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ADMINISTRATIVE AGENCY ACCESS TO GRAND JURY MATERIAL UNDER AMENDED RULE 6(e)

Amended rule 6(e) of the Federal Rules of Criminal Procedure codifies the practice of allowing administrative agency assistance in grand jury investigations. The amendment seeks to minimize abuse of the grand jury process by establishing procedural safeguards concerning the use of grand jury material in subsequent civil actions. The author examines the preamendment case law under rule 6(e) to determine the effect of the amendment. Finding that the amended version does not address such problems as the scope of the coverage of rule 6(e) or the sub silentio use of grand jury material, the author suggests approaches to these problems consistent with the overall objectives of the amendment.

INTRODUCTION

RULE 6(e) of the Federal Rules of Criminal Procedure,¹ originally promulgated in 1945,² governs access to grand jury material and implements the general policy of grand jury secrecy. In its original version the rule essentially codified existing case law.³ Controversy arose over the practice of allowing administrative agency personnel to assist in grand jury investigations since no specific language in the rule allowed for or regulated this procedure.⁴ The most recent debate has focused on the extent to which

1. The original version of rule 6(e) provided:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the 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. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event that clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Fed. R. Crim. P. 6(e), 18 U.S.C. app. (1970) (superseded 1977); see note 10 and text accompanying notes 5-11 *infra*.

2. See 327 U.S. 825 (1945) (order implementing Federal Rules of Criminal Procedure).

3. *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1229 (D.D.C. 1974).

4. Compare *J.R. Simplot Co. v. United States Dist. Court for the Dist. of Idaho*, Nos. 76-1893, 76-1995 (9th Cir. May 2, 1977) with *Robert Hawthorne, Inc. v. Director of Inter-*

an assisting agency can make use of material to which it was exposed in the course of a grand jury investigation in a subsequent civil proceeding. The issue of subsequent use raises questions not only of the breach of grand jury secrecy by disclosure to an assisting agency, but also of the extent to which the grand jury's function in the criminal justice system may be manipulated for the investigation of civil violations.

In response to conflicting decisions and requests for clarification from the courts,⁵ the Supreme Court proposed an amendment to rule 6(e) on April 26, 1976.⁶ The amendment was to have taken effect on August 1, 1976.⁷ Congress, however, enacted legislation that delayed the effective date of the Supreme Court's amendment until August 1, 1977.⁸ The delay reflected Congress' concern that the provisions allowing administrative agency assistance might lead to abuse of the grand jury's investigatory powers.⁹ Eventually Congress adopted a modification intended to cure some of the confusion caused by the old rule as well as by the proposed amendment.¹⁰ This modification includes provisions which permit agency assistance, apparently at the discretion of the government attorney; require a record of all agency personnel so employed; and impose a contempt sanction for breach of grand jury secrecy.¹¹ This Note compares the standards developed

nal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976), and *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971). See also Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162 (1975).

5. See, e.g., *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1126 n.54 (E.D. Pa. 1976); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 476 (E.D. Pa. 1971).

6. The Supreme Court amendment to rule 6(e) provided:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, "attorneys for the government" includes . . . such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding

COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. Doc. No. 94 - 464, 94th Cong., 2d Sess. 1-2 (proposed amendment to rule 6(e)) (emphasis added to set off proposed addition).

7. *Id.*

8. Act of July 8, 1976, Pub. L. No. 94-349, § 1, 90 Stat. 822.

9. 123 CONG. REC. H3223 (daily ed. Apr. 19, 1977) (remarks of Rep. Mann).

10. S. REP. NO. 95-354, 95th Cong., 1st Sess. 6, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 529-30.

11. As amended, rule 6(e) provides in pertinent part:

(1) General Rule. A grand juror, an interpreter, a stenographer, an operator

under the old rule to govern the assistance of administrative agencies in grand jury proceedings with those likely to develop under the amended rule and identifies problems not addressed by the rule's modification.

I. PREAMENDMENT PRACTICE

The modern grand jury performs a dual role in the criminal justice system: it investigates criminal conduct to bring suspects to trial, and it protects the innocent from unjust accusation.¹² Grand jury secrecy promotes this dual function by permitting control of information apt to prompt the guilty to flee or cause the innocent to be unjustly accused in public, and by encouraging uninfluenced deliberation of criminal charges.¹³ Permitting an administrative

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

(2) Exceptions—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) 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.

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

12. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 394 (1959).

13. The justifications for grand jury secrecy were articulated in *United States v. Rose*, 215 F.2d 617, 628-29 (quoting *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D. Md. 1931));

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information

agency to assist the prosecutor involves disclosure of material under consideration by the grand jury to agency personnel and thus necessitates some compromise of the secrecy policy. Furthermore, allowing agency access to the grand jury proceedings raises the possibility that the agency will exert influence to turn the grand jury's investigative powers to uncovering material relevant to civil violations. The cases decided under old rule 6(e) and the legislative history of the amended rule demonstrate a continuing effort to balance the legitimate needs of law enforcement and the protective function of the grand jury in determining the restrictions to be placed upon administrative agency access.

A. *The Validity of Agency Assistance*

Superseded rule 6(e) provided that disclosure of grand jury materials be made only to "attorneys for the government for their use in the performance of their duties."¹⁴ "Attorneys for the government" are defined in the criminal rules as "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney"¹⁵ Despite this restrictive language, the courts generally permitted federal administrative agencies to provide technical assistance to United States attorneys and grand juries in the performance of their duties.¹⁶ Early decisions either tacitly assumed the propriety of administrative agency access to grand jury proceedings or disposed of the issue without extensive analysis.¹⁷

A recent district court opinion,¹⁸ however, has comprehen-

with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

14. Fed. R. Crim. P. 6(e), 18 U.S.C. app. (1970) (superseded 1977).

15. FED. R. CRIM. P. 54(c).

16. See *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965) (disclosure to Special Counsel and to Attorney General and the agents of the FBI who were working on the case); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1123 (E.D. Pa. 1976); *In re July 1973 Grand Jury*, 374 F. Supp. 1334, 1337 (N.D. Ill. 1973); *In re William C. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 467 (E.D. Pa. 1971); *United States v. Anzelmo*, 319 F. Supp. 1106, 1116 (E.D. La. 1970) (disclosure to attorney and accountant of SEC); *United States v. Zirpolo*, 288 F. Supp. 993 (D.N.J. 1968) (disclosure to FBI agents); *United States v. Culber*, 224 F. Supp. 419 (D. Md. 1963) (disclosure to postal inspectors). But see *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963); *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956); *Application of Cal.*, 195 F. Supp. 37 (E.D. Pa. 1961); *In re Grand Jury Proceedings*, 29 F.R.D. 151 (E.D. Pa. 1961).

17. *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956); *Application of Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956).

18. *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976).

sively reviewed the case law and commentary under the old rule and its uncodified antecedents. In *Robert Hawthorne, Inc. v. Director of Internal Revenue*, the corporate petitioner was the target of a grand jury investigating possible violations of a number of federal statutes, including mail fraud and income tax violations.¹⁹ The corporation sought to enjoin the disclosure of subpoenaed material to agents of the Internal Revenue Service.²⁰ In denying the petitioner's motion, the court recognized the conflict between the practical administration of criminal law enforcement and the desire to maintain strict grand jury secrecy.²¹ Judge Becker observed in the course of his opinion that practical considerations often compel the assistance of administrative agency personnel during grand jury investigations. He noted that in complex investigations involving, for example, securities or tax fraud, documents received via a grand jury subpoena "are not generally of substantial probative value per se,"²² and "[t]o simply deposit the material in the grand jury room for 23 lay persons to inspect would be unproductive if not chaotic . . ."²³ The material must be examined and analyzed by experts for meaningful evidence prior to its submission to the grand jury. Yet, as the court recognized:

The United States Attorney's office does not presently employ investigators, accountants, auditors or persons trained in the examination and analysis of banking, corporate, business or financial records. The attorneys on the staff of the United States Attorney's office do not generally have the time, training or expertise necessary to conduct detailed and technical document examination for investigatory purposes.²⁴

Consequently, personnel employed by administrative agencies possessing the requisite resources, experience, and expertise could better perform this function.²⁵

Against these considerations the court weighed several policy factors. Because of its role in uncovering crime and bringing suspects to trial, the grand jury possesses extraordinary investigatory powers—far beyond those of an administrative agency.²⁶ Since

19. *Id.* at 1102–03.

20. *Id.* at 1103.

21. *Id.* at 1104.

22. *Id.* at 1106.

23. *Id.* at 1118.

24. *Id.* at 1107 n.11.

25. *Id.* at 1106–07.

26. For a comparison of the powers of the grand jury and administrative agencies, see Note, *supra* note 4, at 175–83.

agencies generally do not act under direct judicial supervision and most often function in an ongoing capacity without vindication at trial, their investigatory and subpoena powers are more limited.²⁷ The *Hawthorne* court was concerned with the potential for abuse since an administrative agency assisting a grand jury would possibly be exposed to material valuable to it in civil proceedings. The court noted that:

Congress has chosen not to give the agencies powers comparable to those of the grand jury, but rather has fashioned statutes providing protections for citizens under administrative investigation. That policy is subverted when the agencies have easy access to kinds of information obtainable only by the grand jury's extraordinary powers.

. . . [R]estrictions on agency investigation are fundamental to our liberties The agencies are denied unrestrained inquisitorial powers comparable to the grand jury's because that kind of power should not be vested in the executive branch.²⁸

Despite these reservations, the court followed what it regarded as sound precedent and held that administrative agency assistance did not violate grand jury secrecy.²⁹ Underlying the *Hawthorne* decision were the assumptions that agency access would be limited to providing technical assistance, and that other procedural safeguards could be developed to avoid subversion of the grand jury by civil investigations.³⁰ This approach—allowing agency access but seeking to protect against abuse through procedural mechanisms—appeared to be preferred by the courts.³¹ Exactly what procedural controls and safeguards should be employed, however, was open to considerable dispute.

B. *Procedural Prerequisites and Controls*

Since the text of the original rule 6(e) did not specifically allow for administrative agency assistance in the first instance, there were no provisions establishing controls on the assisting agency's use of the material to which it was exposed. As the courts developed the rule allowing agency access, they also developed a variety of procedural controls. Of particular concern to the courts

27. *Id.* at 179–80.

28. *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1124 (E.D. Pa. 1976), (quoting Note, *supra* note 4, at 178).

29. 406 F. Supp. at 1123.

30. *See id.* at 1125 n.50.

31. *See, e.g., J.R. Simplot Co. v. United States Dist. Court for the Dist. of Idaho*, Nos. 76–1893, 76–1995, slip op. at 890–91 (9th Cir. May 2, 1977); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971).

were the type of hearing required prior to obtaining agency assistance, control over the grand jury material during the pendency of the investigation, and collateral use of the material by the administrative agency in civil proceedings. In developing the various procedural constraints, the courts again balanced practical investigatory considerations against the need to ensure the confidentiality of grand jury activities. The result inevitably reflected the individual court's tendency to emphasize the grand jury's role either as an investigatory body or as a protector of individuals against capricious prosecution.

