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THE ROAD NOT TAKEN: CRIMINAL CONTEMPT SANCTIONS AND GRAND JURY PRESS LEAKS

James W. Fox, Jr.*

In August of 1984, the *New York Times* printed an article concerning the federal grand jury investigation of Washington, D.C. mayor, Marion Barry. The story stated that “[f]ederal law-enforcement officials familiar with [the] testimony” disclosed information regarding the mayor’s denial of alleged cocaine use.¹ The article also indicated that a law enforcement officer revealed details of the direction of the investigation.² The article, and similar pieces in other national newspapers,³ indicated possible violations by the federal prosecutors of the rule against disclosure of grand jury information, Rule 6(e)(2) of the Federal Rules of Criminal Procedure.⁴ The story also potentially created public prejudice against Barry which could have affected the grand jury or a future petit jury. At the very least, it could have created public bias and disrespect toward the mayor, prior to any indictment, which would have inhibited the execution of his duties as a public official.

This Note examines the appropriate judicial responses to such news stories, focusing on the options available to counsel for the target of a grand jury investigation⁵ who is affected by the leaked information. Part I explains why dismissal and quashing are extremely difficult remedies to obtain, why

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1. Leslie M. Werner, *Mayor of Washington Is Subject of Perjury Inquiry by Grand Jury*, N.Y. TIMES, Aug. 29, 1984, at A1; see also *Barry v. United States*, 865 F.2d 1317, 1320 (D.C. Cir. 1989).

2. Werner, *supra* note 1, at A16.

3. See *Barry*, 865 F.2d at 1320 (summarizing the various articles).

4. *Id.* For the relevant portion of Federal Rule of Criminal Procedure 6(e)(2), see *infra* text accompanying note 8.

5. Throughout this Note, I refer to targets and targets’ counsel. The discussion also applies to any other person affected by the press leaks, including people already indicted by the grand jury. When the fact that a person has been indicted may alter the applicable issues, the Note includes a relevant discussion.

internal investigations by the government are inadequate, and why, therefore, contempt sanctions are presently the most viable legal response to such leaks. Part II describes the general contours of both criminal and civil contempt actions and reviews specific applications of civil contempt actions in grand jury leak cases. Part III questions the functional and theoretical validity of civil contempt actions in leak situations. It argues that a civil contempt action is proper when the court seeks an affirmative act from the contemnor, but not in a press leak situation where the intended result is inaction through the cessation of future leaks. Part III demonstrates that this theoretical tension produces practical hazards and concludes that the criminal contempt sanction, which punishes past press leaks, is a superior sanction. Finally, Part IV proposes methods to be used in a criminal contempt action.

I. REMEDIES FOR RULE 6(E)(2) VIOLATIONS

The Supreme Court has recognized "that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."⁶ Secrecy preserves the willingness of witnesses to come forward and testify truthfully, reduces the risk that persons to be indicted will flee, and ensures that persons investigated but not indicted will not be subject to public ridicule.⁷ Rule 6(e)(2) of the Federal Rules of Criminal Procedure codifies the required grand jury secrecy. It provides:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.⁸

6. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). Protection of grand jury secrecy by the courts is rooted in well-established common-law traditions. *See id.* at 218 n.9.

7. *Id.* at 219.

8. FED. R. CRIM. P. 6(e)(2). Rule 6(e)(3)(A)(ii) includes within the scope of subsection (2) any government personnel brought into the investigation.

As the Supreme Court has stated, two of the important reasons for the grand jury secrecy secured by Rule 6(e)(2) are protecting the reputations of the unindicted and preventing the influencing of prospective petit jurors.⁹ These harms are most likely to occur when the leak of grand jury information becomes public knowledge. This is why leaks to the press, such as those in Mayor Barry's case, are so threatening to the grand jury process and why courts are concerned about such leaks.¹⁰ Furthermore, although leaking grand jury information to the press¹¹ clearly violates Rule 6(e)(2), it is far less clear how a court or someone affected by the leak should respond.

A. *Dismissal and Quashing Remedies*

When confronting such a leak, counsel for a target initially might be tempted to seek the quashing of a subpoena or dismissal of the grand jury rather than contempt sanctions; the prospect of ending the investigation of one's client appears more enticing than simply obtaining an action against the prosecutor or other government official. Because of an unwillingness to interfere with the grand jury investigation,¹² however, courts have imposed severe roadblocks to intrusive forms of relief such as motions to quash or dismiss.

The primary difficulty for a target seeking dismissal or quashing is the requirement that she demonstrate prejudice.¹³

9. *Douglas Oil*, 441 U.S. at 219; see also *In re Grand Jury Investigation* (Lance v. United States), 610 F.2d 202, 213 (5th Cir. 1980). Both *Douglas Oil* and *Lance* involved the former version of Rule 6(e), wherein the current Rule 6(e)(2) was then Rule 6(e)(1). Although the subsection numeration was different, the text was identical. See 610 F.2d at 217.

10. See *Blalock v. United States*, 844 F.2d 1546, 1555-56 & n.11 (11th Cir. 1988) (Tjoflat, J., specially concurring) (citing *Douglas Oil* and discussing the importance of secrecy expressed in Rule 6(e)(2)); *In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188, 1194 (E.D. Mich. 1990) (citing *Douglas Oil* and Rule 6).

11. It is not the purpose of this Note to consider why leaks to the press occur. Whatever the causes, this Note assumes that such leaks will continue to occur. An inquiry into the reasons behind such leaks, however, provides an interesting perspective on the relationship between the press and government prosecutors. See Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 889-91 (1990), and materials cited therein.

12. See *Barry v. United States*, 865 F.2d 1317, 1326 (D.C. Cir. 1989) (stating that the district court should seek to avoid relief that would interfere with the grand jury proceedings).

13. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

In establishing that requirement, the Supreme Court applied the harmless error standard to Rule 6, holding that a district court may not dismiss an indictment for errors arising under Rule 6 unless such errors prejudice the defendant.¹⁴ It is unlikely, however, that the release of the information alone will have prejudiced the target before the grand jury because the information is already before the grand jury, independent of the leak. Therefore, the target must demonstrate both evidence of the leak and that the generally negative press engendered by the leak biased the grand jurors. Given that grand jury proceedings are secret and that indictments are presumed valid if they are valid on their face,¹⁵ the target stands little chance of proving bias sufficient for a showing of prejudice.

The Supreme Court did, however, provide a small opening for counsel to sustain a prejudice argument by demonstrating prosecutorial misconduct. If the defendant can demonstrate that the prosecutor's misconduct infringed upon the grand jury's independence or that this misconduct continues a history, over several cases, of similar errors, then she might be able to support a claim of prejudice or the denial of fundamental fairness.¹⁶ Given the difficulty of collecting evidence of press leaks¹⁷ and of investigating a history of prosecutorial misconduct,¹⁸ such an avenue to a showing of prejudice is remote.¹⁹

14. *Id.*

15. *Id.* at 261 (citing *United States v. Calandra*, 414 U.S. 338, 344-45 (1974)).

16. *Id.* at 259; see also 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 15.5, at 106-07 (Supp. 1991).

17. See *infra* text accompanying notes 81-91.

18. For example, in the context of the impermissible use of peremptory strikes by a prosecutor to dismiss jurors on the basis of race, the Supreme Court has declared that the proof of a history, over several cases, of such actions amounts to "a crippling burden" for the party alleging misconduct. *Batson v. Kentucky*, 476 U.S. 79, 92 (1986). *Batson* is admittedly an extreme example. Someone trying to uncover proof of racial motivation in past jury selections will probably have little objective evidence, whereas someone trying to prove past leaks to the media can at least comb old newspaper articles. Nonetheless, the general point still applies: requiring a showing of prosecutorial misconduct over several cases only compounds the proof problems inherent in such cases. The problems that a target has compiling information about leaks in her own case will multiply when she is required to gather information from several other past cases with which she is unfamiliar and which were not investigated for leaks at the time.

19. Indeed, to prove prejudice, targets will likely have to rely on evidence of misconduct in addition to leaks to the press. *United States v. Kilpatrick* is a rare example of a case where the district court found misconduct partly as a result of leaks. 594 F. Supp. 1324, 1346 (D. Colo. 1984). Yet, even that dismissal was based

In addition to the problem of showing prejudice, courts, which are loath to interfere with the grand jury, have imposed a high burden of proof on those seeking remedies that intrude on the grand jury.²⁰ The target must show that the statements concerned "matters occurring before the grand jury" and that the source was covered by Rule 6(e)(2).²¹ Courts inquire very closely into the particularity of the evidence, especially the specification of the source of the leak. Whereas reference to "government sources" in a press article may constitute sufficient cause for a contempt hearing,²² a dismissal motion requires greater specificity.²³ Reporters, however, rarely provide more specific information regarding their sources.²⁴ It is therefore unlikely that a target can prove a Rule 6(e)(2) violation with enough particularity to sustain a motion to dismiss.

