Criminal Procedure—Federal Rule of Criminal Procedure 6(e): Criminal or Civil Contempt for Violations of Grand Jury Secrecy?

Janice S. Peterson

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
CRIMINAL PROCEDURE—FEDERAL RULE OF CRIMINAL PROCEDURE 6(e): CRIMINAL OR CIVIL CONTEMPT FOR VIOLATIONS OF GRAND JURY SECRECY?

INTRODUCTION

The grand jury has evolved from its English origins as a vehicle to serve the will of the king to its function today as an investigatory body that both assists the prosecutor in bringing criminal accusations and protects the innocent against unjustified prosecutions. Similarly, the secrecy required of grand juries has developed to serve the competing interests of the government’s criminal investigations and of the individual’s liberty. Federal Rule of Criminal Procedure 6(e) provides for secrecy in grand jury investigations.

2. See Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972) (A grand jury serves the “dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.”); M. Frankel & G. Naftalis, The Grand Jury: An Institution on Trial 19 (1977) (“[A]ll grand juries have a common function: to determine if there is sufficient evidence to warrant putting the subject of an investigation on trial, where the question of guilt or innocence can be determined.”); Stern, Revealing Misconduct by Public Officials Through Grand Jury Reports, 136 U. Pa. L. Rev. 73, 83 (1987) (“It is generally agreed, however, that in its development the grand jury had sharpened its sword to a fine point long before it acquired its shield.”).
3. See United States v. Roth, 777 F.2d 1200, 1202 (7th Cir. 1985) (“[T]he grand jury is as a matter of fact an investigative arm of the prosecutor’s office, as a matter of theory it is a protection for the liberty of the subject . . . .”).
4. Federal Rule of Criminal Procedure 6(e) provides in relevant part:
   (c) RECORDING AND DISCLOSURE OF PROCEEDINGS.
   (1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter’s notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.
   (2) General Rule of Secrecy. 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.
The grand jury's dual functions of "sword and shield" are embodied in the text and legislative history of Rule 6(e) of the Federal Rules of Criminal Procedure. This same dual principle is found in the 1977 amendments to Rule 6(e), where Congress amended the rule "to facilitate an increasing need, on the part of Government attorneys to make use of outside expertise in complex litigation." As a consequence of the 1977 amendments, the rule enhanced the "sword" aspect of secrecy by loosening the restrictions on disclosure of grand jury materials in order to assist the government in its investigatory function. However, to curtail or discourage abuse of the grand jury, the "shield" function, the rule continues to prohibit disclosure of "matters occurring before the grand jury" except under particular circumstances of governmental need. Rule 6(e) requires an ex parte hearing.


5. In re Presentment of Special Grand Jury Impaneled January, 1969, 315 F. Supp. 662, 671 (D. Md. 1970) ("The Grand Jury is both a sword and a shield."). See generally W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE (1985), stating that the grand jury: is likened to a shield in its operation as a screening agency interposed between the government and the individual. . . . [T]he grand jury . . . "protect[s] the individual citizen against oppressive and unfounded government prosecution." The grand jury is likened to a sword in its performance as an investigative agency. . . . Utilizing its investigative authority, the grand jury uncovers evidence not previously available to the prosecution, and thereby provides the sword that enables the government to secure convictions that might otherwise not be obtained.

Id. at 346.


8. See infra notes 76-100 and accompanying text for a discussion of the legislative history of the 1977 amendments.

9. In this Note, the term "disclosure" is used to refer to both permissible and impermissible revelations of "matters occurring before the grand jury" as defined by Rule 6(e).

10. Federal Rule of Criminal Procedure 6(e) provides in relevant part:

(3) Exceptions.

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

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

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

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall
to obtain a court order for disclosure not otherwise permitted by the rule.\(^{11}\) An additional, deliberate safeguard that protects the targets of grand jury investigations is the final sentence of Rule 6(e)(2), added in 1977, which provides a penalty of contempt for a knowing violation of the rule.\(^{12}\)

Prior to the 1977 amendments, contempt was used throughout the circuits as a sanction for violations of grand jury secrecy under the inherent supervisory power of the courts. Since 1977, the express contempt provision in the rule has been cited as authority for holding individuals in contempt of court. Two recent cases have questioned whether contempt, as contemplated by the 1977 amendments, is civil and/or criminal.

In the case of *Blalock v. United States*,\(^{13}\) the United States Court of Appeals for the Eleventh Circuit recognized a private cause of action seeking injunctive relief for alleged violations of Rule 6(e). Although bound by precedent,\(^{14}\) two of the judges in a special concurrence

---

\(^{11}\) Id. at 6(e)(C)(i)(ii); Senate Report, supra note 7, at 8, reprinted in 1977 U.S. Code Cong. & Admin. News 527, 532 ("It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be ex parte so as to preserve, to the maximum extent possible, grand jury secrecy.").

\(^{12}\) Federal Rule of Criminal Procedure 6(e)(2) provides that "[a] knowing violation of Rule 6(e) may be punished as a contempt of court." Fed. R. Crim. P. 6(e)(2).

\(^{13}\) 844 F.2d 1546 (11th Cir. 1988).

\(^{14}\) Id. at 1550 n.6 ("In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981."); see Lance v. United States Dep't of Justice, 610 F.2d 202 (5th Cir. 1980). The *Lance* court was the first court to recognize a private cause of action allowing a target to invoke the civil contempt power of the court, while not discussing whether a target has standing to seek such relief or whether the relief sought was criminal or civil. S. Beale & W. Bryson, *Grand Jury Law and Practice*
rence disagreed with the reasoning that led the majority to recognize the right of an individual to invoke the civil contempt powers of the court. The concurring judges argued that the text and legislative history of Rule 6(e) indicated that violations of grand jury secrecy are enforced solely with criminal contempt sanctions.

In the United States Court of Appeals for the District of Columbia Circuit, the majority, in Barry v. United States, relying on the holding in Blalock as persuasive precedent, recognized a private cause of action invoking the contempt power of the court. The dissent in Barry agreed with the Blalock special concurrence that Rule 6(e)(2) is solely a criminal contempt provision. The dissent in Barry disagreed with the majority for its failure to consider a criminal contempt sanction in light of the fact that the court, in this instance, was not bound by precedent as were the judges in Blalock.

The majority opinion in both cases recognized the private cause of action for injunctive relief invoking the civil contempt power of the court for violations of Rule 6(e). Although recognizing the remedy of civil contempt, the Blalock court did so only because of binding precedent, not because of analytic agreement with the mandated result. The apparent consistency in the two results does not clarify the underlying disagreement about the nature of the contempt remedy in Rule 6(e), which is the focus of this Note.

This Note will examine the special concurrence in Blalock and the dissent in Barry and compare and contrast them with the majority opinion in Barry as a way of determining whether the express contempt provision in Federal Rule of Criminal Procedure 6(e)(2) is criminal and/or civil. Part I of the Note examines the historical evolution of grand jury secrecy and its incorporation into the American criminal justice system. The legislative history of Rule 6(e) will be examined in Part II, with particular emphasis on the 1977 amendments. The inherent supervisory powers of the courts as they relate to both criminal and civil contempt will be examined generally in Part III. Additionally, Part III will examine the nature, purposes and possible definitions of criminal and civil contempt. Part IV discusses cases where grand jury secrecy violations were alleged. Cases prior to 1977 will be ex-


15. 844 F.2d at 1552 (Tjoftat, J., Roettger, J., specially concurring).
16. 610 F.2d at 212.
17. 865 F.2d 1317 (D.C. Cir. 1989).
18. Id. at 1322 (Sentelle, J., dissenting).
19. Id. at 1326.
amined for applications of the safeguards used by the courts before the enactment of the contempt provision in Rule 6(e). Cases since 1977 will be explored to help illuminate the current application of the rule. Part V of the Note examines the Blalock and Barry decisions in detail. Part VI focuses on the special concurrence in Blalock and the majority opinion in Barry to determine if criminal contempt was the sole contempt sanction intended by Congress when it enacted the 1977 amendments to Rule 6(e).

This Note suggests that the legislative history is unclear about the nature of the contempt remedy in Rule 6(e). The underlying philosophy and history of grand jury secrecy, regularly recognized by the Supreme Court, must be considered in any remedy for secrecy violations. Traditional judicial distinctions between civil and criminal contempt and the inherent supervisory power of the federal courts to fashion remedies are useful as a guide for courts confronted with governmental violations of grand jury secrecy. An analysis based on such considerations is more effective than one based on a categorical approach which eliminates civil contempt.

I. ORIGIN AND DEVELOPMENT OF GRAND JURY SECRECY

Today the grand jury is primarily a way of accusing a defendant of an alleged crime. Although historically the accusatory function was fused with the actual trial, the modern grand jury does not serve as a trial jury. Currently the grand jury, which is the investigatory arm of the government, decides only whether there is sufficient evidence to indict an individual who will subsequently go to trial. Functionally, the grand jury serves not only as a means "of bringing persons who are suspected of crimes to trial upon just grounds, but of protecting citizens from unfounded accusations whether from the government, partisan passion, or personal enmity." This dual function

21. Id. (In ancient Greece, the Roman Empire, and the Scandinavian countries, citizens accused, tried, and convicted those alleged to have committed crimes.).
22. Id. at 484-85 (citing Charge to the Grand Jury, 30 F. Cas. 992 (C.C.D. Cal. 1872)); see also Wood v. Georgia, 370 U.S. 375 (1962), which stated:

Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Id. at 390. In Hurtado v. California, 110 U.S. 516 (1884), Justice Harlan explained the protective function of secrecy:
of the grand jury, serving both the governmental needs of prosecution and the individual's needs to be protected from unwarranted charges, has resulted in the "veil of secrecy" which historically reduced royal control and guaranteed the independence of the grand jury. Although theoretically secrecy protects the target of a grand jury probe against reputational damage, in reality secrecy also screens the prosecutor's actions before the grand jury from public scrutiny.

A. Historical Development of Grand Jury Secrecy

The modern grand jury has its roots in the reign of the Carolvingian kings (circa 700-800 A.D.) whose inquisition evolved from Roman practices (43 A.D. to circa 500 A.D.). By 1166, the Assize of Clarendon was established by Henry II, whereby sixteen men under oath informed the government on affairs of state and decided who in the community had committed crimes. The Assize drew members

In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies.  

Id. at 554-55 (Harlan, J., dissenting).

23. Brown, The Witness and Grand Jury Secrecy, 11 AM. J. CRIM. L. 169, 169-71 (1983). To ensure secrecy, grand jurors were required to take an oath of secrecy in English courts. The oath appeared as early as 1600 and violations were punishable as a crime. Id. at 171 nn.9-10. See infra notes 174-80 and accompanying text for a discussion of the grand jury's independence and the supervisory function of the court. See also United States v. Sells Eng'g, Inc., 463 U.S. 418, 424 (1983) ("The same concern for the grand jury's dual function underlies the 'long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.' " (quoting United States v. Proctor & Gamble Co., 356 U.S. 677, 681 (1958) (footnote omitted))). In In re Russo, 53 F.R.D. 564 (C.D. Cal. 1971), the court traced the history of grand jury secrecy:

Thus, it is important to note that the common law concept of grand jury secrecy developed from a need to protect the jurors and the accused from the tyranny of the Crown. Secrecy insulated the jurors from the pressures of the Crown and permitted the grand jury to guard the people against the oppressive power of autocratic government.  

Id. at 568-69.


25. Whyte, supra note 20, at 463.

26. Id. at 462.


28. M. EVANS & R. JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 14 (1984), taken from the original Latin text contained in the appendix to Roger of Howden's CHRONICA, which stated:
from the community who heard testimony, deliberated in public, and made accusations against their neighbors.29 This procedure, which raised a presumption of guilt, eventually resulted in a centralization and increase of royal power. Contrary to the purposes ascribed to the grand jury today, this community group did not protect the individual's rights.30 The Assize may have indirectly protected the individual by screening unfounded charges, thus making the court's work more efficient.31

In 1215, the Lateran Council abolished the trial by ordeal and compurgation and the accused was tried by an indicting jury.32 "Here, it is said, the seed of the grand jury acting as a protective buffer between the accused and government officials was sown."33 Although

1. In the first place the aforesaid King Henry, on the advice of all his barons, for the preservation of peace, and for the maintenance of justice, has decreed that enquiry shall be made throughout the several counties and throughout the several hundreds through twelve of the more lawful men of the hundred and through four of the more lawful men of each vill upon oath that they will speak the truth, whether there be in their hundred or vill any man accused or notoriously suspect of being a robber or murderer or thief, or any who is a receiver of robbers or murderers or thieves, since the lord king has been king. And let the justices enquire into this among themselves and the sheriffs among themselves. 

Id. at 7; Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 COLUM. L. REV. 1103 (1955), stating that:

The assize expressly provided for trial by the ordeal by water, wherein the accused was slowly lowered by rope into a body of water. His innocence was vindicated by his sinking; if he floated, he was found guilty. For those who might survive this ordeal, the assize specifically provided the imposition of banishment and outlawry. These sanctions were invoked although the accusation and submission to the ordeal, not necessarily based on direct evidence of guilt, might have been solely premised on the local opinion that the prisoner was guilty. If convicted, punishment was the loss of a foot . . . .

Id. at 1107 n.14.

31. Whyte, supra note 20, at 465.

32. Kuh, supra note 30, at 1107 ("Trial by ordeal and compurgation were finally abandoned, partially because of church dissatisfaction with methods that, having no logical relationship to guilt or innocence, too often resulted in the acquittal of persons deemed to be heretics."). Compurgation is "the clearing of an accused person by oaths of persons who swear to his veracity or innocence." WEBSTER'S NEW COLLEGIATE DICTIONARY 230 (1979).

33. Whyte, supra note 20, at 465.
the accused was now afforded some minor protection from this development, which afforded a more rational means for determining the truth, he was not completely free of royal control of the grand jury. Not only was the panel that had accused the defendant unlikely to acquit at trial, the royal judges regularly fined and imprisoned jurors who found the defendant not guilty.34 Given that such contradictory behavior was disfavored by the Crown, the accused did not have much hope for success at later judicial proceedings.35

The modern notion of the grand jury "stems directly from the 'grande inquest' of twenty-three men which sheriffs began to appoint during the time of Edward III."36 In the fourteenth century, the practice of hearing witnesses in private became a feature of the grand jury.37 However, the rule of secrecy was not part of the proceedings until 1681 at the trial of the Earl of Shaftsbury, where members of the grand jury heard the charges of treason and refused to conduct the proceedings in public or allow the presence of the royal prosecutors during testimony.38 The subsequent refusal of the grand jury to indict the accused raised a case of treason to a symbol against oppression and despotism of the royal power. Secrecy became the touchstone of

34. M. FRANKEL & G. NAFTALIS, supra note 2, at 9 (It is unlikely that this punishment is the ancestor of sanctions for violations of grand jury secrecy, because it was directly related to a violation of the royal will rather than a sanction to protect the individual's rights.).

35. Whyte, supra note 20, at 466.


37. Whyte, supra note 20, at 466.

38. Pickholz & Pickholz, Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards, 36 WASH. & LEE L. REV. 1027, 1029-30 (1979); see also L. CLARK, THE GRAND JURY 9-12 (1975). The grand jury was often the center of political struggles. Shaftsbury and his follower, Stephen Colledge, supported the continued hegemony of the Anglican Church during the reign of Charles II, an avowed Catholic. The king's attempts to indict Shaftsbury and Colledge in public were met with the concerns of the grand jurors who thought "suspects would be alerted and would abscond, and suborning of perjury would be facilitated." Id. at 10. It is possible that the resistance to the royal authority stemmed from religious sympathies with the accused rather than any laudatory notions of establishing the independence of the grand jury. The king was able to have an indictment returned against Colledge by a more favorable grand jury. Shaftsbury fled England to escape the same fate. The foreman of the grand jury that refused to indict Colledge in London was arrested and forced to flee the country, further evidencing the king's control of the grand jury system. See generally Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 AM. CRIM. L. REV. 701, 710-21 (1972); Comment, Federal Grand Jury Secrecy, 5 GONZ. L. REV. 255, 256 (1970) ("[A] significant change in the grand jury's function came . . . in 1681. . . . [W]ith the Lord Shaftsbury case, the tide of history changed, and the grand jury grew more independent from the Crown." (footnotes omitted)).
grand jury independence.39

B. Grand Jury Secrecy in American Criminal Procedure

The rule of secrecy in England stemmed from "the desire to protect . . . defendants and the existence of the grand jury itself."40 English legal institutions and attitudes, such as the fear of government oppression, were brought to this country. The colonial experience under British rule underscored the wisdom of a healthy distrust of centralized government. In addition to overseeing the welfare of the community,41 colonial grand juries protested abuses by the English royal emissaries and urged the people to support the independence of the colonies.42

In the most celebrated case of colonial grand jury independence in this country, a New York grand jury mirrored the earlier English grand jury refusal to bow to royal authority. In 1734, William Cosby, the English governor of New York, sought two indictments for criminal libel against Peter Zenger, a journalist who had published articles critical of Cosby. The grand jury refused to indict both times and Zenger was able to thwart subsequent attempts to punish him.43 The grand jury's ability to protect against royal excesses was once again hailed as a bulwark against despotism.