1. *Obtaining Court Approval for Agency Assistance*

The first question in this area was whether a formal rule 6(e) order was necessary to obtain agency assistance. In many cases where agency access had been contested, this had not been a major issue.³² These cases frequently involved IRS assistance,³³ and, as a matter of internal policy, the Service routinely applied for formal rule 6(e) orders.³⁴ Whether a 6(e) order was actually necessary hinged on an ad hoc evaluation based on the anticipated substantiality and duration of the proposed technical assistance.³⁵ In *Hawthorne*, Judge Becker suggested that an order would be appropriate if the agency in question were outside the Justice Department,³⁶ if the requested assistance were to be of a continuing nature, or if the agency had a regulatory or oversight responsibility.

32. Under superseded rule 6(e) it was much more apparent that an order was contemplated under the rule's second sentence, involving persons *other than* attorneys for the government ("Otherwise [a participant in grand jury proceedings] may disclose . . . only when so directed by the court . . .," Fed R. Crim. P. 6(e), 18 U.S.C. app. (1970) (superseded 1977)), than it was under the rule's first sentence ("Disclosure . . . may be made to attorneys for the government . . .," *id.*). Nevertheless, the IRS applied for such orders as a matter of course. See 5 INTERNAL REVENUE MANUAL [CCH], pt. 9267(2) (1977). This apparently provided the overseeing court an opportunity to control the flow of grand jury materials during the investigation. See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1112-14 (E.D. Pa. 1976).

33. See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1126 (E.D. Pa. 1976) ("The classical case for the application of 6(e) orders is the I.R.S. or S.E.C. case . . .").

34. 5 INTERNAL REVENUE MANUAL [CCH], pt. 9267(2) (1977). The IRS is currently reexamining its grand jury procedures. See *id.* at pt. 9267(1).

35. 406 F. Supp. at 1127.

36. Movement of grand jury materials within the Justice Department has generally been accepted as falling within the rule 6(e) attorney-for-the-government exception. See *id.* at 1126-27 & n.56. Cf. *J. R. Simplot Co. v. United States Dist. Court for the Dist. of Idaho*, Nos. 76-1893, 76-1995 slip op. at 889-90 (9th Cir. May 2, 1977) ("absent an explanation for the failure to use qualified personnel within the Justice Department, the Government cannot carry its burden of showing that outside personnel are necessary.").

ity with respect to the activities under grand jury investigation. Generally, then, *Hawthorne* was not concerned with the routine aid of the FBI or with limited exposure of grand jury material to essentially disinterested government experts.³⁷

The main problem with this approach in deciding whether a formal 6(e) order was required was its failure to provide a clear guideline for the government attorney. Judge Becker, writing in *Hawthorne*, thought that an order was required when IRS or SEC assistance was contemplated,³⁸ but there was virtually no guidance for other situations. The safest course for assisting agencies to follow was to apply for an order in every case to protect themselves from claims of grand jury abuse. Such an eventuality would have a beneficial prophylactic effect. The reason given in *Hawthorne* for not requiring a formal order in all cases was that such an approach would inflict an enormous administrative burden on the United States attorney and the courts.³⁹ Yet the necessity of making an ad hoc determination as to whether a formal order was required in every case in which agency assistance was contemplated would itself constitute a heavy administrative burden.

If a formal order were required, the courts still had to determine the nature of the hearing. Most courts required only an ex parte hearing and a general showing of need for the administrative agency assistance without articulating a rationale for this procedure.⁴⁰ On the other hand, in *J.R. Simplot Co. v. United States District Court for the District of Idaho*,⁴¹ the court held that an adversary hearing and a showing of particular need for each IRS agent whose assistance was requested were required under rule 6(e). *Simplot* involved a grand jury inquiry initiated only after the IRS had been investigating the civil tax liability of the petitioner for two years.⁴² The court concluded that granting the IRS unrestricted access to the grand jury investigation under such circumstances would raise "serious due process problems,"⁴³ allowing the IRS such an unrestrained head start in civil litigation against the target of a grand jury investigation would give rise to a

37. 406 F. Supp. at 1126.

38. *Id.*

39. *Id.* at 1127.

40. *Id.* at 1107-08.

41. Nos. 76-1893, 76-1995 (9th Cir. May 2, 1977).

42. *Id.* slip op. at 885.

43. *Id.* at 889.

“serious inequity” because the target is not entitled to any information concerning the charges against him until indictment.⁴⁴ *Simplot*, however, ignored a fundamental problem with such an adversary approach: it would require the government to disclose the focus of the grand jury inquiry to the target of the investigation. This alone would frustrate the ends served by grand jury secrecy⁴⁵ and hinder the efficient and effective prosecution of crime.⁴⁶

2. *The Aegis Requirement*

Once agency access had been granted for the purposes of rendering technical assistance, some courts attached a requirement that the material remain under the aegis of the United States attorney during the pendency of the investigation.⁴⁷ This requirement included a variety of administrative controls upon agency access. The procedures suggested by the *Hawthorne* court included the maintenance of a detailed rule 6(e) docket by the government attorney showing the substance of the investigation, the identities of all grand jury targets and of all agency personnel involved with grand jury materials, and a running inventory reflecting the circulation of the material during the investigation.⁴⁸ The primary rationale underlying the aegis requirement was that it impressed upon the agency the limited nature of its access, thus reducing the likelihood of improper use of grand jury material.⁴⁹ Additionally, the records would provide a basis for adjudicating subsequent charges of improper civil use.⁵⁰

These procedures could require substantial administrative effort. Again, however, the *Hawthorne* court engaged in a balanc-

44. *Id.* (citing 8 MOORE'S FEDERAL PRACTICE ¶ 16.05[2] (2d ed. 1976)).

45. *See* note 13 *supra*.

46. It should also be noted that *ex parte* proceedings that affect individual rights are not uncommon in criminal procedure. The granting of search warrants is an *ex parte* procedure, *see* FED. R. CRIM. P. 41, as is the authorization of wiretaps, 18 U.S.C. § 2518(3) (1976).

47. *See* *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1120 (E.D. Pa. 1976); *In re July 1973 Grand Jury*, 374 F. Supp. 1334, 1338 (N.D. Ill. 1973); *In re William H. Pfaumer & Sons, Inc.*, 53 F.R.D. 464, 477 (E.D. Pa. 1971).

48. 406 F. Supp. at 1125-27.

49. *Id.* at 1128.

50. *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 5864 Before the House Subcomm. on Criminal Justice, Comm. on the Judiciary*, 95th Cong., 1st Sess. 31 (1977) (statement of Judge Edward R. Becker) [hereinafter cited as *House Hearings*].

ing process.⁵¹ It determined that “[t]he inconvenience . . . of compliance would seem outweighed by the prophylactic effects of these requirements.”⁵² Although the nature and extent of the beneficial effects of the aegis requirement have been the subject of debate,⁵³ the court could, in its discretion, tailor the cautionary requirements to a particular case to reduce any undue administrative burden.

3. *Subsequent Use of Grand Jury Material*

One of the areas of greatest confusion under superseded rule 6(e) was the determination of the standard to be applied in allowing subsequent use of grand jury information in civil litigation by those agencies which assisted the attorney for the government. Even if the grand jury has finished its work by returning an indictment or no bill by the time there is a request for use of its materials in a civil suit, at least one of the objectives of grand jury secrecy remains pertinent: the need to promote “the willingness of witnesses to appear and testify fully in the future,” free from fear of reprisal from parties suspected of crime.⁵⁴ One particularly troublesome development in the regulation of subsequent use under the old rule was the disparate treatment of agencies that had assisted in grand jury investigations and those that had not. When an agency that had assisted in a grand jury investigation later sought to use the grand jury material in civil litigation, it had to meet only a good faith standard. Yet, an agency that had had no connection with the grand jury investigation was required to satisfy a more rigorous “particularized need” test.

a. *Particularized Need.* The particularized need standard emerged as a judicial interpretation of the second sentence of the superseded rule 6(e): “Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding. . . .”⁵⁵ Under this

51. See text accompanying notes 21–31 *supra*.

52. 406 F. Supp. at 1128 (E.D. Pa. 1976).

53. At least one commentator has claimed that the aegis requirement is ineffective. Note, *supra* note 4, at 184–85.

54. *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1079 (2d Cir. 1974).

55. Fed. R. Crim. P. 6(e), 18 U.S.C. app. (1970) (superseded 1977). The terminology “particularized need” was adopted by the Supreme Court in *United States v. Procter & Gamble*, 356 U.S. 677, 683 (1958).

test, the party requesting the grand jury material had to show a specific and compelling need for it that outweighed the policy of secrecy.⁵⁶ Applications for access where the movant was seeking merely to avoid the delay and expense of normal civil discovery procedures have been held invalid.⁵⁷ Ultimately, the standard allowed disclosure as a matter of judicial discretion when the ends of justice so required.⁵⁸

The Supreme Court's clearest articulation of the particularized need test is found in *United States v. Procter & Gamble Co.*⁵⁹ In that case a federal grand jury had investigated possible criminal violations of the antitrust laws but had failed to return an indictment.⁶⁰ Subsequently, the Government brought a civil suit against Procter & Gamble and others to enjoin alleged violations of the Sherman Act.⁶¹ The defendants moved for discovery and production of the grand jury transcript.⁶² The district court⁶³ ruled that "good cause" had been shown for the production of the transcript, ordered it produced, and dismissed the complaint when the Government refused to produce it.⁶⁴ A divided Supreme Court reversed the dismissal.⁶⁵

Justice Douglas' opinion for the majority noted the "long-established policy" of the federal courts to maintain the "indispensable secrecy" of grand jury proceedings.⁶⁶ This secrecy "must

56. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959).

57. *United States v. Procter & Gamble*, 356 U.S. 677, 682 (1958). See also *Corona Constr. Co. v. Ampress Brick Co.*, 376 F. Supp. 598, 603 (N.D. Ill. 1974); *Application of Cal.*, 195 F. Supp. 37, 41 (E.D. Pa. 1961).

58. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1939), a trial judge's ruling allowing the prosecutor to use grand jury testimony to refresh a witness' memory without making the testimony available to the defense was held to be within judicial discretion. *Id.* at 234.

59. 356 U.S. 677 (1958).

60. *Id.* at 678.

61. *Id.*

62. *Id.*

63. *United States v. Procter & Gamble*, 19 F.R.D. 122 (D.N.J. 1956).

64. The trial court's holding was grounded on the "good cause" showing required by superseded Federal Rule of Civil Procedure 34, 28 U.S.C. app. (1954). The equivalent provision is now in civil rule 26, which requires a showing of good cause to justify a protective order limiting discovery. The Supreme Court read the secrecy policy of rule 6(e) into the good cause requirement. See 356 U.S. at 682-83.

65. 356 U.S. 677 (1958).

