5-2001

Case Note: The Office of the Independent Counsel and Grand Jury Secrecy

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Recent Decision of the United States Court of Appeals for the District of Columbia Circuit: Criminal Procedure

The Office of the Independent Counsel and Grand Jury Secrecy

A. Introduction

In *In re Sealed Case No. 99-3091*,[1] the D.C. Circuit ruled on a motion for summary reversal of an order entered by the U.S. District Court for the District of Columbia ("District Court"), where such order required the Office of Independent Counsel Kenneth Starr ("OIC") to provide evidence as to why the OIC should not be held in contempt for violating the grand jury secrecy rule, Rule 6(e).[2] The alleged violation of grand jury secrecy concerned a *New York Times* article that contained information about the grand jury investigation of President William J. Clinton, and which named the OIC as the source of the information.[3]

In order to rule on the motion, the D.C. Circuit first had to determine whether it had authority to hear the motion filed by the OIC, which was before the court on an interlocutory appeal.[4] Upon a determination of proper jurisdiction to hear the appeal under the collateral order doctrine,[5] the D.C. Circuit concluded it was unnecessary to rule on the validity of the OIC's federal sovereign immunity claim, and turned to the merits of the case.[6]

The merits related to whether the information contained in the *New York Times* article amounted to disclosures constituting a prima facie violation of Rule 6(e).[7] In answering this question, the D.C. Circuit clarified the scope of Rule 6(e) and provided insight into the elements of a disclosure that would constitute a prima facie violation of the Rule.[8] The D.C. Circuit then looked to the information in the *New York Times* article, and held that the disclosure did not constitute a prima facie violation of Rule 6(e).[9] The court,

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1 *In re* Sealed Case No. 99-3091, 192 F.3d 995 (D.C. Cir. 1999) (per curiam).

2 *Id.* at 996-97. The grand jury secrecy rule, codified in Federal Rule of Criminal Procedure 6(e)(2), states in part that "an attorney for the government . . . shall not disclose matters occurring before the grand jury." FED. R. CRIM. P. 6(e)(2).

3 *In re Sealed Case No. 99-3091*, 192 F.3d at 997. For a more in-depth description of the content of the *New York Times* article, see *infra* section B.

4 *Id.* at 999.

5 *See infra* section D.1.

6 *In re Sealed Case No. 99-3091*, 192 F.3d at 1001.

7 *Id.* at 999. See *infra* section C.4 for the elements of a prima facie violation of Rule 6(e).

8 *In re Sealed Case No. 99-3091*, 192 F.3d at 1001-04.

9 *Id.* at 1003-04.

therefore, granted the OIC's motion for summary reversal and remanded the case with instructions to the District Court to dismiss the Rule 6(e) contempt proceeding pending against the OIC.[10]

B. Facts and Procedural History

On January 31, 1999, a front-page article published in the *New York Times* spoke to an unheard of possibility: a grand jury indictment of a sitting president.[11] The article reported that OIC attorneys believed Kenneth Starr would seek a grand jury indictment against President Clinton for the charges of perjury and obstruction of justice arising from both the President's sworn testimony in a deposition for the Paula Jones case, and for his testimony before a federal grand jury taken pursuant to the OIC's investigation.[12] On the following day, both the Office of the President and President Clinton himself, filed a motion in the District Court for an order directing the OIC to show cause why the OIC should not be held in contempt for violating Rule 6(e).[13] The Office of the President and President Clinton argued that the OIC's violation was evident from the information contained in the *New York Times* article, which included disclosures by government attorneys of matters before the grand jury.[14] The OIC responded to this motion by asserting that the information in the article did not fall within the Rule 6(e) definition of "matters occurring before the grand jury," and, alternatively, the OIC was not the source of the disclosures.[15] Although the OIC later withdrew the source defense, and conceded that the source of the article's information was a member of the office, the Office continued to assert the information was not within the scope of Rule 6(e).[16]

The District Court determined that the disclosures within the article were a prima facie violation of Rule 6(e), granted the motion filed by the Office of the President and President Clinton, and ordered both Mr. Bakaly and the OIC to "show cause why they should not be held in civil contempt for a violation of Rule 6(e)."[17] The District Court concluded that this show cause proceeding was to be "closed and ex parte,"[18] but agreed to stay the proceedings until the Department of Justice ("DOJ") completed its related criminal investigation of the leak.[19] Once the DOJ investigation was complete, the District Court proceeded *sua sponte* with the contempt proceed-

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10 *Id.* at 1005.