After the end of British rule, the Americans incorporated the fear of repression into the Bill of Rights in the fifth amendment guarantee, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

39. M. FRANKEL & G. NAFTALIS, supra note 2, at 9 ("About the same time, the grand jury began to hear testimony in private, a practice that gave rise to grand jury secrecy, which remains a fundamental concept today."); see Pickholz & Pickholz, supra note 38, at 1030.
40. Comment, supra note 27, at 308.
41. R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 2 (1963) ("Grand juries acted in the nature of local assemblies: making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks, and looking after the welfare of their communities.").
42. M. FRANKEL & G. NAFTALIS, supra note 2, at 11-12; see also L. CLARK, supra note 38, at 13 (The first grand jury was established in Massachusetts in 1635 and by 1683 all the colonies had a grand jury in some form.). See generally Whyte, supra note 20, at 466-71 (The Governor of Virginia ordered justices to make court proceedings as close as possible to English legal institutions.).
43. Kuh, supra note 30, at 1108-09. The date of 1734 for the Peter Zenger incident does not have unanimous agreement in the secondary sources. M. FRANKEL & G. NAFTALIS, supra note 2, at 11, give the date as 1743. The Note, supra note 1, at 590, gives the date as 1734, which agrees with the Kuh article, supra note 30, at 1108-09 n.19. Yet another date (1735) is given in L. CLARK, supra note 38, at 18.
Jury."44 By incorporation into the Bill of Rights, which was intended "mainly for the security of personal rights,"45 the Americans recognized that the "ultimate function of the secrecy privilege was for the protection of the rights of the accused."46 The American grand jury was a close cousin to its English counterpart and operated similarly to the English model.47 Although the grand jury remains intact in the federal sphere, it is not required in state criminal prosecutions. In 1859, Michigan became the first state to eliminate the requirement that a criminal prosecution be initiated by a grand jury.48 In 1884, the United States Supreme Court held that the requirement of an indictment by the grand jury was not applicable to the states.49

The Supreme Court has upheld the need for grand jury secrecy in

44. U.S. CONST. amend. V; see also United States v. Sells Eng'g, Inc. 463 U.S. 418, 423 (1983) ("The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution.") (citing Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959)); Costello v. United States, 350 U.S. 359, 361-62 (1956). But see M. FRANKEL & G. NAFTALIS, supra note 2, at 118-19, where the authors discuss the fact that there have been many suggestions for reform, including abolition of the grand jury. "The effort to alter the Fifth Amendment encounters a deep-seated conviction among many constitutional lawyers and scholars that it is dangerous to tamper with any part of the Bill of Rights, which has remained exactly as it was adopted nearly two hundred years ago. Any change . . . may be the start of fatal breaches." Id. at 118.

45. Ex parte Bain, 121 U.S. 1, 6 (1887).


47. See Costello, 350 U.S. at 362 (1956) (The grand jury was "brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor."); Pickholz & Pickholz, supra note 38, at 1030. But see M. FRANKEL & G. NAFTALIS, supra note 2, at 16 (The grand jury was abolished in England in 1933.); Knudsen, supra note 46, at 237 n.3 (The English abolished the grand jury system because it was an expensive burden on the citizenry that performed no useful function.).


49. In Hurtado v. California, 110 U.S. 516 (1884), the Court held that:

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. . . . It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments.

Id. at 538; see also Ford v. Seabold, 841 F.2d 677, 688 (6th Cir. 1988) ("The basis for this distinction results from the now well-settled constitutional holding that the Fifth Amendment right to a grand jury does not apply to state prosecutions.") (quoting Aldridge v. Marshall, 765 F.2d 63, 68 (6th Cir. 1985), cert. denied, 474 U.S. 1062 (1986) (citations omitted)).
American criminal procedure.50 Confidentiality of grand jury pro-
ceedings protects several important, yet often competing, interests of
the government and of private citizens. This tradition of secrecy,
which had its historical roots in England, is, according to the Supreme
Court, as “important for the protection of the innocent as for the pur-
suit of the guilty.”51 Justice Brennan summed up the rationale:

Essentially four reasons have been advanced as justification for
grand jury secrecy. (1) To prevent the accused from escaping before
he is indicted and arrested or from tampering with the witnesses
against him. (2) To prevent disclosure of derogatory information
presented to the grand jury against an accused who has not been
indicted. (3) To encourage complainants and witnesses to come
before the grand jury and speak freely without fear that their testi-
momy will be made public thereby subjecting them to possible dis-
comfort or retaliation. (4) To encourage the grand jurors to engage
in uninhibited investigation and deliberation by barring disclosure
of their votes and comments during the proceedings.52

The four principal reasons given by Justice Brennan incorporate
the traditional rationale for grand jury secrecy: the “sword” which
aids the state in effective criminal investigations and the “shield”
which protects both the accused and the grand jurors from govern-
mental intrusion and oppression. The fourth reason, protection of the
grand jurors, is of “paramount importance.”53 Rule 6(e) prohibits
either disclosure or recording of the grand jury’s deliberations or
votes54 because citizens who assume the duty of grand juror must be
protected by law to prevent any subsequent injury that might result
from public knowledge of their discussions. Grand jury deliberations
and votes are kept permanently secret. The first reason is important to

Petrol Stops Northwest, 441 U.S. 211, 219 (1979); United States v. Procter & Gamble Co.,
51. 319 U.S. at 513.
52. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959) (Brennan,
J., dissenting) (footnote omitted); United States v. Rose, 215 F.2d 617, 628-29 (3d Cir.
1954); see also United States v. Geller, 154 F. Supp. 727, 729 n.1 (S.D.N.Y. 1957) (Secrecy
of the grand jury is an administrative necessity.); Application of United Electrical, Radio &
Machine Workers, 111 F. Supp. 858, 866 (S.D.N.Y. 1953) (Secrecy before the indictment
protects the accused in case no indictment is returned against him. If an indictment is
returned it prevents possible prejudice at trial.); United States v. Smyth, 104 F. Supp. 283,
304 (N.D. Cal. 1952) (The rule of secrecy is not for the benefit of the defendant after an
indictment has been returned. The rule protects the grand jurors and helps the government
in its prosecution.).
53. Calkins, supra note 29, at 459.
54. See supra note 4 for the text of Rule 6(e)(1).
the government because an accused may flee before he can be apprehended and placed in custody if he knows of charges pending against him. Additionally, the accused could collude with witnesses to testify falsely on his behalf. The third reason is also important to the government during the preparation phase of its investigation. "Secrecy is the state's inducement for obtaining evidence" sufficient for an indictment. Only the second reason addresses the need of an individual to be protected against public condemnation or suspicion. Permanent secrecy of the grand jury materials is required to protect a target who is unindicted by the grand jury.

Historical and political realities remain embedded in the continued respect accorded grand jury secrecy by the judiciary. However, the current reality of how the federal grand jury operates reveals a less

---

55. Knudsen, supra note 46, at 240 ("Although there is disagreement as to the original reasons for grand jury proceedings being held in secret, the most likely reason was to prevent offenders from learning of the proceedings and attempting to escape prosecution." (footnote omitted)).

56. Calkins, supra note 29, at 459.

57. Id. at 460.

58. In United States v. Sells Eng’g, Inc., 463 U.S. 418 (1983), the defendants were indicted by a federal grand jury for conspiracy to defraud the United States through defense contracts. In a plea bargain, the defendants agreed to plead guilty to a count of conspiracy to obstruct an IRS investigation. The government moved for disclosure of the grand jury materials to attorneys in the Civil Division for use in a possible civil suit. The Supreme Court held that the government attorneys in the Civil Division could not have automatic access to such materials. The government had to obtain a court order under Federal Rule of Criminal Procedure 6(C)(i). Rule 6(A)(i)'s provisions of automatic access are limited to attorneys involved in the criminal investigation before the grand jury. Justice Brennan, writing for the majority, stated:

This conclusion is mandated by the general purposes and policies of grand jury secrecy . . . and by the legislative history of Rule 6(e).

Given the strong historic policy of preserving grand jury secrecy, one might wonder why Government attorneys are given any automatic access at all.

[Disclosure] threatens to do affirmative mischief. The problem is threefold. First, disclosure to Government bodies raises much the same concerns that underlie the rule of secrecy in other contexts. . . . [A witness] may be less willing to speak for fear that he will get himself into trouble in some other forum.

Second, because the Government takes an active part in the activities of the grand jury, disclosure to Government attorneys . . . poses a significant threat to the integrity of the grand jury itself.

Third, . . . there are few if any other forums in which a governmental body has such relatively unregulated power to compel other persons to divulge information or produce evidence. . . . [T]he limitations imposed on investigation and discovery exist for sound reasons—ranging from fundamental fairness to concern about burdensomeness and intrusiveness.

Id. at 427-28, 431-33 (citation omitted).
clear picture of an independent body cautiously supervised by the court.

Noteworthy in the traditional purposes and policies advanced by the Supreme Court for preserving secrecy of the grand jury is the absence of any rationale supporting the government's need to keep its investigatory behavior (as opposed to "matters occurring before the grand jury," as required in Rule 6(e)) from public scrutiny. The freedom that secrecy provides to the grand jurors to investigate and to the witnesses to testify is not historically related to sheltering the government from any judicial or public scrutiny of its practices. This aspect of the grand jury has been criticized: "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked ex parte examination. . . . [T]he Supreme Court has shown itself extremely sensitive to the opportunities for oppression that such examination offers."60

As its inception at the trial of Shaftsbury indicates, the secrecy provision originally precluded the presence of the government. The erosion of this concept has resulted in the prosecutor exercising discre-

59. Cf. In re Grand Jury Matter (Catania), 682 F.2d 61, 62-65 (3d Cir. 1982) (One of the threshold questions in deciding whether there has been a breach of grand jury secrecy is to decide if the information in question is in fact grand jury material. Grand jury material has been defined as only that material which directly or indirectly reveals what transpired before the grand jury. If material is obtained from an independent source, it is not grand jury material under the Rule 6(e) definition.). See Calkins, supra note 29, stating:

In examining the evolution of grand jury secrecy, it is important to note that the common-law concept of secrecy that was imparted to American jurisprudence arose initially from a need to protect the grand jurors and private citizens from the oppression of the state. It was not intended to aid the prosecution in its discovery of facts or to protect the prosecution's case from disclosure.

Id. at 458.

60. United States v. Remington, 208 F.2d 567, 573 (2d Cir. 1953), cert. denied, 347 U.S. 913 (1954); see also In re Groban, 352 U.S. 330 (1957), where Justice Black stated in dissent:

Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea . . . remains unchanging—extraction of "statements" by one means or another from an individual by officers of the state while he is held incommunicado. . . . [I]t violates the Due Process Clause to compel a person to answer questions at a secret interrogation where he is denied legal assistance and where he is subject to the uncontrolled and invisible exercise of power by government officials. Such procedures are a grave threat to the liberties of a free people.

Id. at 352-53 (Black, J., dissenting) (footnote omitted).
tion in conducting the investigation of the grand jury, with the necessity of extending the secrecy requirement to the prosecutor. The policy of government intrusion into the grand jury developed throughout the nineteenth and twentieth centuries, such that today it is a matter of right. However, the prosecutor's access and use of grand jury material is restricted by judicial supervision of the Executive's actions. "[G]overnment attorneys are allowed into grand jury rooms, not for the general and multifarious purposes of the Department of Justice, but because both the grand jury's functions and their own prosecutorial duties require it." The grand jury remains an arm of the judiciary, under its supervision, despite the necessary guidance of the prosecutor.

Congress has also sought to "defend [grand jury secrecy] ... against unwarranted intrusion." Rule 6(e), as originally enacted in 1946, limited use of grand jury materials to government attorneys in the performance of their duties. The 1977 amendments to Rule 6(e), which relaxed the restrictions on disclosure by government attorneys, advanced the government's interest in criminal prosecutions and attempted to curb abuse by restricting automatic access to grand jury materials and by imposing sanctions upon violators of grand jury secrecy.

---

61. Note, Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power, 56 Fordham L. Rev. 129, 133 (1987); see also In re Russo, 53 F.R.D. 564 (C.D. Cal. 1971), which stated:

Over the years, as fear of the oppressive power of the government has subsided, the government prosecutor has regained substantive influence over the grand jury and, consequently, that institution has lost much of its former independence. The grand jury now relies upon the prosecutor to initiate and prepare criminal cases and investigations which come before it. The government attorney is present while the jury hears testimony; he calls and questions the witnesses and he draws the indictment. The only remnant of secrecy with respect to the government which adheres today is the practice of conducting the actual deliberations and voting of the jury in private.


63. See infra notes 336-49 and accompanying text for a discussion of the inherent supervisory powers of the judiciary over the grand jury.


65. Id. at 425.
II. Federal Rule of Criminal Procedure 6(e)

Federal Rule of Criminal Procedure 6(e) has embodied the long-established rule of grand jury secrecy since 1946, when the criminal rules of procedure for the federal courts went into effect. The rule, as originally enacted, continued the common law practice in the federal courts—"The policy of secrecy is traditional, and violation of the required... oath... is both a contempt and a crime at common law."66 Prior to the 1977 amendments, Rule 6(e) was amended in 1966 to extend secrecy to the auxiliary personnel who recorded and transcribed the testimony of witnesses.67

A. Federal Rule of Criminal Procedure 6(e) in 1946

The Federal Rules of Criminal Procedure, enacted in 1946,68 codified in Rule 6(e) the common law rule requiring secrecy of grand jury proceedings. Rule 6 on the Grand Jury (originally Rule 7 in the preliminary draft) did not change the traditional common law form of the grand jury.69 However, the new rule enhanced the "effectiveness of the grand jury by permitting greater flexibility in its use," particularly in the area of numbers of grand juries that can be summoned at the same period of time and the length of service.70

Rule 6(e) dealt with the "frequently troublesome problem"71 of

67. See supra note 4 for the text of Rule 6(e)(1) and (2).
68. See Fed. R. Crim. P., 327 U.S. 821 (1946); see also Dession, The New Federal Rules of Criminal Procedure: I, 55 YALE L.J. 694 (1946) [hereinafter Dession I]; Dession II, supra note 66; Orfield, The Federal Rules of Criminal Procedure, 33 CALIF. L. REV. 543 (1945). In 1941, the Supreme Court appointed an Advisory Committee to draft the original Federal Rules of Criminal Procedure. The Court approved the draft rules in 1944 and submitted them to Congress. The Rules took effect on March 21, 1946. Dession I, supra, at 694-97. The Advisory Committee to the original Federal Rules of Criminal Procedure prepared at least ten drafts, "a laborious eight-year enterprise which required the participation of... judges, lawyers, government officers, legal scholars, and committees of bench and bar." Id. at 694. The result of this work, where all those interested in criminal procedure could make known their needs, was a comprehensive code originating from every known source. The rules which were confined to general principles embodied the following objectives: promotion of simplification of procedure; improvement in objectively ascertaining the facts; more complete fulfillment of democratic values; and greater uniformity. Orfield, supra, at 544.
69. Dession II, supra note 66, at 197 (The drafters could not change the requirement for a grand jury in light of the Constitutional mandate for a grand jury for prosecution of any felony.).
70. Id. at 198.
71. Id. at 203. The text of the original Federal Rule of Criminal Procedure 6(e) provided:

Disclosure of matters occurring before the grand jury other than its deliberations
the secrecy of the grand jury proceedings. The secrecy provision essentially restated the traditional requirement of secrecy with two important exceptions. The first exception was the provision for disclosure. The rule continued the practice of allowing disclosure to government attorneys to the extent that they are present in the room when the evidence is presented. Additionally, to save time and facilitate proof, disclosure was permitted by the court when a defendant made a good faith motion to dismiss an indictment. The second exception was the provision that no obligation of secrecy could be imposed on any person except in accordance with the rule. Prior to the adoption of the Federal Rules of Criminal Procedure, witnesses took the oath of secrecy, a restriction deemed "impractical and unfair." The original rule made no mention of sanctions for violations of the rule.

Rule 6(e), as adopted in 1946, contained no provision for nonattorneys assisting the government to access grand jury materials for other purposes. The only provision relating to such activities stated: "Disclosure . . . may be made to . . . the attorneys for the government for use in the performance of their duties." Despite this language restricting access and use of grand jury materials, the Justice Department, faced with the reality of complex litigation, consulted a multitude of specialists, who in turn had to be apprised of what had transpired before the grand jury. It became "common in some Dis-
districts for nonattorneys to be shown grand jury materials." The 1977 amendments to Rule 6(e) addressed this problem.

B. 1977 Amendments to Rule 6(e)

In the 1970's, regulatory agencies were referring economic violations of their regulatory statutes to prosecutors for criminal proceedings. Courts struggled with this erosion of keeping the "sovereign" out of the grand jury room. The first case that prompted statutory consideration of the problem was *In re William H. Pflaumer & Sons.*

There, the District Court of the Eastern District of Pennsylvania denied the petitioner's motion for a protective order to prevent IRS access to materials the petitioner had given to the grand jury pursuant to a subpoena. Although the IRS had access to the material while providing technical assistance to the prosecutor, the information was not requested in connection with a civil tax prosecution. The court would not issue a protective order "so long as [the records] . . . remain under the aegis of attorneys for the government."

Five years later, the same court considered *Robert Hawthorne, Inc. v. Director of Internal Revenue,* where the plaintiff sought an injunction to halt grand jury proceedings or an order restraining the use of subpoenaed documents by the IRS. The plaintiff alleged that the IRS had corporate records that had been given to the grand jury and that the IRS agents had not been sworn to secrecy or advised that the materials needed to remain under the "aegis" of the United States Attorney. Although the plaintiff did not prevail, the court expressed concern "as to the manner in which the Rule 6(e) orders were implemented in this case and apparently in general." Both parties relied on *Pflaumer* as the sole authority. The court "suggested" the proper procedures to be followed when agency personnel have access to grand

75. 463 U.S. at 436.
76. See supra note 4 for the text of Rule 6(e)(2), which was amended in 1966 to include the operator of a recording device and any typist who transcribes recorded testimony among those bound by secrecy, and for the text of Rule 6(e)(1), which was amended in 1979 to require the recording of all grand jury proceedings except deliberations and voting.
79. 53 F.R.D. at 477.
81. Id. at 1104.
jury materials. 82 The Hawthorne court submitted this order, 83 as well as its Pflaumer decision, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. 84

The Court of Appeals for the Ninth Circuit considered a similar problem in J.R. Simplot Co. v. United States, 85 where the petitioner challenged the use of grand jury materials by IRS agents who had assisted the grand jury. Judge Hufstedler held that agency access to grand jury materials must be restricted because the "grand jury is a constitutional entity under court supervision, not a tool available for Executive branch purposes." 86 Judge Hufstedler recommended the guidelines suggested by the Hawthorne court and added that the "agency bears the burden of proving an independent source for the information." 87

While the courts were balancing the need for secrecy against the government's need "to make use of outside expertise in complex litigation," 88 the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and the Supreme Court began to consider the problem of agency access to grand jury materials and the resulting uncertainty from the judicial decisions. The amendment, proposed by the Advisory Committee on Criminal Rules, 89 reflected

82. Id. at 1125-27. The suggestions included: 1) All persons giving assistance should be sworn to secrecy and written instructions should clarify the restricted use of the materials. 2) Grand jury materials must be segregated and marked as separate from agency files. 3) Before granting a request for specialized assistance there should be a strict showing of necessity. 4) A detailed docket would keep track of the agency personnel with access to what particular grand jury materials including dates when the agency was granted access.