66. *Id.* at 682. The Court stated that one goal of grand jury secrecy was "to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants The grand jury as a public institution might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *Id.*

not be broken except when there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity."⁶⁷ The Court held that no such showing had been made in the case before it. The "relevancy and usefulness" of the grand jury material in the civil case were clearly established;⁶⁸ that, however, was not enough. "[T]hese showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done."⁶⁹ Thus, in order to obtain the grand jury material for civil use, a "particularized . . . , discrete showing of need is necessary"⁷⁰

The Court in *Procter & Gamble* stated in dictum that the particularized need test might be met if the grand jury material were to be used for impeaching a witness, refreshing his recollection, or testing his credibility.⁷¹ The cases demonstrate that a clear need had to be shown for specific items of otherwise unavailable information. A comparison of *In re Special 1952 Grand Jury*⁷² and *In re Grand Jury Investigation*⁷³ illustrate this point. In both cases proponents sought the grand jury testimony of witnesses who failed to recall pertinent information during the taking of deposi-

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 683. It appears that the government attorneys had made use of the grand jury transcript to prepare the civil case for trial. *Id.* at 678. The Court stated that if the prosecution had been "using criminal procedures to elicit evidence in a civil case . . . it would [have] flout[ed] the policy of the law." *Id.* at 683. The Court's concern, however, was not rooted in a fear that the grand jury's powers would be used as an improper tool for civil discovery. *See, e.g.*, Note, *supra* note 4. Rather, the policy at stake was deemed to be that of the Sherman Act to ensure that discovery proceedings in civil antitrust cases would not be cloaked in secrecy. 356 U.S. at 683 (quoting 15 U.S.C. § 30 (1976): "[T]he taking of depositions . . . shall be open to the public. . . ."). In any event, the Court concluded that "[t]here is no finding that the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach The fact that [the] criminal case failed does not mean that the evidence obtained could not be used in a civil case." 356 U.S. at 683-84. In *United States v. Pennsalt Chems. Corp.*, 260 F. Supp. 171, 175 (E.D. Pa. 1966), the Antitrust Division submitted affidavits stating that after the *Procter & Gamble* decision it "abandoned the practice" of utilizing the grand jury as a means of civil discovery.

Although *Procter & Gamble* involved a defendant's request for grand jury material, the particularized need test is equally applicable when a plaintiff seeks the material in a civil action commenced after the criminal investigation. *See Atlantic City Elec. Co. v. A.B. Chance Co.*, 313 F.2d 431 (2d Cir. 1963); *In re Grand Jury Investigation*, 414 F. Supp. 74 (S.D.N.Y. 1976).

71. 356 U.S. 677, 683 (1958) (dictum).

72. 22 F.R.D. 102 (E.D. Pa. 1958).

73. 414 F. Supp. 74 (S.D.N.Y. 1976).

tions.⁷⁴ In the former case, the corporate defendant was able to show that the witness, the plaintiff, could not even remember the year of his grand jury testimony.⁷⁵ By persuading the court that there were reasonable grounds to believe the material would be pertinent to developing a defense, the corporate defendant was permitted to use the grand jury material in the civil suit.⁷⁶ In *In re Grand Jury Investigation*, however, the SEC failed to show a particularized need for a witness' grand jury testimony;⁷⁷ the court was particularly impressed with the availability of other testimony of the witness even prior to his grand jury appearance and thus denied the SEC access.⁷⁸

The secrecy policy and the showing of particularized need for civil use of grand jury material required under rule 6(e) applied only to "matters occurring before the grand jury."⁷⁹ Grand jury testimony clearly fell within this category,⁸⁰ but documentary material—often crucial in complex tax or securities litigation—presented further difficulties. Judicial interpretations of what constituted such "matters" for rule 6(e) purposes varied considerably. One line of authority adopted a restrictive approach, maintaining that the "[s]ecrecy of Grand Jury proceedings could not be violated either directly through inspection of the Grand Jury minutes . . . or indirectly by disclosure of the documentary evidence presented to it."⁸¹ Other courts held that rule 6(e) was intended to protect against disclosures of what actually took place during the grand jury proceedings, and when a particular document was sought "for its intrinsic value in furtherance of a lawful investigation . . . ,"⁸² it did not involve a matter occurring before the grand jury.⁸³

74. *Id.* at 77; 22 F.R.D. at 103, 108.

75. 22 F.R.D. at 104.

76. *Id.*

77. 414 F. Supp. at 77.

78. *Id.*

79. Fed. R. Crim. P. 6(e), 18 U.S.C. app. (1970) (superseded 1977).

80. *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) ("Rule 6(e) . . . is intended only to protect against disclosure of what is said or what takes place in the grand jury room.")

81. *United States v. Stein*, 18 F.R.D. 17, 19 (S.D.N.Y. 1955) (citation omitted). *See also Application of Cal.*, 195 F. Supp. 37 (E.D. Pa. 1961).

82. *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) (ICC granted access to documents adduced before grand jury for Commission's use in administrative investigation).

83. *Id.* at 53. *Compare Illinois v. Sarbaugh*, 552 F.2d 768, 771-72 & n.2 (7th Cir. 1977) (by implication) (assistant to attorney for the government ordered by trial court to return documents to defendant, the original owner, for civil discovery) *with United States*

In *Davis v. Romney*,⁸⁴ the court attempted to reconcile these conflicting interpretations. The *Davis* court observed that in the restrictive cases the movants had sought, for example, "all books, pamphlets, documents, and papers presented to the Grand Jury,"⁸⁵ or "a list of documents . . . to be inspected by the Grand Jury."⁸⁶ In the *Davis* court's view, such general requests, framed around the grand jury's own selection of materials, appeared to be an attempt to short-circuit normal discovery procedures to uncover the course of the grand jury investigation.⁸⁷ In *Davis*, on the other hand, specific documents were requested without reference to their presentation to the grand jury,⁸⁸ that the grand jury then happened to have the requested materials in its possession was merely incidental. Since there was no effort to discover exactly what papers the grand jury had, *Davis* allowed access on the grounds that the requested documents were not "matters occurring before the grand jury" and thus were beyond the coverage of rule 6(e). The *Davis* court's conclusion should not be underestimated. If documents are not considered to be matters occurring before a grand jury, the government would be allowed virtually unrestricted access to the evidence, subject only to a showing of good faith.

b. *Good Faith Rule*. As discussed above, an administrative agency which had not assisted in the grand jury investigation had to meet a "particularized need" standard to gain access to the material. If an agency had rendered such assistance, however, the courts typically would permit the agency to make use of any grand

v. Saks, 426 F. Supp. 812, 814 (S.D.N.Y. 1976) (FTC granted access to documents subpoenaed in criminal investigation, the court noting that without grand jury minutes, the documents alone would not reveal content of grand jury deliberations). *In re Grand Jury Investigation (General Motors Corp.)*, 210 F. Supp. 904, 905 (S.D.N.Y. 1962), distinguished *Interstate Dress Carriers* on the ground that the latter decision was based on the ICC's independent statutory power to inspect the appellant's records. This factor would be present in nearly all attempts at access by administrative agencies. See, e.g., I.R.C. § 7602 (IRS investigative authority); 15 U.S.C. § 77s(b) (1976) (SEC investigative authority). More recent cases do not subscribe to this theory. See, e.g., *Capitol Indem. Corp. v. First Minn. Constr. Co.*, 405 F. Supp. 929, 930-31 (D. Mass. 1975) (access given to a private surety company which clearly had no statutory inspection or summons power).

84. 55 F.R.D. 337, 342 (E.D. Pa. 1972).

85. *United States v. Stein*, 18 F.R.D. 17, 19 (S.D.N.Y. 1955), quoted in *Davis v. Romney*, 55 F.R.D. 337, 342 (E.D. Pa. 1972).

86. *Application of Cal.*, 195 F. Supp. 37, 40 (E.D. Pa. 1961), quoted in *Davis v. Romney*, 55 F.R.D. 337, 342-43 (E.D. Pa. 1972).

87. 55 F.R.D. at 342.

88. *Id.* at 341.

jury information in subsequent civil litigation. The only constraint placed upon this practice was that the grand jury investigation must have been conducted in good faith by the government.⁸⁹

The good faith test was first articulated in the context of civil use of grand jury material by United States attorneys⁹⁰ and was later carried over to cover assisting government agencies.⁹¹ By applying only a good faith test to the assisting agencies, the courts treated the administrative agency personnel as the equivalent of United States attorneys.⁹² To the extent that a United States attorney is allowed civil use of grand jury information restrained solely by his duty to faithfully execute his office,⁹³ the good faith standard is arguably appropriate for agency personnel. It seems doubtful that United States attorneys and their assistants are significantly more ethical or less subject to executive pressures than are employees of the IRS or SEC.⁹⁴ A more concrete justification for limiting the application of the good faith standard to United States attorneys, however, lies in the judicial supervision of their activities, a level of supervision significantly greater than that exercised over administrative agencies and their personnel.⁹⁵ Thus,

89. Compare *In re Grand Jury Investigation*, 414 F. Supp. 74 (S.D.N.Y. 1976) with *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 239 F.2d 263 (E.D. Pa. 1976); *April 1956 Term Grand Jury v. United States*, 406 F. Supp. 1098 (7th Cir. 1956); and *In re July 1973 Grand Jury*, 374 F. Supp. 1334 (N.D. Ill. 1973).

90. See *United States v. Procter & Gamble*, 356 U.S. 677, 684 (1958); *United States v. General Elec. Co.*, 209 F. Supp. 197, 202 (E.D. Pa. 1962).

91. *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971).

92. Judge Becker, the presiding judge in both *Hawthorne* and *Pflaumer*, suggested that the practicalities of agency assistance compel identical treatment of United States attorneys and agency personnel:

[T]o hold: (1) that agents of the IRS may use the documents and records to assist the United States Attorney with respect to criminal matters; and (2) that records and documents may be used for any criminal or civil violations that appear [citation omitted], but then to say: (3) that the documents and records, when they are being processed through the agency itself and are beyond the immediate control of the United States Attorney lose their viability, seems to us to be questionable.

Id. at 476.

93. See *United States v. Doe*, 341 F. Supp. 1350, 1352 (S.D.N.Y. 1972).

94. One commentator has argued that administrative agencies should be denied access to grand jury materials because of the potentiality of executive abuse. Note, *supra* note 4, at 179. That writer found the various abuses of administrative agencies during the Nixon administration particularly telling, citing as examples the IRS's release of confidential information to the White House and special tax investigations of political enemies. *Id.* It was suggested that by comparison, the United States Attorney is more independent of the executive than administrative agencies and, therefore, could act with greater integrity. *Id.* The validity of this argument is suspect, however, given the recent actions of the Carter administration in dismissing U.S. Attorney Marston. See generally Jenkins, *The Martyrdom of Merit*, STUDENT LAWYER at 14 (April 1978).

