, by writ of mandamus, in his

Despite the difficult constitutional questions involved, these cases illustrate that the Supreme Court repeatedly has emphasized the importance of avoiding secrecy in judicial proceedings. Closure orders are looked upon with extreme disfavor and will be strictly scrutinized.¹⁶⁰ Mandatory closure orders are avoided.¹⁶¹ Accordingly, rules threatening contempt for interviewing¹⁶² grand jurors are in conflict with the trend of Supreme Court cases stressing the necessity of including the press in the judicial process.¹⁶³ This trend should be carried to its logical conclusion by allowing the media free access to grand jurors after the jurors have been discharged from their judicial duties.

IV. STRIKING A BALANCE

A. *Extent of Grand Jury Secrecy Unclear*

Not everything relating to a grand jury proceeding falls within the rule of secrecy. Grand jury secrecy is not absolute, but rather Rule 6(e) of the Federal Rules of Criminal Procedure has built-in exceptions that lift the veil of secrecy.¹⁶⁴ These exceptions add to the confusion of determining what aspects of grand jury proceedings may be properly disclosed. For example, the Supreme Court has said that after the grand jury's functions are completed, disclosure of grand jury testimony is "wholly proper where the ends of justice require it."¹⁶⁵ The Court's opinion, however, fails to define when the ends of justice require disclosure.

Rule 6(e) also lacks sufficient specificity, extending the policy of secrecy only to "matters occurring before the grand jury."¹⁶⁶ If the disclosure

attempt to close the voir dire proceedings in a rape and murder trial, and to prohibit the release of a transcript of the proceedings. *Press-Enterprise I*, 464 U.S. at 505.

160. See *supra* note 140.

161. *Globe*, 457 U.S. at 608.

162. The typical interview would involve one or more media representatives asking a juror what occurred during the grand jury proceedings. The likely focus of these questions would be on who the target of the investigation was, what evidence was presented against this person, whether the grand jury returned an indictment, and how the grand jurors voted. Obviously, the jurors could refuse to answer some or all of the questions.

163. As noted earlier, the holdings in these cases are based in part on the historical openness of judicial proceedings. See related discussion *supra* note 151.

164. *In re Grand Jury Matter*, 682 F.2d 61, 63 (3d Cir. 1982). See *infra* notes 166-76 and accompanying text.

165. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940). Obviously, the *Socony-Vacuum* case is dated. The case, however, remains good law, particularly because the oath regarding grand jury secrecy has changed so little over the years. See *supra* note 1.

166. FED. R. CRIM. P. 6(e)(2). This rule expressly provides that disclosures otherwise prohibited of matters occurring before the grand jury, may be made to: an attorney for the government for use in the performance of such attorney's duty; or such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such

of a particular item would not reveal "matters occurring before the grand jury," Rule 6(e) does not apply, and thus disclosure is not in any way restricted by the principles of grand jury secrecy.¹⁶⁷ Evidence obtained independently of the grand jury does not ordinarily constitute a "matter occurring before the grand jury" even if the same witness or similar evidence has been or will be presented to the grand jury.¹⁶⁸ The test used in determining whether documents are included within the reach of the secrecy provisions is whether the documents tend to reveal what transpired before the grand jury.¹⁶⁹

In addition, it is now settled law that Rule 6 of the Federal Rules of Criminal Procedure does not prevent disclosures by a grand jury witness of what transpired in the grand jury room during the witness' presence.¹⁷⁰ Rule 6(e)(2)¹⁷¹ does not expressly impose a secrecy obligation on grand jury witnesses.¹⁷² Thus, a witness who has testified before a federal grand jury may subsequently discuss his or her testimony with others, including the media. It is less clear whether a witness is entitled to a transcript of his or her own testimony as a matter of right, absent a showing of need, but the majority of courts prohibit such disclosure as unnecessary.¹⁷³

Under appropriate conditions, the secrecy requirement also may be re-

attorney's duty to enforce federal criminal law. Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made: when so directed by a court preliminarily to or in connection with a judicial proceeding; when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; when the disclosure is made by an attorney for the government to another federal grand jury; or when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such a manner, at such time, and under such conditions as the court may direct.

167. BEALE & BRYSON, *supra* note 1, § 7:06, at 26.

168. *In re* Grand Jury Matter, 682 F.2d 61, 63 (3d Cir. 1982).

