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## Grand Jury Disclosure in Antitrust Litigation

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## COMMENT

### GRAND JURY DISCLOSURE IN ANTITRUST LITIGATION

Most criminal prosecutions under the Sherman Antitrust Act<sup>1</sup> have begun with grand jury investigations.<sup>2</sup> The secretive nature of criminal antitrust activity often makes it impossible for the federal government to marshal the evidence necessary to obtain an indictment before convening the grand jury.<sup>3</sup> The extensive use of the grand jury as an investigatory tool is, "in many aspects, unique to antitrust."<sup>4</sup>

Civil antitrust plaintiffs are well aware of the valuable factfinding function performed by the grand jury and often seek discovery of grand jury transcripts from related criminal actions.<sup>5</sup> In deciding whether to grant these requests, courts are required to balance the established principle of grand jury secrecy against the goal of effectuating civil enforcement of the antitrust laws.<sup>6</sup> The analytical starting point for a court considering whether to grant civil antitrust plaintiffs access to grand jury materials is Federal Rule of Criminal Procedure 6(e).<sup>7</sup> Rule 6(e) does not absolutely bar disclosure of grand jury materials, but instead expressly permits disclo-

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1. 15 U.S.C. §§ 1-7 (1976). The Sherman Act prohibits any unreasonable interference, by contract, combination, or conspiracy, with the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade.

2. See Brief for the United States as Respondent at 6, *Illinois v. Abbott & Assoc., cert. granted*, 455 U.S. 1015 (1982) ("Antitrust Division investigates per se violations almost exclusively by grand jury"). See also Lewin, *The Conduct of Grand Jury Proceedings in Antitrust Cases*, 7 LAW & CONTEMP. PROBS. 112 (1940); ABA ANTITRUST LAW DEVELOPMENTS 233 (1975).

3. Steinhouse, *Antitrust Grand Jury Procedure*, 23 CLEV. ST. L. REV. 447 (1974).

4. *Id.*

5. See *infra* text accompanying notes 147-80.

6. See *infra* text accompanying notes 35-37.

7. FED. R. CRIM. P. 6(e) provides in pertinent part:

(2) *General rule of secrecy.* . . . any person to whom disclosure is made under paragraph 3(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. . . .

(3) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before

sure in four situations.<sup>8</sup> In antitrust litigation, the largest amount of controversy has been generated by the provision of the rule permitting disclosure "preliminarily to or in connection with a judicial proceeding."<sup>9</sup> While the rule states a factually simple condition precedent to the disclosure of grand jury materials, the Supreme Court has consistently held that the requesting party must demonstrate "particularized need" before disclosure will be granted.<sup>10</sup>

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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.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

8. The four situations in which disclosure is permitted are the following:

(1) Attorneys for the federal government and government personnel assisting them in the investigation are permitted access without court permission, FED. R. CRIM. P. 6(e)(3)(A)(i), (ii);

(2) A court may direct disclosure "preliminarily to or in connection with a judicial proceeding," FED. R. CRIM. P. 6(e)(3)(C)(i);

(3) A court may order disclosure to a defendant upon a showing that there may be grounds "to dismiss the indictment because of matters occurring before the grand jury," FED. R. CRIM. P. 6(e)(3)(C)(ii); and

(4) A witness before the grand jury may voluntarily divulge the contents of his testimony inasmuch as he is under no obligation of secrecy with regard to his own testimony, FED. R. CRIM. P. 6(e)(2). See 8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 6.05[1] (2d ed. 1982).

Furthermore, the doctrine of secrecy does not apply if the requested material does not come within the ambit of "matters occurring before the grand jury." FED. R. CRIM. P. 6(e)(2). See *infra* text accompanying notes 202-07.

9. FED. R. CRIM. P. 6(e)(3)(C)(i).

10. See, e.g., *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223-24 (1979); *Dennis v. United States*, 384 U.S. 855, 872 (1966); *Pittsburgh Plate Glass Co. v. United*

Present controversy exists over the applicability of the "particularized need" standard to requests for grand jury disclosure by state attorneys general pursuant to title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>11</sup> Section 4F of title III<sup>12</sup> directs the Attorney General of the United States to make available "to the extent permitted by law, any investigative files or other materials" requested by state attorneys general for possible state *parens patriae* actions under the Sherman Act.<sup>13</sup> The controversy involves the proper construction to be given this provision,<sup>14</sup> and has rekindled commentary as to the necessity and utility of the doctrine of grand jury secrecy in the antitrust arena.<sup>15</sup>

This Comment will place the doctrine of grand jury secrecy in its proper historical perspective and will explore the controversy that has arisen in *parens patriae* antitrust actions. It will then expand its focus to embrace issues regarding the utility and current application of the particularized need standard in both public and private antitrust litigation. The Comment will conclude that the particularized need standard should not be applied in *parens patriae* actions. In a more general context, the Comment will argue that a more liberal application of the particularized need standard should prevail in cases where that standard is controlling.

## I. HISTORICAL ORIGINS OF THE GRAND JURY

The precursor of the modern grand jury was established in England in 1166 by King Henry II's Assize of Clarendon.<sup>16</sup> Often comprised of a

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States, 360 U.S. 395, 400 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958).

11. See *infra* text accompanying notes 72-122. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 is codified at 15 U.S.C. § 15(c)-15(h) (1977 Supp. I).

12. 15 U.S.C. § 15(f) (1976).

13. The *parens patriae* provisions of title III are an addition to the Clayton Act, which amended the Sherman Antitrust Act by adding prohibitions against price discrimination, tying and exclusive contracts, mergers and interlocking directorates, where these practices may substantially lessen competition or tend to create a monopoly in any line of commerce. 15 U.S.C. §§ 12-27 (1976). *Parens patriae* actions under title III are, however, limited to violations of the Sherman Act. 15 U.S.C. § 15(a)(1) (1976).

14. See *infra* text accompanying notes 72-122.

15. See generally Kintner, Griffin & Goldstone, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1 (1977) [hereinafter cited as Kintner]; Maximov, *Access by State Attorneys General to Federal Grand Jury Antitrust Investigative Materials*, 69 CALIF. L. REV. 821 (1981); Note, *Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b)*, 79 MICH. L. REV. 1234 (1981).

16. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 321 (7th ed. 1956); see also C. LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 109 (1962); Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 456 (1965). The Assize of Clarendon proclaimed that for the preservation of the peace and the maintenance of justice enquiries be made throughout each county and hundred . . . under oath to tell the truth; if in their

"body of knowledgeable local gentry," it was designed to investigate those suspected of having committed serious crimes.<sup>17</sup> In time, the grand jury, known then as the Grand Assize, proved to be a particularly effective device in the King's arsenal for usurping control of the administration of justice from the Church and the feudal barons.<sup>18</sup> In its infancy, the grand jury was a "public body," and it was not until 1368 that it conducted its inquiries secretly in an attempt to free itself from control by the Crown.<sup>19</sup>

As a legal concept, the doctrine of grand jury secrecy dates from the *Earl of Shaftesbury Trial*,<sup>20</sup> and the *Colledge*<sup>21</sup> case.<sup>22</sup> Shaftesbury and Colledge were Protestants who avidly opposed King Charles II's attempts to reestablish the Catholic Church in England.<sup>23</sup> The King sought their indictment for treason and demanded that the grand jury, sitting in London, conduct its inquiry in public.<sup>24</sup> The grand jury adamantly refused, conducted its proceeding in secret, and failed to return a "true bill."<sup>25</sup>

In the years that followed, the grand jury's significance dwindled and, by the twentieth century, the return of indictments had become pro forma.<sup>26</sup> Rather than continuing to expend the time and money required to preserve the grand jury's now perfunctory role, Parliament passed the

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hundred or township there be any man who is accused or generally suspected of being a robber or murderer or thief . . . since our lord the King was King.

1 W. HOLDSWORTH, *supra*.

17. M. FRANKEL & G. NAFTALIS, *THE GRAND JURY AN INSTITUTION ON TRIAL* 6 (1977).

18. *Id.* at 7.

19. *Id.*

20. 8 How. St. Tr. 759 (1681).

21. 8 How. St. Tr. 563 (1681).

22. M. FRANKEL & G. NAFTALIS, *supra* note 17, at 9.

23. *Id.*

24. *Id.* at 9-10.

25. *Id.* Although these cases are often cited as establishing the "true independence" of the grand jury, King Charles did not acquiesce to the London grand jury's show of independence. In what may be the first known instance of "forum-shopping," the King had the case presented to a "friendlier" grand jury in the town of Oxford. It returned a "true bill." *Id.* John Dryden, the King's favorite poet, used the medium of poetry to express his distaste for the London grand jury's action:

So easie still it proves, in Factious Times,  
With publick Zeal to Cancel private Crimes:  
How safe is Treason, and how sacred ill,  
Where none can sin against the People's Will:  
Where Crowds can wink; and no offence be known,  
Since in another's guilt they find their own.

Quoted in Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 718 n.84 (1972).

26. C. LOVELL, *supra* note 16, at 546-47.

Administration of Justice Act in 1933,<sup>27</sup> abolishing it.<sup>28</sup> Except for "charges of treason committed outside the realm, violations of the official secrets laws, and oppressive acts by governors of the colonies," indictments are now returned by magistrates after preliminary hearing.<sup>29</sup>

While England allowed other governmental bodies to assume the grand jury's tasks, the United States has been unwilling to forego the institution of the grand jury originally brought over by the English colonists.<sup>30</sup> It is embedded in the fifth amendment to the United States Constitution<sup>31</sup> which requires grand jury indictments for all "capital, or otherwise infamous crime[s]."<sup>32</sup> Although the Constitution does not mention whether the grand jury should meet in public or private, there has never been any question that the grand jury should meet in private in order to preserve the doctrine of secrecy that had long existed under English common law.<sup>33</sup> This common law doctrine of grand jury secrecy has been codified in Federal Rule of Criminal Procedure 6(e).<sup>34</sup>

Rule 6(e) sets forth the general principle that, subject to certain enumerated exceptions, grand jury material should not be disclosed.<sup>35</sup> The most troublesome provision of rule 6(e) is the general exception allowing disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding."<sup>36</sup> Although this exception obviously permits disclosure of certain matters occurring before the grand jury, it provides no stan-

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27. Administration of Justice Act, 23 & 24 Geo. 5, ch. 36 (1933), excerpted from 8 H. HALSBURY, STATUTES OF ENGLAND 307-08 (1969):

(1) . . . grand juries are hereby abolished, but where a bill of indictment has been signed in accordance with the provisions of this Act, the indictment shall be proceeded with in the same manner as it would have been proceeded with before the commencement of this Act if it had been found by a grand jury, and all enactments and rules of law relating to procedure in connection with indictable offences shall have effect subject only to such modifications as are rendered necessary by the provisions of this section and of the section next following . . . .