95. Note, *supra* note 4, at 179.

it does not appear that all of the factors warranting the application of the good faith rule to United States attorneys are present when an assisting agency seeks access to grand jury material for a subsequent civil suit.

The consequence of applying the good faith test to administrative agencies is that it places an almost insuperable barrier before any party seeking a protective order or suppression of evidence in subsequent civil litigation. *United States v. Doe*⁹⁶ was one of the rare cases in which a court has found abuse of the grand jury. In that case the Government expressly admitted its intention to utilize the grand jury process to determine civil tax liability.⁹⁷ Even when the circumstances surrounding a grand jury investigation strongly indicate the deliberate misuse of the grand jury as a civil discovery mechanism, the courts appear reluctant to find bad faith absent a virtual admission by the government. Consider *April 1956 Term Grand Jury v. United States*,⁹⁸ in which the Government was found to have acted in bad faith. In that case the Treasury Department had initiated an administrative investigation of a corporation.⁹⁹ Departmental subpoenas were issued, but the corporation refused to comply, asserting that the records had repeatedly been made available to the Department.¹⁰⁰ The Department did not attempt to enforce their own administrative subpoenas, but recommended to the Justice Department that a grand jury investigation be instituted. The grand jury was empaneled, and it issued subpoenas essentially duplicating those of the Treasury Department. Meanwhile, eight civil cases were pending against the corporation. The court noted that the grand jury was not instituted until after the breakdown of the civil investigation and found it particularly significant that the Government would not even disclaim the intention to use grand jury information in the civil proceedings. These factors led the court to a finding of bad faith on the part of the Government in its initiation of the grand jury investigation. As a result, the court barred any use in the civil proceedings of the information adduced before the grand jury.¹⁰¹

*In re William H. Pflaumer & Sons, Inc.*¹⁰² involved similar

96. 341 F. Supp. 1350 (S.D.N.Y. 1972).

97. *Id.* at 1350-51.

98. 239 F.2d 263 (7th Cir. 1956).

99. *Id.* at 265.

100. The facts and procedural posture of *April 1956 Term Grand Jury* are reported in 239 F.2d at 265-68.

101. *Id.* at 272.

102. 53 F.R.D. 464 (E.D. Pa. 1971).

facts but reached a different result. Following the petitioner's refusal to comply with an IRS summons, grand jury subpoenas were issued seeking the same records.¹⁰³ The grand jury apparently had been investigating racketeering. Two weeks after the issuance of the subpoenas, however, it began considering possible criminal tax violations. It was contemplated that IRS agents would analyze the subpoenaed records for presentation to the grand jury. Although the Government conceded the possibility that material obtained via the grand jury would be used in civil litigation against the petitioner, the *Pflaumer* court found no bad faith on the part of the government in the conduct of the grand jury investigation. Because a grand jury investigation into other matters was already in process, the court refused to infer that the grand jury had been manipulated to generate evidence for the civil investigation, thereby placing the burden of proving bad faith on the petitioner.¹⁰⁴

As the foregoing suggests, the protection afforded by the good faith rule was practically illusory. An administrative agency could drop its own discovery efforts, permit an ongoing criminal inquiry to subsume its civil investigation, participate in the grand jury proceedings, and freely admit its intention to use grand jury material in civil litigation against the target—all without breaching the good faith rule. In fact, as long as the government neither expressly nor impliedly admitted an intention to develop information for its civil case via the grand jury process, there appeared to be little chance that the court would find bad faith. Moreover, the strong showing demanded of those claiming bad faith¹⁰⁵ rendered proof an impossibility since any evidence of an improper link between the criminal and civil investigations was likely to be in the hands of the government attorneys and agents accused of the impropriety.¹⁰⁶ Thus, because the particularized need test imposed upon uninvolved parties seeking grand jury material was more onerous than the good faith standard, a curious irony arose: grand jury targets were provided with less protection when the potential for abuse was greater.

103. The facts and procedural posture of *In re William H. Pflaumer & Sons, Inc.*, are reported in 53 F.R.D. at 466–67.

104. "A strong showing indeed must be made before a court should interfere with the orderly processes of a grand jury." *Id.* at 477.

105. *See id.*

106. *See House Hearings, supra* note 50, at 158.

c. *Simplot and the Independent Source Doctrine*. In *J.R. Simplot Co. v. United States Court for the District of Idaho*,¹⁰⁷ the Ninth Circuit formulated new rules to regulate agency assistance and subsequent civil use of grand jury material. The lower court had issued an ex parte order under rule 6(e), allowing disclosure of grand jury information to an assisting agency and containing no restrictions on civil use.¹⁰⁸ The appellate court reasoned that allowing such unrestrained agency access would subvert the second sentence of the old rule by permitting disclosure of grand jury material without the requisite showing of need.¹⁰⁹ The court held that in order to obtain the assistance of administrative agency personnel in a grand jury investigation, the government must demonstrate, in an adversary hearing, the necessity for each particular agent's aid, as opposed to showing merely a general need for assistance.¹¹⁰ With respect to subsequent use of the grand jury material by the agency, however, rather than requiring the assisting agency to meet either the particularized need standard or the good faith test, the *Simplot* court established a demanding independent source test:

- (1) on appropriate request, the [agency] must identify the source of its information in a civil case that was preceded by a grand jury investigation in which its personnel were used to assist the prosecutor in presenting a case to the grand jury; and
- (2) upon a motion to suppress in the civil proceeding, the [agency] bears the burden of proving an independent source for the information.¹¹¹

This strict procedure was designed to eliminate certain evils that the court felt resulted from allowing unrestricted agency access. The court maintained that since the sole justification for the grand jury's powers was the importance society has attached to detecting *criminal* activity, the use of grand jury material to establish civil tax liability was "itself an abuse of the grand jury."¹¹² The *Simplot* court feared a "blurring" of the "distinction between criminal and civil investigations" and the possibility that the

107. Nos. 76-1893, 76-1995 (9th Cir. May 2, 1977).

108. *Id.* slip op. at 886.

109. *Id.* at 889.

110. *Id.*

111. *Id.* at 890. *Cf.* *United States v. Wade*, 388 U.S. 218, 241 (1967) (explaining independent source test: "[w]hether, granting establishment of the primary illegality, the evidence to which [the] instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.") (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

112. Nos. 76-1893, 76-1995, slip op. at 888.

grand jury would be diverted from its proper role to matters more of interest to the assisting agency.¹¹³

Although no cases have arisen after *Simplot* in which the independent source test has been applied, some far-reaching implications can be drawn from the imposition of this standard. In complex areas such as tax and securities fraud, investigation is typically commenced by the appropriate agency long before the United States attorney becomes involved.¹¹⁴ During the course of the investigation both civil and criminal violations may appear.¹¹⁵ Under the independent source rule, an administrative agency would probably be forced to develop the civil case as completely as possible through its own investigative processes¹¹⁶ before requesting a grand jury investigation for possible criminal charges. This procedure would likely provide a sufficient basis for proving a source independent of the grand jury investigation in response to a motion to suppress in the civil action.¹¹⁷ Two undesirable results may be suggested. First, such a procedure would delay the expeditious investigation of criminal activity and facilitate the loss, destruction, or concealment of incriminating evidence. Second, it is possible that in the course of the grand jury investigation civil violations would be discovered for the first time, and because in such a case no independent source would exist, the target would escape civil liability.¹¹⁸ Despite its shortcomings, the *Simplot* rule represented an attempt to allow administrative agency assistance, but to negate the potential for abuse of the grand jury process.

113. *Id.*

114. "Federal crimes are 'investigated' by the FBI, the IRS or by Treasury agents and not by the government prosecutors or the citizens who sit on grand juries." S. REP. NO. 95-354, 95th Cong., 1st Sess. 6, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 530.

115. See, e.g., *In re* 1973 Grand Jury, 374 F. Supp. 1334 (N.D. Ill. 1973); *In re* William H. Pfaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971).

116. The primary discovery device of the IRS is its own administrative subpoena issued pursuant to § 7602 of the Internal Revenue Code.

117. The IRS reacted quickly to *Simplot*. Its internal regulations stipulate that:

To prevent doubt about the origins of information available for civil use, information in the possession of the Service prior to the receipt by Service personnel of any grand jury information must be identified by preparing comprehensive records, with appropriate indexes and descriptions, of such information as of the moment preceding such receipt. Thereafter, any related information obtained by the Service totally apart from grand jury information should similarly be recorded and its independent source identified.

5 INTERNAL REVENUE MANUAL [CCH], pt. 9267(2) (1977).

118. The possibility that civil violations would escape notice until a grand jury investigation commences is particularly likely during investigations involving tax fraud or securities violations where detailed auditing is necessary. See, e.g., *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1107-11 (E.D. Pa. 1976).

The drafters sought to resolve the same conflict in amended rule 6(e).

II. PRACTICE UNDER THE AMENDED RULE 6(e)

The amendment eventually enacted by Congress is a modification of the original proposal by the Supreme Court.¹¹⁹ The Supreme Court's proposal would have sanctioned agency assistance by simply expanding the definition of "attorneys for the government" to include "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties."¹²⁰ After three days of hearings,¹²¹ the House rejected the Court's proposed amendment¹²² on the ground that it "would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them."¹²³ The House concluded that any change in the rule should await the planned comprehensive revamping of the grand jury.¹²⁴ The Senate, however, in recognition of the "increasing need on the part of Government attorneys to make use of outside expertise in complex litigation,"¹²⁵ favored the Supreme Court's proposal to allow agencies to assist United States attorneys during grand jury investigations.¹²⁶ The Senate adopted a compromise version which sanctioned agency access but which, unlike the Court's proposal, attempted to clarify the permissible scope of disclosure of grand jury material to agency personnel. The Senate version was ultimately approved as amended rule 6(e).¹²⁷ As modified, rule 6(e) establishes a general rule of secrecy in paragraph (1), and sets

119. See notes 6-11 *supra* and accompanying text.

120. COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. No. 94-464, 94th Cong., 2d Sess. 1 (1976) (proposed Fed. R. Crim. P. 6(e)). Superseded rule 6(e) authorized "disclosure of matters occurring before the grand jury . . . to the attorneys for the government for use in the performance of their duties." Fed. R. Crim. P. 6(e), 18 U.S.C. app. (1970) (superseded 1977).

121. *House Hearings, supra* note 50.

122. H.R. REP. NO. 95-195, 95th Cong., 1st Sess. 4 (1977).

123. *Id.* (footnote omitted).

124. *Id.* at 5.