Several factors support this reluctance to grant relief that intrudes on the grand jury. The defendant will have a full and fair consideration of his case at trial, which could remedy the possible prejudice caused by the leak. Fear of prejudice in the

on several incidents of misconduct, *id.* at 1351-53, including the improper disclosure of information by the prosecutor to the IRS, the use of information by that agency, and the improper restriction of witnesses. *Id.* at 1345-47. When the case was appealed to the Supreme Court, even with evidence of misconduct beyond the leaks, the Court still held that dismissal of the indictment was inappropriate. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

Quashing of subpoenas, like dismissals of indictments, is also rare. In a case involving leaks to the press, the evidence of leaks was not enough to support a motion to quash. *In re Archuleta*, 432 F. Supp. 583, 597-99 (S.D.N.Y.), *reconsidered on other grounds*, 434 F. Supp. 325 (S.D.N.Y. 1977). Moreover, as with the dismissal remedy, to obtain a quashing remedy a target will likely need to demonstrate additional prosecutorial misconduct, such as attempting to deceive the court and the other party. See, e.g., *In re Kiefaber*, 774 F.2d 969 (9th Cir. 1985), *vacated and dismissed as moot*, 823 F.2d 383 (9th Cir. 1987) (en banc) (describing a case in which a prosecutor leaked information to local law enforcement agencies and concealed important information from the target and the court; although the case was vacated as moot, it provides an example of the type of additional misconduct courts may require to quash a subpoena).

20. See *In re Grand Jury Investigation (Lance v. United States)*, 610 F.2d 202, 219 (5th Cir. 1980).

21. *Id.* at 216-17.

22. See *infra* text accompanying notes 81-91.

23. See *In re Special April 1977 Grand Jury (Scott v. United States)*, 587 F.2d 889, 892 (7th Cir. 1978); *United States v. Sweig*, 316 F. Supp. 1148, 1155 (S.D.N.Y. 1970).

24. See, e.g., *United States v. Criden*, 633 F.2d 346, 348-50 (3d Cir. 1980) (describing a case in which a reporter endured contempt penalties in order to protect the confidentiality of her source and information), *cert. denied*, 449 U.S. 1113 (1981).

petit jury can be cured in voir dire.²⁵ Acquittal would presumably cure a grand jury defect which impairs the validity of the indictment, while a conviction provides an opportunity to raise prejudice on appeal. Additionally, a target may be told to wait until an indictment is handed down and to challenge the indictment instead of the grand jury, because the grand jury will have valid reasons for indicting which are distinct from the influence of the Rule 6(e)(2) violation.²⁶ Finally, courts also may be reluctant to provide a target or defendant the benefit of such drastic relief because they view such relief as a "windfall"²⁷ absent sufficient prejudice to the target.

B. Internal Investigations and Discipline

Rather than quashing or dismissing an indictment, a court could require the internal investigative branch of the prosecutor's office to look into the matter and respond with internal disciplinary actions against the offenders or present the evidence of the leak to the court for further action. A federal district court in Michigan adopted this approach when confronted with possible leaks by the U.S. Attorney's Office in an investigation of Mayor Coleman Young and other Detroit officials.²⁸ In that case, the court determined that newspaper articles indicated a possible Rule 6(e)(2) violation. The court required an internal inquiry into the prosecutor's responsibility for the leak.²⁹ Although the court specifically reserved a threat of a contempt action against the prosecutor's office, it did not institute such an action.³⁰ Instead, it asked the Department of Justice's Office of Professional Responsibility to investigate the leak and report its findings to the court.³¹

The district court in the City of Detroit's case reasoned that, because some of the news reports were inaccurate, further

25. See LAFAVE & ISRAEL, *supra* note 16, § 15.5, at 330 (1984).

26. The Rule 6(e)(2) violation does not affect the grand jury's decision to indict because the information leaked was already known to the grand jury; FED. R. CRIM. P. 6(e)(2) covers only "matters occurring before the grand jury."

27. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988); see also *United States v. Myers*, 510 F. Supp. 323, 326 (E.D.N.Y. 1980).

28. *In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188, 1212 (E.D. Mich. 1990).

29. *Id.* at 1211-12.

30. *Id.* at 1207.

31. *Id.* at 1212.

investigation of the leak was necessary before the court could respond, and it viewed the Justice Department as the appropriate investigative agent.³² Although such a solution was certainly within the district court's power³³ and may have been proper in that case, the court's decision raises potential difficulties which could be avoided by moving directly to a contempt investigation.

An internal investigation will likely only complicate resolution of the leaks because it places the agency already suspected of misconduct in charge of presenting the court with evidence of the misconduct. Even though the Office of Professional Responsibility operates somewhat independently of the U.S. Attorney's Office, both are under the supervision of the Attorney General's Office.³⁴ At the very least, this connection produces an appearance of bias. In the worst situation, it enables the Justice Department to cover up the misconduct. Even if the Justice Department institutes internal disciplinary actions, the public and the target may not discover the source or the full extent of the leaks.

The danger that the government may not publicly release information about the leaks is the most compelling reason for avoiding the type of resolution sought in the City of Detroit case. Although the district court may have viewed an internal investigation as more reasonable under the circumstances than a contempt investigation,³⁵ its response ignored the public rights and values at stake. The court sought to investigate a violation of a federal rule governing court procedure, not a breach of Justice Department policy.³⁶ The Rule protects public and judicial values, including the rights

32. *Id.* at 1211-12.

33. *See, e.g.,* *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) (identifying internal discipline by the Justice Department as one of several responses to a Rule 6(e)(2) violation).

34. *See* 28 C.F.R. §§ 0.39-0.39e (1991) (Office of Professional Responsibility); 28 C.F.R. § 0.5 (1991) (Attorney General's Office). These regulations assign the Office of Professional Responsibility authority to conduct internal investigations, but nonetheless state that primary responsibility for investigating misconduct remains with the head of the department in which the questioned official works. 28 C.F.R. § 0.39d (1991).

35. The district court may also have succumbed to the courts' traditional reluctance to employ contempt sanctions against prosecutors. *See* BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* § 13.3 (1991) (observing that despite the appropriateness of a contempt sanction in responding to misconduct, few judges impose the penalty).

36. *See In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188, 1198-1202, 1207-12 (E.D. Mich. 1990).

of witnesses and targets, and the integrity of the grand jury process.³⁷ Although the prosecutor and Justice Department also protect the public, when the prosecutor's office is suspected of the violation, no division of the same agency should retain authority over the investigation. Otherwise a cloud could remain over the investigation and any subsequent response.

In addition, it is important to remember that Rule 6(e)(2) itself specifies that contempt sanctions are appropriate punishment for a violation of the Rule.³⁸ Although courts have discretion in how to respond to a leak, the exercise of that discretion in response to a violation should be guided by the Rule itself.³⁹ The Rule does not say that the violation should be investigated by the office or agency responsible for the violation, nor does it request that the court merely inquire into the matter. Rather than requesting an internal investigation, the district court could have initiated a contempt investigation. When, as in the City of Detroit case, there is evidence of a Rule 6(e)(2) violation and also some evidence to the contrary, the more effective avenue would be to assign a special prosecutor, independent of the U.S. attorney, who could pursue and evaluate the evidence without a possible bias in favor of the suspected violator.

The Supreme Court has recommended the use of private attorney prosecutors, reasoning that "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution."⁴⁰ The fear that the Executive Branch would fail to prosecute becomes especially acute when it is asked to prosecute itself. The contempt action provides the proper mechanism for a court to "protect itself" when confronted with a leak.⁴¹

37. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979).

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

39. The Federal Rules of Criminal Procedure are the strongest authority governing grand jury leaks. See 8 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 1.02 (2d ed. 1983) (stating that, as to federal courts, the Rules have the force and effect of statute and supersede all laws in conflict with their provisions). Professional ethical codes, however, can provide some additional guidance for a judge because some codes prohibit extra-judicial speech by attorneys regarding an ongoing case. See generally Matheson, *supra* note 11, at 872-77 (discussing the various forms of ABA model ethical rules on extrajudicial lawyer comment).

40. Young v. United States *ex. rel.* Vuitton, 481 U.S. 787, 801 (1987).

41. For a suggested method which a special prosecutor can follow in a criminal contempt investigation, see *infra* Part IV.

C. Contempt Sanctions

Were drastic measures such as dismissal the only enforcement mechanisms for Rule 6(e)(2) violations, courts might be more inclined to employ them. When refusing to dismiss, however, courts often refer to the less intrusive response of contempt sanctions. One district court declined to quash a subpoena but stated that "[t]he remedy for improper disclosure of grand jury evidence is to punish the offending party in a contempt proceeding."⁴² Even where the court acknowledges the misconduct of the prosecutor, it frequently will deny dismissal and suggest contempt sanctions or censure.⁴³ The Supreme Court expressed its approval of this approach in *Bank of Nova Scotia v. United States*.⁴⁴

Though courts have not, to the best of my knowledge from reported cases, applied contempt sanctions for press leaks, several courts have considered the possibility of doing so. In the leading case, the Fifth Circuit ordered the district court to conduct an evidentiary hearing to determine whether or not to impose contempt sanctions on the prosecutor.⁴⁵ In Mayor Barry's case, the D.C. Circuit demanded a similar hearing.⁴⁶ More recently, in the case involving Detroit Mayor Coleman Young and Chief of Police William Hart, the district court ordered the Department of Justice to conduct an inquiry into possible press leaks by the U.S. attorney and report its results to the court, leaving open the option of contempt sanctions or other action.⁴⁷ Significant questions remain, however, concerning the nature of and the procedures for implementing these potential contempt sanctions.