28. *Id.*

29. C. LOVELL, *supra* note 16, at 547.

30. M. FRANKEL & G. NAFTALIS, *supra* note 17, at 10.

31. U.S. CONST. amend. V.

32. The relevant part of the fifth amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

*Id.* *But cf.* *Hurtado v. California*, 110 U.S. 516 (1884) (requirement of indictment by the grand jury has not been held applicable to the states).

33. MCCORMICK ON EVIDENCE § 113 (E. Cleary 2d ed. 1972).

34. *See supra* note 7.

35. *See id.*

36. FED. R. CRIM. P. 6(e)(C)(i).

dard to determine when such information should be disclosed. In light of the long common law heritage of secrecy, the Supreme Court has interpreted rule 6(e) as allowing the secrecy of grand jury proceedings to be breached only upon a showing of "particularized need" by the requesting party.<sup>37</sup>

The question of what constitutes "particularized need" has been a thorny one, and the Supreme Court's pronouncements on the matter have not been unwavering.<sup>38</sup> In an effort to avoid the burden of demonstrating particularized need, state attorneys general have recently argued that section 4F of the Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>39</sup> entitles them to certain federal grand jury materials without the necessity of a preliminary showing of need.<sup>40</sup>

## II. DISCLOSURE IN PARENS PATRIAE ACTIONS

The Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>41</sup> significantly changes the scheme of federal antitrust enforcement by generally broadening the government's investigatory and enforcement powers.<sup>42</sup> Title III of the Antitrust Improvements Act authorizes state attorneys general to bring treble damage actions as *parens patriae* for its citizens to redress Sherman Act violations.<sup>43</sup> This provision has thus far proven to be the

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37. *See supra* note 10.

38. *See infra* text accompanying notes 152-80.

39. Section 4F provides in pertinent part:

To assist a State attorney general in evaluating the notice or in bringing any action [under the Sherman Act], the Attorney General of the United States shall, upon request by such state attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action . . . .

15 U.S.C. § 15(f) (1976).

40. *See infra* text accompanying notes 72, 74-98.

41. Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in sections of 15, 18 & 28 U.S.C. (1977 Supp. I)).

42. Title I, the Antitrust Civil Process Act Amendments, 15 U.S.C. §§ 1311-14, amends the Antitrust Civil Process Act of 1962, 15 U.S.C. § 1311(f) (1970), to allow the Justice Department to issue civil investigative demands (CIDs) to investigate "activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation." 15 U.S.C. § 1311(c). *See also* A. NEALE, ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 375-78 (2d ed. 1970). Prior to the 1976 amendments, the Justice Department could not use its CID power to investigate a proposed but un consummated merger or acquisition. *United States v. Union Oil Co.*, 343 F.2d 29 (9th Cir. 1965). Title II, Premerger Notification, 15 U.S.C. § 18(a), mandates prior notification of the Justice Department and the Federal Trade Commission of proposed acquisitions and mergers of significant size. 15 U.S.C. § 18(a)(2). This provision is intended to supply the government with the precious *time* needed to develop their case before the egg has been scrambled.

43. 15 U.S.C. § 15(c).

most controversial.

The *parens patriae* provisions of the Antitrust Improvements Act were adopted in response to “the present inability of our judicial system to afford equal justice to consumers for violations of the antitrust laws.”<sup>44</sup> Section 4F(a) of the Antitrust Improvements Act provides that whenever the United States has brought suit under the Clayton Act<sup>45</sup> and the challenged activities may give rise to potential claims under the antitrust laws, the United States Attorney General should notify the appropriate state attorney general.<sup>46</sup> Section 4F(b) of the Antitrust Improvements Act allows the state attorney general to request access to “investigative files or other materials” for possible state *parens patriae* actions under the Sherman Act.<sup>47</sup> The United States Attorney General must then turn over such files “to the extent permitted by law.”<sup>48</sup>

The federal circuit courts are divided over the proper interpretation of this provision.<sup>49</sup> At the heart of this dispute is the meaning of the terms “investigative files or other materials” and “to the extent permitted by law.” The first question facing a court is whether “investigative files or other materials” include grand jury materials. If so, a court will then be faced with the determination whether the phrase “to the extent permitted by law” incorporates the particularized need standard.

### A. Legislative History

The Antitrust Improvements Act was passed amidst intense political pressures generated by strong opposition from the business community.<sup>50</sup> As is the case with the Antitrust Improvements Act in general, the legislative history of section 4F is sparse and inconclusive.<sup>51</sup> It is clear, however,

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44. 122 CONG. REC. 29,148 (1976) (statement of Sen. Abourezk).

45. 15 U.S.C. §§ 12-27, 44 & 29 U.S.C. §§ 52-53 (1976 & 1980 Supp. IV).

46. *See supra* note 39.

47. *See id.*

48. *Id.*

49. *See infra* text accompanying notes 72-122.

50. The Senate floor manager of the bill commented: “Over the last 3 months . . . [t]here have been approximately 85 votes, two filibusters, two successful cloture votes, hundreds of printed amendments, [and] unprecedented parliamentary maneuvering . . .” 122 CONG. REC. 29,145 (1976) (statement of Sen. Abourezk).

51. One commentator succinctly addressed the problems with the Act’s legislative history in the following passage:

Because of the extraordinary procedures adopted by the Act’s sponsors to secure passage, resulting in the enactment—without conference—of a compromise bill that replaced three House-passed bills and an omnibus Senate-passed bill, and because of the number of separate bills and titles that were the subject of testimony, the legislative history of the Act is a patchwork of testimony, floor statements, de-



that the *parens patriae* provisions were designed to create a new federal antitrust remedy "to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violations."<sup>52</sup> Both the House and Senate reports clearly lament the federal antitrust laws' consumer-related remedial inadequacies and recognize the need to improve antitrust enforcement mechanisms.<sup>53</sup> Although the general legislative purpose is clear, the scope and force of that purpose is regrettably murky and ill-defined.<sup>54</sup> One of the issues left unclear is whether Congress, by providing for state *parens patriae* actions, also intended to ease the burden on state attorneys general bringing such actions by allowing them access to federal grand jury materials without a preliminary showing of particularized need.

The House discussion of section 4F(b)'s disclosure language, which referred to an earlier version of the bill,<sup>55</sup> is critical to a determination of legislative intent because the disclosure language originated in the House and was subsequently adopted by the Senate.<sup>56</sup> The House specifically

bates, Committee Reports and 'Additional Statements' inserted after the conclusion of floor debates.

Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679, 682 (1977); see also Kintner, *supra* note 15, at 1-3.

52. H.R. REP. NO. 499, 94th Cong., 1st Sess. 3 (1975).

53. It was noted in the House Report that "[f]ederal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers [and] revised class action provisions [aimed at] fashion[ing] a mechanism for consumer redress . . . have been disappointing." H.R. REP. NO. 499, *supra* note 52, at 4-6. The Senate report concludes that a "major factor underlying the ineffectiveness of the antitrust laws is the inadequacy of existing investigatory, enforcement, deterrent, and procedural aspects of present law." S. REP. NO. 803, 94th Cong., 2d Sess. 1 (1976).

54. One commentator conceded that while

[s]ome insights can be gleaned by floor statements by the sponsors of the bills and from committee reports, [they] are in some instances contradicting and . . . of limited value because many provisions . . . were either not enacted or enacted in an amended form. Thus, a definitive interpretation of the Act must await judicial action . . . .

Kintner, *supra* note 15, at 1, 3.

55. The distinctions between the § 4F(b) discussed by the House Committee and the present law are: (1) the earlier version only granted access to the Department of Justice's files for purposes of bringing an action under § 4C, 15 U.S.C. § 15(c) (1976), while the present law allows access for purposes of bringing *any* action under the Clayton Act; and (2) the "usage clause" of the earlier version was conjunctive "to assist a State attorney general in evaluating the notice *and* in bringing any action." (emphasis added). This was changed by substituting "or" for "and." *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 948 n.11 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

56. Section 4F(b) was included in the final enactment of title III of the Antitrust Improvements Act at the insistence of the "acting" House conferees. 122 CONG. REC. 29,160 (1976) (statement of Sen. Abourezk). Because of the threat of another Senate filibuster, a "formal" conference was impossible. Instead, the Senate sponsors and others met infor-

addressed the meaning of the clause "to the extent permitted by law" as mandating disclosure "except where specifically prohibited."<sup>57</sup> Although this explanation is couched among several references to the House's "desire" to encourage full federal-state cooperation, the report is bereft of any reference to grand jury materials or to what constitutes investigative files and other materials.

The only reference to grand jury materials in the reports of either house is found in a provision that was included in an earlier version of the Senate bill.<sup>58</sup> This provision would have afforded a "private plaintiff" access to "documentary material and testimony furnished to a grand jury" upon the completion of any criminal or civil proceeding arising out of the federal grand jury investigation.<sup>59</sup> In conjunction with this provision, the Senate report acknowledges that, under *existing law*, a private treble damages plaintiff may gain access to grand jury materials only upon a showing of particularized need.<sup>60</sup> Although the report cited the traditional reasons for grand jury secrecy,<sup>61</sup> it recognized that the "trend in recent court decisions is clearly in favor of more liberal disclosure . . . to private plaintiffs who have filed subsequent treble damage antitrust actions."<sup>62</sup> Maintenance of grand jury secrecy, under those circumstances, was viewed by the Senate as "contrary to the efficient and economic administration of justice."<sup>63</sup> The report concluded with the Senate's "determination that the reasons for grand jury secrecy are generally no longer relevant" upon completion of the government's case.<sup>64</sup> The Senate, however, did allow for the district courts' imposition of appropriate protective orders "on the grant of access . . . as the interests of justice may require."<sup>65</sup>

Notably, this version of the Antitrust Improvements Act also included section 4F(b).<sup>66</sup> It is unclear, however, whether the Senate provision was ultimately excluded due to potential conflict with the judicial branch over the necessity of showing particularized need or because it duplicated section 4F(b)'s disclosure provision and was inconsistent with Congress's in-

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mally with representative members of the House to work out a compromise, without amendment, that would be acceptable to both Houses. *See Scher, supra* note 51, at 681 n.9.