125. S. REP. NO. 95-354, 95th Cong., 1st Sess. 6, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 529.

126. *Id.*

127. 123 CONG. REC. H7868 (daily ed. July 27, 1977).

forth the exceptions to that rule in paragraph (2).¹²⁸ Among the more significant departures from the original version are subparagraph (A) (ii), granting agency assistance; the last sentence of paragraph (1), providing for contempt of court sanctions if grand jury secrecy is broken; and subparagraph (2) (B), limiting agency use of grand jury material to aiding the government attorney in his duty to enforce federal criminal law and requiring that the names of all agency personnel assisting the grand jury investigation be provided to the district court. The amendment was initially an attempt to more “accurately and fully” articulate the law under rule 6(e).¹²⁹ Since the law under the original rule was confused and marked by contradictory decisions,¹³⁰ Congress was faced with drafting a provision that would strike a balance between the need to promote effective enforcement of the criminal law and the need to prevent the subversion of grand jury investigations to non-criminal purposes.¹³¹

A. *The Validity of Agency Assistance and Procedural Controls*

The amendment ratifies the commonsense approach that prevailed under preamendment practice by permitting employees of federal governmental agencies to assist the prosecutor, subject to certain procedural controls. The drafters understood the practical difficulties of criminal investigations in technical areas: “Often the prosecutors need the assistance of [government] agents in evaluating evidence [I]f . . . investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it.”¹³² The congressional hearings reveal fairly widespread recognition of this legitimate need to have experts analyze evidence in complicated securities or tax cases.¹³³ Prior to the amendment, however, there was no consen-

128. For the text of rule 6(e), see note 11 *supra*.

129. 123 CONG. REC. H7867 (daily ed. July 27, 1977); H.R. REP. NO. 95-195, 95th Cong., 1st Sess. 4-5 (1977).

130. H.R. REP. NO. 95-195, 95th Cong., 1st Sess. 5 (1977); S. REP. NO. 95-354, 95th Cong., 1st Sess. 7, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 530.

131. S. REP. NO. 95-354, 95th Cong., 1st Sess. 7-8, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 531-32.

132. *Id.* at 6, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 530.

133. *House Hearings, supra* note 50, at 21 (statement of Terry P. Segal), 29 (statement of Judge Edward R. Becker), 66 (statement of Acting Deputy Attorney General Richard Thornburgh), 86 (statement of Prof. Wayne LaFave), 111 (statement of David Epstein), 194 (statement of Prof. Leon Friedman). Even the *Simplot* court conceded the legitimacy of administrative agency assistance. *J.R. Simplot Co. v. United States Dist. Court for the Dist. of Idaho*, Nos. 76-1893, 76-1995, slip op. at 886 n.2 (9th Cir. May 2, 1977).

sus as to whether formal judicial approval was necessary before the outside agencies could render assistance.¹³⁴ In this area it was clearly the intent of the drafters to eliminate the controversy engendered by the old rule and to avoid the uncertainty which the Supreme Court's proposal would have generated.¹³⁵

One court had interpreted the original rule as requiring in each case an exhaustive hearing on the propriety of agency assistance.¹³⁶ During the congressional hearings on the amendment it was asserted that requiring a court order every time assistance was sought would result in thousands of applications to the court, imposing a burden on the court system which was not justified by a record showing few abuses.¹³⁷ The language and legislative history of the amended rule indicate that Congress intended to eliminate any requirement for prior judicial authorization of agency assistance. Subparagraph (2)(A)(ii) states that disclosure may be made to "such government personnel as are *deemed necessary by an attorney for the government . . .*" There is no requirement that the government certify to the court that assistance is required. In the absence of such language the opportunity for court intervention in the decision to obtain assistance appears to be foreclosed. Comparison of the language of subparagraph (2)(A)(ii) to that of (2)(C)(i) supports this conclusion: section (2)(A)(ii) stipulates that "such government personnel as are *deemed necessary by an attorney for the government*" are allowed access to grand jury material, while section (2)(C)(i) directs disclosure only "when *so directed by a court.*" Thus, when the drafters desired the courts to determine access to grand jury material, they explicitly provided

134. See text accompanying notes 32-39 *supra*.

135. See S. REP. NO. 95-354, 95th Cong., 1st Sess. 7, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 530. The Court's proposal would have allowed agency assistance, but did not clarify whether the court or the United States attorney should determine the necessity for such assistance. See COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 94-464, 94th Cong., 2d Sess. 1 (1976) (proposed Fed. R. Crim. P. 6(e)). In a discussion of the Supreme Court's proposal, the *Simplot* court noted: "Because of the United States Attorney's involvement in the prosecution of the case, he or she cannot be entrusted with passing on the necessity of assistance." Nos. 76-1893, 76-1995, slip op. at 890 n.15 (citation omitted).

136. *J.R. Simplot Co. v. United States Dist. Court for the Dist. of Idaho*, Nos. 76-1893, 76-1995, slip op. at 889-90 (9th Cir. May 2, 1977) (footnote omitted):

[T]he Government must show the necessity for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise. Moreover, absent an explanation for the failure to use qualified personnel within the Justice Department, the Government cannot carry its burden of showing that outside personnel are necessary.

137. *House Hearings*, *supra* note 50, at 56 (statement of Acting Deputy Attorney General Thornburgh).

for such a process.¹³⁸

The failure to provide clearly for court participation in the determination of the necessity of agency assistance would seem to compel the conclusion that this decision is within the sole discretion of the government attorney. Furthermore, the legislative history indicates that the drafters were specifically concerned with dispelling any suggestion that a showing of need was required to obtain agency assistance.¹³⁹ Thus, the controversy over the type of hearing required prior to allowing agency assistance has been resolved: no such hearing is required at all.

B. *The Aegis Requirement*

As a procedural safeguard, the new rule incorporates an element of the *Hawthorne* court's requirement that the grand jury material remain under the aegis of the United States attorney.¹⁴⁰ This aegis requirement involved detailed recordkeeping in connection with the circulation of the grand jury material to agency personnel.¹⁴¹ Its twin goals were to impress the importance of secrecy upon the administrative agency personnel and to provide a record upon which to act in case a civil litigant later claimed that the government abused the grand jury process.¹⁴² The drafters were impressed by the latter rationale: "In order to facilitate reso-

138. The language of the adopted version should also be compared to that of the Supreme Court's proposal, which allowed disclosure to "other government personnel as is necessary to assist the attorneys for the government in the performance of their duties." COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 94-464, 94th Cong., 2d Sess. 1 (1976) (proposed Fed. R. Crim. P. 6(e)). In the Court's version there is a notable absence of delegated authority to the attorney for the government in the determination of whether assistance is warranted. In addition, subparagraph (2)(B) of the amended rule, providing that "[a]n attorney for the government shall promptly provide the district court . . . with the names of the persons to whom such disclosure has been made," suggests that the court in fact has no knowledge of such disclosure to an assisting agency until so informed by the government.

139. The Senate Judiciary Committee noted with disapproval that the Supreme Court's proposed amendment had been interpreted as requiring a judicial finding of need for agency assistance. S. REP. NO. 95-354, 95th Cong., 1st Sess. 7, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 530 (discussing *J.R. Simplot Co. v. United States Dist. Court for the Dist. of Idaho*, Nos. 76-1893, 76-1995, slip op. at 890 n.15 (9th Cir. May 2, 1977)). The amendment, as adopted, effectively overrules *Simplot* to the extent that the case imposed judicial control over agency assistance.

140. See text accompanying notes 47-53 *supra*.

141. See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1127 (E.D. Pa. 1976).

142. See text accompanying notes 49-50 *supra*.

lution of subsequent claims of abuse,"¹⁴³ the new rule provides that the names of all government personnel assisting the attorney for the government shall be promptly supplied to the district court.¹⁴⁴

This provision should be considered in conjunction with the contempt power provided in subparagraph (1). The contempt power has always been available to the courts to enforce grand jury secrecy. The drafters were aware, however, that it had not been a satisfactory remedy in the past.¹⁴⁵ By making it plain that the court will employ such measures and by mandating a record of the responsible agents' names, the new rule could make the contempt sanction a viable deterrent to breaches of secrecy.

The incorporation of this single facet of the aegis rule does not render inapplicable the other features enunciated in *Hawthorne*. The aegis requirement was rooted in the general supervisory power of the court over the grand jury¹⁴⁶ and is not dependent upon the language of amended rule 6(e). Therefore, the court could in its discretion order any of the remaining restrictions¹⁴⁷ of the aegis rule not incorporated in the amendment.

Although additional elements of the aegis standard may be imposed in this manner, the rule does have some weaknesses. A court can only dictate supervisory rules to an individual grand jury¹⁴⁸ when it empanels a grand jury or when it rules upon a petition to quash a grand jury's subpoena. Consequently, the rulemaking is conducted on a case-by-case basis, resulting in great variance from one court to another and increasing the burden on both the judge and the United States attorney. To obtain any level of consistency in protection, the United States attorney's office would have to adopt some of the remaining provisions of the aegis requirement as an internal policy. Thus, at present it appears that the rule will have only limited impact beyond that significant portion written into rule 6(e).

143. S. REP. NO. 95-354, 95th Cong., 1st Sess. 7, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 531.

144. FED. R. CRIM. P. 6(e)(2)(B).

145. *House Hearings, supra* note 50, at 90-91 (statement of Prof. Wayne LaFave), 158 (statement of Bernard J. Nussbaum).

146. *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1128 (E.D. Pa. 1976).

147. *See id.* at 1127.

148. *Id.* at 1128.

C. *Subsequent Use of Grand Jury Material*

During the debates accompanying the formulation of the new rule, concern was frequently expressed about the possibility of improper civil use of material obtained in the course of a grand jury investigation by assisting agencies.¹⁴⁹ The rule as adopted attempts to allay this concern. Subparagraph (2)(B) provides: "Any person to whom matters are disclosed under subparagraph (A)(ii) [authorizing disclosure to assisting agencies] shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." The drafters regarded this as a "clear prohibition" upon unauthorized use of grand jury material, which was subject to the contempt penalty.¹⁵⁰ Strict confidentiality was contemplated: "A government agent receiving grand jury information from an attorney for the government . . . is not free to share such information within the agency which directly employs him, even though it may be useful and relevant to the mission of that agency."¹⁵¹ Thus, it was envisioned that the agents would become exclusive "employees" of the grand jury.¹⁵²

Read in isolation, the foregoing language of subparagraph (2)(B) would foreclose all subsequent civil use of material obtained by agencies while assisting United States attorneys. However, Congress believed that the presentation of evidence to a grand jury should not forever bar its use in civil litigation. The drafters were aware that the investigation of certain conduct could lead to evidence supporting both criminal and civil liability.¹⁵³ They also presumed that assisting personnel would respect the purpose of the grand jury to investigate solely criminal matters.¹⁵⁴ Thus, the Senate report stated: "There is . . . no intent to preclude the use of grand jury-developed evidence for civil law enforce-

149. *House Hearings, supra* note 50, at 23 (statement of Terry P. Segal), 36-37 (statement of Judge Edward R. Becker), 46-47 (questioning by Rep. Gudger), 86-87 (statement of Prof. Wayne LaFave).

150. S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 531.

151. 123 CONG. REC. H7868 (daily ed. July 27, 1977). Contrast this with the relationship described in *Hawthorne* in which agency personnel were apparently expected to report to their supervisors information uncovered in the criminal investigation. *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1111 (E.D. Pa. 1976).