11 *Id.* at 997 (citing Don Van Natta, Jr., *Starr Is Weighing Whether To Indict Sitting President*, N.Y. TIMES, Jan. 31, 1999, at A1).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* After learning that the source of this leak was Charles G. Bakaly, III, a counselor and spokesperson for the Independent Counsel, the OIC took "administrative action" against Mr. Bakaly and forwarded the information to the Department of Justice for purposes of a criminal investigation. *Id.*

17 *Id.* at 997-98.

18 *Id.* at 998 (emphasis omitted) (citing *In re* Sealed Case No. 98-3077, 151 F.3d 1059, 1075-76 (D.C. Cir. 1998)).

19 *Id.*

ings, ordering the DOJ to serve as prosecutor against both Mr. Bakaly and the OIC even though the focus of the DOJ investigation was solely on contempt charges against Mr. Bakaly.[20] The DOJ objected to the court's action against the OIC, arguing the following: (1) no facts existed to justify further criminal proceedings against the OIC; (2) the court had no authority to pursue charges against the OIC because Rule 6(e) applies only to individuals; (3) the OIC could not be held vicariously liable for the actions of its staff members; and (4) the doctrine of federal sovereign immunity protected the OIC against a criminal contempt proceeding.[21] The OIC agreed with the arguments of the DOJ—namely that there was no factual basis for continued action and that the OIC was protected from suit under federal sovereign immunity—and filed an emergency motion with the District Court to vacate the court's orders to continue the contempt proceeding.[22]

Failing to receive a court ruling on the emergency motion, and nearing the date of the required status conference appearance, the OIC filed a motion with the D.C. Circuit requesting summary reversal of the lower court's orders relating to the finding of a prima facie violation of Rule 6(e) and the continuation of the criminal contempt proceeding.[23] In order to provide an appropriate amount of time to consider this appeal, the D.C. Circuit issued an administrative stay of the District Court's criminal contempt proceedings, and ordered all involved parties "to brief the question whether the alleged disclosures in the *New York Times* article relied upon by the district court in ordering a criminal contempt proceeding constitute a *prima facie* violation of Rule 6(e)."[24]

C. Significant Legal Background

1. Collateral Order Doctrine

The final judgment rule[25] provides that a federal appellate court does not have jurisdiction to hear an appeal from a district court decision unless that decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[26] If a district court's decision does not fall within the requirements of the final judgment rule, the decision must meet an exception to this general rule before an appellate court can assert jurisdiction over an appeal of a case at an intermediate stage of the judicial process.[27]

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20 *Id.* (noting the District Court explained its inclusion of Bakaly and the OIC in these contempt proceedings by asserting that the charges against both Mr. Bakaly and the OIC were "closely related" matters that would be "best resolved through a single contempt proceeding").

21 *Id.*

22 *Id.*

23 *Id.* The OIC also requested, as an alternative to a summary reversal, a stay of the contempt proceedings pending appeal. *Id.* Furthermore, the OIC also filed a writ of mandamus in case it was determined that the D.C. Circuit did not have jurisdiction to hear the OIC's interlocutory appeal. *Id.* at 998 n.3.

24 *Id.* at 998-99.

25 *See* 28 U.S.C. § 1291 (1994) (providing the statutory authority for this principle of finality).

26 Catlin v. United States, 324 U.S. 229, 233 (1945).

27 Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978).

Cohen v. Beneficial Industrial Loan Corp.[28] set out one such exception to the final judgment rule: the collateral order doctrine.[29] According to the *Cohen* Court, the rationale underlying the exception is that the rights at issue in collateral orders are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[30] In *Coopers & Lybran v. Livesay,* the Court elaborated on the *Cohen* analysis and stated that in order for a court order to fall under this exception, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[31]

2. Federal Sovereign Immunity

In *United States v. Sherwood,*[32] the Supreme Court discussed the significance of federal sovereign immunity, stating that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."[33] Without such consent, a claim of sovereign immunity serves as protection from defending the suit itself rather than merely as a defense from liability due to an adverse judgment.[34] This protection extends to the federal government as well as to all federal agencies falling within its authority.[35] However, sovereign immunity is not absolute because it may be waived.[36]

Since sovereign immunity can be waived, it has been described as "differ[ing] from the classic 'jurisdictional' limitation of Article III,"[37] and defined as "hybrid" in nature.[38] This characterization becomes significant to a court's authority to reach the merits of a case before it on appeal. Although a purely jurisdictional question must first be resolved before the court can proceed to consider the merits,[39] a "less than pure jurisdictional question" does not have to be addressed before a court proceeds to consider the merits of that case.[40]

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28 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

29 *Id.* at 546.