83. Id. at 1126 n.54.
84. Id. at 1121.
85. 77-1 U.S. Tax Cas. (CCH) ¶ 9146, at 86,195 (9th Cir. 1976).
86. Id. at 86,197.
87. Id. at 86,199.
88. HOUSE REPORT, supra note 7, at 2-3; SENATE REPORT, supra note 7, at 6, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 527, 529; HOUSE DOCUMENT, supra note 7, at 8.
89. See 8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 6.01[6][b] (2d ed. 1990) for the Proposed 1977 Amendment to Federal Rule of Criminal Procedure 6(e), which provided: 6(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, "attorneys for the government" includes those enumerated in rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Otherwise, a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that
the fact that government personnel assisted the Justice Department in grand jury proceedings because the increased volume and complexity of litigation required increased specialization. The Advisory Committee Notes to the 1977 amendments to Rule 6(e) were submitted to Congress on April 26, 1976 by the Supreme Court. The proposed changes continued to permit disclosure to government attorneys under the original rule, but expanded the definition to include those individuals defined by Rule 54(c). In addition to those individuals named in Rule 54(c), the Advisory Committee included "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." The final limitation "in performance of their duties" was intended as a safeguard to protect against unlawful disclosure and to further the policy of grand jury secrecy. The Advisory Committee's proposed language for Rule 6(e) did not include sanctions for violations of the rule.

Because of time pressures, the three days of hearings before the House Subcommittee on Criminal Justice of the Committee on the Ju-

...
diciary were the only hearings conducted on these amendments by Congress. Many who testified welcomed the substantive changes in Rule 6 from "disclosure of matters occurring before the grand jury ... may be made to the attorneys for the government for use in the performance of their duties" to an expanded definition of attorneys including "other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." However, concerns were expressed at the hearings about the scope of such changes and the possible effects on targets if grand jury information were made more widely available to government attorneys not directly involved with the grand jury. 94

The House was primarily concerned about access to materials by personnel outside the Department of Justice:

The substantive change to Rule 6(e) has been much criticized. There was concern that it would permit too broad an exception to the rule of keeping grand jury proceedings secret. It was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them. 95

The House voted to disapprove the amendments because of the inadequate protection against improper use by government personnel not directly involved in the grand jury investigation. The House did not submit alternative language.

The Senate Judiciary Committee redrafted the rule. 96 The Senate Report favored the Supreme Court's proposal and found the Hawthorne and Simplot decisions too "restrictive of the use of government experts." 97 The report specifically stated that the relaxation of restrictions on secrecy of the government attorneys was:

necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Fed-

97. Id. at 7 n.10, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS at 530-31.
eral laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure.98

The concerns expressed reflected the balancing necessary to maintain secrecy as government attorneys legitimately needed to make material available to others in the government. The Senate version, which was ultimately adopted without significant opposition, included a contempt provision for violations of Rule 6(e).99

The basic reason for expanding the scope of permissible disclosure was to enhance the effectiveness of law enforcement. Secondary reasons included providing certainty to attorneys seeking assistance in grand jury investigations and encouraging efficient investigations without judicial delay. Although the amendment expanded the use of grand jury materials by government personnel, it also sought to balance such expansion with the express safeguard of contempt for violations found in Rule 6(e).100 The rule attempted to clarify who was granted access to grand jury materials, but was unclear as to whether criminal or civil contempt was envisioned as the sanction to guarantee the necessary secrecy. To help clarify the nature of the contempt provision expressly provided in Rule 6(e), a general examination of contempt as traditionally used by the courts is useful.

III. CONTEMPT OF COURT

Contempt of court is an act or omission obstructing or disrupting the proper functioning of the judicial process.101 The power to hold an individual in contempt of court is the means by which the judicial system protects itself from disorder in the courtroom, compels compliance with court orders, and protects litigants in an action before the court. The power of contempt allows courts to protect "systemic values by deterring official misconduct and preserving the appearance of fairness,"102 while guaranteeing that prosecutors "act with due regard

---

98. Id. at 8, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS at 531-32.
100. Id.
101. Dobbs, Contempt of Court: A Survey, 56 CORNELL L. REV. 183, 185 (1971). "Probably more common is the challenge presented to the administration of justice through distortion or blocking of its processes—obstruction rather than disruption. The distinguishing characteristic of obstruction cases is that the contemptuous act tends to subvert fairness or efficiency without the direct challenge of disruption." Id. at 189.
for the integrity of the administration of justice.”

If courts were unable to enforce their orders and control the proceedings before them, they would be relegated to “mere boards of arbitration.”

The contempt power is an inherent power, largely judge-made, and necessary to the very existence of the court. It establishes and maintains “civilized standards of procedure and evidence.” As an independent branch of the government, the judiciary has the powers necessary to function properly, including the power to preserve the orderliness of the decision-making process and to enforce decisions. However, legislation authorizes contempt in specific situations, regulates the power, and describes rules governing the proceedings. Occasionally legislation “allows” contempt as a way to achieve its goals. The key is that there is a constitutional rationale that is not the only way to dismiss an indictment and that limiting the inquiry thus:

obsures the crucial analytical distinction between that rationale and an alternate ground for dismissing an indictment: a court’s exercise of its inherent supervisory power.

... [W]hile a constitutional analysis focuses on preserving fairness for the individual defendant ... the exercise of a court’s inherent supervisory power serves two institutional purposes: deterring governmental misconduct and protecting the integrity of the judicial process.

Id. at 1394 (Norris, J., dissenting in part). See infra notes 336-49 for a discussion of the inherent supervisory power of the judiciary over the grand jury.

103. United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974) (Hufstedler, J., specially concurring).


106. Dobbs, supra note 101, at 185 n.3 (“There is an ancient statute that seems as remote from the modern power of contempt in logic as it is in time. The Statute of Westminster II, 13 Edw. 1, c. 39 (1285), provided that a sheriff might in some instances imprison those who resisted his process. This resembles contempt power, but much as the acorn resembles the oak: no one would ever have recognized the resemblance in advance.”).


109. Kuhns, Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury, 73 MICH. L. REV. 484, 496 (1975); see also Note, supra note 61, at 129 (“The federal courts . . . possess an inherent supervisory power that allows them to reach beyond the Constitution or acts of Congress to establish and maintain civilized standards of procedure and evidence.” (footnote omitted)); Dobbs, supra note 101, at 184 (“The power to preserve courtroom order is clearly essential. Unfortunately, it is easy to shade the need for order into a requirement of dignity. . . . The power to enforce decrees, once made, is likewise essential and important, though often enough this is done through execution of sentence rather than through the contempt power.”).

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


112. FED. R. CRIM. P. 42(b).
of enforcing behavior without delineating what type of contempt is intended and what procedures govern the adjudication of any process. 113

Similarly, Rule 6(e) does not indicate the nature of the contempt for violations of grand jury secrecy. The Rule does not regulate contempt as other federal statutes do, 114 it merely authorizes its use for specific misconduct. Examining contempt as it has evolved historically, and as it has been codified in federal statutes, will assist in determining the nature of the authorized contempt provision in Rule 6(e). Additionally, understanding how civil and criminal contempts are actually defined and used in the federal courts will help with the analysis of the nature of the contempt under Rule 6(e).

A. History of Contempt

Almost as old as the common law, 115 "the massive power of contempt" 116 grew up around the concept of contempt of the English King's authority. 117 It was a way of assuring the dignity of and respect for the governing sovereign. The early common law deemed disobedience to the King's writ to be contempt and eventually the defendant's failure to obey became contempt of the administration of justice. 118 The American colonists' legal attitudes were largely a prod-

---

113. See Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 631 n.4 (1988) (Civil and criminal labels of law have become increasingly blurred in the codified laws of contempt. For example, in California, civil and criminal contempts are defined in separate statutes, but the procedural rules are the same for both.); see also LaGrange v. State, 238 Ind. 689, 692-93, 153 N.E.2d 593, 595 (1958) ("This power is essential to the existence and functioning of our judicial system, and the legislature has no power to take away or materially impair it. . . . However, the legislature may regulate the exercise of the inherent contempt power by prescribing rules of practice and procedure."); Comment, Contempt of Court: Some Considerations for Reform, 1975 Wis. L. Rev. 1117, 1117 (1975) ("[M]ost statutes merely recognize the contempt power; they do not define it.").

114. See infra notes 122-29 for a discussion of the federal statutes regulating contempt.

115. Brautigam, Constitutional Challenges to the Contempt Power, 60 Geo. L.J. 1513, 1514 (1972) ("It is the antiquity of the contempt power which makes it nearly impregnable, but antiquity must not be confused with validity." (footnote omitted)); see also R. Goldfarb, The Contempt Power 14-19 (1963) (History of English law indicates that contempt power dates to the tenth century. There was no greater crime than contempt because the King represented divine power and to disobey his representatives was to disobey him directly and, therefore, God.).


118. See R. Goldfarb, supra note 115, at 1-45, stating:

Justice was as strict as it was swift. In a case in 1631, a man threw a brickbat at the Chief Justice after being convicted of a felony. Though he missed the
uct of English law; it was natural that the contempt power was copied. The Judiciary Act of 1789 gave federal courts "[the] power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." The first challenge to the inherent power of an American court to punish without due process came in 1826 when Judge James Peck disbarred and punished an attorney who published an article critical of judicial proceedings. Although Judge Peck was impeached and eventually acquitted, Congress enacted the Act of March 2, 1831 to limit the court's contempt power to three categories of conduct: 1) misbehavior "in the presence of the said court[, or so near thereto as to obstruct the administration of justice”; 2) misbehavior of an officer of the court in “official transactions”; and 3) disobedience or resistance to a “lawful” court order.

judge, his right hand was cut off and fixed to the gibbet, and he was immediately hanged in the presence of the court.

Id. at 15; see also Wright, Byrne, Haakh, Westbrook & Wheat, supra note 117, at 167-68 (stating that while originally, “the contempt power was regarded as a means of vindicating the court’s authority,” the concept of using it as a remedy for an adverse party gradually evolved, and “this process has sometimes been accelerated by restrictions of various sorts placed upon criminal contempt proceedings”); Fink, Basic Issues in Civil Contempt, 8 N.M.L. REV. 55 (1978), stating:

Chancery did no more than to coerce the will of a disobedient party until such time as he cooperated. The religious, moralistic atmosphere and the degree of intimacy thus engendered between Chancellor and litigant with its emphasis on duty, obedience and conscience underlies our Anglo-American belief in responsibility for contempt . . . . It explains how a purely private litigation between parties . . . may become, as soon as an injunction issues, a matter personal to the court . . . .

To this double-edged nature of civil contempt must be added the “historical” fact that civil contempt is not really contempt at all. Criminal contempt . . . corresponds to . . . the function of enforcing courtroom order. Historically, there was a body of law labeled “contempt” and a distinct equitable procedural device which was used to secure obedience to court orders, the so-called contempt in procedure.

Id. at 56 (footnotes omitted).

119. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.
120. Kuhns, supra note 109, at 486. See generally Butterworth v. Smith, 110 S. Ct. 1376 (1990) (The Supreme Court held that a Florida statute was unconstitutional to the extent that it prohibited disclosure of the reporter’s own testimony after the term of the grand jury had ended.); Dobbs, supra note 101, at 208-19 (summary of recent contempt citations for criticism of judicial proceedings and the resulting tension of the constitutional mandate in the first amendment for freedom of speech).
121. Act of March 2, 1831, ch. 99, 4 Stat. 487 (codified as amended at 18 U.S.C. § 401 (1988)); see also Green v. United States, 356 U.S. 165 (1958), stating: Although it is true that the Act marks the first congressional step to curtail the contempt powers of the federal courts, the important thing to note is that the area of curtailment related not to punishment for disobedience of court orders but to
This statute, as amended in 1970, continues to define the conduct which constitutes contempt of court. Federal Rule of Criminal Procedure 42 governs the procedures for a contempt hearing. Because the proceedings determine the rights afforded the contemnor, a brief examination of the federal statutes is useful as these proceedings can also be determinative of the nature of the contempt.

B. The Federal Statutes and Rules

The basic statutory provision relating to contempt in the federal courts is 18 U.S.C. section 401, entitled "Power of Court." It contains substantially the same language as the Act of 1789. Section 402 of Title 18 requires that contempts involving willful disobedience

punishment for conduct of the kind that had provoked Judge Peck's controversial action.

Id. at 171; Kuhns, supra note 109, at 486 n.16; Note, Civil and Criminal Contempt in the Federal Courts, 57 Yale L.J. 83, 86-87 (1947).

122. For a more complete discussion of the federal statutes governing contempt and their possible application in the context of civil contempt, see infra notes 309-15. See also United States v. Powers, 629 F.2d 619, 624 (9th Cir. 1980) ("Section 401 applies to both criminal and civil contempt and contains no limitation on the power of the district court to impose fine or imprisonment for a violation.").

123. 18 U.S.C. § 401 (1988) provides:

A court of the United States shall have power to punish by fine or imprison­ment, at its discretion, such contempt of its authority, and none other, as—
(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
(2) Misbehavior of any of its officers in their official transactions;
(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Id. 18 U.S.C. § 402 (1988) provides:

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under any laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprison­ment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all
of district court orders which constitute a criminal offense be prosecuted by a jury trial. Section 402 also provides that fines may be paid either to the United States or to the complainant or other injured party. 124 This section specifically excludes direct contempts. All cases of contempt “may be punished in conformity to the prevailing usages at law.”125

Federal Rule of Criminal Procedure 42126 deals with proceedings to punish for criminal contempt.127 There are two ways of proceeding in criminal contempt cases: the summary hearing governed by Rule 42(a), triggered by an act committed in the presence of the judge, and labeled a direct contempt; and a formal plenary hearing governed by Rule 42(b), triggered by an act committed outside the presence of the judge, initiated by a notice charging the individual with contempt of court, and labeled an indirect contempt.128 Although distinguishing

other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Id.

124. See also Wright, Byrne, Haakh, Westbrook & Wheat, supra note 117, at 170 (“Section 402 ... recognizes ... the possibility of relief to the injured party in contempt proceedings, and the structure of the statutes and rule ... clearly contemplates civil contempt proceedings.”).

125. 18 U.S.C. § 402 (1988); see also supra note 123.

126. In the FEDERAL RULES OF CRIMINAL PROCEDURE, PRELIMINARY DRAFT 146-50 (1943), Rule 42 was Rule 34. Federal Rule of Criminal Procedure 42(a) provides for Summary Disposition:

(A) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

FED. R. CRIM. P. 42(a). Federal Rule of Criminal Procedure 42(b) provides:

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided by these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

FED. R. CRIM. P. 42(b).

127. But see United States v. Powers, 629 F.2d 619 (9th Cir. 1980) (Although Rule 42 is labeled criminal, procedural safeguards apply to civil contempt.).

128. Dobbs, supra note 101, at 227-28 (The distinction between a direct contempt, which is dealt with on the spot by the judge who witnessed the contempt, and an indirect
between types of contempt on the basis of where the act occurs, the rule does not define the nature of the contempt. "The rule does not endeavor to define a criminal contempt or to distinguish it from a civil contempt. To do this would constitute prescribing a rule of substantive law." Although the drafters did their best to require notice for criminal contempts, meaningful distinctions between civil and criminal contempt remained unclear in many cases.

C. Criminal and Civil Contempt in the Federal Courts

The inherent judicial power to punish for contempt includes the power to impose both civil and criminal penalties. Judges, legisla-

contempt, which requires a full hearing, is often a difficult line to draw.; see also Note, supra note 105, at 374 (The direct/indirect distinction does not determine whether the contempt is civil or criminal.). But see Kuhns, supra note 109, at 518.

In McCann v. New York Stock Exchange, Judge Learned Hand pointed out the difficulties in distinguishing between the two types of contempts and suggested that "some simple and certain tests by which the character of the prosecution can be determined" should be promulgated. 80 F.2d 211, 214, cert. denied, 299 U.S. 603 (1935). Rule 42(b) was in part a response to this need. Orfield, supra note 68, at 585. The requirement of notice in Rule 42(b) will "result in an early decision on the complicated question of the difference between a criminal and a civil contempt." Id.

129. Orfield, supra note 68, at 585; see also 18 U.S.C. § 402 ("[A]ll other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."); Blalock v. United States, 844 F.2d 1546, 1558 n.17 (11th Cir. 1988) ("If the contumacy is a crime in itself, the conduct is prosecuted under 18 U.S.C. § 402 (1982). Because the disclosure of grand jury matters does not constitute a crime in itself, that statute does not apply.").

130. Kuhns, supra note 109, at 496. See generally Fink, supra note 118, at 57-70, where the author examines the development of contempt and the beginning of the dichotomy between civil and criminal contempts. The distinction was finalized for purposes of review in Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911). The Court concluded that criminal safeguards were required in any adjudication of a criminal contempt and absent such proceedings, the contempt had to be civil, allowing only civil-type penalties. The Court went further and stated that:

It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. Id. at 441. After Gompers, a judge was limited in using a contempt sanction: coercion could only be used if there was something to coerce and criminal due process had to apply to the adjudication of any procedure where any determinate sentence was handed down. The problem with the punishment classification is that it does not inform the defendant at the beginning of the action of the nature of the case against him. In United States v. United Mine Workers, 330 U.S. 258 (1947), Justice Rutledge, in a biting dissent, criticized the confusion created by the Supreme Court's lack of clarity:

This case is characteristic of the long existing confusion concerning contempts and the manner of their trial, among other things, in that most frequently the question of the nature and character of the proceeding, whether civil or criminal, is determined at its end in the stage of review rather than . . . at the begin-
tors, and commentators have been unable to give a precise definition of the distinctions between civil and criminal contempt that avoids analytic confusion.\textsuperscript{131} However, there is general agreement in the federal courts that the purposes served by each type of contempt are different and that constitutional safeguards are required in any adjudication of a criminal contempt.