57. H.R. REP. NO. 499, *supra* note 52, at 17.

58. *See* S. REP. NO. 803, *supra* note 53, at 33, 110.

59. *Id.* at 33.

60. *Id.*

61. These policy reasons were first developed by the court in *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931). *See infra* note 183.

62. S. REP. NO. 803, *supra* note 53, at 35.

63. *Id.*

64. *Id.*

65. *Id.* at 33.

66. *Id.*

tent to have private civil antitrust plaintiffs seek the aid of their state attorney general, rather than instituting private antitrust actions.<sup>67</sup>

The only other specific reference to the disclosure language of section 4F(b) was made during Senate debate by Senator Hruska who objected to section 4F(b), fearing that it might turn the Department of Justice into a "massive document distribution center."<sup>68</sup> Senator Abourezk, floor manager of the bill, replied to this criticism by saying that 4F(b) "specifically limits the Attorney General's power to release documents to whatever his powers are under *existing law* [and] [u]nder existing law, he cannot turn over materials given in response to a grand jury demand."<sup>69</sup> Hruska's objection indicates that he perceived 4F(b) to include grand jury materials because the bulk of the documentation required to present a successful case is comprised of grand jury related information.<sup>70</sup> Abourezk's reply is ambiguous since it is not clear whether he interpreted this provision to incorporate the existing law, requiring a court order prefaced by a showing of the particularized need standard, or whether the provision dispensed with the particularized need and required only a court order.<sup>71</sup>

Because of the inconclusive nature of the legislative history surrounding section 4F(b), courts have been faced with difficult issues of statutory interpretation. This lack of a clear congressional directive has resulted in an even split among the federal circuit courts that have been required to interpret the provision.

### *B. Section 4F(b) Disclosure Provision Causes Split Among the Circuits*

Federal courts of appeals are divided over the question of whether "investigative files or other materials" include grand jury materials, and if so,

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67. 122 CONG. REC. 29,147 (1976) (statement of Sen. Abourezk). Adding to the confusion is Sen. Abourezk's comment that the omission of this provision of the bill was one of the "compromises that the sponsors have been forced to make to the House in this legislation in order to avoid a second filibuster." *Id.*

68. 122 CONG. REC. at 29,144 (1976) (statement of Sen. Hruska).

69. 122 CONG. REC. at 29,160 (1976) (statement of Sen. Abourezk) (emphasis supplied).

70. The Senate's discussion of § 202(1) indicates its awareness of the large importance of grand jury materials in developing the evidence needed to prosecute such cases: "It is contrary to the efficient and economic administration of justice to require private plaintiffs to expend time and effort in developing facts which have already been developed before the grand jury." S. REP. NO. 803, *supra* note 53, at 35.

71. It should be noted that a court order permitting disclosure is required in all except two cases. First, FED. R. CRIM. P. 6(e)(3)(A)(i) permits disclosure of grand jury materials without a court order to "an attorney for the government for use in the performance of such attorney's duty." Second, FED. R. CRIM. P. 6(e) was amended in 1977 to permit disclosure of grand jury information to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." FED. R. CRIM. P. 6(e)(3)(A)(ii).

whether the language in the Antitrust Improvements Act limiting disclosure "to the extent permitted by law" forbids disclosure without the traditional requisite showing of "particularized need." The Fourth and Ninth Circuits have answered both questions in the affirmative;<sup>72</sup> the Second and Seventh Circuits have answered both questions in the negative.<sup>73</sup>

The Ninth Circuit was the first federal court of appeals to rule on this matter in *United States v. B.F. Goodrich Co.*<sup>74</sup> The case arose after a federal grand jury was convened to investigate possible antitrust violations by a major tire company.<sup>75</sup> An indictment was not returned, but the United States instituted a civil action against the company.<sup>76</sup> The State of California thereafter filed an antitrust action against Goodrich and requested the district court to produce the federal grand jury materials.<sup>77</sup> The motion was granted by the district court and the Ninth Circuit affirmed in a short per curiam opinion.<sup>78</sup>

In reaching its decision, the Ninth Circuit held that the "investigative files" language in section 4F(b) included the grand jury materials.<sup>79</sup> The court described the legislative history of the Antitrust Improvements Act as being "equivocal,"<sup>80</sup> and stated that state attorneys general need not show "particularized need" because Congress intended to place the states on a "different footing" than private parties bringing antitrust actions.<sup>81</sup> Most of the court's opinion delineated the bounds within which such disclosure could occur. The court concluded this discussion with a list of "protective orders" aimed at preserving the secrecy of the grand jury materials upon disclosure.<sup>82</sup>

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72. *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 945 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *United States v. B.F. Goodrich Co.*, 619 F.2d 798, 801 (9th Cir. 1980).

73. *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 28 (2d Cir. 1982), *petition for cert. pending sub nom.* *Connecticut v. Cuisinarts, Inc.*, No. 81-1595 (U.S. Feb. 17, 1982); *In re Illinois Petition to Inspect And Copy Grand Jury Materials*, 659 F.2d 800, 801 (7th Cir. 1981), *cert. granted sub nom.* *Illinois v. Abbott & Assoc., Inc.*, 455 U.S. 1015 (1982).

74. 619 F.2d 798 (9th Cir. 1980).

75. *Id.* at 799.

76. *Id.*

77. *Id.* at 800.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 801. The court placed the following limitations on the disclosure of the grand jury materials: (1) disclosure was limited to state attorneys general and designated members of their staff; (2) only one copy of the materials would be provided, the custody of which would be the responsibility of the state attorney general; (3) disclosure of the names and testimony of witnesses would be prohibited until trial or until they were disclosed to the defendant; (4) the disclosure would only be allowed pursuant to a protective order on a

In *United States v. Colonial Chevrolet Corp.*,<sup>83</sup> the Fourth Circuit addressed some of the issues left open by the Ninth Circuit's decision in *Goodrich. Colonial Chevrolet* involved an appeal by the State of Virginia from an order denying disclosure of grand jury materials resulting from a successful criminal antitrust action brought by the federal government.<sup>84</sup> The district court denied disclosure on two grounds.<sup>85</sup> First, it held that grand jury transcripts are not included within the meaning of "investigative files" to which the Antitrust Improvements Act refers.<sup>86</sup> Second, the court held that even if such transcripts were included in the investigative files, the requesting party must make the showing of particularized need inasmuch as the Antitrust Improvements Act permits disclosure only "to the extent permitted by law."<sup>87</sup> The court concluded that disclosure for the purpose of assisting in the preparation of an actual or potential civil antitrust suit did not constitute such particularized need.<sup>88</sup>

In reversing the decision, the Fourth Circuit criticized the district court's narrow construction of the term "investigative files."<sup>89</sup> The court found such a restrictive interpretation to be "plainly contrary to the legislative purposes" of the Antitrust Improvements Act.<sup>90</sup> The court emphasized Congress's intention to encourage the filing of *parens patriae* actions to assist in the enforcement of the federal antitrust laws. The court noted, moreover, that grand jury materials are often the most important part of the investigative file.<sup>91</sup> In light of these considerations, the court concluded that it was extremely unlikely that Congress intended to exclude such materials from the definition of investigative files.<sup>92</sup>

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stipulation between counsel ensuring confidentiality; (5) use of the materials would be limited to preparation of the instant case or actions under other state or federal statutes; (6) the Attorney General need not disclose the materials if he objects to their disclosure; (7) the Attorney General may not disclose the materials until the grand jury completes its term and if an indictment has been returned, the materials may not be disclosed until the criminal charges are no longer pending; and (8) state attorneys general may not use the materials in a criminal prosecution. *Id.* at 801.

83. 629 F.2d 943 (4th Cir. 1980).

84. *Id.* at 945. The indictment charged Tidewater (Virginia) Automobile Dealers Association and certain of its members with engaging in a price fixing conspiracy in connection with charges for auto body repairs. All of the defendant-appellees entered *nolo contendere* pleas which were accepted by the district court. *Id.*

85. *Id.* at 946, 948.

86. *Id.* at 948.

87. *Id.* at 946.

88. *Id.* at 949.

89. *Id.* at 946.

90. *Id.*

91. *Id.* at 947.

92. *Id.*

The court interpreted Senator Abourezk's statement that the statute incorporated existing law<sup>93</sup> as merely stating that under current law the Attorney General may not unilaterally disclose federal grand jury materials to the states, but must instead seek a court order prior to disclosure.<sup>94</sup> Thus, Senator Abourezk's comments were not addressed to the particularized need standard, but rather merely reiterated the requirement of prior judicial approval.<sup>95</sup>

Expanding upon the Ninth Circuit's analysis, the court distinguished the state's request from private requests on the ground that the Antitrust Improvements Act placed state attorneys general in a position "adjunct to that of the Attorney General himself . . . in the scheme of enforcement of the federal antitrust laws."<sup>96</sup> Congress, by virtue of the Antitrust Improvements Act, had struck a balance between the public interest in disclosure and the need for secrecy in favor of the former.<sup>97</sup> Thus, the court granted the state's disclosure request without requiring a demonstration of particularized need.<sup>98</sup>

The first federal court of appeals to hold that grand jury materials could not be disclosed absent a showing of particularized need was the Seventh Circuit in *In re Illinois Petition to Inspect*.<sup>99</sup> The attorney general of Illinois sought production of materials from a prior federal grand jury investigation that had resulted in an indictment in a bid-rigging conspiracy in piping construction projects in the Chicago area.<sup>100</sup> The district court denied the state's motion for production of the grand jury materials, and the Seventh Circuit affirmed.<sup>101</sup>

In reaching this decision, the Seventh Circuit questioned whether grand jury materials even fell within the ambit of section 4F(b) inasmuch as they were not specifically mentioned therein, and inasmuch as that provision was directed to the Department of Justice which has no power to authorize

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93. See *supra* note 69 and accompanying text.

94. 629 F.2d at 947.

95. *Id.*

96. *Id.* at 950.