42. *In re Archuleta*, 432 F. Supp. 583, 599 (S.D.N.Y. 1977).

43. *See, e.g., United States v. Myers*, 510 F. Supp. 323, 328 (E.D.N.Y. 1980).

44. 487 U.S. 250 (1988). The Court stated that a contempt sanction was a more adequate remedy than dismissal because it responds to the specific problem of misconduct without a windfall to the defendant. *Id.* at 263; *see also* GERSHMAN, *supra* note 35, at § 13.3 (arguing that contempt actions "may be the most efficient method for dealing with misconduct").

45. *In re Grand Jury Investigation (Lance v. United States)*, 610 F.2d 202, 207, 220-21 (5th Cir. 1980).

46. *Barry v. United States*, 865 F.2d 1317, 1325-26 (D.C. Cir. 1989).

47. *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1212 (E.D. Mich. 1990).

II. CONTEMPT AND GRAND JURY LEAKS: THE CURRENT LAW

Although several federal courts have considered contempt actions for violations of grand jury secrecy and press leaks, there is no consensus on whether the actions should be civil or criminal.⁴⁸ Confusion over the proper form of action in a leak situation is due partly to the historical intermingling of the two actions.⁴⁹ Nonetheless, they are distinguishable.

A. Civil and Criminal Contempt

The distinction between civil and criminal contempt has engendered much confusion;⁵⁰ even those not so baffled have sometimes suggested that courts and legislatures dispense with the distinction.⁵¹ Despite this confusion and criticism, however, courts have retained the two forms of action.⁵² Because questions concerning the proper procedure, the right to appeal, and the appropriate sentence hinge on the distinction, how courts treat contempt in a grand jury press leak situation has significant consequences for resolution of Rule 6(e)(2) violations.

48. Compare *Barry*, 865 F.2d at 1321 (holding that civil contempt action was proper) and *Lance*, 610 F.2d at 212 (5th Cir. 1980) (same) with *Blalock v. United States*, 844 F.2d 1546, 1552 (11th Cir. 1988) (Tjoflat, J., concurring) (arguing that criminal contempt action was proper) and *In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188, 1198-1204 (E.D. Mich. 1990) (same).

49. The seminal case discussing the distinctions between civil and criminal contempt is *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). The Supreme Court there acknowledged that the distinction is tenuous. *Id.* at 441. Subsequent case law, although reiterating the distinctions made in *Gompers*, has not eliminated confusion. See *Shillitani v. United States*, 384 U.S. 364, 368-70 (1966); *United States v. United Mine Workers*, 330 U.S. 258, 297 n.64 (1947). See generally Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943) (discussing confusion between criminal and civil contempt); Douglas C. Berman, Note, *Coercive Contempt and the Federal Grand Jury*, 79 COLUM. L. REV. 735, 739 (1979) (stating that the "evolution of law in this area was often haphazard and doctrinally weak"). The most contested issues between civil and criminal contempt involve matters of procedure and appealability. OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 866 (1984).

50. See *supra* note 49.

51. See, e.g., Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 687-88, 705 (1981).

52. The authority for contempt actions rests in 18 U.S.C. § 401 (1988).

The core of the distinction rests in the purpose of the "punishment"; that is, what the court intends to accomplish.⁵³ Punishment is actually a tricky term in this context. Although the term might indicate criminal contempt specifically, "'punishment' as used in contempt cases is ambiguous,"⁵⁴ and does not clarify the difference between civil and criminal contempt. This ambiguity stems from the fact that, in either a criminal or civil contempt case, the sentence can appear to be punishment: the contemnor can be fined or imprisoned for failing to obey a court directive. Thus, as the Supreme Court stated eighty years ago, "[i]t is not the fact of punishment but rather its character and purpose that often serve to distinguish between [civil and criminal contempt sanctions]."⁵⁵

If the punishment, by either fine or imprisonment, is intended to compel action, then the contempt action is civil.⁵⁶ A contempt sanction which seeks to have the defendant testify or turn over documents is civil because the court tries to compel the defendant to act in the future in accordance with the law, a court rule, or a court order.⁵⁷ Civil contempt sanctions, therefore, are frequently employed to compel compliance with an injunction.⁵⁸

Criminal contempt sanctions, on the other hand, are more directly connected to the usual conception of punishment: the court punishes the defendant for having violated a law, court rule, or court order.⁵⁹ In addition, the judge hopes to deter similar future actions by the violator or others; however, the

53. See *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); Berman, *supra* note 49, at 737-39.

54. *United States v. United Mine Workers*, 330 U.S. 258, 297 n.64 (1947).

55. *Gompers*, 221 U.S. at 441.

56. See *id.* at 441-42.

57. See *id.* at 442.

58. An extreme and controversial example of this occurred in the Yonkers low-income housing dispute. When the city council failed to adopt legislation creating low-income housing as had been ordered by the district court, the court held the city in contempt for \$100 on the first day, doubling the fine each day the city failed to enact the legislation. It also fined and threatened to imprison the recalcitrant city council members. *United States v. City of Yonkers*, 856 F.2d 444, 450-52 (2d Cir. 1988) (affirming and modifying in part the district court's opinion). The Supreme Court reversed this latter sanction, holding that contempt sanctions against the council members should have been considered individually by the district court only after contempt sanctions against the city proved to be ineffective. *Spallone v. United States*, 493 U.S. 265, 279-80 (1990).

59. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-44 (1911); see also Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 235 (1971).

specific reason for the contempt sanction is a response to a past act with no requirement of affirmative future conduct.⁶⁰

The type of punishment imposed clarifies the distinction. If the court conditions the penalty on the defendant's compliance, the contempt penalty is civil,⁶¹ the defendant is said to hold the keys to his own cell because his choice to comply will release him.⁶² If the punishment is for a fixed period and is not conditioned on the contemnor's future actions, then the contempt penalty is criminal.⁶³ If, however, the fixed term of imprisonment is conditioned on a future action of the contemnor, it is simply a civil contempt penalty with a maximum imprisonment period which applies as long as the contemnor refuses to comply with the court's order.⁶⁴

In addition to the nature of the punishment, the benefit received from the two forms of contempt sanctions is also important. A civil contempt sanction remedies a wrong to individuals or private parties, and its benefits flow to those persons specifically.⁶⁵ Criminal contempt sanctions, like criminal actions generally, protect the public interest, and it is the public which reaps the benefits.⁶⁶

The choice between designating a contempt action as civil or criminal determines the procedural rules that govern the action. Civil contempt actions operate under the Federal Rules of Civil Procedure, while the Federal Rules of Criminal

60. See *Gompers*, 221 U.S. at 443 (stating that deterrence may be an incidental benefit of criminal contempt sanctions).

61. Not all civil contempt penalties are designed to coerce behavior. Sometimes a civil contempt penalty in the nature of a fine will serve compensatory or remedial functions. See Berman, *supra* note 49, at 737. Because there may be no direct financial losses involved in a leak of grand jury information, remedial civil contempt penalties would be difficult to use in a leak situation. See *infra* text accompanying notes 137-39.

62. *Gompers*, 221 U.S. at 442. The origin of the concept of having the keys to one's cell is not entirely clear. See Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 502 n.45 (1989) (suggesting a possible origin for the phrase).

63. *Gompers*, 221 U.S. at 442.

64. See *Shillitani v. United States*, 384 U.S. 364, 369-70 (1966). As was the case in *Shillitani*, civil contempt penalties for a fixed period are often applied in cases where a grand jury witness refuses to testify. The fixed term must not be for longer than the term of the grand jury for which the testimony is needed. *Id.* at 371. Congress has limited the period of confinement in recalcitrant witness cases to the lesser of the life of the court proceeding, the term of the grand jury, or 18 months. See 28 U.S.C.A. § 1826 (West Supp. 1992).

65. See *In re Grand Jury Investigation* (Lance v. United States), 610 F.2d 202, 221 (5th Cir. 1980) (Kravitch, J., dissenting); 8B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.02[2] (2d ed. 1991).

66. See *Lance*, 610 F.2d at 221.

Procedure govern criminal contempt proceedings.⁶⁷ A civil action is more favorable for the party raising the action because civil contempt actions permit broad discovery and the proceedings are largely controlled by the complaining party's pleadings. The complainant also benefits from the fact that the defendant in a civil action retains fewer procedural protections: there is no right to a jury trial;⁶⁸ proof must be clear and convincing instead of beyond a reasonable doubt;⁶⁹ and the violation need not be willful.⁷⁰ Criminal contempt actions, on the other hand, are initiated by a court,⁷¹ may be prosecuted by a federal or special prosecutor,⁷² and the defendant receives most criminal procedure protections, including the right to a jury trial.⁷³ Thus, the contemnor will benefit more from the procedures in a criminal contempt action, although the prospect of a criminal sanction may be far more frightening.