1. Civil Contempt

The primary purpose of civil contempt is to coerce the individual into compliance with a court order.\textsuperscript{132} Civil contempt benefits the other party in the proceeding, whose rights or remedies have been interfered with by the contemnor. Possible sanctions can include fines and/or imprisonment that "encourage" the contemnor to cooperate with the court. Such imprisonment and fines can continue indefinitely since compliance is what the court requires from the contemnor. The contemnor "carries the keys of . . . [his] prison in . . . [his] own pockets,"\textsuperscript{133} indicating that a strong-willed person could be imprisoned indefinitely for civil contempt.\textsuperscript{134} Civil contempts are initiated by the offended party who petitions the court for relief. Civil contempt has been praised as the least drastic power to compel obedience to a court order; however, this underestimates the sometimes drastic results to an individual held in civil contempt.\textsuperscript{135}

2. Criminal Contempt

The primary purpose of criminal contempt is to punish the contemnor for disobedience. The conduct consists of violating a court order. And this fact in itself illustrates the complete jeopardy in which rights are placed when the nature of the proceeding remains unknown and unascertainable until the final action on review. \textit{Id.} at 368 (Rutledge, J., dissenting) (citation omitted).

\textsuperscript{131} Kuhns, \textit{supra} note 109, stating:

Prior to the adoption of rule 42, courts tended to classify contempts as civil or criminal according to such factors as the title of the proceeding, whether the defendant testified, the nature of the relief sought or granted, and who conducted the prosecution. The controlling factor would vary from case to case, and the labeling might occur for the first time on appeal . . . .

\textit{Id.} at 517-18 (footnotes omitted).

\textsuperscript{132} Shillitani v. United States, 384 U.S. 364, 370 (1966); \textit{Gompers}, 221 U.S. at 442.

\textsuperscript{133} \textit{In re} Nevitt, 117 F. 448, 461 (8th Cir. 1902).

\textsuperscript{134} Brautigam, \textit{supra} note 115, at 1523 n.61.

\textsuperscript{135} R. GOLDFARB, \textit{supra} note 115, at 2-3 ("[I]t has been pointed out that the magnitude of the coercive penalty in civil contempts is measured by the resistance to be overcome rather than the gravity of what has been done. Though all societies punish people for what they have done, only the common law punishes man 'in order to do violence to his incoercible freedom to do or not to do something.' ").
order or interfering with the orderly process of the court.\textsuperscript{136} Criminal contempt is not imposed for any private party's benefit because it is imposed to vindicate the court's authority. It punishes acts in the past rather than coerces any future act. "[I]f the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience."\textsuperscript{137} Sanctions for criminal contempt are always punitive and often confined within statutory limitations.

A recent Supreme Court case has attempted to clarify the distinction. In \textit{Hicks ex rel. Feiock v. Feiock},\textsuperscript{138} the Supreme Court held that the issue of whether the contempt proceeding and the subsequent relief were civil or criminal raised a federal question under the Due Process Clause of the fourteenth amendment because of the applicability of constitutional protections in a criminal proceeding. The critical features which characterize one or the other contempt are "the substance of the proceeding and the character of the relief that the proceeding will afford."\textsuperscript{139} The purposes for which the relief is imposed "are properly drawn from an examination of the character of the relief itself."\textsuperscript{140} Remedial relief imposed for an indefinite period of time is civil and punitive relief which imposes a determinate sentence is criminal. "These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such crimi-

\begin{itemize}
\item \textsuperscript{136} \textit{Gompers}, 221 U.S. at 442.
\item \textsuperscript{137} \textit{Id}.
\item \textsuperscript{138} 485 U.S. 624 (1988). In \textit{Feiock}, a father was compelled by a California state court to make support payments. \textit{Id}. at 627. Upon his failure to pay, he was held in contempt of court, ordered to pay the support, spend 25 days in jail, and be on probation for three years upon suspension of sentence. \textit{Id}. at 628. The Court remanded the decision for a determination of whether the contempt proceedings were civil or criminal, because such a determination would be dispositive on the question of the validity of the presumption that an obligated parent is required to make support payments. \textit{Id}. at 637-41. In a criminal proceeding the presumption would violate due process, whereas in a civil proceeding the presumption would be constitutionally valid. The problem with the contempt sentence in \textit{Feiock} was the uncertainty about the 25 days imprisonment. If the contemnor violated the probation by not paying the support and consequently went to prison to serve the 25 days, it is unclear if the sentence could be purged by paying the money during the 25 days, thus being released early. If that were the case, the contempt would be civil. If the contemnor's violation during the probationary period resulted in 25 days imprisonment regardless of payment during that time, the contempt would be criminal. \textit{Id}. at 639-41.
\item \textsuperscript{139} \textit{Id}. at 631; cf. \textit{Gompers}, 221 U.S. at 441 ("It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases.") (emphasis added).
\item \textsuperscript{140} \textit{Feiock}, 485 U.S. at 636.
\end{itemize}
nal proceedings . . . . The Court has consistently applied these principles." 141

The Court in Feiock reitered its view that the distinction between civil and criminal contempt is an important one because it determines what procedure governs the adjudication of the contempt. "The United States Supreme Court has centered on the procedural consequences of a criminal contempt citation; it has not directly concerned itself with a clarification of the differences between civil and criminal contempt." 142 The Supreme Court has recommended looking at what "the court primarily seek[s] to accomplish" as the best approach. 143 If the goal is to benefit the other party to the action by some act that the contemnor refuses to do, then the contempt is civil; if the court wants to punish the contemnor for refusing to cooperate with the court or for interfering with court procedures, then the contempt is criminal. However, in Feiock, the Court appeared to reject the purposes distinction as dispositive. Although noting that "'[t]he proper classification of the relief imposed . . . is dispositive of this case,'" 144 the Court also pointed out that the purposes underlying the proceeding were ambiguous. 145

In the absence of any more explicit guidelines, courts have struggled with classifications and definitions of contempt to establish procedures and punishments for the various types of contempt. Since the purpose of the proceeding is open to differing interpretations, and can be ambiguous, as in Feiock, there exists confusion about what type of contempt has been applied or should have been applied in a given situation. 146 It would seem logical that the classification of the contempt would also classify the conduct, but the procedures followed, the relief granted, or the sentence imposed usually determines the nature of the contempt. 147 The court's characterization of the contempt "is but one factor to consider in determining the true character of contempt proceedings." 148 However, the way the court views the contempt deter-

141. Id. at 632.
142. Comment, supra note 113, at 1121.
144. Feiock, 485 U.S. at 637.
145. Id. at 638-39 ("[T]he proceeding may have been intended primarily to vindicate the court's authority in the face of his defiance. On the other hand . . . these charges were part of an ongoing battle to force respondent to conform his conduct to the terms of those orders, and of future orders as well.").
147. Dobbs, supra note 101, at 236; Martineau, supra note 107, at 681.
148. United States v. Powers, 629 F.2d 619, 626 (9th Cir. 1980).
mines how the contempt is adjudicated and affects the contemnor's rights throughout the proceedings. The importance of this last point underscores the need for an early, accurate, and consistent determination of the nature of the contempt.

To determine what type of contempt is being contemplated, the reason for its imposition must be determined. This method of determining whether civil or criminal contempt is appropriate appears to be backwards since the focus is not the conduct itself but the resulting punishment. The contemnor can be "punished" before any determination has been made of whether the contempt is criminal or civil. "To state an act constitutes criminal contempt because criminal sanctions are applied merely completes a tautology. This approach provides no aid to analysis." If the type of contempt depends on the type of sanction, the type of contempt cannot be determined until the conclusion of the proceeding and the procedure cannot be tailored to the type of contempt, as yet undetermined. A punitive sanction can only be imposed after a proceeding meeting the constitutional safeguards necessary to a criminal proceeding. "Notwithstanding this principle, no judicial opinion or statute has ever required the judge at the initiation of contempt proceedings to determine the type of sanction that may be imposed."

Examining briefly the civil and criminal distinction outside the area of contempt may help clarify the differences as they relate to the constitutional requirements of the proceedings. "Parties to a civil suit litigate in positions of reasonable equality. A criminal defendant, on the other hand, stands against the prosecutorial powers of the government and therefore criminal due process grants the defendant additional protection to safeguard the balance of powers between the

149. Note, supra note 105, at 375.
150. Comment, supra note 113, at 1120.
151. See supra note 130.
152. Martineau, supra note 107, at 684.
153. See Moskovitz, Contempt of Injunctions, Civil and Criminal, 43 COLUM. L. REV. 780 (1943), stating:

[O]ne of the pervading principles of Anglo-American law is that a private plaintiff may generally obtain only compensatory relief, while punishment is to be imposed at the suit of the state. Thus, it is proper that civil or remedial contempt proceedings be brought by private parties, while criminal or punitive proceedings are to be brought by the state. The value of making the character of the party plaintiff a test of the nature of the proceeding is enhanced by the fact that its application is exceptionally easy, and also because it is available at the very beginning of litigation.

Id. at 787.
Traditionally contempt was viewed as *sui generis* so traditional concepts of criminal adjudication did not apply. Today, however, in adjudication of criminal contempt, traditional due process applies to the proceedings.

### 3. Importance of the Distinction

The most important reason for determining whether a contempt is criminal or civil is the fact that Constitutional procedural safeguards are available to the contemnor in a criminal contempt. A contemnor in a proceeding for criminal contempt is innocent until proven guilty beyond a reasonable doubt. The contemnor has a right to call witnesses and be able to prepare a defense. Additionally, he has the right to a trial by jury if the sentence imposed can be longer than six months. The imposition of a criminal contempt sanction (determinate sentence) after a civil proceeding will result in reversal on appeal. A civil proceeding does not require such elaborate due process because the contemnor can cooperate at any time and the punishment will cease.

One of the secondary reasons for making the distinction between

---

155. Moskovitz, *supra* note 153, at 783 (“Proceedings for contempt of court are *sui generis*. The label has no value, save as a caveat. It warns us that precedents from other fields of law will not solve the problems in this one, but the term does not itself furnish any solutions.” (footnote omitted)).
157. Washington Metro. Area Transit Auth. v. Amalgamated Transit Union Local Div. 689, 531 F.2d 617, 622 (D.C. Cir. 1976); Southern Ry. Co. v. Lanham, 403 F.2d 119, 125 (5th Cir. 1968); see also Brautigam, *supra* note 115, at 1535 n.155 (“The high number of reversals or reductions of sentences in contempt cases only confirms the view that justice would be better served if imposition of punishment were less frequent.”).
158. R. Goldfarb, *supra* note 115, stating:

[A] different door is opened to a different legal arena and a new association of participating procedures and characteristics. These classifications go to the heart of an accused contemnor's liberty . . . . One turn, one move of position causes a swirl of new and special legal relationships between government and the individual. This aspect of the law of contempt is as reasonable as Russian roulette. Often also the results are tragic.

To shrug this off as an unimportant procedural matter is to overlook the crucial point. Because each determination of the classification of a contempt a *a fortiori* defines the treatment of the contemnor which will follow . . . . [C]riminal contempts are pardonable, civil contempts are not; civil contempts allow for punishment which could conceivably continue without end, while criminal contempts have vaguely limited punishments; the privilege against self-incrimination and the criminal Statute of Limitations apply to criminal but not civil contempts; the burden of proving the offense is greater for criminal than for civil contempts; the civil contempt sentence can be purged while an adjudication of criminal contempt is fixed and final. . . . These are but a few of the more glaring examples, which
criminal and civil contempt is the right of appeal. Civil contempt is considered interlocutory since it involves the original cause of action and cannot be appealed until there is a final judgment. A criminal contempt proceeding is a separate cause of action with a final decree, independent of the suit prompting the action, and is immediately appealable.\footnote{159}

4. Blurring of the Distinctions

There exists considerable confusion about the boundaries of civil and criminal contempt because certain conduct arguably constitutes both civil and criminal contempt. The laws governing contempt have failed to clarify the distinctions and the labels used are not controlling because the "'civil' and 'criminal' labels of the law have become increasingly blurred."\footnote{160}

The _Feiock_ court recognized that "both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order."\footnote{161} Theoretically, a criminal sentence satisfies the court's need to maintain respect for its processes, while coercing compliance with its decrees benefits other parties to the litigation.\footnote{162} A single proceeding can accomplish both as long as constitutional safeguards are respected. "[T]here is no theoretical barrier to the use of both civil and criminal contempt powers simultaneously, though procedural demands may put practical limits on such an operation."\footnote{163}

In _Shillitani v. United States_,\footnote{164} where a witness refused to testify before a grand jury, the Supreme Court stated by way of dictum that the "trial judge [must] first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should re-

\footnote{159. Wright, Byrne, Haakh, Westbrook & Wheat, _supra_ note 117, at 171-72.}
\footnote{160. _Feiock_, 485 U.S. 624, 631 (1988).}
\footnote{161. _Id._ at 635.}
\footnote{162. Dobbs, _supra_ note 101, at 237.}
\footnote{163. _Id._ at 237-38; _see also_ United States v. Monteleone, 804 F.2d 1004 (7th Cir. 1986) (The defendant refused to answer questions before a grand jury and was held in civil contempt. He was subsequently convicted of criminal contempt for the same refusal.), _cert. denied_, 480 U.S. 931 (1987).}
\footnote{164. 384 U.S. 364 (1966).}
sort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate. ¹⁶⁵ In *Shillitani*, the Court concluded that the contempt was civil because the contemnors were jailed until they agreed to go before the grand jury and testify. The Court found that the sanctions were remedial. "Courts often speak in terms of criminal contempt and punishment for remedial purposes."¹⁶⁶ The United States Court of Appeals for the Fifth Circuit expressed similar frustration in 1966:

The simple fact is that no one, simply no one, is able to determine whether this was begun, tried, or ended as a case for criminal contempt, civil contempt, or both, or whether some place down the trail, begun as one it was transmuted into the other. That is, of course, one thing about which there may not be any doubt if a contempt order is to stand.¹⁶⁷

The United States Court of Appeals for the Second Circuit in *United States v. Wendy*,¹⁶⁸ found that any contempt was improper, but as imposed by the district court it was predominantly civil, although "[a]rguably, appellant was really cited for criminal contempt."¹⁶⁹ The defendant, an attorney, was held in contempt and fined five hundred dollars per day by the judge for refusing to proceed with a trial as ordered. The appellate court found that the appellant's inability to proceed with the criminal trial because the appellant was a tax attorney rather than a criminal attorney was a recognized defense to civil contempt and, as such, was dispositive of the classification because the appellant was "obviously unqualified"¹⁷⁰ to do what was being ordered. His inability to do what was ordered militated against any contempt citation under the circumstances.¹⁷¹

The appellate court in *Wendy* held that there was no violation of 18 U.S.C. section 401, which governs criminal contempt. However, the contemnor was unable to purge his contempt, a determining factor in civil contempt. "The civil nature of the contempt is not turned criminal by the court's efforts at vindicating its authority, an interest which may be implicated in either civil or criminal proceedings. Thus,

¹⁶⁵. *Id.* at 371 n.9.
¹⁶⁶. *Id.* at 369.
¹⁶⁸. 575 F.2d 1025 (2d Cir. 1978).
¹⁶⁹. *Id.* at 1029 n.13.
¹⁷⁰. *Id.* at 1031.
¹⁷¹. The court was sensitive to the consequences to an attorney of being cited for contempt, either criminal or civil. "The appellation of 'civil' rather than 'criminal' contempt hardly alleviates the harm." *Id.* at 1030.
we are giving principal weight to the punitive-remedial dichotomy."\textsuperscript{172} There is a presumption of finding civil as opposed to criminal contempt when there is some doubt about the contempt.\textsuperscript{173} The \textit{Wendy} court looked at the contempt order and the defendant's response to determine whether the contempt was civil or criminal.

The authority of the judiciary to punish for contempt is not questioned under the courts' inherent supervisory power. Although guided by the Executive branch, the judiciary enforces the orders of the grand jury under statutory and due process limitations. However, even with statutory authority, the judiciary must still make the initial and final determinations of whether certain conduct is better dealt with under a civil or criminal contempt. Clarity about the nature of the contempt and the statutory basis of the proceeding simplifies the appellate process when contempt orders are challenged. In the absence of such early judicial clarification, contempt proceedings can prejudice the contemnor.

D. Judicial Control of the Grand Jury

The grand jury is organized by the court and its proceedings are determined by statute.\textsuperscript{174} The grand jurors, the United States Attorney, his or her assistants, the reporter of the grand jury proceedings, the marshal and the bailiffs are considered officers of the court subject to the control of the court for violations of their duties.\textsuperscript{175} Although grand juries do not operate independently of the court, courts should not intervene in the grand jury process absent compelling reason.\textsuperscript{176}

In addition to sanctions for breaches of grand jury secrecy, courts have the power to hold witnesses in contempt for a refusal to testify and to purge the individual of contempt when the dignity of the court has been restored.\textsuperscript{177} The Supreme Court observed that "[a] grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative func-

\textsuperscript{172} Id. at 1029 n.13.
\textsuperscript{173} Id.
\textsuperscript{174} FED. R. CRIM. P. 6.
\textsuperscript{176} United States v. Dionisio, 410 U.S. 1, 17-18 (1973); United States v. De Rosa, 783 F.2d 1401, 1404 (9th Cir.) (The prosecutor may not interfere with the unbiased judgment of the grand jury.), cert. denied, 477 U.S. 908 (1986); see also Lance v. United States Dep't of Justice, 610 F.2d 202, 213 (5th Cir. 1980) ("Moreover, because the grand jury process is now complete for Lance's case, there is no chance that any remedial relief granted could interfere with the grand jury's work.").
\textsuperscript{177} In re Russo, 53 F.R.D. 564, 573 (C.D. Cal. 1971).
tion without the court's aid.” Consequently, courts use their inherent power of contempt, a power necessary “to the preservation of order in judicial proceedings,” including the work of the grand jury.

Grand juries possess enormous power because of the “difficulty and importance of their task,” and their powers ought to be supervised and limited to the extent necessary to guarantee fairness. Because secrecy is one basic way to limit abuse of this power, inadvertent or illegal breach of secrecy should be monitored by the court. Since 1977, Federal Rule of Criminal Procedure 6(e) has expressly provided for punishment by contempt for violations of grand jury secrecy. Accordingly, the federal courts have cited the express provision of contempt and other remedial sanctions to safeguard the necessary secrecy of the proceedings of the federal grand jury.