30 *Id.*

31 *Coopers & Lybrand,* 427 U.S. at 468 (citing *Cohen,* 337 U.S. at 546).

32 United States v. Sherwood, 312 U.S. 584 (1941).

33 *Id.* at 586.

34 FDIC v. Meyer, 510 U.S. 471, 475 (1994).

35 *Id.* This protection is arguably derived from Article III, Section 2 of the Constitution. *In re* Sealed Case No. 99-3091, 192 F.3d 995, 1000 n.7 (D.C. Cir. 1999) (quoting Bartlett *ex rel.* Newman v. Brown, 824 F.2d 1240, 1248 (D.C. Cir. 1987)) (noting that although the court assumed that the doctrine of federal sovereign immunity is a constitutional one not all agree with such an assumption).

36 *In re Sealed Case No. 99-3091,* 192 F.3d at 1000 (quoting *Meyer,* 510 U.S. at 475).

37 *Id.* (citing *Meyer,* 510 U.S. at 475).

38 *Id.* (quoting United States *ex rel.* Long v. SCS Bus. & Tech. Inst., 173 F.3d 890, 892-93 (D.C. Cir. 1999)).

39 *In re Sealed Case No. 99-3091,* 192 F.23d at 1000 (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998)).

40 *Id.* (quoting *Long,* 173 F.3d at 894); *see also* Parella v. Ret. Bd. of R.I. Employees' Ret.

Statutes may expressly waive the federal government's claim of sovereign immunity in certain circumstances.[41] Two U.S. Courts of Appeal have held that the Administrative Procedure Act[42] ("APA") effects such a statutory waiver of the right not to be sued.[43] However, some appellate courts have not focused on this APA language and continue to hold that the federal government does indeed possess the right to claim sovereign immunity from defending a civil suit unless there is explicit statutory language to the contrary.[44] Courts are undecided as to whether a similar statutory waiver exists with respect to criminal provisions.[45]

3. Rule 6(e)—Grand Jury Secrecy

A grand jury is an important part of the federal criminal justice system, and it is a "body that conducts its business in private."[46] In *Douglas Oil Company of California v. Petrol Stops Northwest*,[47] the Supreme Court emphasized that grand jury proceedings must be kept secret if the grand jury system is to function correctly.[48] The Court summarized the various interests served by the secrecy of grand jury proceedings, including the protection of potential witnesses,[49] the protection of witnesses who have already testified,[50] the protection of the accused,[51] and the interests of justice.[52]

Rule 6(e)(2) of the Federal Rules of Criminal Procedure codifies this grand jury requirement and provides:

Sys., 173 F.3d 46, 54-57 (1st Cir. 1999). *But see* United States *ex. rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 286-88 (5th Cir. 1999) (holding that all jurisdictional questions must be answered before addressing the merits because deciding the merits first would effectively be giving advisory opinions); Seaborn v. Fla. Dep't of Corrs., 143 F.3d 1405, 1407 (1st Cir. 1998), *cert. denied*, 525 U.S. 1144 (1999) (holding that a state's assertion of Eleventh Amendment immunity from suit must be addressed prior to reaching the merits).

41 *E.g.*, Lane v. Pena, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text.").

42 5 U.S.C. § 702 (1994).

43 Pullman Constr. Indus., Inc. v. United States, 23 F.3d 1166, 1169 (7th Cir. 1994) (holding Congress waived the federal government's right not to be sued when it was a party to a civil suit via the statutory language of the APA); Alaska v. United States, 64 F.3d 1352, 1355-57 (9th Cir. 1995) (agreeing with the *Pullman* court that federal sovereign immunity is no longer a right to not be named a party in a civil suit but rather merely a defense from liability).

44 *E.g.*, McQueen v. Bullock, 907 F.2d 1544, 1550-51 (5th Cir. 1990); Coleman v. Espy, 986 F.2d 1184, 1189 (8th Cir. 1993).

45 *In re Sealed Case No. 99-3091*, 192 F.3d at 999.