169. *United States v. Armco Steel Co.*, 458 F. Supp. 784, 790 (W.D. Mo. 1978).

170. *In re* Grand Jury Investigation, 610 F.2d 202, 217 (5th Cir. 1980).

171. FED. R. CRIM. P. 6(e)(2). This provision deals with the general rule of secrecy. It states in relevant part:

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 other 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.

Id.

172. M. David, A. Lengyel, C. Manuelian & P. Sutko, *The Federal Grand Jury: Practice & Procedure*, 13 U. TOL. L. REV. 1, 13 (1981).

173. See *Bast v. United States*, 542 F.2d 893 (4th Cir. 1976); *In re Alvarez*, 351 F. Supp. 1089 (S.D. Cal. 1972); but see *In re Russo*, 53 F.R.D. 564 (C.D. Cal. 1971).

laxed to allow a party who was not a witness access to a transcript of a prior grand jury proceeding.¹⁷⁴ The party seeking disclosure must satisfy three requirements.¹⁷⁵ First, the party seeking disclosure must show that the material sought is needed to avoid a possible injustice in another judicial proceeding. Second, the party must show that the need to disclose the materials is greater than the need for continued secrecy. Third, the party must show that the request is structured to cover only necessary material. When a party meets these three requirements, secrecy may be relaxed and access to grand jury transcripts may be granted.¹⁷⁶

Whether the exceptions to grand jury secrecy encompass the right to interview jurors after completion of proceedings in a particular case remains unsettled. Some cases have held that secrecy is absolute and forever binding.¹⁷⁷ Other cases have followed the trend of relaxed secrecy and held that disclosure may be proper under particular circumstances, such as dis-

174. A typical example of this situation is a person who is indicted by a grand jury, but did not appear before it. This person may attempt to obtain a copy of the grand jury transcript to try to quash the indictment, to bring about inconsistencies in testimony, or to otherwise aid in his or her defense.

175. *In re Grand Jury Matter*, 682 F.2d 61, 63-64 (3d Cir. 1982)(citing *Douglas Oil Co. v. Petro Stops Northwest*, 441 U.S. 211, 222 (1979)).

176. *Id.* Cases emphasizing this three-part test generally do not involve the press. For example, *In re Grand Jury Matter* involved a request by a state district attorney for disclosure of grand jury materials.

177. In *United States v. American Medical Ass'n*, 26 F. Supp. 429 (D.D.C. 1939), the court held that the grand jurors' oath of secrecy is not limited by time or circumstance, "but is a lasting obligation binding all who have served as grand jurors." *Id.* at 430. In *Matter of Grand Jury v. United States*, 239 F.2d 263 (7th Cir. 1956), the court held that secrecy continues even after the grand jury has completed its efforts. *Id.* at 272. In a case involving newspaper reports of grand jury activities, the court held that newspaper disclosures of what occurred before the grand jury, obtained either by direct statement or by collection of circumstantial evidence, is an interference with grand jury proceedings. *United States v. Providence Tribune Co.*, 241 F. 524, 526 (D.R.I. 1917). *Goodman v. United States*, 108 F.2d 516 (9th Cir. 1939), held that a grand juror may be held in contempt for disclosing grand jury proceedings to an outsider. *Id.* at 519.

A recent Indiana Court of Appeals decision is directly on point. In *Indiana v. Heltzel & Kiesling*, 533 N.E.2d 159 (Ind. Ct. App. 1989), the court held an action for indirect contempt could lie against two newspaper reporters who attempted to induce grand jurors to divulge information regarding the proceedings. The court dismissed the reporters' claims of first amendment right of access. *Id.* at 160. The court stated "the questioning of former grand jurors about secret grand jury evidence, deliberations and notes invades the sanctity of the grand jury, offends the administration of justice and impairs the operation of court proceedings." *Id.* The court, however, cited little authority for its position. Furthermore, only the concurring opinion of Chief Justice Ratliff addressed the key issue that the grand jury session involved in the case had been concluded. *Id.* at 162. Attorneys for the reporters filed a petition for rehearing February 13, 1989. This petition was denied March 21 by a 3-0 vote. A petition for transfer to the Indiana Supreme Court was filed April 10. This petition had not been ruled on at the time of publication.

charge of the grand jury.¹⁷⁸ All of the federal cases on point are somewhat dated, and ripe for reevaluation and harmonization. The Supreme Court has never ruled directly on this issue. Other judges, however, have acknowledged that since the adoption of Rule 6(e) of the Federal Rules of Criminal Procedure, cases have had widely differing interpretations of the rule's disclosure provision.¹⁷⁹ The result is a chaotic assortment of case law on the issue and a need for reform so that courts, grand jurors, and the press have a clear understanding of how far grand jury secrecy reaches.