178. Brown v. United States, 359 U.S. 41, 49 (1959). This case involved a witness who refused to testify before a grand jury. Id. at 42. The initial refusal was not a contempt of court. However, once the grand jury requested the judge's help to order the petitioner to answer and he subsequently refused, he was guilty of a contempt. Id. at 42-43. At this point Rule 42(b) would have been appropriate because the contempt was indirect. The court ordered the petitioner to answer the questions in front of the judge who was then in the grand jury room. The petitioner refused again and was summarily sentenced to fifteen months imprisonment, under Rule 42(a), for directly violating a court order. Id. at 44. The Supreme Court upheld the sentence and the summary nature of the proceeding. Id. at 52. In his dissent, Chief Justice Warren remarked that principles of fair play and the intent of Rule 42 were violated by such a harsh summary punishment. Chief Justice Warren stated that Rule 42(a) was reserved for exceptional circumstances, not for the administrative purpose of making contempts easier to prosecute. This was the longest sentence ever sustained on appeal for a refusal to answer questions before a grand jury. Id. at 58-59 (Warren, C.J., dissenting).


180. United States v. Sells Eng'g, Inc., 463 U.S. 418, 434 (1983); see also In re Grand Jury Investigation of Hugle, 754 F.2d 863 (9th Cir. 1985), which stated:

The grand jury is, to a degree, an entity independent of the courts, and both the authority and the obligation of the courts to control its processes are limited. Frequent or undue court intervention in the proceedings of a grand jury would impede its authority and make it a less efficacious instrument for the administration of the criminal laws. The need to preserve the secrecy of an ongoing grand jury investigation is of paramount importance, and the judiciary must respect the autonomy of the grand jury proceedings in this regard. . . .

The rule of judicial noninterference with grand jury proceedings is not absolute. A court may exercise supervisory authority over the grand jury proceedings if there is a clear basis in law and fact for so doing. . . . Courts may also exercise supervisory power over the grand jury where there is a clear potential for a violation of the rights either of a witness or of a nonwitness, if the violation cannot be corrected at a later stage.

Id. at 864 (citations omitted).
IV. CASES INVOLVING RULE 6(e) VIOLATIONS

Prior to 1977, federal courts used their inherent supervisory powers to sanction individuals who violated the secrecy provisions of Rule 6(e). Many of the cases involved motions by defendants to dismiss indictments or quash subpoenas. Rarely did the defendant request sanctions in the form of contempt of court, although the courts regularly recognized contempt as an appropriate remedy for violations of Rule 6(e). After the adoption of the 1977 amendments to Rule 6(e) expressly authorizing contempt, the federal courts have continued to recognize the appropriateness of contempt and other remedies such as suppression of testimony, dismissal of indictments and convictions, and quashing of subpoenas. The following sections divide the cases of Rule 6(e) violations chronologically into the cases before the 1977 amendments and the cases after the adoption of the express contempt provision, with particular emphasis on Lance v. United States Department of Justice,181 which established standards for determining what is sufficient for a prima facie showing of a Rule 6(e) violation.

A. Cases Prior to 1977

Many of the cases prior to the 1977 amendments reveal a reluctance on the part of the courts to remedy prosecutorial abuse of the grand jury. Secrecy has largely shielded the actions of the prosecutor, who exercises substantial control over the grand jury.182 However, the early cases do underscore the judiciary’s respect for grand jury secrecy in general, and its willingness to impose sanctions on violators other than government attorneys.

In re Summerhayes,183 decided in 1895 by the District Court of the Northern District of California, involved disclosures by a grand juror, who violated the oath of secrecy. The court proceeded under section 725 of the Revised Statutes that allowed courts to use their authority to prevent obstruction of justice.184 The district court’s opinion, holding the grand juror in contempt of court, illustrated the importance with which the courts treated such violations of their orders and inattention to the secrecy oath. “I think it is a serious of-
fense. I think it is one of the gravest offenses that has been committed in this district against the regular and proper administration of the law. The respondent must be punished, and I think he ought to be punished severely.”

Consistent with the traditional purposes of criminal contempt, the criminal contempt in *Summerhayes* was imposed to vindicate the court's authority.

In *Schmidt v. United States*, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the district court and remanded the case before another judge to ensure fairness and to determine whether the conduct of the appellants was merely technical contempt or involved willful and intentional disrespect of the court. The appellants were attorneys who had advised their clients that they had the right to question grand jurors about the indictment that had been returned against them. The district court found that, although claiming to act in good faith, such conduct was an obstruction of justice and, therefore, the attorneys were guilty of criminal contempt.

The court stated the traditional rules for secrecy of the grand jury and indicated that only one of these reasons was to protect the innocent against unjust accusations. The other reasons of promoting freedom of the investigation and untrammeled disclosures, and

---

185. Id. at 775.
186. 115 F.2d 394 (6th Cir. 1940).
187. Id. at 398; cf. FED. R. CRIM. P. 42(b) (“If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent.”).
188. Id. at 396. This case involved a petition against alleged contemnor to show cause why they should not be held in contempt of court for violations of grand jury secrecy. After being judged guilty of contempt, they appealed their convictions. The appellate court viewed the contemnor's conduct as an "unlawful interference with the proceedings of the court," but stated that their actions may only have involved a technical contempt. Id. at 396. On remand, the court sought a distinction between a technical contempt and a contempt involving willful and intentional disrespect for the court. “Such decision is required as a prerequisite to a proper determination of the penalty to be imposed.” Id. at 398.

In *Schmidt*, the court found the punishment for contempt necessary to vindicate the court's authority, a purpose consistent with a finding of criminal contempt. However, the court's remand to determine the contemnor's state of mind appeared to necessitate further inquiry into a finding of criminal contempt or civil contempt. Nonetheless, the facts did not support the usefulness of a coercive sanction. Perhaps the reference to a technical contempt was to mitigate the harshness of any punishment for the contempt, rather than to clarify the underlying purpose or nature of the contempt. The current language of Rule 6(e) requires a "knowing" violation which would seem to negate any contempt where the alleged contemnor acted in good faith consistent with past practices and cases. See FED. R. CRIM. P. 6(e)(2).
189. Id. at 396.
190. Id. at 396-97.
preventing perjury and flight of the target, were for the protection of the grand jury itself which is a representative of the public. The court did mention that protecting the innocent was traditionally respected, but implied that the other reasons, which protect the grand jury itself as an independent representative of the people, are more important. The court reiterated the view that private attorneys do not decide when secrecy can be relaxed, because "[l]ogically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court..." 191

In United States v. Providence Tribune Co.,192 the District Court for Rhode Island denied the newspaper's motion to dismiss an information charging it with contempt of court for publishing the names of four prominent doctors testifying before a grand jury which was investigating illegal cocaine traffic. The court found that conspicuous publication of the identity of witnesses frustrated the purposes of secrecy:

Publicity may defeat justice by warning offenders to escape, to destroy evidence, or to tamper with witnesses....

... Even when it does not lead to the flight of an offender, it may result ... in a failure of the grand jury to secure evidence sufficient for an indictment.

Secrecy is also required in order that the reputations of innocent persons may not suffer from the fact that their conduct is under investigation ....

... Furthermore, such premature reports may go further and prejudice the mind of the public, thus affecting a trial which may follow the action of the grand jury. 193

The newspaper gave no account of matters occurring before the grand jury. It merely observed who entered the grand jury room and published enough facts in the newspaper for the reading public to draw accurate inferences. The court found that even though not sworn to secrecy, the newspaper, as any citizen, had the duty to "assist, and not to frustrate, the work of the administration of justice." 194

These early cases illustrate the importance with which the judiciary viewed grand jury secrecy, and the willingness of the judiciary to

191. *Id.* at 397.
192. 241 F. 524 (D.R.I. 1917); see also United States v. Smyth, 104 F. Supp. 283, 302-09 (N.D. Cal. 1952) (The court addressed the role of the grand jury and the press, finding that unauthorized disclosure by government attorneys was reprehensible, but not prejudicial.).
193. 241 F. at 526.
194. *See id.* at 528.
exert control by use of the contempt power when breaches of secrecy occurred. However, the reasoning fails to illuminate the need or the efficacy of remedies against government attorneys involved in breaches of secrecy. All of these cases contemplated criminal contempt against jurors, defense attorneys, and newspapers involved in “leaking” information to the public. None of the cases compelled the court to discuss sanctions against government attorneys for secrecy violations. Although the facts in the Tribune case were somewhat similar to modern cases of “leaks” to the newspaper, the reasoning which found a citizen’s duty not to frustrate justice may fail when applied to the government. Arguably, the contempt in the Schmidt case could be construed as civil because the judge found no willful state of mind. Such reasoning opens up the possibility of civil as well as criminal contempt. However, further analysis would show that in this factual situation, vindication of the court’s authority would be the only purpose served by the imposition of any contempt.

Many of the more recent pre-1977 cases involved a motion by the defendant to dismiss the indictment, not a motion to seek sanctions against the government officials allegedly violating Rule 6(e)’s secrecy provision. In In re the Grand Jury Subpoena Served Upon Pedro Archuleta, the District Court for the Southern District of New York refused the requested relief of quashing the subpoena, upon grounds of lack of good faith in calling the defendant as a witness, illegal wire-
tapping, ethnic composition of the grand jury, and illegal disclosure of grand jury information to the New York Times. The district court acknowledged the harm to defendant's reputation and standing in the community, and suggested that the proper remedy was the imposition of sanctions upon the offending party.

In Archuleta, the grand jury was investigating allegations of involvement in a New York City bombing incident. Archuleta was allegedly a supplier of dynamite to a Puerto Rican independence group. The court did not think it sufficient to rest on "mere exhortations and condemning words: 'the mere gnashing of judicial teeth should not remain the sole response to such law enforcement behavior.'" The court recognized that leaks from the government were "a betrayal of the grand jury's historic role as a shield for innocent citizens from unwarranted charges of wrongdoing." The court was unable to determine the identity of the source of the leaks to the press, however, the district court directed the United States Attorney for the Southern District of New York to conduct an internal investigation and report back to the court within thirty days. The district court assumed that the Department of Justice would investigate the disclosures. No sanctions were ever imposed.

On appeal, the United States Court of Appeals for the Second

Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extra-judicial punishment or to chill their expressions and associations, is not a governmental interest that we can accept or consider. It would circumvent the adversary process which is at the heart of our criminal justice system and of the relation between government and citizen under our constitutional system. It would be intolerable to our society.

Id. at 806 (footnote omitted).

198. 432 F. Supp. at 598.

199. Id. at 599.


201. Id. at 598.

202. Id. at 599 ("The government is not in a position to deny that some of that information may have come from federal sources somewhere in the United States.").

203. Id.

204. 561 F.2d 1059, 1063 n.8; cf. United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (An indictment was dismissed because the prosecutor failed to heed warnings against using hearsay before the grand jury.). Although Estepa was not a case where Rule 6(e) was implicated, it does demonstrate the court's willingness prior to 1977 to use supervisory powers to ensure the fairness of the grand jury system. The court's acknowledgment that injunctive relief in the form of requesting that the prosecutor cease his use of hearsay was ineffective. The court did not use contempt sanctions to ensure the fairness, but dismissed the indictment, an extreme sanction.
Circuit upheld the conviction for civil contempt for Archuleta’s refusal to answer questions before the grand jury because the “government has supplied affidavits denying that any breach of grand jury secrecy was the basis for any of the articles mentioned.” The court stated that “[i]f such violations do occur, the district court has adequate powers to remedy the situation.”

The attitudes expressed by the appellate court in *Archuleta* underscore the need for more careful analysis of the problem of what is necessary for a prima facie showing of a grand jury secrecy violation. Such clarity may have been useful to Archuleta considering that the court found affidavits merely denying breaches of secrecy sufficient to deny any relief. Although the district court attempted to remedy the abuse, its efforts were ineffectual. Given the reluctance to dismiss indictments and the willingness to hold nongovernment violators of grand jury secrecy in criminal contempt, the adoption of the express sanction may have influenced the courts to examine the government’s conduct. An examination of the cases after the 1977 amendment will assist in any determination of whether the judiciary has become more willing to use its express grant of authority to sanction the government attorneys for breaches of secrecy.

**B. Cases After the 1977 Amendments to Rule 6(e)**

Contempt of court has been more readily acknowledged as the

---

205. 561 F.2d at 1064.
206. Id.
207. See, e.g., United States v. Malatesta, 583 F.2d 748, 753 (5th Cir. 1978) (“In the usual case Rule 6(e) may be adequately enforced by a contempt citation . . . .”); United States v. Kouba, 632 F. Supp. 937 (D.N.D. 1986) (The court found that the defendant’s claim of violations of Rule 6(e) lacked substance and that dismissal of the indictment was not warranted absent a showing of prejudice because the rule provided for sanctions.). In United States v. Barker, 623 F. Supp. 823 (D. Colo. 1985), six defendants were charged with violations of federal narcotic laws. The motion to dismiss the indictment, subsequently denied, was based on an allegation of breach of grand jury secrecy. The court’s holding that there was no violation of the rule turned on the definition of “government personnel” within the meaning of the rule. Dismissal of the indictment is only warranted where there is “a showing that there was such an abuse of the grand jury process that any substantial rights of the defendant were impaired or the integrity of the grand jury proceedings was impugned.” Id. at 840 (quoting United States v. Phillips, 664 F.2d 971, 1044 (5th Cir. 1981)). In the absence of any such showing the rule is enforced by sanctions specifically provided in the Rule. In Donovan v. Smith, 552 F. Supp. 389 (E.D. Pa. 1982), the defendants alleged that the charges of breaches of fiduciary duty under the Employment Retirement Income Security Act were the product of a violation of grand jury secrecy. To prove the allegation, the defendants had deposed various people employed in the United States Department of Labor and the United States Department of Justice Strike Force. The government moved for a protective order to prevent the deposition of the lead attorney in the Labor Department. The attorney had already testified *in camera* and the court was
appropriate sanction for violations of grand jury secrecy since its inclusion in Rule 6(e). Most courts, however, do not see it as the exclusive remedy for violations of grand jury secrecy and recognize not only criminal contempt and civil contempt, but also injunctive relief, when considering whether the exercise of supervisory power is warranted for breaches of secrecy in grand jury proceedings.

In *United States v. Myers*, the District Court for the Eastern District of New York refused to dismiss indictments, holding that dismissal was an inappropriate sanction for violations of Rule 6(e). The targets alleged leaks to the news media concerning their alleged involvement in the Abscam investigations by the grand jury. The court acknowledged that the government's conduct was grossly improper, and possibly illegal, and that it could properly exercise its supervisory power to deter prosecutorial misconduct. However, the court found that "this authority must be invoked with extreme caution and in the exceptional case." The court found its supervisory power limited "to achieve one or both of two objectives: first, to eliminate prejudice to a defendant in a criminal prosecution; second, to help to

satisfied from this testimony that no breach of secrecy had occurred. The court stated that contempt or a motion to suppress was an appropriate remedy. In *United States v. Gregory*, 508 F. Supp. 1218 (S.D. Ala. 1980), the judge refused to recuse himself after tendering a financial disclosure statement and remarking to the defense counsel, "I hope you choke on it." *Id.* at 1219. In support of the request for recusal, the defendants had accused the judge of ignoring contemptuous behavior of the government prosecutor. The judge stated that the defendant must initiate a motion for contempt in any allegation of prosecutorial misconduct.

---

208. See, e.g., *United States v. DiBona*, 601 F. Supp. 1162 (E.D. Pa. 1984). In *DiBona*, injunctive relief was granted where the defendants had entered guilty pleas in a criminal action for filing false statements with the United States government. In the subsequent civil action for filing false claims for payment of defense contracts for work that was not performed, the defendants alleged that the government used grand jury material in contravention of Rule 6(e). The court found no violation of Rule 6(e), however, it issued an order enjoining the government from any further use of the material.


210. See *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988) (The government repeatedly violated Rule 6(e); however, such problems cannot result in dismissal of an indictment after conviction absent any effect on the outcome at trial.). In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Supreme Court held that a district court may not dismiss an indictment for errors in grand jury proceedings absent prejudice to the defendants. However, Justice Marshall in dissent stated that:

Because of the strict protection of the secrecy of grand jury proceedings, instances of prosecutorial misconduct rarely come to light. ... The fact that a prosecutor knows that a Rule 6 violation is unlikely to be discovered gives the Rule little enough bite. ... Today's decision reduces Rule 6 to little more than a code of honor that prosecutors can violate with virtual impunity.

*Id.* at 264-65 (Marshall, J., dissenting).

211. 510 F. Supp. at 328.
translate the assurances of the United States Attorneys into consistent performances by their assistants.” 212 The court listed other lesser sanctions to deter future misconduct of government attorneys, including the contempt sanctions of Rule 6(e). 213 The court found such remedies sufficient to deter future misconduct and noted that supervisory powers needed to be exercised with restraint. 214

The contempt sanction in Rule 6(e) is not considered the exclusive remedy for violations of grand jury secrecy. 215 In United States v. Coughlan, 216 the defendant claimed that a civil complaint which attached four pages from defendant’s grand jury testimony in a criminal indictment violated Rule 6(e). The defendant wanted to suppress the testimony from the criminal indictment.

Although the government admitted the violations of Rule 6(e), it contended that sanctions for contempt were the appropriate remedy, not suppression of the evidence. The court stated that the language in

---

212. Id. (quoting United States v. Fields, 592 F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979)).

213. Id. Although using the word “guilty” in describing the potential contemnor, the court cited Lance v. United States Department of Justice, 610 F.2d 202 (5th Cir. 1980), as authority for the use of Rule 6(e), which applied civil sanctions. See infra notes 224-41 and accompanying text for a discussion of the Lance case. See also United States v. Anderson, 778 F.2d 602 (10th Cir. 1985), where the court refused to use the “drastic action” of dismissal for alleged violations of Rule 6(e). The court did not mention other lesser sanctions, but implied that dismissal was not the usual way to proceed when prosecutorial misconduct is found under Rule 6(e). “Reported cases where an appellate court has upheld a district court's dismissal of an indictment because of alleged prosecutorial misconduct are few and far between.” Id. at 606. In In re Harrisburg Grand Jury—83-2, 638 F. Supp. 43 (M.D. Pa. 1986), the Department of Justice asked for a prospective determination of whether certain conduct that complied with a subpoena duces tecum would violate Rule 6(e). The court acknowledged the Lance opinion and the fact that an individual may petition the government for contempt sanctions, although no such petition was filed in the instant case. Id. at 50 n.8.