97. *Id.* The court stated further that the burden of opposing such disclosure would rest with those who sought to have it denied. Protective limitations would also apply to such disclosure where appropriate. *Id.*

98. *Id.*

99. 659 F.2d 800 (7th Cir. 1981).

100. *Id.* at 801.

101. The State of Illinois was provided with fewer than 20 documents in response to its request directed to the Department of Justice pursuant to § 4F(b) of the Act. The state then moved pursuant to FED. R. CRIM. P. 6(e) for production of all grand jury materials. *Id.* at 801.

grand jury disclosure in the absence of a court order.<sup>102</sup> Even if grand jury materials were included within section 4F(b), the language limiting disclosure "to the extent permitted by law" clearly suggested to the court that disclosure would be subject to the requirements of rule 6(e).<sup>103</sup>

The court relied on the legislative history of section 4F(b) to support its conclusion.<sup>104</sup> The exchange between Senators Abourezk and Hruska,<sup>105</sup> together with the House's construction of the language limiting availability of the files "except where specifically prohibited,"<sup>106</sup> demonstrated Congress's recognition that existing law prohibits the release of grand jury materials in the absence of a preliminary showing of particularized need.<sup>107</sup> Since Congress was cognizant of existing law, the court reasoned that it was highly unlikely that the Antitrust Improvements Act was intended to make new law regarding the disclosure of grand jury materials.<sup>108</sup>

Consistent with this line of reasoning, the court concluded its opinion with a restrictive view of the purposes of title III. The creation of *parens patriae* actions was labelled a "limited" response to two "technical problems" in the prior scheme of enforcement: the difficulty of obtaining class certification and the difficulty of maintaining class actions.<sup>109</sup>

In dissent, Judge East<sup>110</sup> argued for a more liberal construction of the Antitrust Improvements Act. The dissent pointed out that the major purpose of the Antitrust Improvements Act was to induct the states into the "antitrust business by lending them the federal investigative work product regarding antitrust violations."<sup>111</sup> The dissent argued that any ambiguity in the provision should be resolved in favor of disclosure and stated that the rationales underlying grand jury secrecy could be adequately preserved by appropriate protective orders.<sup>112</sup>

The numerical split between the circuits became evenly balanced with

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102. *Id.* at 802-04.

103. *Id.* at 804.

104. *Id.* at 806.

105. *See supra* notes 68-69 and accompanying text.

106. *See supra* note 57 and accompanying text.

107. 659 F.2d at 806. Although both the Seventh and Second Circuits reached the same conclusion regarding these aspects of the legislative history, neither court gave a definitive explanation for this interpretation beyond citing the history and concluding that Rule 6(e) applies.

108. 659 F.2d at 805-06.

109. *Id.* at 807.

110. Senior District Judge William G. East of the District of Oregon was sitting by designation on the Seventh Circuit's panel. *Id.* at 801.

111. *Id.* at 808 (East, J., dissenting).

112. *Id.* at 809 (East, J., dissenting).

the addition of the Second Circuit's opinion in *In re Grand Jury Investigation of Cuisinarts, Inc.*<sup>113</sup> *Cuisinarts* involved the disclosure of grand jury materials in connection with a federal grand jury's investigation and indictment of a food processor manufacturer for resale price maintenance.<sup>114</sup> The district court denied the state attorneys' general motions for production of the materials<sup>115</sup> and the Second Circuit affirmed, invoking the "long shadows of history enshroud[ing]" the grand jury and the "time-honored policy of secrecy."<sup>116</sup>

The Second Circuit began with the premise that because grand jury materials are solely within the province of the judicial branch, they can only be disclosed by court order.<sup>117</sup> The court, therefore, reasoned that grand jury materials are not part of the Justice Department's "files."<sup>118</sup> The Antitrust Improvements Act itself is addressed to the Attorney General and not to the courts—the keepers of grand jury secrecy.<sup>119</sup> As an alternative ground for its holding, the court asserted that disclosure of investigative files is permitted only to the extent allowed by law.<sup>120</sup> Since rule 6(e) contains no standard for determining when disclosure is permissible, the court reasoned that Congress intended to incorporate the judicially created "particularized need" standard into section 4F(b).<sup>121</sup> The court argued that Senator Abourezk's comments and the House report both supported its interpretation that the states had not been relieved of the burden of showing particularized need prior to obtaining grand jury materials.<sup>122</sup>

### C. Section 4F(b) Authorizes Grand Jury Disclosure to State Attorneys General Without A Showing of Particularized Need

Section 4F(b) of the Antitrust Improvements Act created a new statutory cause of action<sup>123</sup> intended to alleviate the complex problems that often

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113. 665 F.2d 24 (2d Cir. 1982), *petition for cert. pending sub nom.* Connecticut v. Cuisinarts, Inc., No. 81-1595 (U.S. Feb. 17, 1982).

114. *Id.*

115. The district court denied these motions without prejudice allowing the states to reapply for disclosure upon demonstration of a particularized need. *Id.* at 30.

116. 665 F.2d at 27-28.

117. *Id.* at 31.

118. *Id.*

119. *Id.* at 34.

120. *Id.* at 32.

121. *Id.* at 33.

122. *Id.* at 34.

123. Kintner, *supra* note 15, at 24-25 & 23 n.140. The authors conclude that since H.R. 8532 was passed by the Senate, authorizing civil actions by state attorneys general *without* referring to § 4 of the Clayton Act, *parens patriae* actions can be characterized as a new cause of action.



plagued individual consumers attempting to take on antitrust violators.<sup>124</sup> Congress envisioned a new scheme of federal antitrust enforcement, using *parens patriae* as a vehicle to encourage federal-state cooperation. The keystone of this cooperative enforcement effort hinges on the free flow of information between these governmental units. Section 4F(b) created a conduit through which information gathered during the federal investigation of antitrust violations can flow to state attorneys general to aid them in the enforcement of federal antitrust laws. If the Antitrust Improvements Act is to be given full effect, section 4F(b) must be read in harmony with rule 6(e) to permit grand jury disclosure under appropriate circumstances without a showing of particularized need.

An examination of the practical realities of antitrust litigation leads to the inescapable conclusion that "investigative files or other materials" encompass grand jury information. A contrary conclusion would render section 4F(b) of the Antitrust Improvements Act a dead letter, something that must be avoided under standard canons of statutory construction.<sup>125</sup> As the United States cautioned in its memorandum filed with the district court in *Cuisinarts*, "[w]ere grand jury materials not encompassed by Section 4F(b), in most cases the only materials the Attorney General could provide to the states would be preliminary staff memorandum requesting authority to commence a grand jury investigation."<sup>126</sup> Furthermore, the use of grand jury materials as an investigative tool is well recognized.<sup>127</sup> That the life of such information can extend well beyond the confines of the particular grand jury that produces it, is amply illustrated by the Department of Justice Antitrust Division's practice of making a stenographic transcript of all testimony before the grand jury.<sup>128</sup> The Division may disclose the information to other government personnel aiding in the investigation,<sup>129</sup>

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124. S. REP. NO. 803, *supra* note 53, at 39.

125. See *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (statutes should not be construed to render them meaningless); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (a statute should be construed so as to give effect to every word and it should not be interpreted in a way that renders one part of it inoperative) *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (every clause and word of a statute should be given effect).

126. Memorandum of United States at 14, *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24 (2d Cir. 1981).

127. See generally C. HILLS, *ANTITRUST ADVISER ANTITRUST GRAND JURY PRACTICE MANUAL DEPARTMENT OF JUSTICE* (1975); M. MALINA, *LITIGATING AN ANTITRUST CASE* (1977); Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 AM. CRIM. L. REV. 651, 683-90 (1977).

128. C. HILLS, *supra* note 127, at 175.

129. See FED. R. CRIM. P. 6(e)(3)(A)(ii) which permits disclosure of grand jury materials to "government personnel," without a court order, to aid attorneys for the government in their investigation. See also *infra* note 143 and accompanying text.

but most often this information is used by the Division itself in subsequent antitrust litigation.<sup>130</sup> The reasons for such extensive use of grand jury materials stem from the unique and perplexing nature of antitrust litigation. As one commentator noted, “[t]he process from the inception of the investigation through the return of an indictment is somewhat involved and, in many aspects, unique to antitrust.”<sup>131</sup> Requiring state attorneys general to repeat the entire procedure would contravene the purpose of the Antitrust Improvements Act, which was designed to encourage the “Federal Government [to] cooperate *fully* with the State antitrust enforcers.”<sup>132</sup> Such a requirement would also cast doubt upon the many court decisions that have sought to effectuate this goal.<sup>133</sup>

Section 4F(b) thus contemplates a symbiotic relationship between the states and the federal government wherein the states seek relief for state consumers who have fallen prey to antitrust violators. The federal government aids this process by contributing its work product, and in return, receives needed assistance from the states in the enforcement of federal antitrust laws.<sup>134</sup> The benefits of such a policy to the public far outstrip the time-worn policy of grand jury secrecy which can be adequately safeguarded by the use of protective orders.<sup>135</sup> Thus, the limitation that has been imposed on “private” antitrust litigants’ use of grand jury materials—the particularized need requirement—should not govern the access to or use of that material by state attorneys general in their role as *parens patriae*. While the courts have not yet held that the “public interest” creates a *per se* “particularized need,”<sup>136</sup> the Fourth<sup>137</sup> and Ninth<sup>138</sup> Circuits have held that requests by state attorneys general for grand jury materials pursuant to section 4F(b) of the Act demonstrate a *per se* particularized need. Furthermore, the courts have held that the need for secrecy diminishes

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

131. Steinhouse, *Antitrust Grand Jury Procedure*, 23 CLEV. ST. L. REV. 447 (1974).

132. H.R. REP. NO. 499, *supra* note 52, at 17.

133. See *In re Grand Jury Proceedings*, Misc. No. 1331 (N.D. Tex. Jan. 21, 1981), *appeal pending*, No. 81-1059 (5th Cir. 1981); *United States v. Cargo Gasoline Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,868 (M.D. Fla. 1980), *stay denied*, No. 81-5128 (5th Cir. 1981); *United States v. Campbell Hardware, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,794 (D. Mass. 1979); *United States v. B.F. Goodrich Co.*, 1978-2 Trade Cas. (CCH) ¶ 62,389 (N.D. Cal. 1978); *In re Montgomery County Real Estate Antitrust Litig.*, 452 F. Supp. 54 (D. Md. 1978).