46 *In re* Motion of Dow Jones & Co., 142 F.3d 496, 499 (D.C. Cir. 1998).

47 Douglas Oil Co. of Cal. v. Petrol Stops N.W., 441 U.S. 211 (1979).

48 *Id.* at 218.

49 *Id.* at 219. The rationale behind the protection of potential witnesses is that public knowledge of the preindictment proceedings may deter them from "com[ing] forward voluntarily, knowing that those against whom they testify would be aware of that testimony." *Id.*

50 *Id.* Keeping secret the testimony of actual witnesses that have come before the grand jury serves to encourage complete and truthful testimony because there is a decreased chance that the witness will "be open to retribution as well as to inducements." *Id.*

51 *Id.* ("[B]y preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.") (citing United States v. Proctor & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958)).

52 *Id.* The secrecy of the proceedings reduces the chance that "those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment." *Id.*

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, [or] an attorney for the government, . . . shall not disclose matters occurring before the grand jury, except as otherwise provided 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.[53]

Rule 6(e) "serves to protect the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like."[54] It is not, however, without its limitations because "[i]t does not require . . . that a veil of secrecy be drawn over all matters occurring in the world that happen to be investigated by a grand jury."[55] Although the rule does apply to both grand jurors and government attorneys, it does not apply to grand jury witnesses who choose to disclose the content of their testimony.[56]

Enforcement proceedings serve as the tool for ensuring adherence to the requirements of Rule 6(e). *Barry v. United States*[57] provides the general outline for such enforcement actions brought in the D.C. Circuit.[58] A prima facie violation of Rule 6(e) for disclosures in a news report must include information consisting of "matters occurring before the grand jury," and the source of the disclosed information must be a government attorney or agent.[59] Most of the evidence presented to satisfy both elements of a prima facie violation arises from the content of the news report itself.[60]

Once a district court finds that a prima facie violation of Rule 6(e) exists, it proceeds with a show cause hearing, where the burden then shifts to the government to provide evidence rebutting the presumption of a Rule 6(e) violation.[61] This hearing is to be conducted *ex parte*,[62] and under *in camera* review[63] rather than in a "fully adversarial manner."[64] If the government is

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

54 SEC v. Dresser Indus., 628 F.2d 1368, 1382 & n.6 (D.C. Cir. 1980) (citing Douglas Oil Co. of Cal. v. Petrol Stops N.W., 441 U.S. 211, 219 (1979)).

55 *Id.*; *see also* FED. R. CRIM. P. 6(e)(3) (providing exceptions to the general rule of secrecy in particular circumstances)

56 *In re* Investigation Before Apr. 1975 Grand Jury, 531 F.2d 600, 606 n.11 (D.C. Cir. 1976).

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

58 *Id.* at 1321; *accord In re* Sealed Case No. 98-3077, 151 F.3d 1059, 1067 (D.C. Cir. 1998) (reiterating the use of the *Barry* court's decision in determining the proper way in which to proceed with such an enforcement action).

59 *Barry*, 865 F.2d at 1321 (quotation omitted) (citing United States v. Eisenberg, 711 F.2d 959, 963 (11th Cir. 1983); Lance v. United States, 610 F.2d 202, 216-20 (5th Cir. 1980)).

60 *Id.* at 1325.

61 *Id.* at 1321. This shift in burden is premised on the idea that the government is in a better position to determine whether the information disclosed was a matter before the grand jury and whether it was the source of the disclosure. *Id.* at 1326.

62 An *ex parte* proceeding is one "in which not all parties are present or given the opportunity to be heard." BLACK'S LAW DICTIONARY 1221 (17th ed. 1999).

63 An *in camera* review is one either completed in the judge's chambers, or at least done so privately. *Id.*

64 *In re* Sealed Case No. 98-3077, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (providing addi-

able to conclusively rebut the presumption, then the enforcement action is dismissed.[65] If the government fails to meet its burden during the show cause hearing, it is found in contempt for violating Rule 6(e),[66] and the court proceeds to consider the appropriate remedy for the violation.[67] The remedy may consist of "civil contempt sanctions or equitable relief or both, 'depending upon the nature of the violation and what the trial court deems necessary to prevent further unlawful disclosures of matters before the grand jury.'"[68]

D. The Court's Decision

The D.C. Circuit first determined that it had jurisdiction to hear the interlocutory appeal of the OIC,[69] and then concluded that the disclosures in the *New York Times* article did not constitute a prima facie violation of Rule 6(e).[70] The D.C. Circuit, therefore, granted the OIC's motion for summary reversal and remanded the case to the District Court with an instruction to dismiss the pending contempt proceeding.[71]