B. Civil Contempt and Grand Jury Press Leaks: The Current Law

In the leading case regarding grand jury press leaks, the court asserted that the purpose of the proceeding was clearly

67. For a full description of civil and criminal contempt procedures, see 3 CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 705 (civil contempt), §§ 709-12 (non-summary criminal contempt) (1982) and 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2960 (1982) (enforcing injunctions by contempt citations). Federal Rule of Criminal Procedure 42(a) permits summary criminal contempt proceeding, which does not retain the normal criminal procedures, when the contumacious conduct is committed in court. FED. R. CRIM. P. 42(a). Rule 42(b) insures the right to notice and hearing for criminal contempt actions other than those under subsection (a) and affords other criminal procedure rights to an accused criminal contemnor. FED. R. CRIM. P. 42(b). There is no counterpart to Federal Rule of Criminal Procedure 42 regarding civil contempt proceedings in the Federal Rules of Civil Procedure.

68. Berman, *supra* note 49, at 739; *see also* Shillitani v. United States, 384 U.S. 364, 371 (1966) (stating that civil contempt proceedings can be held without the safeguard of a jury).

69. *See* 3 WRIGHT, *supra* note 67, § 705.

70. *Id.*

71. *See id.* § 710.

72. *Id.* § 711.

73. The right to a jury trial in criminal contempt actions was secured in *Bloom v. Illinois*, 391 U.S. 194, 198-200 (1968). Much earlier, the Court recognized that a defendant in a criminal contempt action was presumed innocent, that guilt must be proved beyond a reasonable doubt, and that the defendant cannot be compelled to testify against himself. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911). *See generally* 3 WRIGHT, *supra* note 67, § 711-12 (discussing criminal contempt procedures); *Dobbs, supra* note 59, at 242-43 (same); *Berman, supra* note 49, at 738-39 (same).

remedial and, therefore, the action was appropriately characterized as civil.⁷⁴ The court provided no authority supporting its determination, but instead proceeded to outline the proper procedures and analysis for a civil contempt action in a grand jury press leak case.⁷⁵ Although some appellate judges have spiritedly argued that criminal contempt is the proper characterization in such cases, each of the appellate courts which have confronted the issue have decided that civil contempt is the proper designation.⁷⁶

The procedure established in *Lance* consists of several stages. First, the party alleging a violation must establish a prima facie case that Rule 6(e)(2) was violated.⁷⁷ The accused party, that is, the prosecutor, then may present evidence rebutting the presumed violation.⁷⁸ This is often done with affidavits of denial, which the prosecutor may present before or after the prima facie showing.⁷⁹ Naturally, the prosecutor maintains a stronger strategic position with early submission of affidavits; judges may reward accommodating prosecutors and punish the delinquent. Finally, if a prima facie case exists and the prosecutor fails to respond, admits the violation, or otherwise does not satisfy the court, the judge then conducts an evidentiary hearing regarding contempt sanctions.⁸⁰

1. *The Prima Facie Case*—The most difficult aspect of this process for the target may be constructing the prima facie case. He must establish both that the leaked information consisted of “matters occurring before the grand jury” and that

74. *In re Grand Jury Investigation (Lance v. United States)*, 610 F.2d 202, 212 (5th Cir. 1980).

75. *Id.* at 212–21.

76. The appellate courts have followed *Lance* in the following cases: *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989); *Blalock v. United States*, 844 F.2d 1546 (11th Cir. 1988); *United States v. Eisenberg*, 711 F.2d 959 (11th Cir. 1983). Certain judges have disagreed with *Lance*, either in dissents or concurrences. See *Barry*, 865 F.2d at 1326 (Sentelle, J., dissenting); *Blalock*, 844 F.2d at 1552–53 (Tjoflat, J., concurring); *Lance*, 610 F.2d at 221–28 (Kravitch, J., dissenting). One district court has agreed with these dissenting views. See *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1195–1206 (E.D. Mich. 1990).

77. *Lance*, 610 F.2d at 216–19.

78. *Id.* at 219.

79. *Id.* at 219–20.

80. *Id.* at 220–21. I assume that nowhere in this process will target's counsel be able to obtain information from the press. Although the press has no privilege against testifying, *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972), reporters will often refuse to reveal their confidential sources. See LAFAVE & ISRAEL, *supra* note 16, § 15.5 n.58.

the source was a person covered by Rule 6(e)(2).⁸¹ Because the target seeks contempt sanctions rather than dismissal, however, the court will probably not require as particularized a showing as it would in a dismissal action.⁸² For example, the *Lance* court did not require a particularization of the source. Instead, it permitted the substance of the information leaked to play a part both in the proof of the "matters occurring before the grand jury" and the proof of the source.⁸³ The court, in effect, created a nexus between the two prongs, so that if the information found in the newspaper was so specific that it could only have originated with a Rule 6(e) source, the target need not identify a specific source. Thus, a general statement such as "sources close to the investigation report" could be sufficient for a prima facie case if the information is specific.⁸⁴ The *Lance* court found that one article which described testimony the grand jury was about to hear, named the witness being called, and described a specific question the witness would be asked constituted evidence of a violation, even though the source reference was merely "sources familiar with the investigation."⁸⁵

The complainant may also avail himself of the full collection of media reports. As Judge Clark said, "[t]he precise attribution of a source in one or more articles may give definition to a vague source reference in others because of their context in time or content."⁸⁶ A statement in one article, which may not be attributable to a specific source by itself, might still support the prima facie case when combined with other such statements. The complainant must therefore comb carefully all the news reports once he suspects that leaks are occurring.

Courts may also prefer targets to present evidence in several stages in an effort to resolve the leak without resorting to contempt actions. Prior to the contested contempt motion in *Lance*, *Lance* had already complained to the court that information was being leaked. On the first such complaint, the court ordered that, *inter alia*, all grand jury papers be filed *in camera* and that the prosecution institute procedures with

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

82. Courts generally require very specific evidence of a leak in order to support dismissal. See *supra* notes 20-24 and accompanying text.

83. See *Lance*, 610 F.2d at 218.

84. *Id.*

85. *Id.* at 218 n.12.

86. *Id.* at 219.

the grand jury and within the Department of Justice to prevent future leaks.⁸⁷ When these efforts failed and additional articles appeared disclosing more information, Lance complained to the court and informally requested a "show cause" hearing for possible contempt sanctions against government attorneys.⁸⁸ The court sternly admonished the U.S. attorney, but did not rule on the alleged Rule 6(e) violations.⁸⁹ It took yet another round of press leaks and a filed motion for sanctions for the district judge finally to examine the articles and rule on the Rule 6(e)(2) violation.⁹⁰ This example demonstrates how a court may prefer alternative methods of providing secrecy, and how the target may wish to present evidence of the leaks to the court gradually in order to build the prima facie case against the prosecutor.⁹¹

2. *Government Affidavits*—Once the target has made a prima facie case, the prosecutor may respond with affidavits discussing the violation.⁹² This response is crucial. The *Lance* court stressed the failure of prosecutors to deny a violation as a primary reason for requiring further proceedings.⁹³

Some confusion exists regarding when the affidavit should be submitted in relation to the contempt hearing. In the D.C. Circuit, once the prima facie case is made, the court must hold a show cause hearing at which the government defends itself with affidavits or other means, such as evidence of an ongoing Justice Department investigation of the leak, and shows why contempt sanctions are inappropriate.⁹⁴ In the Eleventh Circuit, the government presents its affidavits before the contempt hearing.⁹⁵ The affidavits are presented *in camera*.⁹⁶

87. *Id.* at 207–09.

88. *Id.* at 209. The request came in the form of an unfiled motion attached to the complaint letter sent to the district court for *in camera* consideration. *Id.* No formal motion for sanctions was filed at this point.

89. *Id.* at 210.

90. *Id.* at 210–11. The court denied relief and Lance appealed. *Id.* at 212.

91. A district court in Michigan, in the grand jury case involving Mayor Coleman Young, followed a path similar to the *Lance* district court. Even though the court in Young's case believed that leaks had occurred from within the government's offices and that there had been similar leaks in another case, it did not apply contempt sanctions. Instead, the court ordered the Department of Justice to investigate and report its findings to the court. *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1212 & n.34 (E.D. Mich. 1990).

92. *Lance*, 610 F.2d at 219–20.

93. *Id.* at 220.

94. *Barry v. United States*, 865 F.2d 1317, 1326 (D.C. Cir. 1989).

95. *United States v. Eisenberg*, 711 F.2d 959, 964 (11th Cir. 1983).

96. *Id.*

If the court feels that a violation has occurred, then the target's counsel receives the names of the violators and assumes the role of civil complainant at the contempt hearings.⁹⁷

The opportunity to request affidavits may have desirable benefits for a target, beyond forcing the prosecutor to actually admit to a violation. It is possible that the court would require a spate of affidavits covering everyone from the U.S. attorney, to the grand jury, to anyone in a department related to the investigation, such as the FBI and the SEC.⁹⁸ It may also require an internal Justice Department investigation.⁹⁹ The burden placed on the government and its embarrassment before the judge, can result in a tactical advantage, even if no contempt is ultimately found. Additionally, even if the government submits affidavits denying any leaks, *Lance* left open the option for the court to hold a contempt hearing based on the news reports, in spite of the affidavits.¹⁰⁰

3. *The Evidentiary Hearing*—Both the *Barry* and *Lance* courts remanded their cases so that the district courts could hold evidentiary or show cause hearings.¹⁰¹ Unfortunately, my research has revealed no published description of any evidentiary hearings on contempt sanctions for a leak to the press, either in those cases or any others. Such a hearing, however, raises significant questions engendered by the conflict between civil procedure rules and the secrecy of the grand jury. These important questions require some discussion of the possible nature of evidentiary hearings in these cases.