B. *Keeping An Eye On The Media*

The unclarity surrounding grand jury secrecy and its exceptions should not be resolved in favor of giving the media unchecked access to every facet of the judicial arena. Though many members of the press perform their duties professionally, examples abound of over-zealous press members.¹⁸⁰ An unbridled media poses potential problems in this area, as postverdict interrogation of jurors presents a very real threat to the individual juror's right to privacy.¹⁸¹ The Supreme Court, however, has stated that infringement upon first amendment rights is only justified in the most exceptional cases.¹⁸²

It is paramount that courts and jurors not be subjected to a media-imposed carnival atmosphere.¹⁸³ A balance must be struck that would allow the press greater access to grand jury proceedings, while protecting both jurors' privacy and defendants' rights to fair trials. Freedom to report the

178. *Atwell v. United States*, 162 F. 97 (4th Cir. 1908), held that the law does not require a grand juror to keep the evidence adduced in a grand jury room secret after the presentment and indictment has been found and made public, the accused has been apprehended and the grand jury finally discharged. *Id.* at 101. *Metzler v. United States*, 64 F.2d 203 (9th Cir. 1933), held that after the indictment has been found and made public and the defendants apprehended, secrecy loses its importance to the function of the grand jury. *Id.* at 206. And in *Howard v. State*, 60 Ga. App. 229, 4 S.E.2d 418 (1939), the court held that it did not violate grand jury secrecy for the grand jury foreman to give a statement published in all the Atlanta newspapers regarding the nature of the grand jury investigation. *Id.* at 235, 4 S.E.2d at 423.

179. *In re Report of Grand Jury*, 370 F. Supp. 1219 (D.D.C. 1974).

180. *See supra* note 141.

181. Sharp, *supra* note 21, at 381.

182. *Worell Newspapers of Indiana v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984)(discussing several Supreme Court cases with first amendment issues).

183. *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966). At one point in its opinion the Court describes a portion of the first day of the trial, during which the jury viewed the scene of the murder. The opinion states that hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. *Id.* The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour. *Id.*

news must necessarily carry with it a regard and concern for the rights of others whose interests may conflict with those of the press.¹⁸⁴ Assuming other citizens' rights are respected, the responsibility for relaxing the rule of grand jury secrecy and supervising any subsequent inquiry resides in the sound discretion of the court of which the grand jury is a part.¹⁸⁵

V. ALLOWING INTERVIEWS OF GRAND JURORS

Many writers have criticized grand jury secrecy,¹⁸⁶ and there is mounting support for significant changes in traditional grand jury procedure.¹⁸⁷ One change that would safeguard against abuses of grand jury secrecy, protect the public's interest, and secure faith in the judicial system would be to afford the media the opportunity to freely interview grand jurors upon completion of grand jury proceedings.

Using secrecy to prevent the press from interviewing grand jurors has the effect of producing a type of mandatory closure order, an effect the Supreme Court has expressly rejected.¹⁸⁸ A better approach is to use a case-by-case analysis,¹⁸⁹ whereby a judge can scrutinize the competing interests involved and make a more informed and practical ruling than would result under a blanket closure interpretation of grand jury secrecy. A viable solution to the issue of what media contact with grand jurors is permissible can be reached by synthesizing the approach used in *Globe*, supplemented by that used in *Bridges v. State of California*.¹⁹⁰ The by-product of such a synthesis is a four-part test to determine if the media should be denied access to grand jurors.

The proposed four-part test would be supplemented by an important, initial distinction between cases in which an indictment is issued and cases where one is not. Although completion of deliberations and the issuing of an indictment does not always eliminate all need for secrecy,¹⁹¹ common sense dictates that when an indictment is returned the media will learn the facts of the case as the case proceeds through the judicial process. As one court stated, if the citizen is indicted, the reason for secrecy ends; if no indictment is issued, the cloak of secrecy remains in place.¹⁹² Thus, where an

184. W. HACHTEN, *supra* note 115, at 306.

185. *Schmidt v. United States*, 115 F.2d 394, 397 (6th Cir. 1940).