1. The Court's Jurisdiction

The D.C. Circuit began with an explanation of its jurisdiction to hear this interlocutory appeal.[72] The court found it possessed jurisdiction under the collateral order doctrine because the lower court to have "conclusively rejected" the OIC's claim of sovereign immunity.[73] The court addressed the elements of the collateral order doctrine and determined all three were met.[74] The D.C. Circuit first found that the District Court's order was a conclusive determination of the OIC's claim of sovereign immunity because the order required the OIC to appear as a defendant.[75] In particular, since federal sovereign immunity protects the government from suit itself,[76] which includes protection from appearing before the court as a defendant in a status conference, the District Court's demand for an appearance served as a conclusive rejection of the OIC's claim of immunity from suit.[77]

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tional instruction on the way in which to proceed with a show cause hearing in light of the lack of detail to this matter provided by the *Barry* Court). An *ex parte* proceeding with an *in camera* review serves to maintain the secret nature and investigative function of the grand jury far better than a full scale adversarial proceeding. *Id.*

65 *Id.* at 1076.

66 *Id.* at 1068.

67 Barry v. United States, 865 F.2d 1317, 1321 (D.C. Cir. 1989) ("[The trial court] may order the Government to take steps to stop any publicity emanating from its employees.").

68 *In re Sealed Case No. 98-3077*, 151 F.3d at 1068 (quoting *Barry*, 865 F.2d at 1323).

69 *In re* Sealed Case No. 99-3091, 192 F.3d 995, 999 (D.C. Cir. 1999).

70 *Id.* at 1003-04.

71 *Id.* at 1005.

72 *Id.* at 999-1001.

73 *Id.* at 999.

74 The D.C. Circuit relied upon the decision of *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), when outlining the elements of a collateral order. For a discussion of these elements see *supra* section C.1.

75 *In re Sealed Case No. 99-3091*, 192 F.3d at 999.

76 *Supra* section C.2.

77 *In re Sealed Case No. 99-3091*, 192 F.3d at 999.

The D.C. Circuit then addressed the second element of the collateral order doctrine, and concluded without further explanation that the District Court's rejection of the OIC's sovereign immunity claim constituted "an important issue separate from the merits of the contempt charge."[78] Turning to the final element of the doctrine, the court determined that delaying the resolution of the question of the existence of sovereign immunity until the lower court rendered a final judgment on the merits was not possible because "the right to be free from the burdens of trial is effectively unreviewable on appeal from a final judgment."[79] The court's rationale for this conclusion was that federal sovereign immunity protects the government from suit itself rather than just from liability after adjudication on the merits.[80] In other words, the government would already have suffered the burdens of trial if the D.C. Circuit waited until the rendering of a final judgment before hearing the government's appeal.[81]

2. Federal Sovereign Immunity

After concluding that the "OIC's substantial claim of immunity from the proceedings ordered by the district court suffices to entitle OIC to an interlocutory appeal," the D.C. Circuit proceeded to consider the OIC's claim of sovereign immunity.[82] The court recognized the current circuit split regarding whether a statutory provision can expressly waive a government entity's federal sovereign immunity status in a civil case.[83] The D.C. Circuit acknowledged the decisions by the Seventh and Ninth Circuits finding a statutory waiver,[84] and then went on to point out the decisions of appellate courts who disagree with the decisions rendered by these two circuits.[85]

The D.C. Circuit considered the criminal nature of the contempt proceeding, and asserted that "it is far from clear that Congress has waived federal sovereign immunity in the context of criminal contempt."[86] Iterating the need for a waiver of federal sovereign immunity to be expressly stated in the statutory language, the court concluded that it "kn[e]w of no statutory provision expressly waiving federal sovereign immunity from criminal contempt proceedings."[87]

The court indicated that it was leaning toward requiring an explicit statutory waiver of sovereign immunity in civil or criminal cases, but the court decided the case on different grounds.[88] The court proceed to the merits of the case without determining the immunity question because "[g]iven the

78 *Id.*

79 *Id.* (citing Midland Asphalt Corp. v. United States, 489 U.S. 794, 800-01 (1989)).

80 *Id.* (citing FDIC v. Meyer, 510 U.S. 471, 475 (1994)).