134. The Department of Justice has taken a position favoring the dissemination of grand jury materials to the states. See 822 ANTITRUST & TRADE REG. REP. (BNA), at D-1 (1977).

135. See *infra* text accompanying note 217.

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

137. *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980).

138. *United States v. B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980).

when disclosure is sought by a public body for use in fulfilling a public function.<sup>139</sup> *Parens patriae* litigation assumes not only a public body acting on behalf of the public, but a governmental unit discharging a public obligation pursuant to federal law.<sup>140</sup>

The advancement of the public's interest in effective federal antitrust enforcement through more liberalized treatment of grand jury disclosure need not have a parallel detrimental effect upon the preservation of grand jury secrecy. Such fears are apparently unfounded in light of the federal experience since the amendment of rule 6 in 1977. Rule 6 now permits disclosure of grand jury materials to "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."<sup>141</sup> When the rule was amended, the Senate Judiciary Committee commented that there was "no intent to preclude the use of grand jury developed evidence for civil law enforcement purposes."<sup>142</sup> While the amendment clearly addresses itself to a federal attorney's duty to enforce federal criminal law, it is equally clear that the rule has been judicially expanded to include a broader cadre of support personnel to assist the federal government in its enforcement of the antitrust laws.<sup>143</sup> In line with this expansive trend, the Antitrust Improvements Act may be construed, in effect, as placing state attorneys general in a position analogous to that of government personnel called into service on behalf of the Department of Justice to ensure civil enforcement of the federal antitrust laws. Congress's recruitment of the states to assist in the enforcement of the antitrust laws is consistent with the Antitrust Improvements Act's

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139. *Sobotka*, 623 F.2d at 767 (burden of showing particularized need was less compelling since grand jury investigation was completed and the materials were sought in connection with the "performance of a public duty"). *Id.*

140. *See, e.g.*, *Matter of Disclosure of Testimony, Etc. (Troia)*, 580 F.2d 281, 287 (8th Cir. 1978) (disclosure of grand jury materials granted to a city "seek[ing] to protect the public's welfare"); *In re the Grand Jury*, 1974, 377 F. Supp. 1282, 1282 n.1 (W.D. Okla. 1974) (approving cooperation between state and federal prosecutors in the public interest); *In re Grand Jury Proceedings*, 483 F. Supp. 422, 424 (1979) (federal court has obligation to cooperate with state officials).

141. FED. R. CRIM. P. 6(e)(3)(A)(ii) (emphasis added).

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

143. While the district courts' constructions of "government personnel" have been mixed, the trend is toward a liberalization of grand jury disclosure where such disclosure would facilitate the government's enforcement of antitrust laws. *See, e.g.*, *In re 1979 Grand Jury Proceedings*, 479 F. Supp. 93 (E.D.N.Y. 1979) (disclosure to non-attorney investigators who were employees of a municipal government). *But see In re Miami Federal Grand Jury*, 478 F. Supp. 490 (S.D. Fla. 1979) ("government personnel" not likely to include state governmental employees).

broad goal of facilitating cooperation between these governmental units in the interest of providing effective antitrust enforcement.

The vitality of that provision of the Antitrust Improvements Act providing for *parens patriae* actions will depend upon whether the Supreme Court lends a broad construction to the Antitrust Improvements Act's goals and purposes.<sup>144</sup> This question of statutory interpretation will have to be answered with little help from the legislative history.<sup>145</sup> Nevertheless, established principles of statutory construction, recent trends in the case law, and notions of federalism all support a liberal reading of the *parens patriae* provision allowing state attorneys general access to grand jury materials without a separate showing of particularized need.<sup>146</sup>

### III. GRAND JURY DISCLOSURE IN ANTITRUST LITIGATION

This Comment has argued that section 4F should be interpreted to obviate the particularized need requirement when disclosure requests come from state attorneys general. This section of the Comment will explore the practical consequences to state attorneys general should the Supreme Court hold in *Cuisinarts* that they, like all other parties seeking disclosure of grand jury materials, must demonstrate particularized need. It will focus upon the nature of the demonstration that courts require before concluding that particularized need exists. Consequently, this section will not only be relevant to state attorneys general, but will also have ramifications for private parties seeking disclosure of grand jury materials.

While historians have established that the secrecy of grand jury proceedings arose from a need to protect the citizenry from the oppression of the state, they have cautioned that this veil of secrecy was not intended to be a guise under which the government could amass evidence which then could be protected from disclosure.<sup>147</sup> Nevertheless, this has been the practical consequence to date.<sup>148</sup> The state legislatures<sup>149</sup> and lower federal

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144. The Supreme Court has granted certiorari to the Seventh Circuit case, so argument and a definitive decision on the matter should be forthcoming sometime during the October 1982 term. *See supra* note 73.

145. The ambiguity of the *parens patriae* provision of the Antitrust Improvements Act is evident by the fact that the scant legislative history surrounding it has been marshalled to support both a liberal and rigid interpretation. *See supra* text accompanying note 54.

146. *But see* Kintner, *supra* note 15, at 30. The authors conclude that grand jury materials may not be provided state attorneys general. They characterize title III of the Antitrust Improvements Act as a "limited legislative response" to private consumers' inability to effectively avail themselves of the relief provided under the antitrust laws. *Id.* at 19.

147. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 458 (1965).

148. Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668, 668-69 (1962).

149. *See, e.g.*, CAL. PENAL CODE §§ 869, 938.1 (West 1970); PA. R. CRIM. P. 310 (Supp. 1971); R.I. GEN. LAWS § 12-17-16 (Supp. 1972).

courts,<sup>150</sup> however, have been eroding the doctrine of secrecy through the adoption of "open" grand jury systems and liberal construction of the "particularized need" test. In the wake of this liberalizing trend, the grand jury has been recognized as a tool of "civil" discovery in antitrust litigation.<sup>151</sup> Analysis of the status of the "particularized need" standard will commence with examination of the evolution of the standard.

*A. Judicial Evolution of "Particularized Need" Standard*

The Supreme Court first addressed the issue of whether and when to allow disclosure of grand jury materials in *United States v. Procter & Gamble*.<sup>152</sup> Criminal defendants sought production of the federal grand jury transcripts from an investigation regarding their possible violations of the Sherman Act.<sup>153</sup> The government had not asked the grand jury to return an indictment, and was using the grand jury materials to prepare its civil case for trial.<sup>154</sup> The district court found that the defendants had shown "good cause" under Rule 34 of the Federal Rules of Civil Procedure, which supports disclosure of grand jury materials where the ends of justice require it,<sup>155</sup> and the government's use of that information might result in an unfair advantage to them in the case.<sup>156</sup> In reversing the district court's disclosure order, the Supreme Court noted that the complexity, length, and expense of antitrust litigation were not sufficient by themselves to support a production order.<sup>157</sup> Instead, the Court decided that the long-established policy of maintaining grand jury secrecy could be overcome only by a showing of "compelling necessity."<sup>158</sup> The Court found that the appellees had failed to show "good cause" under rule 34 for the "wholesale discov-

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150. See *infra* notes 180-232 and accompanying text.

151. See *Atlantic City Elec. Co. v. A.B. Chance Co.*, 313 F.2d 431, 434 (2d Cir. 1963). *Atlantic City* was the first case to permit the disclosure of grand jury testimony in a civil case.

152. 356 U.S. 677 (1958).

153. *Id.* at 678.

154. *Id.* at 687 n.2.

155. 19 F.R.D. 122, 126 (D.N.J. 1956); FED. R. CIV. P. 34 provides in pertinent part:

Upon motion of any party showing good cause therefore and upon notice to all other parties . . . the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing . . . of any designated documents . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control. . . .

156. 19 F.R.D. at 125.

157. 356 U.S. at 683.

158. *Id.* at 682.

ery" of the grand jury's proceedings.<sup>159</sup> Concluding its opinion with a rigid rule allowing disclosure *only* when the government had subverted the grand jury process,<sup>160</sup> the Court established itself as a staunch guardian of what it labelled the "indispensable secrecy of grand jury proceedings."<sup>161</sup>

The Supreme Court's next important ruling on the issue came in *Pittsburgh Plate Glass Co. v. United States*.<sup>162</sup> Unlike the *Procter & Gamble* defendants, the defendants in *Pittsburgh Plate* did not request "wholesale" discovery of matters occurring before the grand jury but instead only sought the discovery of a particular witness's relevant testimony for possible use on cross-examination at trial.<sup>163</sup> Although the Court realized that its opinion in *Procter & Gamble* the year before had suggested that "particularized need" might include use of grand jury minutes for impeachment purposes "where the secrecy of the proceedings is lifted discretely and limitedly," it refused to order disclosure.<sup>164</sup> In a lengthy dissent, four justices took issue with the Court's blind adherence to the doctrine of grand jury secrecy under circumstances where disclosure would "further the fair administration of criminal justice."<sup>165</sup>

Seven years later, the Supreme Court unanimously held in *Dennis v. United States*,<sup>166</sup> that defense counsel may have access to relevant portions of a trial witness's grand jury testimony upon a showing of particularized need. The Court emphasized the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."<sup>167</sup> It found that none of the traditional reasons for nondisclosure<sup>168</sup> were applicable in *Dennis* due to

159. *Id.* at 683.

160. *Id.*

161. *Id.* at 682 (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)).

162. 360 U.S. 395 (1959).

163. *Id.* at 396.

164. *Id.* at 399. The Court, citing *Procter & Gamble*, listed three instances sufficient to meet the "particularized need" standard: "to impeach a witness, to refresh his recollection, to test his credibility and the like." *Id.*

165. *Id.* at 403 (Brennan, J., dissenting).

166. 384 U.S. 855 (1966).

167. *Id.* at 870.