A target wields a potentially powerful sword in civil discovery. The liberal discovery of civil procedure would theoretically enable counsel to depose government agents, request broad document production, and submit interrogatories. Were the full panoply of tools applied to the contempt action, counsel

97. *Id.* at 965.

98. *See* *United States v. Marcello*, 508 F. Supp. 586, 596–97 (E.D. La. 1981) (noting that the court requested an additional Justice Department report even after receiving affidavits from seven government attorneys), *aff'd*, *United States v. Roemer*, 703 F.2d 805 (5th Cir.), *cert. denied*, 464 U.S. 935 (1983).

99. *See In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188, 1212 (E.D. Mich. 1990); *In re Archuleta*, 432 F. Supp. 583, 599 (S.D.N.Y. 1977).

100. *In re Grand Jury Investigation* (*Lance v. United States*), 610 F.2d 202, 221 (5th Cir. 1980).

101. *Barry v. United States*, 865 F.2d 1317, 1319 (D.C. Cir. 1989); *Lance*, 610 F.2d at 207.

could divert the prosecutor from the underlying investigation and obtain information regarding the scope and direction of that investigation. For example, if the target obtains a list of all the government investigators involved with the grand jury, he could anticipate the scope of the investigation.¹⁰²

The danger of abuse will probably encourage most courts to restrict discovery. A court's interest in protecting the continued secrecy of the grand jury supports some limitation on discovery; the contempt action itself should not subvert the secrecy rule it seeks to enforce.¹⁰³ The limitation should be designed to prevent interference with the grand jury investigation and protect its secrecy. Yet, the court should not prevent all possible discovery, as that would rob the action of its civil character. A reasonable solution is to permit written interrogatories which could help determine what specific depositions or document requests might uncover the sources of the leaks.¹⁰⁴

The extent of the discovery may not include the target's receipt of a list of names of all the government officials involved in the investigation. The Eleventh Circuit, in *United States v. Eisenberg*, ruled that the lower court erred in demanding that the prosecutor turn over such a list directly to the target's counsel.¹⁰⁵ Such information may reveal investigatory secrets or endanger witnesses. The appellate court observed that the district court could demand the list for *in camera* review as part of the affidavit review.¹⁰⁶

The *Eisenberg* case perhaps should be limited to the discovery allowed at the affidavit stage. The contempt action

102. See *United States v. Eisenberg*, 711 F.2d 959, 965 (11th Cir. 1983).

103. Courts may limit discovery if it would frustrate the underlying purpose of the proceeding. See 4 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 26.51 (2d ed. 1984).

104. See *United States v. IBM*, 60 F.R.D. 650, 653 (S.D.N.Y. 1973) (limiting IBM's discovery to interrogatories and narrow document requests); see also *United States v. Julius Doochin Enters., Inc.*, 370 F. Supp. 942, 945 (M.D. Tenn. 1973) (requiring the government witness to respond to some, but not all, of the contempt defendant's deposition questions). It should be noted that in these cases the government was the complainant. It could be argued that the target's status of seeking contempt sanctions rather than defending against the action would justify greater discovery because the government possesses all the information. Alternatively, it could be that the target deserves less discovery since he is not the one facing severe sanctions. Without precedential guidance, how specific courts will weigh this factor can only be a matter of speculation.

105. *Eisenberg*, 711 F.2d at 964.

106. *Id.* at 965.

in *Eisenberg* had not progressed to an evidentiary hearing.¹⁰⁷ It is possible that the target's rights as a civil litigant might not attach until the evidentiary hearing. A court might wish to restrict discovery prior to the evidentiary hearing, but then broaden discovery once it believes that the case is serious enough to warrant the hearing. If so, then perhaps the list of government officials would constitute permissible discovery. The need for broader discovery prior to the hearing is particularly important in light of the "clear and convincing" standard of proof generally required of plaintiffs in civil contempt actions.¹⁰⁸ Because it is unlikely that the target/plaintiff can obtain information from reporters,¹⁰⁹ restriction of the target's discovery from the government, which possesses the information necessary to prove contempt, virtually ensures his failure to meet a clear and convincing standard. Given the tension between the target's need for discovery to prove his case and the continuing need for secrecy of the grand jury information, courts should permit broad discovery but screen all information requested by the complainant, as was done in *Eisenberg*.

Another question created by the application of civil procedure rules to a grand jury secrecy issue is whether the hearing should be open. Federal Rule of Criminal Procedure 6(e)(5) permits a court to close a hearing concerning a possible violation of Rule 6(e)(2) "to the extent necessary to prevent disclosure of matters occurring before a grand jury."¹¹⁰ Depending on the extent of the right to an open hearing in the first place, the authorization of Rule 6(e)(5) for closed hearings could permit the court to close the entire hearing.

In the context of civil contempt, it is not clear whether there is a right to an open hearing at all and, if so, who possesses the right. Although the Supreme Court held in *In re Oliver* that a defendant has a right to an open hearing in the criminal contempt context,¹¹¹ it has not ruled on whether

107. *Id.*

108. The clear and convincing standard of proof has traditionally applied to civil contempt actions. See 11 WRIGHT & MILLER, *supra* note 67, § 2960 at 591; Moskovitz, *supra* note 49, at 818-19.

109. See *In re Grand Jury Investigation* (Lance v. United States), 610 F.2d 202, 219 (5th Cir. 1980); see also *supra* note 80.

110. FED. R. CRIM. P. 6(e)(5).

111. *In re Oliver*, 333 U.S. 257, 271-73 (1948).

this right extends to civil proceedings. As the Second Circuit noted, however, the contempt sentence at issue in *Oliver* was conditioned on the defendant's actions—a civil contempt characteristic—and that circuit had no problem extending the right to a civil case.¹¹² Yet, even assuming that this extension to civil cases is permissible, it may be possible for the defendant to forfeit the right to an open hearing by failing to request one.¹¹³ In a press leak case it is unlikely that the defendant, usually a U.S. attorney, will desire an open hearing during which the misconduct of her staff could be subjected to public scrutiny. Thus, if the right to an open civil contempt hearing belongs to the defendant, that right might be waived.

It is possible that the target would desire an open hearing, especially if he wants to clear the public air after the unfavorable press caused by the leaks.¹¹⁴ Because the right to an open hearing originates in the defendant's due process rights,¹¹⁵ however, the target may not possess a comparable right. Given the authorization of closed hearings in Rule 6(e)(5), the general need for secrecy regarding grand jury information, and the fact that the right to a public hearing lies with the defendant, it is unlikely that the target can demand a public hearing against the defendant's wishes.

A third advocate of an open hearing could be the press. Based on the First Amendment,¹¹⁶ the press does possess such a right in criminal trials.¹¹⁷ A criminal contempt

112. *In re Rosahn*, 671 F.2d 690, 696-97 (2d Cir. 1982).

113. *See* *Levine v. United States*, 362 U.S. 610, 618-20 (1960). *Levine* was decided prior to the Court's determination that serious criminal contempt required a jury trial. *See* *Bloom v. Illinois*, 391 U.S. 194, 198-200 (1968). The continued vitality of *Levine's* holding that a defendant can waive a public contempt trial by not so requesting has not been tested in the Supreme Court.

114. The target may react ambivalently to an open hearing even if he has the option. Although he will want to elicit the sympathies of the press and the public by demonstrating the prosecutor's misbehavior, the target does not want to risk having the government release information adverse to him. For instance, the government could call a former grand jury witness to testify at the contempt hearing. Grand jury witnesses have no secrecy obligation. *See* FED. R. CRIM. P. 6(e)(2) advisory committee's note. The witness may then say that she released the information to the press, which clears the government of the charge, and in so doing divulge evidence of unseemly or illegal actions by the target. The contempt hearing may thus be too slippery an eel for the target's counsel to control.

115. *See In re Oliver*, 333 U.S. at 272-73.

116. U.S. CONST. amend. I.

117. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980). Justice Stewart would have extended the right to civil trials. *See id.* at 599 (Stewart, J.,

hearing, however, falls just short of a criminal trial in terms of constitutional protection.¹¹⁸ Because the press only has a right to attend "criminal trials,"¹¹⁹ it may not possess a right to attend either civil or criminal contempt trials.¹²⁰

Should the judge permit an open hearing, she would then need to focus on the language of Rule 6(e)(5) to guide the proceeding; she would have to determine what closing the hearing "to the extent necessary"¹²¹ meant in that specific case. It is possible that the contempt issue would be sufficiently distinct from the underlying investigation that no "matters before the grand jury" would be divulged in the hearings, and thus there would be no need to protect secrecy. Such would be the case when the sole question at the contempt hearing was the identity of the wrongdoer, rather than what other information was known or leaked. The court can open the hearing to consider that information, even if evidence requires closing part of the hearing.¹²²

4. *Civil Contempt and the Right to Appeal*—In addition to these procedural characteristics, another notable aspect of civil contempt actions concerns the right to appeal. Both the *Barry* court and the *Lance* court held that the denial of a civil contempt motion is appealable.¹²³ They reasoned that such a denial could not receive adequate review later because the subsequent criminal trial would so obscure the contempt issue as to make it meaningless.¹²⁴ They also found that because the alleged violation was capable of repetition, delayed review

concurring).