81 *In re Sealed Case No. 99-3091*, 192 F.3d at 999.

82 *Id.*

83 *Id.* at 999-1001.

84 *Id.* at 1000 (citing Pullman Constr. Indus., Inc. v. United States, 23 F.3d 1166, 1169 (7th Cir. 1994); Alaska v. United States, 64 F.3d 1352, 1355-57 (9th Cir. 1995)).

85 *Id.* at 1000 n.6 (citing McQueen v. Bullock, 907 F.2d 1544 (5th Cir. 1990); Coleman v. Espy, 986 F.2d 1184 (8th Cir. 1993)).

86 *Id.* at 999.

87 *Id.* at 1000.

88 *Id.*

'quasi-jurisdictional or 'hybrid' status' . . . of federal sovereign immunity," courts are only obligated to deal with pure jurisdictional matters before proceeding to the merits.[89] In other words, the court asserted that it could decide the merits of the case before addressing quasi-jurisdictional issues first.[90]

3. The Scope of Rule 6(e)

Relying on the court's decision in *Barry*, the D.C. Circuit stated that a prima facie violation of Rule 6(e) exists if an article discloses information constituting "matters occurring before the grand jury," and a government attorney is a source of this same information.[91] The court quickly disposed with the latter of the two requirements; the OIC conceded that a member of its staff was the source of the information.[92] This left the court to decide the definition of "matters occurring before the grand jury" within the context of Rule 6(e).[93]

The D.C. Circuit recognized the District Court's reliance on D.C. Circuit precedent in determining that the disclosure satisfied the rule's requirement of "matters occurring before the grand jury."[94] The D.C. Circuit was quick to point out, however, that since the time of the *Dow Jones* decision, a subsequent opinion warned against interpreting the language of that decision too broadly when applying Rule 6(e) to later enforcement proceedings.[95] Although the court acknowledged that Rule 6(e) may be interpreted to include matters "likely to occur before the grand jury," disclosure of this nature would need to include a discussion of matters such as "clearly anticipated testimony," rather than any general discussion of an investigation's direction.[96]

Relying on both the text and the underlying purpose of Rule 6(e), the D.C. Circuit clarified the meaning of "matters occurring before the grand jury." With respect to the text of the rule, the court focused on the need for the information in question to be before the grand jury, rather than merely

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89 *Id.* at 1000-01 (quoting United States *ex rel.* Long v. SCS Bus. & Tech. Inst., Inc., 173 F.3d 890, 893 (1999); noting that a debate exists among the courts over whether to characterize the question of the existence of federal sovereign immunity is a purely jurisdictional characterization).

90 *Id.*

91 *Id.* at 1001 (citing Barry v. United States, 865 F.2d 1317, 1321 (D.C. Cir. 1989)).

92 *Id.*

93 *Id.*

94 *Id.* The District Court relied on the language of the *Dow Jones* decision, where the court noted that matters occurring before the grand jury "encompass[ ] 'not only what has occurred and what is occurring, but also what is likely to occur,' including 'the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'" *Id.* (quoting *In re* Motion of Dow Jones & Co., 142 F.3d 496, 500 (D.C. Cir. 1989)).

95 *Id.* (quoting *In re* Sealed Case 98-3077, 151 F.3d 1059, 1071 n.12 (D.C. Cir. 1998)). *In re Sealed Case 98-3077* involved a previous contempt proceeding against Independent Counsel Starr based on allegations he improperly disclosed other matters involving the grand jury investigation of President Clinton.

96 *Id.* at 1002-03.

"'coincidentally before'" the grand jury.[97] Next, the D.C. Circuit opined that the purpose of Rule 6(e) also limited the rule's scope, because the rule served to "preserve the secrecy of the grand jury proceedings themselves."[98] The court found this significant when concluding that an assessment of any alleged violation of Rule 6(e) requires a court to distinguish between statements that concern the grand jury investigation and those that relate to an investigation by the prosecutor's office.[99] Information meeting the former category is "core Rule 6(e) material that is afforded the broadest protection from disclosure[s],"[100] while information falling within the latter category would only raise Rule 6(e) concerns when the statements "directly reveal grand jury matters."[101]