152. 123 CONG. REC. H7868 (daily ed. July 27, 1977).

153. *See House Hearings, supra* note 50, at 25 (statement of Terry P. Segal); 123 CONG. REC. H7868 (daily ed. July 27, 1977).

154. *See S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 531.

ment purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation."¹⁵⁵ In light of this legislative history, it is reasonable to conclude that the rulemakers intended that an assisting agency would be able to use material to which it was exposed in the course of a grand jury investigation in a subsequent civil suit under the rule set out in subparagraph (2)(C): "Disclosure otherwise prohibited . . . of matters occurring before the grand jury may be made . . . when so directed by a court preliminarily to or in connection with a judicial proceeding" This provision for disclosure only under a court order, identical to the language of the superseded rule,¹⁵⁶ represents a safeguard against abuse of the grand jury and was imposed by Congress to balance the need for agency assistance to grand juries with the potential for abuse inherent in this practice.¹⁵⁷

As to the standard to be applied in determining whether a rule 6(e) order authorizing civil use of grand jury material by an assisting agency should be issued, the language of the old rule was car-

155. *Id.* at 532.

156. *See* note 1 *supra*.

157. Although it is clear that a court order is required before disclosure may be made for subsequent civil use, the amended rule, incorporating verbatim the language of the old rule, does not specify whether the hearing on an application for such an order should be ex parte or adversary. The legislative history on the point is equivocal; it does not appear to have been considered in any depth by the drafters. The Senate report states a preference for ex parte proceedings "so as to preserve, to the maximum extent possible, grand jury secrecy." S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 532. Representative Mann, on the other hand, noted that the rule purposely left open the question whether the application should be made ex parte or with notice to the adversary. 123 CONG. REC. H7867 (daily ed. July 27, 1977).

In *In re* December 1974 Term Grand Jury Investigation, 449 F. Supp. 745 (D. Md. 1978), one of the few cases interpreting the amended rule, the court adopted the Senate report's position. However, in a number of preamendment cases involving rule 6(e) orders the hearing was adversary in nature. *See, e.g.*, *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960); *Application of Cal.*, 195 F. Supp. 37 (E.D. Pa. 1961). In fact, it appears that at least some courts prefer the hearing to be adversary. Such was the case in *In re* Grand Jury Investigation, 414 F. Supp. 74 (S.D.N.Y. 1976), in which the court denied an initial ex parte application by the SEC for disclosure of grand jury material without prejudice to renewal on notice to the civil defendant. Ultimately, the court considered the application upon renewal where the defendant was represented. *Id.* at 75-76. In this context, the preservation of grand jury secrecy, adopted as the rationale for an ex parte hearing in the Senate report and in *In re 1974 Term Grand Jury Investigation*, seems inappropriate. In the typical instance the judge will examine the testimony or other material in camera. The movant and opponent, if any, argue whether there may be other methods of acquiring comparable evidence, and whether it is critical to the case. The material would not be disclosed to either party at this point. And, as in *In re Grand Jury Investigation*, the testimony or other material under consideration will often be that of the civil defendant. Thus, considerations of grand jury secrecy are not as compelling.

ried over verbatim to the amended version. It will be recalled that a dual standard had been developed under the old rule: the requirement of a showing of particularized need by agencies which had not rendered assistance to the grand jury, and an examination of the good faith of the government in initiating the grand jury investigation in those cases in which an agency had been involved in the proceedings.¹⁵⁸ The particularized need test received little comment in the debates.¹⁵⁹ The good faith test was explicated during the hearings¹⁶⁰ but was not met with strong enthusiasm.¹⁶¹ It was deemed ineffective because the proof of bad faith was likely to be in the possession of the government personnel accused of it.¹⁶²

The amended version appears to eliminate the dual standard and to avoid exclusive reliance upon the largely illusory good faith test. Paragraph (B) limits agency access to assisting the attorneys for the government in the enforcement of the federal criminal law. Thus, subsequent use of grand jury material by administrative agencies must be had under paragraph (C)(i).¹⁶³ This section adopts verbatim the exception to grand jury secrecy found in the second sentence of the superseded rule¹⁶⁴ which has been interpreted as requiring a showing of particularized need.¹⁶⁵ The Senate report states that "the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding

158. See text accompanying notes 53-78, 89-107 *supra*.

159. During the House hearings the drafters were presented with a proposal which would have explicitly incorporated the particularized need test into the new rule:

Disclosure of matters occurring before the grand jury . . . may be made to the attorneys for the government for use only in connection with any assistance they render to the grand jury. *To obtain disclosure of grand jury material for use by administrative agencies, the government, at an adversary hearing, must show particularized and compelling need.*

House Hearings, supra note 50, at 28 (statement of Terry P. Segal) (proposed new language in italics). It is unclear from the proposal whether the particularized need standard was meant to apply in the determination of the necessity for agency assistance in the first instance or in the decision to allow subsequent use of grand jury material in civil suits. This proposal was rejected by the drafters.

160. *Id.* at 36.

161. *Id.* at 45 (questioning by Rep. Evans).

162. *Id.* at 158 (statement of Bernard J. Nussbaum).

163. S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 532.

164. Both the superseded and amended version provide for disclosure of "matters occurring before the grand jury . . . when so directed by a court preliminarily to or in connection with a judicial proceeding." See notes 1 & 11 *supra*.

165. See notes 55-78 *supra* and accompanying text.

should be no more restrictive than is the case today under prevailing court decisions."¹⁶⁶ Thus, the amended version of the rule appears to incorporate the particularized need test.

However, in *In re December 1974 Term Grand Jury Investigation*¹⁶⁷ the court arrived at a different conclusion, holding that only a showing of good faith was required upon a request for access to grand jury material.¹⁶⁸ In the course of its decision the court pointed out a latent ambiguity in the legislative history in regard to the standard that must be met prior to disclosure.¹⁶⁹ It noted that the Senate report cited only *Procter & Gamble* and *Hawthorne*¹⁷⁰ in its reference to what type of showing must be made upon request for subsequent use of grand jury material. Although the court recognized that *Hawthorne* required merely a showing of good faith,¹⁷¹ it was unsure whether *Procter & Gamble* utilized a good faith test or a particularized need standard.¹⁷² Confronted with this ambiguity, the court looked elsewhere in the legislative history for guidance. It finally focused upon the legislators' disapproval of *Simplot's* requirement that particularized need be shown for administrative agency assistance, and reasoned that since the amendment was designed to eliminate restrictions on administrative agency access for the purposes of criminal law

166. S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 532.

167. 449 F. Supp. 743 (D. Md. 1978).

168. *Id.* at 751. This case is particularly perplexing in that it did not involve an assisting agency seeking subsequent disclosure of grand jury material for civil purposes, but rather an independent request by the IRS for disclosure of grand jury materials. Thus, the case represents a break with those cases which required parties that had not assisted the grand jury investigation to meet the particularized need standard. Under this approach, rule 6(e)(2)(C)(i) would be read differently when the government rather than third parties, including civilian defendants, requested disclosure. Such a result would render the grand jury almost exclusively a prosecutorial tool of the government, a development at odds with its historic role and rationale for its powers.

169. *Id.* at 748-50.

170. *Id.* at 747 (quoting S. REP. NO. 95-354, 95th Cong., 1st Sess. 8 & n.13, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 532).

171. *Id.* at 749 (quoting *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1119 n.35 (E.D. Pa. 1976)).

172. *Id.* at 748. The court first noted that *Procter & Gamble* stated that "[the] 'indispensable secrecy of grand jury proceedings' . . . must not be broken except where there is a compelling necessity" and "that [this] need . . . must be shown with particularity." *Id.*, (quoting *United States v. Procter & Gamble*, 356 U.S. 677, 682 (1958)). But the court also found indications that *Procter & Gamble* was based upon a good faith test, citing the following language from that case: "[the lower court] also seemed to have been influenced by the fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law." *United States v. Procter & Gamble*, 356 U.S. 677, 683 (1958).

enforcement, it should have the same effect on disclosure for civil law enforcement.¹⁷³

While such an approach is not devoid of merit, it cannot stand against a more comprehensive examination of the legislative history. The House hearings reveal a lack of confidence in the good faith rule as an effective constraint on abuse of the grand jury.¹⁷⁴ Moreover, it is clear that the drafters contemplated a showing of particularized need¹⁷⁵ prior to any subsequent use of grand jury material by the agency. At no point does the legislative history indicate a determination to make administrative agency access to grand jury material for civil law enforcement relatively unrestricted. In fact, an obvious intent was to limit access to grand jury material to *criminal* law enforcement. The proposed amendment imposed no limitation on how the administrative agency could assist the government attorney.¹⁷⁶ Thus, there was concern that the duties of the government attorney referred to in rule 6(e) could be interpreted to encompass activities in both civil and criminal proceedings.¹⁷⁷ The promulgated version carefully stipulates that agency access is limited to assisting "an attorney for the government in the performance of such attorney's duty to enforce Federal *criminal law*."¹⁷⁸ This legislative history undercuts the holding in *In re December 1974 Term Grand Jury Investigation* that the amended rule does not contemplate a showing of particularized need for use of grand jury material in civil proceedings.

173. *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743, 750 (D. Md. 1978).

174. In his questioning of Judge Becker, who articulated the good faith test, Representative Evans asked: "Because the Government proceeds in good faith on what they thought was a criminal matter and it turned out it wasn't and there was no justification, then by your decisions or by the decisions that have been rendered you can make a differentiation between that and a situation in which it was proceeding in bad faith?" *House Hearings*, *supra* note 50, at 45.

175. When questioned by Representative Mann concerning the likelihood that the assisting agency would routinely gain access to grand jury information by making a disclosure request under the second sentence of the original and proposed versions of rule 6(e), Professor LaFave stated:

I suppose that would happen, but I am not sure that the cases have really broadened the right of discovery quite as much as you have suggested under this latter provision.

The cases that I am familiar with generally have required a strong showing by the administrative agency of a need for the material, that there is no way they could acquire comparable evidence that it is critical to their undertaking, and that is going to be used in connection with a judicial proceeding.

House Hearings, *supra* note 50, at 92-93. See also *id.* at 28 (statement of Terry P. Segal).

176. See note 11 *supra*.

177. *House Hearings*, *supra* note 50, at 93-94 (remarks of Rep. Mann).

178. FED. R. CRIM. P. 6(e)(2)(A)(ii) (emphasis added).

Once it is concluded that the drafters contemplated a showing of particularized need to justify subsequent civil use of grand jury material by assisting agencies, the next issue arising under the rule concerns the application of this standard in the context of a request by an administrative agency. Courts have usually invoked the particularized need test when a party in a subsequent civil suit has sought grand jury testimony for relatively narrow evidentiary purposes, such as impeaching a witness or refreshing his memory.¹⁷⁹ Frequently, however, an agency such as the IRS or the SEC will be interested not in testimony, but in documents obtained by the grand jury and still in the custody of the court. While these documents may be sought for collateral purposes such as refreshing memory or testing credibility, more often they will be critical to the merits of the agency's case. The precedents confining subsequent use of grand jury testimony to collateral uses were limited by the constraints of the hearsay rule. However, the applicability of grand jury secrecy and the admissibility of grand jury material as evidence are distinct inquiries.¹⁸⁰ Moreover, grand jury testimony has been used substantively in subsequent proceedings when it has fallen within an exception to the hearsay rule.¹⁸¹ Thus, the fact that the documents involved will be used to prove the merits of the agency's case should not affect the court's analysis of whether particularized need has been demonstrated.