168. The traditional policy considerations underlying the doctrine of grand jury secrecy were recognized by the majority in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). These same considerations were also recognized and enumerated by the dissent:

(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 with respect to the commission of crimes; (5) to protect innocent accused who

the fifteen year lapse between the grand jury proceedings and the trial, and the fact that the charge could not be sustained without the testimony of four key witnesses before the grand jury.<sup>169</sup>

Before *Douglas Oil Co. v. Petrol Stops Northwest*,<sup>170</sup> the only cases in which the Supreme Court had considered the applicable standard for disclosure of grand jury transcripts involved requests by defendants in criminal or civil antitrust actions. *Douglas Oil Co.* was the first case in which the Court decided the availability of grand jury transcripts to private treble-damages action plaintiffs. The plaintiffs, independent gasoline dealers, brought civil antitrust actions against several large oil companies.<sup>171</sup> During the pretrial stages of the case, a federal antitrust investigation culminated in the indictment of Petrol Stops, the civil defendant in *Douglas Oil Co.*<sup>172</sup> After Petrol Stops pleaded nolo contendere to the criminal charges, Douglas Oil petitioned the district court for the transcripts of certain grand jury witnesses.<sup>173</sup> The district court ordered disclosure of the requested materials as "preliminarily to or in connection with a judicial proceeding,"<sup>174</sup> and the Court of Appeals for the Ninth Circuit affirmed.<sup>175</sup>

On appeal, the Supreme Court articulated a three-pronged test for determining whether the "particularized need" standard has been satisfied. The Court stated that "[p]arties seeking grand jury transcripts under rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."<sup>176</sup> Although the Court did not concede that it had lowered the standard of proof required by *Procter & Gamble* and *Dennis*, the Court did state that "as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification."<sup>177</sup> The *Douglas*

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is exonerated from disclosure of the fact that he had been under investigation, and from the expense of standing trial where there was no probability of guilt.

*Pittsburgh Plate*, 360 U.S. at 399 (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). See also *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979).

169. 384 U.S. at 872-73.

170. 441 U.S. 211 (1979).

171. *Id.* at 213.

172. *Id.* at 215.

173. *Id.* at 215-16.

174. *Id.* at 220.

175. *Petrol Stops Northwest v. United States*, 571 F.2d 1127 (9th Cir. 1978).

176. 441 U.S. at 222.

177. *Id.* at 224 n.14.

*Oil Co.* Court concurred in the lower court's findings that secrecy was no longer a substantial factor because the grand jury proceeding had terminated three years before and the transcripts had already been released to the petitioners.<sup>178</sup> Nevertheless, it held that the disclosure decision was flawed because these lower courts knew little about the civil case and merely speculated as to the relevancy the transcripts would have in the civil suit.<sup>179</sup>

### B. A Framework for Disclosure

The *Dennis* Court's admission that traditional reasons for grand jury secrecy were inapplicable in that case<sup>180</sup> and the *Douglas Oil Co.* Court's three-part test<sup>181</sup> indicate the Court's increasing willingness to tip the scales in favor of disclosure of grand jury materials when the circumstances justifying secrecy become less relevant. Implicit in these decisions is the Court's recognition of certain factors that militate against rigid application of the particularized need standard. Instead of precipitously invoking the doctrine of grand jury secrecy, the Court has begun to scrutinize closely the policies favoring grand jury secrecy and to examine the various factors supporting and opposing disclosure in each case.

Lower federal courts have followed this lead and have begun to balance more carefully the various factors involved before deciding whether to order disclosure of grand jury materials.<sup>182</sup> Although this more deliberative process does not always result in disclosure, recent decisions evidence movement toward a sound and thoughtful approach to the disclosure question.

This recent, more liberal treatment of the disclosure question should not be interpreted as an abandonment of the "particularized need" standard. It is extremely unlikely that the doctrine of grand jury secrecy protected by this standard will ever be completely abandoned by the courts. Instead, the judicial evolution from blind adherence to the particularized need standard of *Procter & Gamble* to the more reasonable rule of *Douglas Oil Co.* has proceeded cautiously. It is only through examination of the policy considerations surrounding grand jury disclosure and identification of the pertinent, recurring factors bearing on the issue that a useful framework

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178. *Id.* at 223.

179. *Id.* at 222.

180. *Dennis*, 384 U.S. at 872 n.18: "None of the reasons traditionally advanced to justify non-disclosure of grand jury minutes are [sic] significant here." (parenthetical note omitted). See *supra* note 169 and accompanying text.

181. *Douglas Oil*, 441 U.S. at 222.

182. See *supra* text accompanying notes 147-234.



may be constructed for determining the likelihood of a court's granting disclosure.

### 1. Policy Analysis

The five policy considerations traditionally advanced in favor of grand jury secrecy were originally formulated a half-century ago by a Maryland federal district court. In *United States v. Amazon Industrial Chemical Corp.*,<sup>183</sup> the court reasoned that grand jury proceedings should be kept secret: 1) to prevent flight by those whose indictment is contemplated; 2) to allow the grand jury freedom in its deliberations; 3) to prevent tampering with witnesses; 4) to encourage others to come forward with information regarding the commission of crimes; and 5) to protect the innocent accused.<sup>184</sup> These same policy considerations have subsequently been adopted by the Supreme Court in *Procter & Gamble*<sup>185</sup> and by a host of lower courts.<sup>186</sup> Other than for a perfunctory citation to the five policies, however, most opinions have ignored the *Amazon* court's underlying analysis as to the degree of their importance and their limited applicability.

The *Amazon* court based all its reasons for secrecy, except protection of the innocent accused, on the protection of the *grand jury* "as the direct independent representative of the public as a whole . . . ."<sup>187</sup> Recent courts have begun to recognize<sup>188</sup> that most of the *Amazon* policies favoring secrecy are only operative while a particular grand jury is sitting. The only policy considerations that remain beyond termination of the grand jury are protection of the innocent accused and the effect disclosure may

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183. 55 F.2d 254 (D. Md. 1931). *Amazon* involved the sufficiency of indictments charging the defendant corporation with conspiracy to violate the National Prohibition Act. The court held that the presence of a stenographer in the grand jury room did not invalidate the indictments. *Id.* at 259-61.

184. *Id.* at 261.

185. 356 U.S. at 681 n.6. See also *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405 (1959) and *Douglas Oil Co.*, 441 U.S. at 219 n.10.

186. See, e.g., *In re Grand Jury Investigation, Ven-Fuel*, 510 F. Supp. 1047 (M.D. Fla. 1981); *United States v. Boffa*, 513 F. Supp. 444 (D.C. Del. 1980); *United States v. White Ready-Mix Concrete Co.*, 449 F. Supp. 808 (N.D. Ohio 1978).

187. *Amazon*, 55 F.2d at 261.

188. In *In re Miami Federal Grand Jury*, No. 79-8, the court stated that the rationale for grand jury secrecy is at its strongest when the grand jury is still in session. 478 F. Supp. 490 (S.D. Fla. 1979). In *In re Grand Jury*, the court concluded that after the termination of the grand jury's proceedings, most of the policy reasons for secrecy are inapplicable: "[t]he indicted will not flee; the investigation has not been impeded; witnesses cannot be bribed or intimidated; it is less likely that an innocent person will suffer injury to his reputation." 583 F.2d 128, 130-31 (5th Cir. 1978). See also *Wisconsin v. Schaffer*, 565 F.2d 961 (7th Cir. 1977); *In re Grand Jury Investigation, Ven-Fuel*, 510 F. Supp. 1047 (M.D. Fla. 1981); *United States v. Boffa*, 513 F. Supp. 444 (D. Del. 1980).

have on *future* grand juries.<sup>189</sup> In the context of civil antitrust damage actions brought subsequent to the grand jury's termination, even these policy considerations become less viable as the need for disclosure becomes more compelling.<sup>190</sup>

The policy of protecting the innocent accused is based upon the belief that the public's awareness of a grand jury investigation of a particular target, even though no indictment is returned, may subject him to public scrutiny and irreparable injury to reputation.<sup>191</sup> Use of the term innocent "accused," to describe one under grand jury *investigation*, is somewhat of a misnomer because individuals under investigation are not formally charged or "accused" of crime unless and until an indictment against them is returned by the grand jury.<sup>192</sup> Furthermore, the substantive policy of protecting the innocent accused becomes less compelling in the antitrust arena because most of the accused are corporate defendants. The Supreme Court has held that corporations are not entitled to the same constitutional rights as individuals.<sup>193</sup> Finally, if indictments are returned by the grand jury, this policy is no longer relevant to the disclosure question.

The only policy consideration that survives the grand jury's termination, regardless of whether an indictment is returned, is the effect of disclosure on future grand juries. This interest is often expressed in terms of protecting grand jury witnesses who, if they knew their testimony would become public, would be more guarded in their answers and thereby diminish the

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189. *See, e.g.,* *United States v. Atlantic Container Line, Ltd.*, 511 F. Supp. 115 (D.D.C. 1980) (where disclosure would cause strain in and adversity to objecting parties' careers and have chilling effect on future grand jury testimony, disclosure of grand jury materials would not be ordered); *United States v. Mahoney*, 495 F. Supp. 1270, 1273 (E.D. Pa. 1980) (when grand jury completes its work and adjourns only one of the reasons for secrecy remains: encouragement of free disclosure by persons who have information regarding commission of crimes); *accord, In re Screws Antitrust Litig.*, 91 F.R.D. 47, 49 (D. Mass. 1981).

190. *See, e.g., In re Screws Antitrust Litig.*, 91 F.R.D. 47 (D. Mass. 1981). That case involved multidistrict litigation wherein civil antitrust plaintiffs were granted access to the transcripts of three individuals who had testified before the grand jury which returned an indictment in connection with an antitrust conspiracy. The court reasoned that "this general concern [effect of disclosure upon future grand juries] must be weighed with the need for secrecy in a particular case, balanced against the need for disclosure." *Id.* at 49. For further authority in support of this proposition, see *United States v. Moten*, 582 F.2d 654, 663 (2d Cir. 1978); *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); *United States v. Mahoney*, 495 F. Supp. 1270, 1273 (E.D. Pa. 1980); *SEC v. Everest Management Corp.*, 87 F.R.D. 100, 104 (S.D.N.Y. 1980).

191. *See Douglas Oil Co.*, 441 U.S. at 222.

192. A grand jury is convened to determine "if there is probable cause to believe that a crime has been committed . . ." *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972).

193. *See Bellis v. United States*, 417 U.S. 85 (1974) (corporation may not assert fifth amendment privilege against self-incrimination).

effectiveness of the grand jury.<sup>194</sup> Although protection of witnesses is a noble aim, complete secrecy is unnecessary in the antitrust context because witnesses are usually employees of the suspect corporation. Therefore, copies of their testimony are discoverable by the corporation under Federal Rule of Criminal Procedure 16(a)(1)(A).<sup>195</sup> Because the witness's corporate-employer is the one most likely to render retribution, the efficacy of this policy consideration is substantially weakened. Moreover, *any* witness who gives damaging testimony before the grand jury may be reasonably certain that his testimony will be required at trial.