4. The Application of Rule 6(e) to the New York Times *Article*

In connection with the D.C. Circuit's interpretation of the scope and meaning of Rule 6(e), the court looked to the particular facts of this case in order to determine "whether the alleged disclosures in the *New York Times* article relied upon by the district court in ordering a criminal contempt proceeding constitute a *prima facie* violation of Rule 6(e)."[102] The court answered this question in the negative, reasoning that the alleged disclosures[103] did not satisfy the definition of "matters occurring before the grand jury."[104] The D.C. Circuit explained that information which asserts that an indictment should be sought, rather than "*has been sought* or *will be sought*," was not definite enough to meet this portion of the Rule's definition.[105] Additionally, the alleged disclosures cannot be interpreted to fall within the concept of matters "likely to occur" because the information did not speak to a specific time period in the future during which an indictment would be sought.[106] Finally, the D.C. Circuit characterized the disclosed information as representing the mere desire of government attorneys to seek an indictment, rather than a concrete decision on the part of the prosecutor's office to actually seek one.[107]

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97 *Id.* at 1001-02 (quoting Senate of Puerto Rico v. United States, 823 F.2d 574, 582 (D.C. Cir. 1987)).

98 *Id.* at 1002.

99 *Id.* (noting that other courts, including the U.S. Courts of Appeals for the Second, Fourth, Fifth, and Eleventh Circuits, have focused on such a distinction in related decisions).

100 *Id.* (explaining that such disclosures would be of matters "actually presented to the grand jury").

101 *Id.* The court went on to note, however, that even when statements do not fall within the scope of Rule 6(e), many times "disclosures by the prosecution referencing its own investigation[s] should not be made for tactical reasons, or are in fact prohibited by other Rules or ethical guidelines." *Id.* at 1003.

102 *Id.* at 999.

103 The disclosures in question were essentially that members of the OIC staff believed an indictment of President Clinton should be brought even while he remained a sitting president. *Id.* at 997.

104 *Id.* at 1003-04.

105 *Id.* at 1003.

106 *Id.* at 1004.

107 *Id.*

The D.C. Circuit further noted that general public knowledge of matters, which normally constitute Rule 6(e) protected material, may impact the decision as to whether an alleged Rule 6(e) violation actually occurred.[108] The court acknowledged that the information contained in the *New York Times* article, discussing the possible indictment of President Clinton due to his testimony before the grand jury, would normally be considered material protected by Rule 6(e) because it identified both a subject of, and witness before, a grand jury.[109] However, in light of the public's knowledge that President Clinton was both a grand jury witness and the subject of a grand jury investigation, the D.C. Circuit was not willing to conclude that the "OIC 'disclosed' the name of a grand jury witness," thus finding no violation of Rule 6(e).[110]

The D.C. Circuit, therefore, reversed the District Court and concluded that the OIC did not violate Rule 6(e).[111] The court ordered summary reversal of the orders of the District Court, and remanded the case to the lower court with instructions to dismiss the criminal contempt proceeding.[112]

E. Analysis

In re Sealed Case No. 99-3091 does not represent a major change or modification in the application of Federal Rule of Criminal Procedure 6(e) to alleged disclosures of material covered by the grand jury secrecy requirement. The decision does, however, serve to clarify prior precedent relating to the scope of the Rule's coverage.[113] Although this decision did not assert that confusion existed as to what disclosures constitute grand jury matters, it did recognize the difference in interpretation as to what constitutes information "likely to occur" before the grand jury.[114] The D.C. Circuit seems to require a significant level of specificity and definiteness before it will find a Rule 6(e) violation for the disclosure of information regarding the future of a grand jury investigation; more than the lower court believed current precedent required.[115] The concept of specificity calls for the information to contain more than the mere strategic desires of the prosecutor's office. Instead, it requires disclosures of decisions to take action in the future where the sub-

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108 *Id.* The court cited *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994), for the proposition that "[w]here the general public is already aware of the information contained in the prosecutor's statement, there is no additional harm in the prosecutor referring to such information." *In re* Sealed Case No. 99-3091, 192 F.3d 995, 1004 (D.C. Cir. 1999).

109 *In re Sealed Case No. 99-3091*, 192 F.3d at 1004.

110 *Id.* The court cautioned that "a prosecutor is not free to leak grand jury material and then make a self serving claim that the matter is no longer secret." *Id.* at 1004 n.13 (citing *In re North*, 16 F.3d at 1245).

111 *Id.* at 1004-05.