186. *See supra* notes 82-84 and accompanying text.

187. BEALE & BRYSON, *supra* note 1, § 1:09, at 39. *See also supra* notes 95-96 and accompanying text.

188. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

189. In *Globe*, the Court stated, "[a] trial court can determine on a case-by-case basis whether closure is necessary" to protect the interest involved. *Id.* at 608.

190. 314 U.S. 252 (1941).

191. *United States v. Sobotka*, 623 F.2d 764, 767 (2d Cir. 1980).

192. *Application of Jordon*, 439 F. Supp. 199, 202 (S.D.W. Va. 1977).

indictment has been issued, the grand jury has completed its duties as to the particular case, and the defendant has been apprehended, the press should be free to interview the grand jurors. Prohibiting such interviews would at best merely delay the dissemination of information that likely would become public in the near future. At worst, the prohibition could violate important first amendment rights while keeping from the public information citizens have an interest in knowing.

In all other cases where an indictment is issued,¹⁹³ the four-part test should be applied. The first part of the test would require that the prosecutor or other individual seeking closure show a compelling governmental interest¹⁹⁴ that would be protected by preventing grand juror interviews. This burden would be difficult to meet, but should not be insurmountable in instances where closure is truly merited. Under the second part of the test, there would have to be reasonable grounds to fear that serious evil would result if the interviews occurred.¹⁹⁵ The third prong of the test would require that there be reasonable grounds to believe that the danger apprehended is imminent.¹⁹⁶ The fourth part of the test would require that if a compelling enough interest exists so as to restrict the media, this restriction must be narrowly tailored to serve that interest.¹⁹⁷ In cases involving an issued indictment, the presumption should be in favor of allowing press interviews of grand jurors. To overcome this presumption, the prosecutor seeking the restriction must clearly meet each step of the *Globe-Bridges* analysis. When no indictment issues, the tables should be reversed; the presumption should be in favor of prohibiting interviews of grand jurors. In these cases, it should be the press that must show a compelling interest and otherwise satisfy the inverted four-part test in order to gain access to grand jurors. This reversal, which would be nearly impossible for the press to overcome, would preserve the grand jury's historic purpose of protecting the innocent from public ridicule.¹⁹⁸

Since the court of which the grand jury is a part¹⁹⁹ has the responsibil-

193. Two common examples are when the defendant has not yet been apprehended and when the grand jury remains in session to hear information on a case unrelated to the jurors' prior deliberations.

194. *Globe*, 457 U.S. at 607. It should be emphasized that this would be a tough burden to meet. In *Globe*, safeguarding the physical and psychological well-being of minors who testify in sex crimes cases was not found to be a sufficiently compelling interest to justify mandatory closure of portions of the accused's criminal trial. *Id.* at 608. The test for infringing upon the press' first amendment rights and denying access to grand jurors should be no less stringent.

195. *Bridges*, 314 U.S. at 262.

196. *Id.*

197. *Globe*, 457 U.S. at 607.

198. See *supra* text accompanying note 66.

199. The grand jury is an appendage of the court within the jurisdiction it sits, and its jurisdiction is coextensive with the court's and cannot exceed it. Application of United Electrical, Radio and Mach. Workers, 111 F. Supp. 858, 862 (S.D.N.Y. 1953).

ity for relaxing the rule of grand jury secrecy,²⁰⁰ it would be within that court's discretion to determine whether the test has been satisfied. In addition, should the media feel grand juror interviews have been restricted without the four-part test being satisfied, an action for mandamus should lie against the judge issuing the restrictive order.²⁰¹ This check is especially important, since the use of extraordinary writs has been carefully limited in the federal courts.²⁰²

To illustrate the test in a hypothetical situation, assume a grand jury is hearing evidence regarding an alleged illegal drug smuggling operation. If the grand jury returns indictments against those whom the prosecutor hoped to charge, the press should be free to interview the grand jury members upon discharge of the grand jury and apprehension of the suspects. If no indictments are issued, the burden would be on the press to show a compelling interest in disclosure. This requirement, combined with the three remaining hurdles in the *Globe-Bridges* analysis,²⁰³ would almost certainly curtail press access to the grand jurors. Assuming indictments are issued but the suspects have not been apprehended, the burden would be on the prosecutor to satisfy the four-part test in order to prohibit press interviews of grand jurors. To satisfy the test, the prosecution would argue it had a compelling interest in nondisclosure in that serious evil—the fleeing, perhaps out of the country, of the suspects—would result if the interviews were allowed. That is, if the press published the details of the grand jury investigation, the suspects would be alerted and would be able to avoid police capture. Because of the seriousness of the drug charges, the prosecutor could argue that flight of the suspects is imminent. Assuming further the judge deciding whether to prohibit the interviews held against the press, an action for mandamus would lie to challenge the decision.