118. See *Levine v. United States*, 362 U.S. 610, 616 (1960) ("Procedural safeguards for criminal contempts do not derive from the Sixth Amendment. Criminal contempt proceedings are not within 'all criminal prosecutions' to which that Amendment applies.").

119. *Richmond Newspapers* involved only the question of press access to trials, and although there was no majority opinion, at least five justices discussed the case in terms of criminal trials. See *Richmond Newspapers*, 448 U.S. at 580 n.17 (opinion of Burger, J.); *id.* at 585 (Brennan, J., concurring).

120. The drafters of Rule 6(e)(5) specifically cited the fact that *Richmond Newspapers* covers only "trials" to support the constitutionality of the Rule's limitation of the open hearing. FED. R. CRIM. P. 6(e)(5) advisory committee's note.

121. FED. R. CRIM. P. 6(e)(5).

122. The Second Circuit has, in the context of civil contempt for refusing to supply subpoenaed evidence, required the reopening of the hearings after the grand jury matters had been discussed. See *In re Fula*, 672 F.2d 279, 283 (2d Cir. 1982).

123. *Barry v. United States*, 865 F.2d 1317, 1324-25 (D.C. Cir. 1989); *In re Grand Jury Investigation (Lance v. United States)*, 610 F.2d 202, 212-13 (5th Cir. 1980).

124. *Barry*, 865 F.2d at 1324-25; *Lance*, 610 F.2d at 213.

would permit continued harm.¹²⁵ The decision to deny a civil contempt motion was thus final and appealable under 28 U.S.C. § 1291.¹²⁶

When the complainant is a target, there may indeed be no opportunity to appeal a denial of a civil contempt motion at a later date. If the target is not indicted, his avenue to later appeal in connection with the indictment will be lost, while the injury from the media leak may remain. Because the possibility exists that a target will not be indicted, the order should be appealable.

Additionally, the underlying purpose of civil contempt proceedings supports appealability. Because civil contempt sanctions are designed to compel action, which in this situation means preventing leaks, once the trial is over, no need for civil contempt sanctions exists. This is why a person found in contempt is released at the end of the underlying dispute.¹²⁷ It would not make sense to appeal the denial of a civil contempt motion at the end of the underlying case; even if the denial of a contempt motion were overturned, the prosecutor would not be held in civil contempt because the underlying action would have ended. Were the purpose of civil contempt proceedings purely punishment, then post-trial appeal would be legitimate. But once the court and target choose civil contempt proceedings, punishment is not, supposedly, the goal. Therefore, denial of a civil contempt motion warrants immediate review.¹²⁸

If, however, the district court finds civil contempt, the decision is not appealable. An order finding a party in civil contempt is considered interlocutory and appellate courts will not take the appeal for fear of interfering with the proceedings below.¹²⁹ Generally, if the contemnor wants to appeal, he must comply with the order and appeal afterwards.¹³⁰

125. *Barry*, 865 F.2d at 1324-25; *Lance*, 610 F.2d at 212.

126. *Barry*, 865 F.2d at 1324; *Lance*, 610 F.2d at 212. 28 U.S.C. § 1291 states that the "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." 28 U.S.C. § 1291 (1988).

127. *See supra* note 64.

128. By way of contrast, it should be noted that a denial of dismissal of an indictment based on a violation of Rule 6(e) is not appealable immediately, and may or may not be appealable after conviction. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799-800 (1989).

129. *See Fox v. Capital Co.*, 299 U.S. 105, 107 (1936); *IBM v. United States*, 493 F.2d 112, 114-15, 117-19 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

130. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 293-94 (1947); *IBM*, 493 F.2d at 119.

Although this general rule has not been tested in the context of grand jury press leaks, it is unlikely that courts would find contempt orders appealable in such a case.

III. RECONSTRUCTING CONTEMPT ACTIONS FOR GRAND JURY PRESS LEAKS

The application of civil contempt proceedings in grand jury press leak situations, despite its current acceptance, remains theoretically and practically problematic. The theoretical complications stem from the conflict between the purposes of the civil contempt action and its use to combat leaks. Simply stated, civil contempt actions require an affirmative act from the contemnor, while in a leak situation the court is actually seeking to prevent action. Additionally, civil contempt actions secure private rights, while the enforcement of grand jury secrecy is a public right. These conflicts produce practical problems in the administration of the contempt action, including the two extremes, recidivism and impossibility of enforcement. This Part discusses these problems, and argues that a criminal contempt proceeding is the more appropriate response.

A. *The Hazards of Civil Contempt Actions*

A substantial problem with applying civil contempt actions to leak situations is the impossibility of assuring compliance when compliance means inaction. As discussed above, a civil contempt action generally seeks to compel a future act, such as the production of documents or testimony.¹³¹ The key words in this definition are "future" and "act." In the case of grand jury leaks, the court seeks two things: punishment for past leaks and prevention of further leaks. Regarding the punishment of past actions, a civil contempt sanction is inappropriate because it applies to future actions; criminal contempt sanctions are proper for past misconduct.¹³²

131. See *supra* notes 56–58 and accompanying text.

132. See *supra* notes 59–60 and accompanying text.

As for the prevention of future leaks, a civil contempt action might initially appear quite proper because civil contempt applies to future actions and the court seeks the prospective relief of preventing more leaks. This approach was followed by Judge Edwards in the *Barry* case.¹³³ He argued that the relief sought was plainly prospective: Mayor Barry wanted to stop future leaks, not punish prosecutors for past misconduct. He therefore found the proper contempt action to be civil.¹³⁴

Such reasoning ignores the totality of a civil contempt sanction: it not only operates prospectively, it also compels an affirmative act. This is why it is particularly appropriate for compelling the production of evidence. The contemnor possesses the option of a discrete act to indicate compliance. In the case of a violation of grand jury secrecy, however, the contemnor cannot act so as to define the moment of compliance. A prosecutor who is held in civil contempt in order to prevent future leaks is at a loss to comply.¹³⁵

If the court tries to avoid this problem by holding the prosecutor in contempt until she remedies the past leak, there is still little she can do. The harm done by the press' publication of secret information cannot be undone. Once the information is out, it cannot again become secret. The only possible remedy is compensatory; the court could demand that the prosecutor pay a fine to reimburse the opposing party. A civil contempt fine, however, must compensate an actual loss.¹³⁶ In the context of civil contempt, a remedial fine generally compensates a specific financial loss rather than a

133. *Barry v. United States*, 865 F.2d 1317, 1324 (D.C. Cir. 1989).

134. *Id.* In an apparent effort to buttress this point, Judge Edwards observed that both parties recognized the action to be civil. *Id.* This point was simply irrelevant. The fact that the parties stipulated to civil contempt does not make civil contempt the correct action. A lower court's characterization of a contempt action as civil has no bearing on the appellate court's resolution of the civil or criminal distinction, see *Shillitani v. United States*, 384 U.S. 364, 369 (1966), and neither should the characterizations of the parties.

135. The Supreme Court has found that, in the event that it is impossible for a person to comply with a civil contempt order, the contempt sentence should be lifted. See *Maggio v. Zeitz*, 333 U.S. 56, 72 (1948). The Court in *Maggio* was referring to a situation where the order required a positive act, such as turning over documents, which the contemnor could not perform because he did not possess the materials. Although in a press leak situation the problem is the proof of compliance rather than the ability to comply, impossibility should still render the civil contempt ineffective because, as the Court stated, "to jail one for a contempt for omitting an act he is powerless to perform would . . . make the proceeding purely punitive, to describe it charitably." *Id.*

136. *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947).

vague, nonpecuniary loss.¹³⁷ The loss asserted by the target in a leak situation, a loss to reputation, is not financial and is not easily converted to a monetary amount. Although the target may be able to maintain a libel action, it would be improper to convert a civil contempt proceeding into a wholly different civil action for libel.¹³⁸ Additionally, the purpose of using contempt actions in leak cases—avoiding interference with the grand jury investigation¹³⁹—would be defeated if the contempt action became a fully litigated libel action.

A third alternative is for the court to require a promise by the contemnor to stop any future leaks, thereby converting the requirement of inaction into the demand for a positive act. This option, however, only recharacterizes the prosecutor's original duty under Rule 6 as a court injunction and as such will only delay the question of enforcement. As Judge Tjoflat realized, a required promise to prevent leaks cannot insure the end of the leaks.¹⁴⁰ If the prosecutor is herself the source of the leak and admits as much, the judge can find her in contempt until she promises to stop leaking information. Presumably the prosecutor will do so immediately, ending the contempt. But what if the leaks continue? Does the judge again find the prosecutor in contempt until she promises to stop? The circularity of the process betrays the lack of true deterrence and, therefore, portrays the inadequacy of civil contempt sanctions.

137. If the damage or harm being compensated is financially discernible, compensatory sanctions are appropriate. *See, e.g.,* *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193–95 (1949) (imposing a civil contempt fine to compensate workers for wages unpaid due to violation of the Fair Labor Standards Act and a prior court order). On the other hand, when the harm, even if financial, is too vague to provide a discernible amount for damages, a civil contempt fine is not proper. *See, e.g.,* *Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467, 471–72 (2d Cir. 1958) (Hand, J., concurring) (stating that the use of a civil contempt fine to compensate for harm to a company's good will was improper because the lost profits, though real, were too vague to ascertain; criminal, not civil, contempt sanctions would have been proper).