These cases, where the trial court did not dismiss the indictment or the appellate court did not uphold the dismissal of the indictment, imply that lesser sanctions are useful and adequate to uphold the public interest in a fair system, while at the same time protecting the public interest in law enforcement.


215. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), which stated: Errors of the kind alleged in these cases can be remedied adequately by means other than dismissal. For example, a knowing violation of Rule 6(e) may be punished as a contempt of court. . . . [T]he court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

Id. at 263.

216. 842 F.2d 737 (4th Cir. 1988).
Rule 6(e)(2) was not exclusive, because "may be punished" was permissive language. The court held that suppression of the testimony might be a more appropriate remedy than contempt. The court's acknowledgment that "[s]ome Rule 6 violations are correctable" implies that injunctive relief which prevents further damage is allowable under the rule. In this case, the damage had already been done to the defendant and he could not be protected, however, judicial action was necessary to "protect the integrity of the grand jury system." The court of appeals directed the district court on remand to determine whether particularized need, which would be dispositive on the issue of suppression, justified disclosure of the grand jury testimony to another grand jury. The district court was also instructed to consider other remedies, including contempt, for the admitted violations of Rule 6(e).

The United States Court of Appeals for the Seventh Circuit denied relief in the form of terminating the grand jury proceeding in *Scott v. United States.* The appellant's allegations that the government had made unauthorized disclosures that were the source of news stories about William J. Scott, the Attorney General of Illinois, were found insufficient to warrant an evidentiary hearing. Although the court was "satisfied that a denial of review at this time would deprive Scott of a meaningful opportunity to air his grievance before an appellate court," the court found that denial of a hearing was proper because of the "weak basis" of Scott's allegations. The appellate court affirmed the district court's finding that the news media reports attributing their information to government sources were too vague to merit an evidentiary hearing.

The lack of clarity in the *Scott* case about what was necessary for

217. *Id.* at 740.

218. *Id.*

219. The Supreme Court has consistently construed Rule 6(e) as requiring particularized need before permitting disclosure. See *United States v. Sells Eng'g Inc.*, 463 U.S. 418 (1983), where the Court restated:

> Parties seeking grand jury transcripts under Rule 6(e) must show ... that the need for disclosure is greater than the need for continued secrecy ... [T]he need for it [must] outweigh the public interest in secrecy ... [T]he court's duty ... is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court.

*Id.* at 443 (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222-23 (1979) (citations omitted)).

220. 842 F.2d at 740.

221. 587 F.2d 889 (7th Cir. 1978).

222. *Id.* at 891.

223. *Id.* at 893.
a prima facie finding for sanctions in a news leak case was addressed with specificity in *Lance v. United States Department of Justice*, where the court held that a prima facie showing for sanctions did not require as strong a showing as one where the indictment will be dismissed. Additionally, the *Lance* opinion was the first to recognize a private right of action allowing a target to invoke the civil contempt power of the court for alleged violations of Rule 6(e).

C. *Lance v. United States Department of Justice*  

In 1977, a federal grand jury began investigating banking practices in Georgia. Bert Lance, a close friend of President Carter and former Director of the Budget, was one of the individuals being investigated because of his involvement with the National Bank of Georgia. Nationwide attention was focused on the investigation through articles in the Atlanta Journal and Constitution, the New York Times, the Washington Post, the Los Angeles Times, and the Wall Street Journal.

In *Lance*, the target's motion requesting sanctions against the government for alleged leaks to the press of a grand jury investigation was denied after two previous attempts at prohibition of all extra-judicial publicity had been denied. Finally, Lance requested that the court order the attorneys for the government to show cause why they should not be sanctioned for unlawful disclosure of matters before the grand jury. Lance alleged that the news leaks, which were a violation of Rule 6(e), infringed his right to a fair and impartial trial. In response to his motion, the district court found that Lance had failed to present sufficient evidence of governmental misconduct.

On appeal, the United States Court of Appeals for the Fifth Circuit concluded that the remedy requested by the target was civil contempt. The court reasoned that the primary purpose of the proceeding was remedial, which was the controlling factor in characterizing the contempt. The court emphasized that the harm alleged by Lance was repeatable, and, as such, waiting until the final judgment of a criminal trial would be an ineffective remedy. "Acquittal or conviction would so obscure the claim of a personal remedy for grand jury

---

224. 610 F.2d 202 (5th Cir. 1980).
225. Id.
226. Id. at 207-12 nn.1-3.
227. Id. at 207-12.
228. See Moskovitz, *supra* note 153, at 790 ("The prayer for relief . . . has intrinsic significance in deciding the question of civil versus criminal contempt because it is a direct and conscious statement by the plaintiff of his purpose in bringing the action.").
irregularity as to render it meaningless."229 Because the indictment
had been returned against Lance, any remedial efforts at this point
would not have interfered with the grand jury's deliberations.

The *Lance* opinion analyzed what was required for a prima facie
showing of a violation of Rule 6(e). First, there had to be a clear indi­
cation that the media reports disclosed "matters occurring before the
grand jury."230 Second, the articles had to indicate the source of infor­
mation as one proscribed by the rule.231 Third, the judge should as­
sume that all statements in the news were correct.232 Fourth, the trial
judge had to consider the nature of the relief requested and the extent
to which it would interfere with the grand jury process.233 Finally, the
trial court had to consider any evidence presented by the government
to rebut the assumed truthfulness of the reports.234

Applying these factors in *Lance*, the majority concluded that
"matters occurring before the grand jury" included disclosure of any­
thing "tend[ing] to reveal what transpired before the grand jury."235
The court found that the articles contained "numerous disclosures of
information about the grand jury proceedings,"236 and that the articles
either expressly or inferentially identified government attorneys as the
source of the information. The third factor, which required the judge
to assume the truth of the articles, was considered plausible because
secrecy prevented Lance from gaining access to testimony before the
grand jury. The government was in the best position to know if the
articles contained grand jury information and whether there was a vio­
lation of Rule 6(e). Because the indictment had been returned against
Lance, the effect on the grand jury was a moot point. Finally, the
court found the government's denial inadequate because the defend­
ants in the cases cited by the government's affidavit failed to ask for
injunctive relief.237

The court held that Rule 6(e) expressly authorized the imposition
of sanctions, and that granting the relief sought by Lance in this case
would not have interfered with the grand jury's investigation. The
court did not discuss the possibility that criminal contempt was the

229. 610 F.2d at 213.
230. Id. at 216.
231. Id. at 217.
232. Id. at 219.
233. Id.
234. Id. at 219-21.
235. Id. at 216 (quoting United States v. Armco Steel Corp., 458 F. Supp. 784, 790
(W.D. Mo. 1978)).
236. Id. at 220.
237. Id. at 213-220.
exclusive remedy envisioned by Congress in 1977. Additionally, the
court did not discuss the related question of whether a target has
standing to invoke the contempt powers of the court for alleged viola­tions of grand jury secrecy. The court merely concluded that Lance
had such standing based on the remedial purposes of civil contempt.

The dissent stated that the contempt in Rule 6(e)(2) is criminal
and any denial of the motion for sanctions is not appealable, whereas
the alleged contemnor can appeal without waiting for any final deci­sion on the merits of the case in chief. The distinguishing charac­
teristics of criminal or civil contempt include the character of the
offense and whether the purpose of the sanction vindicates the public
interest (criminal contempt) or remedies a wrong to a particular per­
son (civil contempt). Additionally, it must be determined if the rem­
edy prayed for results in punitive sanctions, such as unconditional
fines or imprisonment, or the remedy results in compensatory or coer­
cive sanctions to secure performance of the obligation, making it a
civil sanction.

The Lance court provided useful guidelines to the lower courts
when they are faced with the problem of the sufficiency of a prima
facie showing of violations of grand jury secrecy in cases involving
preindictment publicity. However, it did not analyze the relative
weight to be given each of the findings nor set forth the procedures to
be followed once a prima facie showing is established. Additionally,
the Lance majority did not address the question of whether criminal
contempt would have been more effective in punishing prosecutorial
misconduct or deterring future violations.

Oil, the Court held that the target of a grand jury investigation had standing to object to the
release of grand jury transcripts. The target had an interest “legally protected under the
Court’s rulings concerning grand jury secrecy. One of the several interests . . . is the pro­
tection of the innocent . . . .” Id. at 218 n.8. In In re Grand Jury Subpoenas, April, 1978,
581 F.2d 1103 (4th Cir. 1978), the court denied a motion to quash grand jury subpoenas
and to terminate grand jury proceedings. The appellant sought a writ of mandamus, alleg­
ing grand jury abuse, which requires exceptional, compelling circumstances and places a
heavy burden on the petitioner. The court found such a drastic intervention unwarranted
and found that the petitioner’s interests were protected by Rule 6(e). In United States v.
Dunham Concrete Prods., 475 F.2d 1241, 1249 (5th Cir. 1973), the court stated that “apart
from the question whether appellants have standing to remedy the alleged breach of grand
jury secrecy, the remedy in any case would not be to dismiss the indictment.”

239. 610 F.2d at 221 (Kravitch, J., dissenting).

240. Id. at 221-22. See supra notes 130-80 for a discussion of the distinctions be­
tween civil and criminal contempt.

241. But see United States v. Jeter, 775 F.2d 670 (6th Cir. 1985), where the defendant
was convicted of participating in the distribution and sale to grand jury targets of im­
printed carbon sheets used in the typing of secret grand jury testimony. The defendant was
In *United States v. Eisenberg*, the United States Court of Appeals for the Eleventh Circuit reversed the district court's order granting to the defendant the names of all the government employees "responsible for the egregious violations of Rule 6(e) that have already caused them great harm" after newspaper articles revealed details of the investigation. The court delineated the procedures to be followed once a prima facie case of breach of grand jury secrecy was established. The government's appeal did not challenge the district court's finding of a prima facie showing of governmental leaks of grand jury materials to the press. Rather, the government limited its challenge to the order requiring that it release all the names of government employees responsible for the leaks.

The district court had ordered the government to conduct an in-house investigation to identify all the government officials who had participated in the investigation. In balancing the targets' need to stop the leaks of prejudicial publicity with the public interest involved in protecting secrecy, the appellate court found that the sanctions should be limited to the extent "necessary to stop the publicity and punish the offenders." The appellate court agreed with the district court's order to identify the responsible government officials, but denied the relief requested by the grand jury targets that they should have access to this list. The court could inspect such information, *in camera*, but the court, limited in its supervisory role of the grand jury, could not make the list available to those under investigation.

The court of appeals acknowledged that injunctive relief was the best remedy for targets of grand jury investigations alleging leaks violative of Rule 6(e). "While the grand jury is in session, the only interests of the targets are to stop the prejudicial publicity and to seek the

*convicted of obstruction of justice under 18 U.S.C. § 1503 (1982). The defendant argued that conviction under the statute was unwarranted because the exclusive language of Rule 6(e) precludes application of any other statutory framework for his behavior and that he was not one of the persons covered by an obligation of secrecy under the rule. The court found that he was correct in asserting that he was not covered by grand jury secrecy under Rule 6(e), and that the language "no obligation of secrecy may be imposed on any person except in accordance with this Rule" precluded the court from expanding the persons covered. However, the court found the language imposing contempt on violators covered by the rule did not mandate that other individuals could destroy grand jury secrecy and escape criminal sanction. *Id.* at 675.*

242. *711 F.2d* 959 (11th Cir. 1983).
243. *Id.* at 961.
244. *Id.* at 964.
245. *Id.* at 966.
punishment of individuals guilty of Rule 6(e) violations." The court did not address any distinctions between civil and criminal contempt, but chose instead to focus on the limits of the supervisory power of the judiciary over the grand jury. While stating that the grand jury is neither a part of the judiciary nor the executive branches of the government, the court went on to "place no restrictions on the [district court’s] power . . . to order an investigation of the government’s alleged violations of Rule 6(e). We can conceive of circumstances where a district court could seek the appointment of a special counsel to assist the court in determining whether Rule 6(e) violations had occurred." Given such freedom to investigate, it is unclear where this court would draw its lines to respect the separation of powers doctrine which limits the courts in its responsibilities for, and powers over, the grand jury. Perhaps the reluctance to interfere with the grand jury stemmed not only from the traditional independence of the grand jury, but also from respect for the Executive’s increasingly powerful role before the grand jury.

Prior to Blalock v. United States, the federal courts addressed the need for contempt sanctions when other remedies were considered too drastic. Although there was a willingness to acknowledge the remedy because it was expressly authorized and had traditionally been used to supervise the grand jury, there was an apparent lack of willingness to impose it upon government attorneys. The remedy was considered less drastic than others that were potentially available to targets of grand jury investigations, although the possible effects on an attorney cited for contempt could hardly be considered benign. There had been little analysis in the cases up to this point of what Congress intended when it authorized contempt in the 1977 amendments to Rule 6(e). The focus in some of the cases and in law review articles had been on the parameters of the expanded language in Rule 6(e) of “attorneys for the government.” Perhaps the lack of clarity at the congressional level on whether civil discovery could take advantage of broad grand jury investigatory powers, had obscured useful debate on

246. Id. at 964. The court cited the Lance decision for authority on the role of the target’s counsel in any hearings involving contempt sanctions. Id. at 965.
247. Id. at 964-65.
248. Id. at 966.
249. 844 F.2d 1546 (11th Cir. 1988).
the less drastic remedies available to targets who allege abuse of the grand jury.

V. THE BLALOCK AND BARRY DECISIONS

Two recent federal courts of appeals decisions have examined the issue of whether the contempt provision in Rule 6(e) for violations of grand jury secrecy is a criminal and/or civil sanction. In Blalock v. United States,252 the majority opinion analyzed the target's motion under the Lance requirement for what is necessary for a prima facie showing of secrecy violations. However, the special concurrence rejected the reasoning in Lance and recognized criminal contempt as the sole contempt sanction for grand jury secrecy violations.253 In Barry v. United States,254 the majority accepted the reasoning in Lance and found that Rule 6(e) violations included civil contempt sanctions and equitable relief, whereas the dissent in Barry agreed with the restrictive interpretation of the Blalock special concurrence.

A. Blalock v. United States255

In Blalock, the United States Court of Appeals for the Eleventh Circuit affirmed a lower court ruling denying relief to the target of a grand jury investigation. The target had applied to the district court for an order permanently enjoining the grand jury from investigating charges of bid rigging and fraud in the construction of Georgia Power Company's nuclear power plant at Vogtle. The grand jury evidence had been gathered primarily by agents of the Federal Bureau of Investigation who collaborated with investigators from Georgia Power Company.

The target alleged that the prosecutor had used the subpoena power of the grand jury to assist private investigations; that the prosecutor and the FBI had improperly remarked that they intended "to break [appellant] or run him out of business"; that the prosecutor had told a witness that the appellant might harm her; and that the prosecutor and the FBI made unauthorized disclosures of matters before the grand jury.256 This last allegation implicated Federal Rule of Criminal Procedure 6(e). This allegation was supported by an affidavit from a potential witness who claimed to have been asked similar

252. 844 F.2d 1546 (11th Cir. 1988).
253. Id. at 1553 (Tjoflat, J., Roettger, J., specially concurring).
254. 865 F.2d 1317 (D.C. Cir. 1989).
255. 844 F.2d 1546 (11th Cir. 1988).
256. Id. at 1548.
questions by the power company investigators and the grand jury.\textsuperscript{257} Appellant also claimed that the FBI questioned potential grand jury witnesses in the presence of investigators for the Georgia Power Company and consequently grand jury matters were disclosed to the power company investigators.\textsuperscript{258} Appellant also alleged that the prosecutor told a competitor that the grand jury would soon indict him, which was an unauthorized disclosure of matters occurring before the grand jury.\textsuperscript{259}

The district court denied injunctive relief, stating that it found, after reading the grand jury transcripts \textit{in camera}, that the prosecutor and the FBI agents had behaved properly.\textsuperscript{260} The court also noted that the target had an adequate remedy at law, a motion for dismissal of the indictment if one were handed down.\textsuperscript{261} The court's remark that it doubted the truth of appellant's allegations, in light of the exemplary behavior of the government officials, prompted the appellant to move for the recusal of the court in the current controversy. The court denied the motion for recusal.\textsuperscript{262}

On appeal, the district court opinion was affirmed. First, the court of appeals found that appellant had an adequate remedy at law\textsuperscript{263} through which to address any due process claims he might have. Second, the court focused on the binding precedent which permitted a grand jury target to seek injunctive relief against the individuals covered by Rule 6(e)(2) and allowed the target to invoke the civil contempt power of the court to coerce compliance with an injunctive order.\textsuperscript{264} Following \textit{Lance}, the court of appeals used the criteria suggested there to determine if the appellant presented sufficient evidence to establish a prima facie case against the government officials.\textsuperscript{265} The appellate court affirmed the district court's finding that no such case had been established and affirmed the district court's conclusion that the appellant's proof was inadequate or not credible.