As a result, a close scrutiny of *Amazon* reveals that only two policies have any application after the grand jury's termination. Even then, neither of these remaining interests survives analysis unscathed. The interest in "free and untrammelled" disclosure by future grand juries is already handicapped by implementation of rule 16(a)(1)(A), while the interest in protecting the innocent accused has never been absolute and is further weakened in the context of corporate defendants. Courts must then balance these two "diminished" policy interests against the policies favoring disclosure.

Policy interests favoring disclosure stem from a litigant's need to secure the accuracy and truth of a witness's testimony. The Supreme Court recognized this interest in *Procter & Gamble* where it identified three instances where the policies in favor of grand jury secrecy could be overcome in the interest of securing the truth. These included using the grand jury transcripts to impeach, refresh, and test the credibility of a witness.<sup>196</sup> Disclosure, in such cases, ensures not only the accuracy of a par-

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194. In *Procter & Gamble*, the Court noted that witnesses may be inhibited by the knowledge that "the secrecy of their testimony [may] be lifted tomorrow." 356 U.S. at 682.

195. FED. R. CRIM. P. 16(a)(1)(A) provides that

Upon request of a defendant the government shall permit the defendant to inspect and copy . . . recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

*See* *United States v. Hughes*, 413 F.2d 1244 (5th Cir. 1969) (statements made by present and former officers and employees relating to their employment held discoverable as statements of the corporate defendant).

196. 356 U.S. at 683.

ticular witness's testimony, but also contributes to a fair outcome of the litigation.

On an even broader scale, grand jury disclosure can facilitate civil enforcement of federal antitrust laws. The imposition of criminal sanctions upon corporate entities or their officers does not adequately redress the injury suffered by those at the hands of antitrust violators. Subsequent civil antitrust damage actions can effectuate this interest by exacting monetary penalties from violators to compensate the injured. Grand jury disclosure helps expedite litigation, thus reducing the public cost of litigation and providing speedy recovery to those actually injured. Nondisclosure can only frustrate the process and impede antitrust enforcement because grand jury materials are the single most important source of information to an antitrust litigant.<sup>197</sup> The efficacy and cost considerations surrounding dissemination of grand jury materials need not, however, entail a massive and irresponsible intrusion into grand jury secrecy when responsibly administered and overseen by the courts.

As the *Amazon* court long ago recognized, a cautious and careful approach must be taken to the application of the rule of secrecy.<sup>198</sup> Such an approach is consistent with and complements the "common law right of access to public records [which] must clearly be *tempered* by the rule of secrecy."<sup>199</sup> In line with this accommodation of competing policies, the Ninth Circuit recently recognized "a limited right of access to grand jury records which interested members of the public have standing to assert."<sup>200</sup> Applicability of the common law right of access which is unique to American jurisprudence, to the question of grand jury disclosure, may weigh heavily upon the common law doctrine of secrecy spurned by a closed English system of jurisprudence.

The above analysis demonstrates that the court's task in balancing these

197. *See supra* notes 89-92 and accompanying text.

198. *See supra* note 183 and accompanying text.

199. *In re* Special Grand Jury (For Anchorage, Alaska), 674 F.2d 778, 780 (9th Cir. 1982). As support for its position that a common law right of access exists, the Ninth Circuit looked to the United States Supreme Court's recent observation that

[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents. In contrast to the English practice . . . American decisions generally do not condition enforcement on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found . . . in the citizen's desire to keep a watchful eye on the workings of public agencies . . .

*Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978) (footnotes and citations omitted).

200. *Anchorage, Alaska*, 674 F.2d at 780.

competing interests is not an easy one. The outcome will be determined by a "factor" analysis that attempts to "temper" secrecy considerations by factoring in variables that will help the court to both identify and quantify the "needs" of the particular party seeking disclosure.

## 2. Factor Analysis

The courts have identified certain factors that may tip the scales in favor of disclosure. These factors fit into three basic categories: timing, safety, and subject-matter. Several of the variables included within the timing factor are the stage of the grand jury's proceedings during which disclosure is requested; whether the grand jury witnesses have already testified at the criminal trial; whether and to whom disclosure has already been made; and whether or not the grand jury witnesses are or will be scheduled for deposition or testimony in the subsequent civil proceeding. The safety factor concerns whether any remnant of secrecy interest can be adequately served by appropriate protective orders. The subject-matter factor addresses the type of grand jury materials requested. Despite this pigeonholing of relevant factors, their recognition and persuasive weight rests within the discretion of the court.<sup>201</sup> Although the results are not always uniform, a study of the pattern of the factors which courts find most persuasive is useful.

While the timing and safety factors clearly have a substantial impact on the disclosure question, some courts hold that the mere subject matter of the request—documents versus transcripts—is potentially dispositive of the entire issue.<sup>202</sup> The logic of the document/transcript distinction is based on the argument that documents do not in and of themselves disclose "matters occurring before the grand jury."<sup>203</sup> In *Golden Quality Ice Cream*

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201. The Court in *Douglas Oil Co.*, emphasized that a court deciding a disclosure question "necessarily is infused with substantial discretion." 441 U.S. at 223. See also *Pittsburgh Plate*, 360 U.S. at 395, 399; *SEC v. Everest Management Corp.*, 87 F.R.D. 100, 104 (S.D.N.Y. 1980); *In re Corrugated Container Antitrust Litig.*, 1980 TRADE REG. REP. (CCH) ¶ 63,192 (S.D. Tex. Jan. 25, 1980).

202. The United States Supreme Court, however, has at least implied that documents should be treated the same as transcripts. See *Douglas Oil Co.*, 441 U.S. 211; see also *Texas v. U.S. Steel Corp.*, 546 F.2d 626, 628 (5th Cir.), cert. denied, 434 U.S. 889 (1977); *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962); *In re the United States for Disclosure of Grand Jury Matters (Miller Brewing Co.)*, 518 F. Supp. 163, 168 (E.D. Wis. 1981); *Corona Constr. Co. v. Ampress Brick Co.*, 376 F. Supp. 598 (N.D. Ill. 1974); *In re California*, 195 F. Supp. 37, 40 (E.D. Pa. 1961).

203. This logic has been countered with the argument that the broader the document request, the more likely it would be to reveal the pattern of the grand jury's investigation which, in any case, may be even more telling than the testimony of any single witness. See *Falstaff Brewing Corp. v. Kessler*, 489 F. Supp. 191 (E.D. Wis. 1980).

*Co. v. Deerfield Speciality*, the court granted the plaintiff's request for documents turned over to the grand jury which had completed its work.<sup>204</sup> Finding that disclosure of *documents* is not prohibited by rule 6(e), the court held that the particularized need standard only applies to the discovery of grand jury transcripts.<sup>205</sup>

Other courts take a middle-of-the-road approach, asserting that documents should be more readily subject to disclosure than transcripts of testimony, but should not be automatically disclosed.<sup>206</sup> Still other courts have employed a purpose test which premises release of documents subpoenaed by the grand jury upon a showing of a legitimate purpose by the party seeking disclosure.<sup>207</sup> The most well-reasoned approach, however, and that in conformity with the in-depth factual analysis relative to time and safety factors, requires a factual inquiry into whether the documents tend to reveal the actual proceedings before the grand jury. If so, the requirements of rule 6(e) must be satisfied.<sup>208</sup>

*Illinois v. Sarbaugh*<sup>209</sup> is a fertile example of the factor analysis now being employed by some courts to determine the disclosure question. In *Sarbaugh*, the Department of Justice instituted a criminal antitrust investigation of highway construction contractors for possible Sherman Act violations in connection with a bid-rigging conspiracy.<sup>210</sup> Employees of the

204. 87 F.R.D. 53, 59 (E.D. Pa. 1980).

205. *Id.* Further support for the proposition that documents are never subject to the disclosure restrictions of rule 6(e) can be found in *United States v. Weinstein*, 511 F.2d 622, 627 n.5 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975); *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1303 (M.D. Fla. 1977).

206. *See Cuisinarts*, 516 F. Supp. at 1008, 1022 n.17; *Illinois v. Sarbaugh*, 552 F.2d 768, 772 n.2 (7th Cir.), *cert. denied sub nom. J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977); *Index Fund, Inc. v. Hagopian*, 512 F. Supp. 1122, 1128 (S.D.N.Y. 1981); *In re Grand Jury Which Presented Criminal Indictments 76-149 & 77-72*, 469 F. Supp. 666, 671 (D.C. Pa. 1978).

207. *See United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960) (disclosure to further lawful agency investigation); *In re Grand Jury Proceedings*, 505 F. Supp. 978, 982 (D. Me. 1981); *SEC v. Everest Management Corp.*, 87 F.R.D. 100, 105 (S.D.N.Y. 1980); *Brink v. DaLesio*, 82 F.R.D. 664, 668-69 (D. Md. 1979); *United States v. Saks & Co.*, 426 F. Supp. 812, 815 (S.D.N.Y. 1976) (disclosure to further lawful agency investigation); *Capitol Indem. Corp. v. First Minn. Constr. Co.*, 405 F. Supp. 929, 931 (D. Mass. 1975) (disclosure to further discovery in civil litigation).

208. *See In re Special February 1975 Grand Jury*, 662 F.2d 1232, 1243 (7th Cir. 1981); *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 869-70 (D.C. Cir. 1981); *In re Grand Jury Investigation*, 630 F.2d 996, 1001 (3d Cir. 1980), *cert. denied*, 449 U.S. 1081 (1981); *In re Doe Grand Jury Proceedings*, 537 F. Supp. 1038 (D.R.I. 1982); *United States v. Monsour*, 508 F. Supp. 168 (D.C. Pa. 1981).

209. 552 F.2d 768 (7th Cir.), *cert. denied sub nom. J.L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977).