138. *See, e.g.,* *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355–58 (5th Cir. 1979) (stating that a compensatory civil contempt action is not the avenue for a claim which is properly a class action).

139. *See supra* text accompanying notes 20–27, 42–44.

140. *See* *Blalock v. United States*, 844 F.2d 1546, 1559 (11th Cir. 1988) (Tjoflat, J., concurring). This was a peculiarly structured opinion. With one of the panel judges recusing himself, the other two filed a per curiam opinion applying the civil contempt procedures created by *Lance*, 610 F.2d 202. Both judges concurred, however, stating that *Lance* was wrongly decided and that the contempt action should be criminal. *Blalock*, 844 F.2d at 1552–53. Since the panel was bound by the precedent, they could not overturn it; only the circuit sitting en banc could do so. *Id.* at 1552–53 n.2.

The only possible situation where a civil action might succeed is where the court demands that the name of the Rule 6(e)(2) violator be submitted to the court by the prosecutor. If the prosecutor fails to do so, she may be held in contempt. The court, by demanding a positive act, can achieve concrete compliance, so the civil contempt action is appropriate. Unfortunately, this option also only delays the original problem. Once the court knows the actual violator, it must still fashion a workable contempt order, and it again confronts the ineffectiveness of civil contempt actions.

One judge has suggested that a civil contempt action in a leak case is improper because the interest being protected—grand jury secrecy—is public rather than private and, therefore, should be prosecuted as a criminal action.¹⁴¹ It is generally true that civil contempt actions protect private interests and criminal contempt actions protect public interests.¹⁴² This observation, however, proves too much. In the grand jury context, the use of contempt penalties always protects a public interest. When a contempt sanction is employed to compel a witness to testify, it is the public's interest in prosecutorial effectiveness which justifies its use. In such a situation, however, a civil contempt action is entirely appropriate.¹⁴³ Thus, as applied to grand jury issues, the distinction between civil and criminal contempt actions hinges more on the "future act"/"past act" distinction than on the public/private interests at stake.

B. The Proper Remedy: Criminal Contempt Sanctions

If the court demands a promise from the prosecutor to stop leaks each time there is a leak and yet the leaks continue, the

141. See *In re Grand Jury Investigation* (Lance v. United States), 610 F.2d 202, 222 (5th Cir. 1980) (Kravitch, J., dissenting). "Public" in this context encompasses the interests of future witnesses and persons other than the complaining target. Fear of witness intimidation is substantial in the context of grand jury leaks. See, e.g., *United States v. Eisenberg*, 711 F.2d 959, 965 (11th Cir. 1983) (reporting that in the course of the investigation, an attorney had been threatened and a witness had been killed).

142. See *supra* notes 65–66 and accompanying text.

143. See *Shillitani v. United States*, 384 U.S. 364, 370 (1966); see also Berman, *supra* note 49, at 740–42 (discussing the historic use of civil contempt sanctions against recalcitrant witnesses).

court may become frustrated with the broken promises. At the point of frustration, the court may decide to confine the prosecutor for the remainder of the grand jury term—a decision based on the contemnor's combined past misconduct of leaking information and violation of a promise not to leak further. Such a response by the court would be akin to criminal contempt sanction, being a punishment for a past action rather than an effort to compel future acts.¹⁴⁴ The penalty is criminal, in effect if not in name.

Alternatively, the court could try to enforce a civil contempt sanction by establishing a prospective fine to charge the contemnor each time a new leak occurs.¹⁴⁵ However, this may also be unworkable because the court will need to investigate each purported leak to determine whether it was a violation of Rule 6(e)(2) and to determine who was responsible. Once the individualized investigation occurs, the civil fine would simply operate like a criminal contempt fine for past conduct.¹⁴⁶

The reality that a civil contempt sanction in a leak situation will, in effect, serve as a criminal contempt sanction undercuts the legal validity of the civil action.¹⁴⁷ Because a civil action contains few of the procedural safeguards of a criminal action,¹⁴⁸ the civil action deprives a contemnor of constitutional procedural rights and may result in an invalid contempt citation.¹⁴⁹

144. See *Blalock*, 844 F.2d at 1560 (Tjoflat, J., concurring). But see *id.* at n.20 (stating that a court may not use civil contempt actions to impose a criminal contempt penalty).

145. This method was proposed by the City of Detroit, but rejected by the district court. *In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188, 1204-05 (E.D. Mich. 1990).

146. *Id.*

147. The problem of having a civil contempt sanction function as a criminal contempt sanction is also apparent in a situation where it is impossible for the contemnor to comply with the order. This can happen when the contemnor does not possess the thing which the court's order demands that he produce, such as documents, see *Maggio v. Zeitz*, 333 U.S. 56, 72 (1948), or a dependent child in a custody dispute, see Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185, 190-91 (1991). In either case, because the civil contempt sanction cannot compel the intended action, it operates only as a punishment. See *Maggio*, 333 U.S. at 72; see also Rendleman, *supra*, at 190-91.

148. See *supra* notes 67-73 and accompanying text; see also 3 WRIGHT, *supra* note 67, § 705.

149. See *United States v. Blalock*, 844 F.2d 1546, 1560 n.20 (11th Cir. 1988) (Tjoflat, J., concurring).

The purpose of a civil contempt sanction is to compel an action; it does not prevent leaks effectively because inaction is required.¹⁵⁰ Criminal contempt sanctions, however, serve both to punish past conduct and to deter future similar conduct.¹⁵¹ This is precisely what is needed to respond to a press leak which violates Rule 6(e)(2). In such cases, the court has before it evidence of a past leak, constituting a violation of the Federal Rules of Criminal Procedure, and the court wants to deter future leaks. A court's effort to use a civil contempt sanction merely creates a paper tiger.¹⁵² Criminal contempt sanctions avoid the judicial frustration of issuing an injunction and having no further recourse when it is violated.

The secondary purpose of criminal contempt sanctions—deterrence—is particularly important in this analysis. In the *Barry* case, Judge Edwards presumed that a civil contempt sanction was appropriate because the relief sought was prospective.¹⁵³ This reasoning fails to take account of the total impact of a criminal contempt sanction. Both civil and criminal contempt sanctions have a prospective element: civil contempt sanctions compel a future act and criminal contempt sanctions deter future acts. Criminal contempt sanctions are intended to instill enough fear into the contemnor that she will not act in the same way. In effect, criminal contempt sanctions can achieve what civil contempt sanctions cannot: inaction. As inaction is exactly what the court seeks in the leak situation, criminal contempt sanctions are the proper response.

These practical and theoretical justifications for employing criminal contempt sanctions for a violation of Rule 6(e)(2) receive some support from the language of the rule itself and its legislative history. The rule states that a "knowing violation of Rule 6 may be punished as a contempt of court."¹⁵⁴ Judge Tjoflat emphasized that the rule speaks of intent ("knowing") and punishment ("punished"), both terms of criminal law.¹⁵⁵ Additionally, the congressional record accompanying the 1977 amendments to Rule 6 stresses that violators of the rule would be "subject to the penalty of

150. See *supra* text accompanying notes 131–35.

151. See *supra* text accompanying notes 59–60.

152. See *supra* text accompanying note 140.

153. See *Barry v. United States*, 865 F.2d 1317, 1324 (D.C. Cir. 1989).

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

155. *United States v. Blalock*, 844 F.2d 1546, 1558 (11th Cir. 1988) (Tjoflat, J., concurring).

contempt."¹⁵⁶ The use of "penalty" expresses the congressional desire for the contempt to be treated as criminal.¹⁵⁷ Finally, the common practice of courts prior to the inclusion of contempt actions in Rule 6(e)(2) was to apply criminal contempt punishments as a response to a grand jury leak.¹⁵⁸ By providing for a contempt action for violations of Rule 6(e)(2), Congress arguably approved the established practice.¹⁵⁹

Further analysis uncovers some ambiguity in the rule, however. As Judge Edwards noted, the rule itself does not limit the response to a contempt violation to criminal action.¹⁶⁰ A similar failure to specify either criminal or civil contempt occurs in Rule 6(e)(5), which permits closed contempt hearings; it appears the drafters intended that general reference to include both civil and criminal actions.¹⁶¹ It follows, then, that the general reference to contempt in Rule 6(e)(2) also implies both actions. Had the drafters intended only criminal contempt, they could have expressly said so or included a cross-reference to Rule 42, which establishes criminal contempt procedures. Finally, although the legislative history does refer to Rule 6(e)(2)'s contempt sanction as punitive,¹⁶² both civil and criminal contempt sanctions have punitive elements.¹⁶³ The simple reference to punishment, therefore, is insufficient to determine whether the contempt action should be considered criminal.

The practical and theoretical limitations of civil contempt actions counsel against reading a requirement for them into the rule. It is more logical to infer that the drafters intended the type of contempt sanction which correctly fits the leak situation.¹⁶⁴

156. S. REP. NO. 354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527, 531.

157. See *Blalock*, 844 F.2d at 1556 (Tjoflat, J., concurring); see also *In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188, 1199-1201 (E.D. Mich. 1990) (noting that references in the legislative history to punitive intent behind the contempt sanction authorized in the rule indicate that criminal, not civil, contempt was contemplated).