1. The Special Concurrence

The special concurrence addressed the issue of whether Federal

\begin{itemize}
  \item \textsuperscript{257} \textit{Id.} at 1548-49.
  \item \textsuperscript{258} \textit{Id.} at 1550.
  \item \textsuperscript{259} \textit{Id.}
  \item \textsuperscript{260} \textit{Id.} at 1549.
  \item \textsuperscript{261} \textit{Id.} at 1550.
  \item \textsuperscript{262} \textit{Id.} at 1552.
  \item \textsuperscript{263} \textit{Id.} at 1549.
  \item \textsuperscript{264} \textit{Id.} at 1551.
  \item \textsuperscript{265} See \textit{supra} notes 230-34 and accompanying text for a discussion of what is required for a prima facie showing of a Rule 6(e) violation.
\end{itemize}
Rule of Criminal Procedure 6(e)(2) provides a grand jury target a right of action for injunctive relief to prevent grand jury leaks and whether the contempt in the rule was intended by Congress to be civil or criminal.\textsuperscript{266} The two judges asserted that Rule 6(e)(2) is nothing more than a statement by Congress that the law found in 18 U.S.C. section 401 (1982), subjecting persons to criminal contempt and thereby punishment for misconduct, applies to the wrongful disclosure by persons of "matters occurring before the grand jury."\textsuperscript{267} Criminal contempts in federal courts are handled as section 401 proceedings.\textsuperscript{268} Federal Rule of Criminal Procedure 42(b) provides for notice to the alleged contemnor and the procedure to be used in criminal contempt proceedings.\textsuperscript{269} The concurrence stated that under Rule 42(b) the person bringing the alleged offensive behavior to the court's attention does not have the right to compel the court to action.\textsuperscript{270}

In reviewing the \textit{Lance} decision, the special concurrence reiterated the four requirements for a prima facie showing of a violation of Rule 6(e). In holding that this appellant failed to establish a prima facie case for official misconduct, the special concurrence stated that the \textit{Lance} opinion failed to analyze the threshold question of whether a grand jury target has the right to seek injunctive relief against government officials.\textsuperscript{271} The special concurrence offered a four-step deductive argument that must be made in order for the \textit{Lance} holding to be valid:

First, the premise is assumed Rule 6(e)(2) authorizes the district court to use its civil contempt power to obtain compliance with the Rule's secrecy requirements. Second, because civil contempt lies only to enforce an injunctive order, it follows that Congress gave the district courts the authority to enjoin persons subject to the Rule's secrecy requirements from the improper disclosure of grand jury matters. Third, since injunctions are adjudicative rather than administrative orders, they must be entered in article III "cases or controversies" between parties. Fourth, a proper party for bringing suit for injunctive relief is the target, because the target is the person whose interests Rule 6(e)(2)'s secrecy requirements were designed to protect.\textsuperscript{272}

\textsuperscript{266} \textit{Bralock}, 844 F.2d at 1552, 1553, 1556-60 (Tjoflat, J., Roettger, J., specially concurring).

\textsuperscript{267} \textit{Id.} at 1553.

\textsuperscript{268} \textit{See supra} notes 122-25 and accompanying text.

\textsuperscript{269} \textit{See supra} notes 126-29 and accompanying text.

\textsuperscript{270} 844 F.2d at 1553 (Tjoflat, J., Roettger, J., specially concurring).

\textsuperscript{271} \textit{Id.} at 1554.

\textsuperscript{272} \textit{Id.} at 1555.
The special concurrence rejected that reasoning because it was based on the premise that the contempt in the rule was civil, whereas the court argued that the legislative history demonstrated that the contempt envisioned by the Rule 6(e) is solely criminal. The court's interpretation of the legislative history from the 1977 hearings was that the rule as amended "codified a practice the district courts had been following for eighty years," where common law breaches of grand jury secrecy had been prosecuted as criminal contempt of court. After the codification of grand jury secrecy in the Federal Rules of Criminal Procedure in 1946, courts continued the practice of prosecuting violations as criminal contempt. The special concurrence stated that the words "knowing" and "punished" are further evidence of the intent to maintain only a criminal sanction. Further evidence was in the Senate Report which stated that "the Rule . . . provid[es] a clear prohibition, subject to the penalty of contempt."

The special concurrence emphasized the purpose of the two types of contempts as further evidence of the congressional intent. Criminal contempt is punitive, not remedial. The purpose of civil contempt is to force compliance with an injunction, not to punish past conduct. The concurring judges used a hypothetical to suggest that civil contempt in a Lance-type situation is futile because the prosecutor can only promise to stop leaking grand jury materials to end the imprisonment for the civil contempt which makes it particularly useless as a safeguard for ensuring grand jury secrecy.

273. Id. at 1556.
274. Id. at 1557.
275. Id.
277. Id. at 1559.
278. In Blalock, the specially concurring judges stated as a way of illustrating the uselessness of civil contempt:

Posit a case in which the prosecutor leaks to the press grand jury information concerning the target. Pursuant to the rule established in Lance, the target moves the court to order the prosecutor to show cause why he should not be held in civil contempt and sanctioned. The court issues the order, and at the show cause hearing, the prosecutor admits responsibility for the disclosure. Suppose further that the court does not sanction the prosecutor, but rather warns the [sic] him that it will tolerate no further disclosure—as the district court did in Lance. The prosecutor, however, continues to leak additional grand jury matters to the press. On the target's application, the court holds another show cause hearing, finds that the prosecutor violated the Rule, and concludes that the issuance of a civil contempt sanction is now necessary to ensure future compliance with the Rule. Believing that a fine will not ensure compliance, the court chooses to incarcerate the prosecutor . . . [T]he court advises the prosecutor that his incarceration will be terminated just as soon as he obeys the law. . . . [H]e can purge himself of the contempt
Additionally, the special concurrence suggested that because there is no civil contempt contemplated by Rule 6(e)(2), there is no right to injunctive relief, since that goes hand in hand with civil contempt. Breaches of secrecy brought to the court's attention would be dealt with under the court's supervisory power and the court would "take administrative steps to ensure the maintenance of secrecy."\textsuperscript{279} If the court was satisfied that a knowing violation had occurred, it could cite the violator for criminal contempt under 18 U.S.C. section 401 in accordance with the procedures set forth in Federal Rule of Criminal Procedure 42(b). Failing that, the target could bring the disclosure to the attention of the United States Attorney who could proceed with an indictment under section 401. If the court or prosecutor refused to grant a motion for sanctions, the target would have no recourse because such decisions are not appealable. At that point, the target would be "simply a member of the public who has complained to the prosecutorial authority that a crime may have occurred."\textsuperscript{280}

The special concurrence, in positing a situation where the appellant can establish that the government violated Rule 6(e), remained convinced that criminal contempt was the contempt remedy envisioned by Congress and the only one that is functional in such circumstances. The specially concurring judges' opinion provided a good basis for a discussion of the sanctions that are useful and desirable to both the court and the target of an investigation. While the Barry court held that civil contempt, as contemplated in Lance, was an appropriate remedy, the majority also recognized that the judges in Blalock were merely following binding precedent.

\textsuperscript{279} 844 F.2d at 1561.

\textsuperscript{280} Id.
B. *Barry v. United States*281

In *Barry*, Mayor Marion Barry sought remedial relief and sanctions against the government in a grand jury investigation examining official misconduct. His allegations included leaks from the grand jury to the press in violation of Federal Rule of Criminal Procedure 6(e)(2). The allegations of leaks from the grand jury were supported by newspaper and television reports and press releases from the United States Attorney. Barry claimed that these leaks were interfering with his ability to perform his official functions.282 He sought an order for a show cause evidentiary hearing to determine if contempt sanctions should be imposed. The district court found that the sanctions sought were civil and that Mayor Barry "failed to carry his burden to establish a *prima facie* case of prosecutorial misconduct based on violations of Rule 6(e)."283 The appellate court agreed that the cause of action was civil but reversed the district court, holding that Barry did have sufficient evidence to make out a prima facie case.284

The United States Court of Appeals for the District of Columbia Circuit held that the cause of action under Rule 6(e) could be civil and that "[e]very circuit that has considered the matter has recognized that a civil cause of action, either for equitable relief or civil contempt, is cognizable under Rule 6(e)(2)."285 The court found further that equitable relief in the form of ordering the government to stop the leaks was appropriate. "[T]he Rule indicates no limits on the relief available to address violations."286

The court disagreed with the special concurrence in *Blalock* which would limit the scope of Rule 6(e) to criminal contempts.287 Because Rule 6(e) does not explicitly provide for either civil or criminal contempt, the critical issue was the purpose of the proceeding. Since Mayor Barry was asking for prospective relief, an end to the grand jury leaks, the court stated that this necessarily required a civil remedy as opposed to the punitive sanction of criminal contempt.

After characterizing the *Blalock* special concurrence as an "unusual decision," the dissenting judge agreed that only criminal sanctions

---

281. 865 F.2d 1317 (D.C. Cir. 1989); see also *In re Sealed Case*, 865 F.2d 392 (D.C. Cir. 1989).
282. *Id.* at 1319.
283. *Id.* at 1318.
284. *Id.* at 1324.
285. *Id.* at 1321.
286. *Id.*
287. *Id.* at 1324 n.6.
are allowed under Rule 6(e).288 The "official opinion" in that case belies the real analytic dispute. "Since we are not so bound, I would not inject into the decisional stream of this Circuit the virus already infecting the Fifth and Eleventh Circuits due to the Lance exposure."289

The Blalock and Barry opinions analyzed whether the contempt provision in Rule 6(e) is criminal and/or civil. The distinction is important because of the consequences to the alleged contemnor in terms of due process and to the complaining party in terms of the type of relief that may be granted. Prior to the Lance decision, there was little useful analysis on the statutory limits of contempt under Rule 6(e). The following section will discuss the debate surrounding the nature of the contempt provision in Rule 6(e)(2) and attempt to explain the analysis that restricts or expands the remedies available to grand jury targets for breach of secrecy.

VI. CRIMINAL AND/OR CIVIL CONTEMPT IN FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)

The special concurrence in Blalock underscores the heuristic value of the debate surrounding the contempt provision in Rule 6(e), because current case law recognizes both criminal and civil contempt as possible remedies under the Rule. Both Lance and Barry interpret Rule 6(e) to permit civil, as well as criminal contempt, whereas the Blalock special concurrence found that criminal contempt is the exclusive contempt remedy envisioned by Congress. The special concurrence in Blalock and the majority opinion in Barry will be the focus of this analysis. Given the limited remedies available to targets and the potential consequences to targets and contemnors, it is important to explore the possibilities and ramifications of both civil and criminal contempt in this context.

In Blalock, the conclusion of the special concurrence that the contempt provision in Rule 6(e) is solely criminal, was based on an interpretation of the text and legislative history of the 1977 amendments. Additionally, the judges concluded that civil contempt was not useful to deter future prosecutorial misconduct. The Barry majority concluded that the text did not expressly limit the type of contempt and that the prospective and coercive nature of civil contempt in pre-indictment publicity cases was particularly useful because it did not interfere with the grand jury.

288. Id. at 1326 (Sentelle, J., dissenting).
289. Id. at 1327.
An analysis of whether the contempt provision in Rule 6(e) is criminal or civil includes the overarching consideration of the historical purposes of grand jury secrecy, as well as the legislative history of the 1977 amendments. The practical applications of civil and criminal contempts, including the statutory uses, will be considered along with the Supreme Court's decisions and interpretations of the tradition in American criminal procedure. This analysis concludes that the remedies available to targets for violations of grand jury secrecy are limited and that absent specific restrictions by Congress in the rule itself or to the inherent supervisory power of the judiciary generally, "contempt" in the rule should be broadly interpreted to afford protection to the targets and to uphold the fair administration of justice.

Section A of this analysis discusses the remedies available to targets who allege secrecy violations under Rule 6(e), concluding that contempt is the most appropriate remedy because of the specific authorization in the rule and the judicial willingness to recognize it. Section B discusses the legislative history of the 1977 amendments, which is unclear as to the congressional intent behind the contempt provision. Section C discusses the inherent supervisory power of the courts over federal grand juries and concludes that the separation of powers doctrine precludes Congress, absent clearly restrictive language, from limiting a judicial decision to only one type of contempt if constitutional and statutory requirements are met in the adjudication of the contempt.

A. Remedies for Grand Jury Secrecy Violations

Although contempt is expressly authorized in Rule 6(e), it is not viewed as the exclusive remedy for breaches of grand jury secrecy. Before deciding that contempt is the appropriate remedy, the court may want to assess "the stage of the proceedings and the cost, inconvenience, and administrative difficulties created by alternative remedies." Sanctioning the prosecutor may "aggravate an already hostile situation" from the defendant's perspective. The defendant wants relief that prevents or hampers the criminal investigation. The court's disciplinary measures taken against the prosecutor represent little effective relief from the defendant's perspective. Even though a defendant may assert that society's interest in fairness is ill-served

291. The Grand Jury Project of the National Lawyers Guild, supra note 290, at 13-79.
when prosecutors violate the rights of defendants and long-established rules of practice and procedure, it is undoubtedly not the main goal of any request for relief. Courts need to balance the individual's needs for effective relief against society's interest in prosecuting criminals and the fair administration of justice.

As noted in the discussion of the cases, dismissal of the indictment is viewed as an "extreme" remedy rarely granted to defendants. There has been no consistent standard for dismissal of an indictment because the facts and circumstances, including the perceived level of prosecutorial misconduct, vary in each case. Even if the court dismisses the indictment, there is the possibility of reindictment if the dismissal was without prejudice. If the defendant can be reindicted, there remains the question of whether the prosecutor is effectively deterred from such conduct in the future. Given the almost certain possibility of reindictment, it is less certain that such a remedy is as "extreme" as the courts imply. However, the cost and administrative inefficiency of reindictment, and possibly even retrial, are great and will probably be considered when entertaining a motion for dismissal. Grand jury secrecy violations that amount to preindictment publicity will almost never rise to the level of prejudice required for dismissal of an indictment.

There is some question if violations of grand jury secrecy even rise to the level of "prosecutorial misconduct." In United States v. Dozier, the United States Court of Appeals for the Fifth Circuit found that the prosecutor's unlawful disclosures to the press amounted merely to "prosecutorial indiscretion at the grand jury level." The defendant's concern that any defendant would be "understandably reluctant" to institute contempt proceedings against the government at-

292. See supra notes 181-289 and accompanying text.
294. See, e.g., United States v. Lawson, 502 F. Supp. 158 (D. Md. 1980). Defendants were indicted for filling prescriptions with fictitious names. The defendants alleged violations of grand jury secrecy among other abuses before the grand jury. The court dismissed the indictment without prejudice because there was no showing that unlawful disclosures operated to prejudice their right to an unbiased grand jury or infringed upon their rights to a fair trial on the merits. The defendants had a right to an unbiased grand jury, but "no concomitant right to bar forever investigation into their alleged criminal conduct." Id. at 172.
295. 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982).
296. Id. at 545; see also United States v. Washington, 705 F.2d 489, 499 (D.C. Cir. 1983) ("Since the concern over adverse publicity is its effect on the fairness of the ensuing trial, . . . it was not error to fail to hold an evidentiary hearing concerning the effect of pre-indictment publicity on the grand jury.").
torneys who had not yet indicted him, was noted in a footnote as precisely the remedy sought in Lance.\textsuperscript{297} The court found the remedy of contempt adequate to deter prosecutorial misconduct because "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."\textsuperscript{298}

Similarly, motions to terminate grand jury proceedings are rarely successful. It is more likely that courts will exercise their supervisory power in a narrower way\textsuperscript{299} to enjoin a specific illegal practice, such as unlawful disclosure of grand jury matters.\textsuperscript{300} Most courts recognize that contempt of court is the appropriate remedy.\textsuperscript{301} In the Lance case, the court fashioned a remedy that combined an injunction to stop leaks to the press with an order that the prosecutor show cause why he should not be held in civil contempt. Many courts have recognized civil contempt under Rule 6(e),\textsuperscript{302} but the Blalock special concurrence was the first court to suggest that a more narrow reading of the rule was required.\textsuperscript{303}

1. Contempt of Court in Lance, Blalock, and Barry

The Barry and Lance cases are factually similar: both targets explicitly requested injunctive relief in the form of demands to stop the leaks to the news media from the government attorneys. Mayor Marion Barry and Bert Lance are both public figures whose activities were newsworthy. In contrast, only Blalock's activities were newsworthy; Blalock was a private figure. In Blalock, the allegations involved leaks to private investigators who potentially could proceed with a civil action against Blalock, whereas in Barry and Lance, the

\begin{itemize}
  \item \textsuperscript{297} 672 F.2d at 545 n.10.
  \item \textsuperscript{298} Id. at 545 (quoting Smith v. Phillips, 455 U.S. 209, 219 (1982)).
  \item \textsuperscript{299} See United States v. Cardall, 773 F.2d 1128, 1134 (10th Cir. 1985) ("Ordinarily, the secrecy rule is enforced by the sanction specifically provided in the rule—punishment for contempt of court.").
  \item \textsuperscript{300} See supra notes 181-289 and accompanying text.
  \item \textsuperscript{301} See M. Frankel & G. Naftalis, supra note 2, at 133 ("[E]fforts to prevent or punish leaks from grand juries have been remarkably feeble. Probably the main practical obstacle to effective control has been the power and protected positions of those primarily involved with the delivery and dissemination of illicitly leaked information—the prosecutors and the media.").
  \item \textsuperscript{302} Advance Publications v. United States, 805 F.2d 155 (6th Cir. 1986); United States v. Eisenberg, 711 F.2d 959 (11th Cir. 1983); Hunter v. Civella, 673 F.2d 211 (8th Cir. 1982); Lance v. United States Dep't of Justice, 610 F.2d 202 (5th Cir. 1980); Scott v. United States, 587 F.2d 889 (7th Cir. 1978); In re Grand Jury Subpoenas, April, 1978, 581 F.2d 1103 (4th Cir. 1978).
  \item \textsuperscript{303} See supra notes 239-40 and accompanying text for a discussion of the Lance dissent.
\end{itemize}
concerns were reputational damage and possible future prejudice of the grand jury and/or a jury trial. Assuming the "correctness" of the holdings, Lance and Barry both established a prima facie case, whereas Blalock's evidence was insufficient.

The facts and the holdings are not the important distinguishing characteristics of the cases for this analysis. The analytic dispute in these cases centers on what relief is available to the target of a grand jury investigation when allegations of Rule 6(e) violations on the part of the government are presented to the court. In considering what relief is available to the target of a grand jury probe, the federal regulations\(^\text{304}\) must be considered to determine the underlying procedural and theoretical rationale for the exercise of the contempt power.

In the case of leaks of grand jury matters by government attorneys, contempt is expressly authorized by Congress, and it has the advantage of interfering only marginally with the grand jury investigation,\(^\text{305}\) a primary consideration. Given the limited remedies available to a target for alleged leaks of grand jury materials, contempt becomes more attractive as one of the few remedies regularly acknowledged by the courts. Although courts are reluctant to sanction prosecutors, this is the least drastic remedy and may prove useful to targets if courts would use it in ways that effectively serve the dual needs of protecting targets' rights by upholding the traditional respect for secrecy and society's need to have a fair and effective administration of the criminal laws.