112 *Id.* Because the court ruled in this manner, the alternative relief requested by the OIC, a stay pending appeal, was dismissed as moot. *Id.*

113 In particular, the decision clarifies, and even possibly narrows, the language used in *In re Motion of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. 1998), especially with respect to the scope of what constitutes matters "likely to occur" before the grand jury. *In re Sealed Case No. 99-3091*, 192 F.3d at 1001-02.

114 *In re Sealed Case No. 99-3091*, 192 F.3d at 1001-02.

115 *See supra* section D.4.

ject of such action relates to the grand jury investigation itself.[116] Further, the concept of definiteness calls for a time frame within which this anticipated action is to occur, rather than a mere suggestion that a particular course of action will happen at some indefinite point in the future.[117] Parties interested in this decision will want to keep such requirements in mind when making or assessing public disclosures of possible grand jury information.

Because this decision serves to clarify rather than to modify the scope of Rule 6(e), it is not likely to have a significant impact on future show cause and criminal contempt proceedings. It is possible, however, that because the court clarified what constitutes a prima facie case, fewer meritless claims of Rule 6(e) violations may be alleged in the future, and fewer subsequent appeals may be filed. The rationale for this assertion is that potential parties would have an opportunity to assess the available evidence in a given situation at the outset, and thus would be better informed about whether the required evidence exists for a finding of a prima facie violation, and for the affirmation of such a determination on appeal.

Although the D.C. Circuit did clarify many matters relating to the merits of this appeal, the decision does leave open a variety of questions relating not only to Rule 6(e), but also to the jurisdictional matters surrounding federal sovereign immunity. With respect to Rule 6(e), because the court failed to find a prima facie violation by the OIC,[118] the court did not answer the question of whether an entity, such as the OIC, may be subject to Rule 6(e). A ruling that Rule 6(e) applies only to individuals and not to entities could result in a giant loophole that swallows the purposes of the rule. If an entity could avoid liability for violating the grand jury secrecy rule, there would be little incentive for an entity's directors to outline practices and procedures that would ensure that its staff members adhere to the rule's requirements. Yet if an entity, along with an individual, could be penalized for violating this rule, then such practices are more likely to be established, and the secrecy of the grand jury will be better protected.

With respect to federal sovereign immunity, the D.C. Circuit appears to be at odds with those courts who characterize questions relating to the subject as solely jurisdictional rather than hybrid in nature.[119] By framing the question as a hybrid one, the court was able to avoid answering the question of whether a statutory waiver of federal sovereign immunity exists with respect to particular civil or criminal actions. It may be argued that such an action had little overall effect in this particular case because the court did not find that the OIC violated Rule 6(e). The court's approach, however, did in fact require the OIC to defend itself against the claims made by the President and the White House because it proceeded to assess the merits of the case. If the OIC were indeed entitled to claim immunity from this suit, then it was unnecessarily burdened by the D.C. Circuit's requirement that both parties brief and argue the merits of this claim of a Rule 6(e) violation. It may be

116 *Id.*

117 *Id.*

118 *In re Sealed Case No. 99-3091*, 192 F.3d at 1005.

119 *See supra* note 40 and accompanying text.

argued, however, that such burdens are both justified and reasonable in light of the importance of maintaining the integrity and secrecy of the grand jury system.

Finally, concerns remain over the effectiveness of Rule 6(e) if sovereign immunity precludes an individual, harmed by a violation of Rule 6(e) from seeking redress against government attorneys and responsible entities. In addition, the integrity and secrecy of the grand jury system may well be jeopardized if the government can not be compelled to adhere to the system's purposes and procedures.

In light of the continued disagreement among the circuit courts with regard to the characterization and existence of a claim of federal sovereign immunity, and the questions begged by this court's ambiguous commentary on the subject, a clarifying and unifying decision may be necessary. The United States Supreme Court should, therefore, consider granting certiorari to a case that would allow the Justices to weigh these issues and provide a more conclusive response.

F. Conclusion

Overall, one principle sounding clearly throughout this opinion and throughout the authority cited therein, is the importance of maintaining the integrity and secrecy of the grand jury system. The purposes and functions of the proceedings are best served by the continued viability of a grand jury secrecy rule, such as the one codified in Rule 6(e). It remains clear to all interested parties that the D.C. Circuit will not tolerate an abuse of this rule or an abuse of the grand jury system itself. Therefore, this decision serves not only to maintain and to clarify the application of Rule 6(e) within the circuit, but also to remind government attorneys of their responsibilities to their employer, and to all individuals involved in a grand jury investigation.

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