210. 552 F.2d at 771.

defendant corporations were called to testify both before the grand jury and during the subsequent criminal proceedings. The court granted the corporate defendants access to this testimony pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A),<sup>211</sup> which allows disclosure to corporations of their own employees' testimony. After the grand jury's discharge, the state filed a treble-damage action against the corporations named in the criminal proceeding and five other companies.<sup>212</sup> The state requested disclosure of the same grand jury transcripts that had been disclosed to the defendants.<sup>213</sup>

The first factor addressed by the court was the need for disclosure which "arises from a litigant's interest in securing accurate and truthful testimony from witnesses."<sup>214</sup> If a witness had previously testified at trial or in a deposition about matters concerning his grand jury testimony, the court found no reason for not allowing the use of the witness's earlier grand jury testimony "to assure the accuracy of his later testimony."<sup>215</sup> Furthermore, the fact that some of the defendants had already obtained access to the grand jury transcripts raised the possibility that they would obtain an "unfair advantage" in the litigation.<sup>216</sup> Combining these factors with the plaintiff's scheduling of the grand jury witnesses for testimony at trial or deposition, the court granted disclosure subject to appropriate protective orders.<sup>217</sup>

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211. *Id.* For the relevant portions of rule 16(a)(1)(A), see *supra* note 195.

212. *Sarbaugh*, 552 F.2d at 771.

213. *Id.*

214. *Id.* at 775.

215. *Id.* at 776. In *In re Braniff Airways, Inc.*, 390 F. Supp. 344 (W.D. Tex. 1975), this same factor was applied to a witness to an earlier *grand jury proceeding*. In that case, the court authorized disclosure to witnesses scheduled to appear before a federal grand jury of their prior testimony concerning the same events given to an earlier grand jury conducting the same investigation. *Id.* at 346. See also *In re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282, 1284 (S.D. Fla. 1974); *In re Minkoff*, 349 F. Supp. 154, 156 (D.R.I. 1972).

216. *Sarbaugh*, 552 F.2d at 776 (citing *Dennis*, 384 U.S. at 873; accord *Douglas Oil Co.*, 441 U.S. at 211; *U.S. Indust., Inc. v. United States Dist. Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965); *In re Cement-Concrete Block*, 381 F. Supp. 1108 (N.D. Ill. 1974). *Contra In re Grand Jury Criminal Indictments 76-149 & 77-72 in Middle District of Pa.*, 469 F. Supp. 666, 670 n.6 (D. Pa. 1978) (disclosure in a subsequent civil proceeding is not automatic simply because corporate defendants have been given access to their employees' grand jury testimony).

217. 552 F.2d at 777. A major condition of the protective orders instituted in *Sarbaugh* was "use." The transcripts could only be used in "that litigation [and] only for the purposes of impeachment, refreshing the witness' recollection and testing credibility." *Id.* (quoting *In re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings*, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974)). The district court was directed to release the transcripts "to a single attorney for plaintiff," who would have sole custody of the documents and who would maintain a log indicating who had seen what portion of each transcript and when they had seen it. There was to be no copying and the materials were to be returned when no longer needed

The importance of judicial discretion underlying a factor analysis such as that employed by the Seventh Circuit in *Sarbaugh* is illustrated by the district court's decision in *United States v. White Ready-Mix Concrete Co.*,<sup>218</sup> which distinguished each of the factors upon which the *Sarbaugh* court relied in granting disclosure. *White Ready-Mix Concrete* involved a disclosure request by civil antitrust plaintiffs for grand jury transcripts and other materials that resulted in indictments against seven corporations and five individuals for an alleged price-fixing conspiracy.<sup>219</sup> The district court found the *Sarbaugh* analysis inapplicable because the court in the criminal proceeding had "refused to release the transcripts of certain officers and employees to the corporate defendants on the grounds that an employee-witness does not necessarily have interests coextensive with those of the corporation."<sup>220</sup> Furthermore, the plaintiffs had not scheduled depositions for those whose grand jury transcripts it sought.<sup>221</sup> The court applied an exhaustion principle and found the plaintiffs' failure to pursue every available civil discovery method before petitioning for disclosure fatal to their request.<sup>222</sup> In deference to the criminal court's decision not to release the transcripts to the criminal defendants, the timing factor seems to have been strictly construed by the court. Although the *White Ready-Mix Concrete* court recognized the *Sarbaugh* factors, it unnecessarily saddled plaintiffs with time consuming and wasteful machinations before those factors would be given any significant weight.

In *In re Screws Antitrust Litigation*,<sup>223</sup> a reasonable balance seems to have been struck between the less demanding factor analysis of *Sarbaugh* and the considerably stricter factor analysis of *White Ready-Mix Concrete*. *Screws* involved multidistrict litigation wherein plaintiff sought the transcripts of four individuals who testified before the grand jury which returned an indictment against defendants in an alleged price-fixing

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for "the prescribed use." Also, the defendant could challenge, on motion in the district court, disclosure of any portion of any transcript not bearing on the antitrust action.

218. 509 F. Supp. 747 (N.D. Ohio 1981).

219. *Id.* at 748.

220. *Id.* at 749. In support of this proposition, see *United States v. Atlantic Container Line, Ltd.*, 511 F. Supp. 115 (D.D.C. 1980) (disclosure of grand jury materials would not be ordered where it would cause strain and adversity to the objecting parties' careers).

221. 509 F. Supp. at 748.

222. *Id.* Although petitioners did serve interrogatories on the corporate officers and employees who might possess knowledge of the price-fixing arrangements, they plead the fifth amendment. This did not, however, convince the court of the necessity of producing the transcripts. The court reprimanded petitioners for failing to compel answers to the interrogatories and for failing to seek depositions. *Id.*

223. 91 F.R.D. 47 (D. Mass. 1981).



conspiracy.<sup>224</sup> The court identified the following factors in rendering its decision: the probability of the grand jury witness's appearance at the civil trial, the release of the transcripts to the defendants prior to the criminal proceeding and the trustworthiness of the testimony of those who appeared at the criminal trial.<sup>225</sup> Of the four witnesses whose grand jury transcripts were sought, all but one had testified at the criminal trial.<sup>226</sup> The plaintiff had deposed all four witnesses, but each invoked the fifth amendment privilege against self-incrimination at these depositions.<sup>227</sup> Furthermore, each of the defendants in the civil suit had received, prior to the criminal trial, the grand jury transcripts of no less than sixty persons, including most of the testimony of the four whose transcripts were sought.<sup>228</sup> The court released, subject to appropriate protective orders,<sup>229</sup> the grand jury transcripts of the three defendants who had testified at the criminal trial.<sup>230</sup> The testimony of the fourth witness was not disclosed because he did not testify at the criminal trial and was an unindicted coconspirator.<sup>231</sup>

The even-handed reasoning of the *Screws* court is attractive in that the court was unwilling to compromise the secrecy of the grand jury proceedings on the basis of mere conclusory allegations that the fourth witness's transcript contained useful and relevant testimony.<sup>232</sup> At the same time, however, the court did not require an exhaustive display of unavailing, expensive, and time-consuming discovery attempts to conclude that the other defendants were not going to be forthright.<sup>233</sup> Other courts that have granted disclosure without requiring an exhaustive demonstration of generally futile discovery attempts<sup>234</sup> may be similarly commended.

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224. *Id.*

225. *Id.*

226. *Id.* at 48-49.

227. *Id.* at 49.

228. *Id.*

229. *Id.* at 51. The court ordered that the transcripts be released to plaintiffs "with the same deletions the government made prior to their release to defendants in the criminal trial." *Id.* The transcripts were to be used solely by counsel of record and their experts and were not to be discussed or disclosed for any other purpose. Finally, all copies were to be returned at the close of the litigation. *Id.*

230. *Id.*

231. *Id.*

232. The interest in protecting a grand jury witness who was not indicted and not called to testify at the criminal proceeding is admittedly great. Such a witness is the person most likely to have lead the prosecutor to those likely to have knowledge of and/or have participated in the wrongdoing.

233. Compare *White Ready-Mix Concrete*, 509 F. Supp. at 748 with *Screws*, 91 F.R.D. at 47.

234. For instances where courts have granted access without such an exhaustive display, see *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743, 750-51 (D. Md. 1978) (court required only "some rational connection with a specific existing or contem-

The above factor analysis is intended to be a *guide* from which one may identify, analyze, and predict those factual circumstances most likely to result in a court's granting disclosure of grand jury materials in a subsequent civil antitrust action. It must be remembered, however, that the relative strength and applicability of these factors considered alone or in combination will be subject to the discretion of the court. A final caution is necessary to those who may perceive this expanded factor analysis now being employed by the courts as a weakening of the particularized need standard. While courts no longer apply the standard mechanically, the judiciary is not unmindful of the importance of grand jury secrecy and has manifested this concern through the imposition of exacting and mandatory protective orders.

If any conclusion may be drawn from the courts' imposition of a factor type analysis, it is that the judiciary has finally begun to give true recognition to the competing interests involved in the resolution of disclosure questions. The judiciary's willingness to assume this considerably more complex task is refreshing indeed, and will result in a realistic approach to the maintenance of grand jury secrecy when the circumstances so warrant.

#### IV. CONCLUSION

The grand jury, with its attendant secrecy doctrine, is a unique and prized institution of the American legal system that permits nonprofessional participation in the decisionmaking process. Its hallowed history and favored position, however, should not be permitted to thwart the equally important and competing goal of efficient administration of the antitrust laws. The need for grand jury secrecy is admittedly less stringent in a modern democracy where fear of grand jury subversion to ensure governmental control is no longer an acceptable reason for completely enshrouding its proceedings.

Implicit in the passage of section 4F(b) of the Antitrust Improvements Act is Congress's recognition of the integral and necessary part that grand jury materials can play in the enforcement of federal antitrust laws by state attorneys general. Similarly the judiciary, through its erosion of the strict

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plated judicial proceeding"); *SEC v. National Student Mktg. Corp.*, 430 F. Supp. 639 (D.D.C. 1977) (use of material for impeachment is sufficient); *In re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings*, 381 F. Supp. 1108 (N.D. Ill. 1974) (same); *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. 1969) (same); *see also In re Grand Jury Subpoenas*, 581 F.2d 1103 (4th Cir. 1978). *Contra Matter of Grand Jury*, 469 F. Supp. 666 (M.D. Pa. 1978) (neither the need to impeach witnesses or refresh their recollections nor the fact that some witnesses had invoked the fifth amendment in response to depositions was sufficient showing upon which to grant disclosure).

“particularized need” standard, is advancing a more flexible and better reasoned analysis where the disclosure question arises in the context of private antitrust litigation. Developments such as these can further only a more enlightened and realistic approach in the application of the secrecy doctrine to antitrust litigation.

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