Under *Procter & Gamble*, disclosure of grand jury material for civil use is warranted when the need for it outweighs the countervailing policy of grand jury secrecy.¹⁸² The strength of the secrecy policy in this context should be considered with reference to its justifications.¹⁸³ When physical documents are sought, rather than recorded testimony, there is no need to protect grand jury witnesses from the possibility of bribery or intimidation. More-

179. See Y. KAMISAR, W. LAFAYE, & J. ISRAEL, *supra* note 157, at 888-90; C. WRIGHT & F. ELLIOTT, *FEDERAL PRACTICE AND PROCEDURE* § 108 (1969).

180. See *United States v. Allison*, 474 F.2d 286, 288 (5th Cir. 1973), *cert. denied*, 419 U.S. 851 (1974), stating:

The Government . . . argues as if the decision as to secrecy or nonsecrecy under Rule 6(e) . . . determines admissibility. Such reasoning amounts to a legal *non-sequitur*. Simply because evidence may be disclosed under Rule 6(e) does not make it otherwise admissible.

181. See, e.g., *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1274 (9th Cir. 1977) (admissible as a prior inconsistent statement); *United States v. Barrow*, 363 F.2d 62, 67 (3d Cir. 1966) (admissible as recorded recollection).

182. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1957); see text accompanying notes 59-70 *supra*.

183. See note 13 *supra*.

over, the owner of the subpoenaed documents is likely to be aware of their incriminating implications, if any; thus, grand jury secrecy cannot effectively prevent the flight of a grand jury target. It is true that the disclosure of documents under grand jury consideration would publicize the target's entanglement in a criminal investigation, an event which the secrecy policy seeks to avoid.¹⁸⁴ Yet, on the whole, the purposes of the secrecy policy are less relevant in the context of a request for documents than when testimony is sought for use in a subsequent civil proceeding.

The requirement for a showing of particularized need prior to disclosure under rule 6(e) is not the sole protection for defendants in subsequent litigation. Release of evidence developed before the grand jury is only proper, according to the Senate report, "assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation."¹⁸⁵ Thus, the good faith test remains as a constraint upon subsequent use. What is not clear from the legislative history is the drafters' conception of how the good faith test should operate. Specifically, it is unclear whether the government must bear the burden of showing good faith, or whether a party opponent in a subsequent civil action must demonstrate bad faith on the part of the government to prevent disclosure. On one hand the drafters indicate that "prevailing court decisions" should apply,¹⁸⁶ and therefore, under *Pflaumer*, the defendant in a subsequent civil action must show an abuse of the grand jury process.¹⁸⁷ At the same time, however, the Senate report indicates that the hearing on a request for disclosure under paragraph C(i) will be *ex parte*.¹⁸⁸ If such is the case, it would appear that the government would have to make at least a *prima facie* showing of good faith.¹⁸⁹ At least one court has followed

184. *See id.*

185. S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 532 (emphasis added).

186. *Id.*

187. *See* notes 105-06 *supra* and accompanying text.

188. S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 532.

189. It may be that the government must present such a showing in all instances regardless of the nature of the hearing. The *Hawthorne* court, in discussing its scope of review, stated that "'some preliminary showing by affidavit that [subpoenaed matter] . . . is not sought primarily for another purpose'" is required of the government. *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1115 (E.D. Pa. 1976) (quoting *In re Grand Jury Proceedings*, 486 F.2d 85, 93 (3d Cir. 1973)). Only a minimal showing need be made for the presumption of regularity of grand jury proceedings to attach. 406 F. Supp. at 1114-15 (citing 507 F.2d 963, 967 (3d Cir. 1975), and *In re Grand Jury Proceedings*, 486 F.2d at 92 (3d Cir. 1973)). Thus, in an adversary proceeding the

this procedure in a case arising under the amended rule.¹⁹⁰ In the past, however, some courts have favored an adversary hearing,¹⁹¹ a practice which would resolve the ambiguity and permit the court to place the burden of showing bad faith upon the government's adversary.

It cannot be ignored that the grand jury subpoena power may be used by the assisting agency to steer the grand jury toward uncovering information relevant to purely civil violations.¹⁹² In view of the inadequacy of the good faith standard as applied under the old rule,¹⁹³ it is submitted that a court should consider several factors when determining good faith under the amended rule. Since any evidence relating to the conduct of the investigation would be in the government's possession,¹⁹⁴ the burden of proving good faith should rest upon the government.¹⁹⁵ The court should look to whether the party against whom the grand jury material would be used in the civil case was a target of the criminal investigation, since a greater likelihood of misuse is presented when an assisting agency seeks to use grand jury material against an actual target. Because an indictment at least suggests the existence of a viable criminal investigation, the court should more closely scrutinize the proposed use of grand jury material whenever no indictments have been returned. Finally, the court should

government must first submit an affidavit making a minimal showing of good faith; the burden is then upon the defendant to make "a strong showing" for the court to find abuse of the grand jury process. *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 477 (E.D. Pa. 1971).

190. *In re* December 1974 Term Grand Jury Investigation, 449 F. Supp. 743 (D. Md. 1978).

191. See discussion in note 157 *supra*.

192. See Note, *supra* note 4, at 162.

193. See text accompanying notes 96-106 *supra*.

194. See *House Hearings*, *supra* note 50, at 158 (statement of Bernard J. Nussbaum).

195. This may not be a revolutionary proposition, as indicated by a brief overview of the law involving the abuse of the administrative subpoena or summons power. The law in this area closely parallels that concerning abuse of the grand jury process. An administrative subpoena may be quashed if it is used for an impermissible purpose. See, e.g., *United States v. O'Connor*, 118 F. Supp. 248 (D. Mass. 1953) (IRS subpoena quashed when shown that it was being used in part to aid a criminal investigation by the Justice Department). As under the good faith test, the burden of showing an abuse is typically placed upon the accuser. See, e.g., *United States v. Powell*, 379 U.S. 48 (1964); *United States v. Litton Indus.*, 462 F.2d 14 (9th Cir. 1922). However, in *United States v. Kessler*, 364 F. Supp. 66 (S.D. Ohio 1973), the court apparently shifted the burden of disproving abuse to the Government once it had been alleged. In that case the judge asked to inspect the IRS' investigatory files after it had been alleged that an IRS summons was used to obtain evidence for a criminal prosecution. When the Government refused, the court quashed the subpoena, in effect placing the burden of showing no abuse upon the Government.

consider the extent of the administrative agency's own civil investigation¹⁹⁶—that is, whether the agency inexplicably declined to seek enforcement of its own summons and instead merely turned the matter over to the grand jury.¹⁹⁷ Agency involvement with the grand jury after unsuccessful civil discovery efforts raises a strong inference of abuse.

D. *The Sub Silentio Use Problem*

Underlying rule 6(e) is the assumption that the procedure out-

196. See April 1956 Term Grand Jury v. United States, 239 F.2d 263 (7th Cir. 1956).

197. Until recently the IRS deemed it appropriate to request an open-ended grand jury investigation whenever an administrative inquiry was stalled by recalcitrant witnesses. 5 INTERNAL REVENUE MANUAL [CCH], pt. 9266.5 (superseded June 2, 1977 by Manual Supplement 9G-61) provided that:

(1) Occasionally, investigations into areas of noncompliance are stymied by a series of reluctant witnesses, and it is not possible to determine the precise limits of the tax violations in terms of defendants and taxable periods. If such investigations are stymied, and it appears that an open-ended Grand Jury inquiry would probably develop information which would result in prosecution recommendations, the special agents should submit a complete report to the Chief

(5) If the Tax Division [of the Department of Justice] concurs in the request, it will authorize the United States Attorney(s) to institute Grand Jury proceedings. . . .

(7) The United States attorney or the Strike Force attorney will be advised that jurisdiction of the tax aspects remains with the Internal Revenue Service. . . .

Such a procedure approves the use of the grand jury as a tool for civil discovery.

In the wake of *J.R. Simplot v. United States Dist. Court for the Dist. of Idaho*, Nos. 76-1893, 76-1995 (9th Cir. May 2, 1977), the Service clarified its position, at least with respect to civil use of grand jury material, by stating:

(2) . . . Grand Jury information is available only to those persons assisting the United States Attorney. As such, it generally may be used or disclosed by such agents only in rendering such assistance. Grand Jury information may not be used for civil purposes without a Federal Rules of Criminal Procedure Rule 6(e) Order which specifically authorizes such information for civil purposes.

(11) While acting as assistants to the attorney for the Government, neither special agents nor revenue agents may solicit or seek information for other than criminal purposes.

5 INTERNAL REVENUE MANUAL [CCH], pt. 9267 (1977).

The sensitivity of administrative agencies to the grand jury process should still be open to question. The IRS is but one of many administrative agencies that may be involved in grand jury investigations, and the others may follow an unwritten procedure similar to the IRS' superseded "recalcitrant witness" rule. Moreover, recent events may cast doubt upon the IRS' recognition of the grand jury's limitation to purely criminal investigations. In *General Motors Corp. v. United States*, 573 F.2d 936 (6th Cir.) (panel opinion), *rev'd on other grounds*, 584 F.2d 1366 (6th Cir. 1978) (rehearing en banc), an attorney employed by the agency was appointed as a special prosecutor to a grand jury investigation. In a letter to the Justice Department prior to the grand jury investigation, this attorney stated that at the proper time the IRS would request an order from the court authorizing the disclosure of grand jury information.

lined there governing subsequent use adequately protects the integrity of the grand jury. The possibility remains, however, that an agency may ignore the procedure prescribed in the rule by failing to get a court order but nevertheless making use of material to which it was exposed during a grand jury investigation in subsequent civil litigation. One commentator described this problem during the House hearings:

[A] lot of grand jury material is sub silentio disclosed. It is very tough for an IRS agent who is assisting the grand jury to then go back to the IRS, pick up the same case, and even without the benefit of the transcripts, wipe from his mind all the leads and information he has developed as a result of assisting the grand jury.¹⁹⁸

The problem lies in the difficulty of ensuring that administrative agencies are not making derivative use of their grand jury exposure in subsequent civil proceedings. Agency assistance is typically required in the most complex of criminal investigations such as antitrust, securities, and tax fraud prosecutions. In these complex settings, where voluminous records and transcripts must be analyzed, it seems improbable that assisting personnel would be able to recall specific portions for use in an agency investigation. However, it would be unrealistic to assume that there was no potential for abuse. Nothing in the amended rule reaches *sub silentio* leaks of information adduced before the grand jury; the only protection from such abuse is the integrity of administrative agency personnel. And the sensitivity of administrative agencies to the role of the grand jury as an investigative tool for solely criminal offenses is questionable.¹⁹⁹

The resolution of this problem may depend upon the continued vitality of the independent source doctrine.²⁰⁰ When Congress reviewed existing law under superseded rule 6(e), it never explicitly considered that portion of the *Simplot* decision²⁰¹ advocating that information obtained by an agency during a grand jury investigation be suppressed absent a showing of an independent source for the information. The drafters anticipated a process in which, following a grand jury investigation in which an agency

198. *House Hearings, supra* note 50, at 23 (statement of Terry P. Segal).