158. See *Blalock*, 844 F.2d at 1556-57; see also Lester B. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 400, 448 (1959).

159. *Blalock*, 844 F.2d at 1558.

160. *Barry v. United States*, 865 F.2d 1317, 1324 n.6 (D.C. Cir. 1989).

161. The advisory committee's note refers to both civil and criminal contempt in relation to Rule 6(e)(5). See FED. R. CRIM. P. 6(e)(5) advisory committee's note.

162. See *supra* notes 156-57 and accompanying text.

163. See *supra* text accompanying notes 53-64.

164. Although criminal contempt sanctions appear to fit the grand jury leak situation far better than civil contempt sanctions, it should be noted that there are

IV. CRIMINAL CONTEMPT ACTIONS: A SUGGESTED METHOD

My research has not revealed a federal court which has yet initiated criminal contempt proceedings in response to a leak of grand jury information. Federal courts outside the District of Columbia, Fifth, and Eleventh Circuits, however, are still free to do so, not being bound by the *Lance*¹⁶⁵ court's characterization of such contempt actions as civil. Should a court agree with this Note that criminal contempt sanctions are the proper remedy, it may wonder what procedures will best facilitate an investigation and resolution of the Rule 6(e)(2) violation. This Part presents some guidelines for initiating and conducting criminal contempt actions in response to leaks.

A. *The Initial Threshold: Proving the Leak*

In order for a court to initiate criminal contempt proceedings, it must first be convinced that a leak has occurred. Unlike some acts of criminal contempt which take place in the presence of the judge,¹⁶⁶ the court will not be aware of leaks when they happen. The target will therefore need to present the court with initial evidence of a leak. As is the case with civil contempt proceedings following a leak, newspaper articles

additional non-legal and unstated reasons why an appellate court might prefer to term the contempt sanction "civil." From a purely pragmatic standpoint, an appellate court may desire to hear a particular case because it believes that the underlying issue is important or that the district court may have erred. A denial of a motion for criminal contempt sanctions is not appealable, but a denial of a motion for civil contempt sanctions is. *Compare supra* text accompanying notes 123-30 (civil contempt actions and the right to appeal) *with infra* text accompanying notes 180-81 (criminal contempt actions and the right to appeal). If the *Barry* and *Lance* courts had characterized the contempt actions as criminal, then they would have remanded to the district courts to reconsider the matters as criminal actions. The district courts probably would have refused to impose criminal contempt sanctions, just as they had refused to impose civil remedies, and the targets would have been unable to seek another interlocutory review by the appellate court. If an appellate court believes that government actions and leaks deserve some reprimand not issued by the district court, they may rely on the right to appeal a denied motion for civil contempt sanctions even though a civil action is itself improper.

165. *In re Grand Jury Investigation* (*Lance v. United States*), 610 F.2d 202 (5th Cir. 1980).

166. See 3 WRIGHT, *supra* note 67, §§ 707-08.

and other press accounts will often be the only evidence of the leak. Thus, the guidelines for reviewing news articles presented in *Lance* should be followed at the initial stage of pursuing criminal contempt sanctions as well.¹⁶⁷

B. *Appointing the Special Prosecutor*

The court should appoint a special prosecutor to investigate the leak.¹⁶⁸ To avoid potential bias, this prosecutor should not be connected with the U.S. Attorney's Office or the Justice Department.¹⁶⁹ The only legal limitation on such an appointment, however, is that counsel for the opposing party to the underlying dispute cannot prosecute the contempt.¹⁷⁰ How the *Young* rule applies to a grand jury case is unclear. Certainly an indicted defendant's attorney could not be appointed. A target's counsel, on the other hand, is not officially counsel for an opposing party. He would bring the violation to the court's attention as a member of the public, not as a private party seeking civil contempt relief.

The Court's language in *Young*, however, does not leave much room for the target's counsel to be appointed. The Court stated that "[a] private attorney appointed to prosecute a criminal contempt . . . should be as disinterested as a public prosecutor"¹⁷¹ The target's counsel is not a wholly disinterested party. Though his client will not benefit directly from the contempt action, his interest in stopping the leaks and seeing some action taken against the violator is probably too great to satisfy *Young*.¹⁷²

167. See, e.g., *In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188, 1206-07 (E.D. Mich. 1990) (rejecting petitioner's motion for civil contempt relief, but still employing the *Lance* court's methods for evaluating newspaper articles as evidence of leaks). For a description of the *Lance* court's methods, see *supra* text accompanying notes 77-100.

168. FED. R. CRIM. P. 42(b) (permitting appointment of a special prosecutor).

169. See *supra* text accompanying notes 28-41 for a discussion of the problems of appointing a prosecutor related to the U.S. Attorney's Office or Department of Justice.

170. See *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 804 & n.15 (1987).

171. *Id.* at 804 (footnote omitted).

172. Target's counsel could argue that the "benefit" referred to in *Young* does not apply to him. The Court stressed the financial and legal rewards to be gained by the private prosecutor's client. In a criminal contempt action, the target receives no damage reward, nor is a settlement possible between the parties; thus the two main

To avoid possible bias in favor of either the prosecutor or the target, therefore, the court should appoint a disinterested private attorney. In a high-profile case like that of Mayor Barry or Mayor Young,¹⁷³ the court should appoint a prominent, well-respected member of the bar, who can inspire the trust of the public and the parties and who will conduct a fair investigation.

C. Investigating the Leak

Once the court appoints a disinterested private attorney, that attorney possesses all the prosecutorial discretion of a government prosecutor.¹⁷⁴ The special prosecutor then can investigate the allegations, using subpoenas if necessary. The special prosecutor may also request a Rule 6(e) disclosure of matters occurring before the grand jury.¹⁷⁵ If the special prosecutor establishes probable cause, he will notify the suspected violator of the charge and the upcoming hearing by an order to show cause.¹⁷⁶

D. Defendant's Rights

Once the defendant has been charged, the traditional protections of criminal procedure attach, including the right to a jury trial,¹⁷⁷ and the "beyond-a-reasonable-doubt" standard

concerns of the *Young* Court are not implicated. *Id.* at 805. Because the contempt action is arguably separate from the underlying grand jury investigation, the target could claim that he receives no benefit in the way the Court defined "benefit."

173. *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989) (Mayor Barry); *In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188 (E.D. Mich. 1990) (Mayor Young).

174. *See Young*, 481 U.S. at 807. The attorney would also receive the salary of a U.S. attorney. *Id.* at 806 n.17.

175. FED. R. CRIM. P. 6(e)(3)(C)(i) permits the disclosure of matters occurring before the grand jury "when so directed by a court preliminarily to or in connection with a judicial proceeding"

176. FED. R. CRIM. P. 6(d)(b). It is apparently in the court's discretion whether or not to require probable cause before notifying a possible contemnor of the action. *See* 3 WRIGHT, *supra* note 67, § 710 & n.14.

177. *See Bloom v. Illinois*, 391 U.S. 194, 198-200 (1968).

of proof.¹⁷⁸ This heavy burden on the prosecutor will certainly mean that the mere evidence from newspaper articles will be insufficient to sustain a conviction. Instead, statements from officials who knew about the leaks may be the best evidence to prove criminal contempt. In addition, the protection against self-incrimination would likely prevent the court from imposing affidavit requirements on the defendant once the criminal contempt proceeding has begun, and may render questionable the admission of prior affidavits.¹⁷⁹ Thus, the defendant would be protected against any compelled statements required of him during the initial investigation of the leak.

E. Right to Appeal

A criminal contempt acquittal cannot be appealed.¹⁸⁰ Nor can there be an appeal of either the judge's decision not to appoint a prosecutor or the appointed prosecutor's decision not to proceed or indict, as these decisions are within legitimate prosecutorial discretion.¹⁸¹ Of course, a conviction for criminal contempt is appealable by the defendant.

CONCLUSION

Contempt sanctions present the only viable response to a leak of grand jury materials to the press. Although I have found no cases where the prosecutor was actually held in contempt, courts have strongly condemned possible leaks and have established procedures to institute contempt remedies. Courts, however, have incorrectly determined that the civil contempt action applies to leak situations. The criminal

178. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911).

179. The Fifth Amendment privilege against self incrimination bars the admission of compelled communications and testimony of the accused. See *Schmerber v. California*, 384 U.S. 757, 764 (1966).

180. See *In re Grand Jury Investigation (Lance v. United States)*, 610 F.2d 202, 221 (5th Cir. 1980) (Kravitch, J., dissenting); *Berman, supra* note 49, at 739.

181. See *Blalock v. United States*, 844 F.2d 1546, 1561 (11th Cir. 1988) (Tjoflat, J., concurring).

contempt proceeding is in fact the superior form of action, both functionally and conceptually. In spite of courts' reluctance to employ criminal contempt proceedings against prosecutors, Rule 6(e)(2) endorses the use of criminal contempt actions. Criminal contempt proceedings provide adequate means, particularly through the appointment of a special prosecutor, to respond to leaks of grand jury information to the press. Courts should, therefore, begin to assert their obligation to respond to violations of Rule 6(e)(2) through criminal contempt proceedings.