200. *Schmidt v. U.S.*, 115 F.2d 394, 397 (6th Cir. 1940).

201. A writ of mandamus is an original proceeding, not an appeal, in the appellate court seeking an order directing the trial judge to enter or vacate a particular order. J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 595 (1985). Thus, a writ of mandamus could be used to order a judge to rescind an improperly issued order restricting the media from interviewing grand jurors. Issues of press standing to bring a mandamus action or otherwise challenge a denial of access to grand jury information are not problematic. The press has standing to intervene in actions to which it is otherwise not a party in order to petition for access to court proceedings and records. *Petition of Tribune Co.*, 784 F.2d 1518, 1521 (11th Cir. 1986).

202. J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 595 (1985).

203. Obviously when the burden is on the press to prove that contact with the grand jury should be allowed, the exact terminology of the *Globe-Bridges* analysis must be altered slightly. However, the four-part test remains generally the same. The first part of the test would require that the press show a compelling interest that would be infringed upon by prohibiting interviews with grand jurors. Under the second part of the test, there would have to be reasonable grounds to fear that serious evil would result if the interviews did not occur. The third and fourth prongs of the test would not change.

The benefits of adopting this proposal are numerous. For example, the proposal strengthens press freedoms in the judicial arena, a result in accordance with the spirit of the first amendment. In addition, the proposal expands the watchdog functions of the press to include grand jury operations. This expansion should serve to minimize abuses of the grand jury process, as prosecutors will realize their previously secret activities will be subject to public scrutiny. Just as important, the proposal establishes much-needed guidelines for press-grand jury contact, thus providing citizens who serve as grand jurors a concrete measure of what contacts are permissible. Not only will this avoid jurors' running afoul of the secrecy requirements and thus being subjected to contempt actions, the proposal avoids any incidental chilling effect the secrecy requirements have on the press by replacing ambiguity with a specific, four-part test. The proposal, however, is not without drawbacks. For one thing, it makes public a system that has not been associated with the tradition of openness of other judicial proceedings. In addition, the suggested case-by-case analysis will require careful judicial inspection to determine whether the elements of the *Globe-Bridges* analysis have been satisfied. In the final analysis, however, the proposal adequately balances all interests involved while making significant changes in traditional grand jury procedure demanded by critics of the system.²⁰⁴

VI. CONCLUSION

Allowing the press a limited right to interview grand jurors upon completion of the grand jury proceedings is a proper and needed reform of the grand jury system. Interpreting grand jury secrecy as an absolute bar to post-proceeding interviews may infringe upon first amendment rights. The first amendment zealously protects important journalistic freedoms,²⁰⁵ and one of the most important of these freedoms is the right to report on the judiciary.

History attests that mankind is prone to abuse power.²⁰⁶ Allowing prosecutors to hide their potential abuse of the grand jury system behind an impenetrable cloak of secrecy only feeds the fires of abuse. By allowing the press some contact with grand jurors, prosecutors will be held more accountable for their sometimes questionable methods used in carrying out investigations and obtaining indictments.

The free press, enjoying increased acceptance by the judiciary, is vital to a strong democracy.²⁰⁷ Prohibiting reporters from talking with grand ju-

204. See *supra* notes 186-87 and accompanying text.

205. *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

206. H. NELSON, *supra* note 100, at 15.

207. As Justice Brandeis stated in his famous concurrence in *Whitney v. California*, 274 U.S. 357 (1927): "[F]reedom to think as you will and to speak as you think are means indis-

rors upon their discharge is an impermissible restriction in light of the ideals with which the first amendment was conceived. Using the foregoing four-part analysis will not destroy grand jury secrecy. Rather, the proposed test will provide a much-needed check on unbearable abuses in the judicial system. At the same time, the analysis provides a means by which press access can be curtailed, if necessary, to protect compelling governmental interests.

TIM A. BAKER

pensable to the discovery and spread of political truth" *Id.* at 375.