199. *See* note 197 *supra*.

200. *See* text accompanying notes 107-13 *supra*.

201. *See* S. REP. NO. 95-354, 95th Cong., 1st Sess. 7, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 530 (citing *Simplot's* unprecedented requirements regulating agency assistance as indicative of "uncertainty" in existing law, but disregarding *Simplot's* independent source test).

had assisted, the government would apply under section (3)(C)(i) for any information needed for subsequent civil litigation with a showing of particularized need.²⁰² But when the agency or its personnel do not follow the anticipated process and *sub silentio* use the information, the amended rule is silent as to the appropriate response. In this context the independent source doctrine might be helpful. During the hearings, Judge Robb of the Advisory Committee on Criminal Rules indicated that if an administrative agency attempted to use grand jury material in violation of the prescribed procedures, suppression of the evidence in the civil suit would be appropriate.²⁰³ He analogized to the suppression of evidence seized in violation of the fourth amendment.²⁰⁴ Logically, Judge Robb would endorse the independent source rule as an exception to the general rule of suppression and place the burden of proof on the proponent of the evidence.²⁰⁵ Thus, in a civil trial preceded by a grand jury investigation in which a plaintiff agency had assisted, a defendant could force the agency to show an independent source for the information presented. This would tend to remove any temptation for administrative agency personnel to attempt to bypass the rule 6(e) order and the particularized need test established by the amendment.

E. *Matters Occurring Before the Grand Jury*

Another potential problem area under the amended rule is the applicability of the old case law involving documents as "matters occurring before the grand jury."²⁰⁶ The provision in the amended rule for subsequent use of grand jury material subject to a court order was lifted directly from superseded rule 6(e); thus, a threshold requirement for the applicability of the new rule remains the determination that the material requested constitutes "matters occurring before the grand jury."²⁰⁷ The legislative history of the amended rule gives no clue as to how to interpret this phrase. Prior to the amendment none of the cases adjudicating this issue involved a request by an administrative agency that had assisted in the grand jury investigation.²⁰⁸ A distinction was

202. See text accompanying notes 163-65 *supra*.

203. *House Hearings, supra* note 50, at 95.

204. *Id.*

205. See generally *United States v. Wade*, 388 U.S. 218 (1967); *Wong Sun v. United States*, 371 U.S. 471 (1963).

206. See text accompanying notes 79-88 *supra*.

207. FED. R. CRIM. P. 6(e)(1), (2)(A), (2)(C).

208. This fact may well be a result of the prevailing practice of allowing the adminis-

drawn in these cases based upon whether the party seeking the documents was trying to learn what transpired before the grand jury or was seeking the documents for their intrinsic value.²⁰⁹ Courts have used this language in a line of cases to grant access to documents when it has appeared that the party seeking them was not merely trying to uncover the direction of the grand jury investigation.²¹⁰ It is clear that the drafters intended that no barrier of secrecy exist between the different facets of the criminal justice system²¹¹ and that the ability of the government to disclose grand jury information in civil proceedings be no more restrictive than prior to the enactment of the amendment.²¹² Prior to the amendment agencies which had not assisted the grand jury were allowed access to grand jury documents on the ground that they were not matters occurring before the grand jury.²¹³ Therefore, one could argue that the drafters desired that an agency rendering assistance would benefit from a similar ruling. Accordingly, a court confronted with this issue might allow agency access to the documents on the ground that they are not matters occurring before the grand jury and not subject to the strictures of rule 6(e).

Though such an approach would remove subpoenaed documents from the constraints of a rule 6(e) order and its requirement of a showing of particularized need, it would not eliminate whatever protection is afforded by the good faith test. The requirement of good faith is not dependent upon a decision whether or not rule 6(e) is applicable; it is fundamentally a constitutional decision that can and has been made totally apart from the rule.²¹⁴ However, relying on the sole protection of the good faith test would frustrate the attempts of the drafters to provide more than

trative agency to use grand jury material in subsequent civil proceedings subject only to the good faith requirement. Since this standard was not as onerous as the particularized need test it was not necessary to litigate the actual coverage of rule 6(e) in these situations.

209. See notes 84-87 *supra* and accompanying text.

210. See, e.g., *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960); *United States v. Saks*, 426 F. Supp. 812 (S.D.N.Y. 1976); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972).

211. S. REP. NO. 95-354, 95th Cong., 1st Sess. 6, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 530.

212. *Id.* at 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 532.

213. See *generally In re Grand Jury Investigation*, 414 F. Supp. 74 (S.D.N.Y. 1976).

214. See *April 1956 Term Grand Jury v. United States*, 239 F.2d 263, 273 (7th Cir. 1956) (holding that the intentional use of the grand jury subpoena to obtain evidence for civil proceedings was unconstitutional). See also *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1116, 1120 (E.D. Pa. 1976) (while not expressly stating that the good faith issue was of a constitutional nature, treating it as an inquiry distinct from that of whether the government had violated rule 6(e)).

minimal protection to the individual against government abuse of the grand jury process. In providing for a showing of particularized need, the drafters sought to offset the potentiality for misuse of the grand jury when an administrative agency assists in its investigations.²¹⁵ If courts read documents as not "matters occurring before the grand jury," the amendment would be emasculated and the drafters' goal lost. Furthermore, there is a clear distinction between those cases which exempt documents adduced before the grand jury from rule 6(e) as falling outside the "matters occurring" language and those in which an assisting agency seeks civil use of such documents. In those cases in which rule 6(e) was considered inapplicable, the courts were concerned only with preserving grand jury secrecy; the possibility of subversion of the grand jury's powers toward civil discovery purposes—always present when an administrative agency assists the prosecutor—was not an element since the party seeking the documents for civil use was wholly uninvolved in the grand jury investigation.²¹⁶ The uninvolved party has no prior knowledge of the fruits of the grand jury inquiry around which it might frame its request for documents in subsequent civil litigation. On the other hand, when an agency has participated in the grand jury proceedings, it is in a position to take advantage of the grand jury's far-reaching investigatory powers by constructing its civil case around the information brought forward during the criminal inquiry. The drafters intended that the agencies not use grand jury information for other than criminal investigatory purposes unless a court order is obtained.²¹⁷ Therefore, in view of the potential for *sub silentio* disclosure, it is unrealistic to suggest that documents involved in a grand jury investigation in which an agency has as-

215. S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 531-32.

216. In *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972), for example, the plaintiffs seeking the documents were homeowners who sued the Secretary of Housing and Urban Development alleging that they were experiencing substandard conditions in houses which they had purchased through mortgages insured by the Federal Housing Authority. A grand jury which was contemporaneously investigating possible criminal conduct concerning housing sold through FHA-insured mortgages had subpoenaed certain documents relating to the mortgages. Plaintiffs needed the identical documents for their wholly unrelated civil case. The court allowed disclosure on the ground that the documents were not "matters occurring before the grand jury" within the meaning of rule 6(e). *Id.* at 1339-41. *See also* *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960).

217. *See* S. REP. NO. 95-354, 95th Cong., 1st Sess. 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 531; 123 CONG. REC. H7868 (daily ed. July 27, 1977).

sisted be used in civil litigation without judicial supervision.²¹⁸

III. CONCLUSION

The validity of administrative agency assistance in grand jury investigations, the procedures for obtaining such assistance, and the restrictions placed upon subsequent use of grand jury information by the agencies were not provided for in rule 6(e) prior to its amendment. The amended rule clearly validates agency assistance to grand juries and facilitates that process by doing away with any requirement for a court order as a prerequisite to allowing such assistance. The new rule distinguishes between criminal and civil use of information obtained in the course of a grand jury investigation: grand jury material may be used in a subsequent civil suit only if a court order is issued upon a showing of particularized need.²¹⁹ This reflects the drafters' approach in seeking to balance efficient law enforcement and protection of the grand jury process. It eliminates or substantially vitiates many of the criticisms voiced in the *Simplot* decision of allowing virtually unrestricted agency access to grand jury materials. Such unregulated access permitted circumvention of the requirement for particularized need imposed upon individuals and agencies that had not rendered technical assistance. Since assisting agencies are no longer excepted from meeting the particularized need requirement, the government no longer enjoys an unfair advantage and can use information only if it meets the same test as any party to a civil proceeding. The amendment, however, has not met all the potential problems arising out of subsequent civil use of grand

218. Documents returned to their owner and requested by an assisting agency after the conclusion of the grand jury inquiry may eventually cease to be "matters occurring before the grand jury." Nevertheless, the potential for *sub silentio* use in the absence of a rule 6(e) court order would suggest the prudence of applying for such an order whenever materials which have been before the grand jury are sought for civil litigation. Even if the literal provisions of rule 6(e) are not applicable, the rule 6(e) court order is not a litigant's only means of seeking judicial protection. The civil defendant may trigger an inquiry into the propriety of civil use by an assisting agency by applying for a protective order or filing a motion to suppress in the civil proceeding.

219. A comparison of the proposed and the adopted amendment clearly reflects the draftsmen's intent. The original amendment provided that "'attorneys for the government' includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties . . ."; whereas the adopted rule reads, "[d]isclosure . . . may be made to . . . government personnel . . . necessary . . . to assist an attorney for the government in the performance of such attorney's duty to enforce the . . . criminal law." The addition of the word "criminal" demonstrates the legislators' concern for the preservation of the grand jury's historic role. See notes 6, 11 & 175-78 *supra* and accompanying text.

jury material. The rule does not address the problems that arise when the agencies do not follow the contemplated procedure. Nor does it clarify the extent to which documents are "matters occurring before the grand jury." Consequently, in these areas the potential for abuse of the grand jury by administrative agencies still exists.²²⁰

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220. Because the amendment addressed a relatively narrow problem in the first instance, it does not reach situations where administrative agencies control grand juries, conduct their own criminal investigations, and decide whether to proceed to trial. *See* *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977) (decided on other grounds). It does not reach agency use of the grand jury to develop information for its files. *See In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975). Nor does it reach situations in which an attorney employed by an administrative agency is appointed as a special prosecutor to conduct a grand jury investigation. *General Motors Corp. v. United States*, 573 F.2d 936 (6th Cir.) (panel opinion), *rev'd on other grounds*, 584 F.2d 1366 (6th Cir. 1978) (rehearing en banc).