The Blalock special concurrence was critical of the analysis in the Lance opinion and pointedly offered a hypothetical\(^\text{306}\) to demonstrate the futility of civil sanctions in a Lance-type situation. The hypothetical did not factor in the historical importance of grand jury secrecy to the target. If the target is afforded some realistic concern, then the rights afforded the target should be more than mere admonitions to the prosecutor or delayed administrative efforts to control the leaks. The rights of the individual are no greater than the remedy. In the context of injunctions in "leak" cases, the remedy of injunction is worth no more than the contempt sanction which enforces the injunction. If, as posited, the injunction and subsequent coercive imprison-

\(^{304}\) See supra notes 122-29 and accompanying text for a discussion of the federal statutes regulating contempt.

\(^{305}\) But see M. Frankel & G. Naftalis, supra note 2, at 23 ("An independent grand jury would be intolerable. The meaningful issues relate to the nature and character of the prosecutorial leadership, the presence or absence of safeguards and countervailing powers, and the nature of the authority formally invested in the grand jury.").

\(^{306}\) See supra note 278 for the text of the hypothetical.
ment of the prosecutor are useless to effectuate the petitioner’s prayer for relief, it is no more a “relief” to the petitioner if the prosecutor stays imprisoned for a determinate period of time to vindicate society’s interest in justice. To eliminate the possibility of civil contempt because it may not be effective, is probably to cut off the target from any meaningful remedy.

There remains the question of what standard attaches to a criminal contempt. If the behavior must be willful, then a determination of the prosecutor’s intent\textsuperscript{307} is necessary. If there must be an obstruction of justice, it is questionable that leaks amounting to “prosecutorial indiscretion” will ever rise to that level. To label the contempt solely criminal is to further discourage its use. Courts are generally reluctant to punish governmental abuses of grand jury secrecy and a requirement of criminal intent\textsuperscript{308} will make the task even more difficult for the target and for the courts that want to correct abuse.

The special concurrence in \textit{Blalock} stated that the cases involving contempts for violations of grand jury secrecy proceeded under the theory of 18 U.S.C. section 401.\textsuperscript{309} Section 401 is based on the Judiciary Act of 1789, as implemented by the Act of March 2, 1831, enacted to limit and define contempt in the federal courts. This section appears to apply solely to criminal contempts because there is no mention of civil contempt. However, 18 U.S.C. section 402 arguably contemplates civil contempt because of its provisions for fines paid to complainants. “[I]t is tacitly assumed that [section] 401 operates as a limitation of the power of federal courts with respect to civil contempt actions.”\textsuperscript{310} If it is not assumed that sections 401 and 402 apply to civil contempt, the inevitable conclusion would be that courts have free rein under their inherent supervisory power with respect to civil contempt. Federal Rule of Criminal Procedure 42(b) distinguishes between civil and criminal contempt only in regard to notice to the con-

\textsuperscript{307} See Moskovitz, \textit{supra} note 153, at 794, stating:

On occasion courts have concluded that a contempt proceeding was criminal because the defendant’s acts were wilful. In civil contempt the general rule is that the defendant need not have acted wilfully, and this would seem correct, inasmuch as civil liability for damage done ought not to depend on whether or not the defendant has a “guilty mind.”

\textit{Id.} (footnotes omitted).

\textsuperscript{308} Because some acts constitute both civil and criminal contempt, willfulness does not preclude civil contempt. \textit{Id.}; see also United States v. Smith, 815 F.2d 24, 26 (6th Cir. 1987) (Knowledge is the culpable mental state for violations of Rule 6(e)(2). Because the rule specifically supplies the culpable mental state, that is the element to be proved.).

\textsuperscript{309} \textit{Blalock}, 844 F.2d 1546, 1557 n.14 (11th Cir. 1988).

\textsuperscript{310} Wright, Byrne, Haakh, Westbrook & Wheat, \textit{supra} note 117, at 169.
FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)

The problem is further complicated by the blurred distinctions in contempt proceedings and court orders. Additionally, the Blalock special concurrence pointed out that section 402 did not apply to improper disclosure of grand jury materials because criminal contempt is not a crime. The 1946 enactment of Rule 6 codified the common law rule of secrecy breaches, which was “a crime at common law.” If violations of Rule 6(e) are a crime, then section 402 would apply, opening up to the possibility that civil-type remedies are available to a target of a grand jury probe. Furthermore, the federal courts view criminal contempt as a crime, since “it is a violation of the law, a public wrong which is punishable by fine or imprisonment.” Such a conclusion has procedural consequences for the contemnor, but it also opens up the possibility that civil-type remedies are available to the person harmed by the improper disclosures.

For example, if a court imposes a gag order to prevent jurors from being influenced by media reports of a trial, the order is apparently intended to benefit the parties by ensuring a fair trial. If one party violates the gag order, that party could be found in civil contempt for prejudicing the rights of the other party, or in criminal contempt for flouting the authority of the court, or both. Enforcing compliance through civil contempt proceedings would protect the rights of the other party and vindicate the court’s authority at the same time.

The Blalock special concurrence’s sole emphasis on the purpose of vindicating the court’s authority, rather than providing a remedy to the complainant, fails to address the dual nature of some requested relief. The Supreme Court has held that the purpose of the proceeding can be difficult to determine and should not be the controlling factor in characterizing the contempt. The contempt power allows a judge to fine or imprison a person who willfully violates court orders and to

311. See supra notes 126-29 and accompanying text for a discussion of Rule 42.
312. Blalock, 844 F.2d at 1558 n.17.
313. See supra notes 68-75 and accompanying text for a discussion of the 1946 enactment of Rule 6(e).
315. Id. at 201 ("Criminal contempt is a crime in the ordinary sense . . . .").
316. See supra notes 130-80 and accompanying text for a discussion of the distinctions between criminal and civil contempt.
award damages to someone injured by such behavior of the contemnor. Given the dual purpose and possible double remedy the judge may award in such a case, the contempt partakes of both criminal and civil contempt. In the present situation, the injunction is designed to restrain the prosecutor from leaking grand jury information to the press and to others not bound by secrecy in the rule. The prosecutor's imprisonment for a determinate sentence to vindicate the authority of the court does little to compensate the complainant, although it may deter further breaches.

Although in the instant cases the targets did not request monetary damages, it is possible that an unindicted target of a grand jury investigation who was harmed by newspaper stories could seek contempt sanctions against the government and request compensatory damages for loss of reputation. The court would then uphold its integrity with criminal sanctions against the contemnors and compensate the complainant injured by the conduct. If the contempt proceeding protected the due process requirements of the alleged contemnor, there is no analytic reason to avoid such remedies. However, the major problem when the judiciary desires both coercive and punitive sanctions is the constitutionally compelled safeguards required in a criminal proceeding. Judges have discretion in classifying contempt, but they should use this discretion for "the least possible power."

Ironically, it is secrecy which makes it difficult for the target to know precisely which of his rights may be threatened by the government's behavior. "In contemporary experience, the effort to enforce secrecy is too frequently defeated by 'leaks.' And where a defendant wishes (after indictment, naturally) to see what went on before the

---


319. See Bessette v. W.B. Conkey Co., 194 U.S. 324, 329 (1904) ("It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both."). In Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911), the Court stated:

It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. . . .

. . . .

It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt . . . the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience.

_Id._ at 441-43.

grand jury, the claims for secrecy have tended to be pushed by prosecutors beyond the fair limits of their logic.”321 In grand jury investigations, the target must rely on the system’s respect for rules and the integrity of the prosecutor because the work of the grand jury is shielded from the public. The judge should be able to use criminal sanctions precisely because the effective and fair functioning of the system is crucial to ensure actual fairness and the public’s perception of fairness. The accused in trial has adequate safeguards: the right of confrontation and cross-examination; the right to testify and call witnesses on his own behalf; the right to refuse to testify on grounds of self-incrimination; and the right to know the charges against him.322 All this is denied to the target of a grand jury investigation. Theoretically, the target is protected from any harm until after an indictment is returned. However, as the concerns over the 1977 amendments to Rule 6(e) demonstrate, secrecy is a double-edged sword easily worked to the government’s advantage when the loosening of restrictions is met with an ineffective safeguard for the target.

The conduct at issue in these cases constitutes indirect contempt because the violation occurs not in the presence of the judge or in the court, but under circumstances where only a few people know directly about the facts concerning the disclosures. The target may only later be affected by the public disclosures that allegedly prejudice the grand jury or the subsequent trial on the merits. Arguably, the government’s conduct in each case is obstruction of justice and/or failure to observe the rules of the court. In so doing, the government affected the rights of the grand jury targets. Because indirect contempts occur outside the judge’s presence, they must be brought to the court’s attention.

321. M. FRANKEL & G. NAFTALIS, supra note 2, at 24; see also Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), where Justice Brennan in dissent stated:

Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice.

Id. at 403 (Brennan, J., dissenting). In In re Russo, 53 F.R.D. 564 (C.D. Cal. 1971), the court stated:

Thus, it is important to note that the common law concept of grand jury secrecy developed from a need to protect the jurors and the accused from the tyranny of the Crown . . .

. . . . [I]t must be remembered that the policy of grand jury secrecy should be maintained to the full extent necessary to fulfill the ends of justice, and no further.

Id. at 568-70 (citation omitted).

322. Note, supra note 1, at 599-600.
The target is the person most interested in seeing that such abuses are corrected. If the target is limited to the remote possibility that the prosecutor will be "punished" by the court, it is unlikely that the target will initiate any action. Without the vigilance of the targets or any realistic hope that anything can or will be done for secrecy breaches, the court will remain in the dark as to the prosecutorial practices before the grand jury.

Unlike most courts, the judges in the principal cases decided in advance what kind of sanction would be imposed. All three of the cases arguably had aspects of both criminal and civil contempt. Lance wanted to stop leaks that would harm his reputation; Barry wanted to stop leaks that were interfering with his ability to perform official functions; and Blalock suggested that grand jury leaks would prejudice the outcomes at the grand jury. All three wanted to enjoin the prosecutor from illegal behavior. Factually, Blalock's case resembled more of the interest society has in guaranteeing a fair process, vindicating the court's authority. He asked for injunctive relief to stop the grand jury from investigating him, not coincidentally the relief that would most hamper future government investigations. Even if Blalock had brought the alleged misconduct to the court's attention and requested criminal sanctions against the contemnors, it is doubtful that he would have prevailed. At a minimum, the civil remedy for Rule 6(e) violations allows the target an opportunity to present evidence of the alleged leaks, whereas the criminal sanction is entirely dependent upon the court or prosecutor's willingness to proceed.323 The varied purposes served by grand jury secrecy in any given circumstance should dictate the nature of the sanction. Grand jury secrecy historically protects the innocent and defies the intrusion of the government into independent inquiries by the "people's panel."324 Although the reality today is that the government guides the grand jury, the legislative history of Rule 6(e)(2) indicated a respect for the traditional safeguard of protecting the innocent from unfounded charges and public disclosure of matters under investigation.

323. See United States v. Blalock, 844 F.2d 1546, 1561 (11th Cir. 1988). Although stating that the court can take administrative steps to ensure the maintenance of secrecy, the specially concurring judges did not specify what those steps would be. In any case, those steps would have to involve some way of stopping the leaks, an intervention that could conceivably involve an injunction, bringing the process full circle to civil contempt. If the district court declines to act, the target has no recourse on appeal. The problem with this thinking is that the target is the injured party, while the court is only an injured party in a secondary sense.

324. R. Younger, supra note 41.
B. Legislative History of the 1977 Amendments

The legislative history of the 1977 amendments to Rule 6(e) must be read in light of the dual policy rationale expressed by the Senate of assisting the government in effective law enforcement and allaying the fears of those who anticipated abuse of the system. It is also necessary to clarify exactly what abuse was contemplated by Congress when it considered the 1977 amendments. The contempt sanction was added specifically to curb abuse by the prosecutor.\(^\text{325}\) Although the contempt sanction had been used prior to 1977 to ensure grand jury secrecy, this language expressly authorized contempt and presumably was to encourage the vigilance of the judiciary against prosecutorial misconduct.\(^\text{326}\)

The early cases relied upon by the special concurrence in *Blalock* to support the proposition that Congress was merely codifying existing practice did not involve prosecutorial abuses. In *In re Summerhayes*,\(^\text{327}\) the court charged a grand juror with criminal contempt. There was no dispute as to the purpose of the contempt, which was to uphold the proper administration of the laws. There was also an indi-

---

325. In the *Blalock* special concurrence, the judges cited the legislative history of the 1977 amendments to Rule 6(e). 844 F.2d at 1556. The specially concurring judges omitted the phrase "such prosecutorial power" when discussing the specific language in the Senate Report, supra note 7, referring to the fears expressed at the Hearings, supra note 94.

326. But see Hearings, supra note 94, at 151-53, 157-58, where concerns were expressed about the potential abuse of grand jury secrecy by the expansion in the rule:

Given that history—given that oath—I submit that intrusion on grand jury secrecy by the Government surely cannot be automatically permitted solely on the undocumented belief of a prosecutor that there must be disclosures to assist him in his duties.

. . . . .[P]erhaps we would do better to put such boundless faith in our institutions and principles rather than in the uniform reliability of Government personnel. That more conservative and traditional view has vivid history to recommend it.

. . . . .[S]ecrecy has become a one-way street.

. . . . .Who is going to try to hold the Government in contempt?

Only one person and that is a convicted accused, who is probably the person that you are least interested in in some ways, and then it is after he has been convicted and he doesn’t have too much of a shot at contempt.

The idea that a contempt sanction serves any function is nonsense . . . How do you prove bad faith after the fact? How?

There is another thing with the contempt remedy that is wrong . . . [T]he entire burden is put on the party charging that the breach was not justified.

*Id.* (testimony of B. Nussbaum).

327. 70 F. 769 (N.D. Cal. 1895). See supra notes 183-85 and accompanying text for further discussion of *Summerhayes*. 
cation that the grand juror had possibly engaged in other criminal behavior. His revelations of grand jury matters were for the purpose of bribery and corruption. Given such a circumstance there is little reason to expect the court to do anything but vindicate its authority and possibly proceed with other criminal charges.\textsuperscript{328}

In \textit{Schmidt v. United States},\textsuperscript{329} the breach of secrecy was by the attorneys for the accused, not by the government officials involved in the investigation. The contempt was considered criminal with no analysis of other remedies. However, the facts of \textit{Schmidt} are distinguishable from the principal cases in this Note, because in \textit{Schmidt}, the target was not asking the court for any relief, rather the court was interceding on its own behalf to vindicate its authority and protect the grand jury's secrecy. The remedy applied in \textit{Schmidt} fit squarely with an analysis based on the purpose of the proceeding to vindicate the court's authority rather than remedy a wrong to an individual.

The other early case mentioned by the judges in \textit{Blalock} was \textit{Goodman v. United States}.\textsuperscript{330} The United States Court of Appeals for the Ninth Circuit traced the punishment that had been meted out for violations of grand jury secrecy:

So strict was the requirement of secrecy in this respect that ancienly a grand juror who disclosed to an indicted person the evidence that had been given against him was held to be an accessory to the crime, if the crime was a felony, and a principal if the crime was treason; and later such conduct appears to have been denounced as high misprision. Nowadays, in the absence of special statute providing a different method of punishment, a grand juror may be held in contempt for disclosing grand jury proceedings to an outsider.\textsuperscript{331}

These early cases are evolutionary and it is unrealistic to cite them in support of the proposition that Congress was merely enacting existing practices in 1977 when it approved the amendments to Rule 6(e).

On the other hand, if these cases do represent congressional respect for past practices, they are a narrow corner of the reasons for using the contempt power to maintain judicial integrity at the grand jury level. It is unlikely that the final sentence of Rule 6(e) was a codification of all the remedies pertaining to the scope of power left to

\textsuperscript{328} 70 F. at 773.
\textsuperscript{329} 115 F.2d 394 (6th Cir. 1940). See \textit{supra} notes 186-91 and accompanying text for a discussion of \textit{Schmidt}.
\textsuperscript{330} 108 F.2d 516 (9th Cir. 1939). See \textit{supra} note 183 for a discussion of \textit{Goodman}.
\textsuperscript{331} 108 F.2d at 519 (citation and footnote omitted).
the discretion of the courts. One possible interpretation that comports with the Blalock special concurrence reasoning is that Congress did indeed intend criminal contempt because of the seriousness with which it viewed secrecy violations. However, given the separation of powers doctrine and the existing power of courts to uphold their dignity and authority through inherent power, Congress indicated no objection to the judicial fashioning of a civil contempt remedy in combination with an injunction in preindictment publicity cases. When the federal rules were enacted in 1946, this type of breach was recognized as a serious problem. "Conspicuous publication in a newspaper of large circulation that the conduct of certain persons is under investigation . . . is contempt of court. Offenders may be thereby warned that their conduct is under investigation."332

If Congress had intended to curtail or limit the judiciary's use of contempt while striking a balance between government agency access to grand jury materials and grand jury secrecy, the legislative history would presumably have been more clear. It is more reasonable to assume that Congress left the courts free to fashion remedies, while encouraging the use of at least criminal contempt, and guiding the courts by the broad purposes of the rule. The Supreme Court, in United States v. Sells Engineering, Inc.,333 interpreted the 1977 legislative history precisely in the light of the historic reasons for preserving grand jury secrecy, while holding that the Department of Justice may not have automatic access to grand jury materials for civil litigation when the information was disclosed for reasons of technical assistance.

Congress is also aware of the judiciary's inherent powers and there is no indication that it intended to curb the use of such powers in this context. Contempt is considered integral to the effective functioning of the courts. "[A]ny attempt to regulate it will be viewed as cutting at the pulsebeat of the court, and will be examined with intense judicial scrutiny."334 In addition to an awareness of the importance of contempt, Congress also was aware of the common law importance of grand jury secrecy. The original Rule 6 embodied the "traditional notion of secrecy," and one of the stated purposes was to protect the individual defendant from reputational harm which can be great in such proceedings. Congress intended to protect such people, albeit with a sometimes less than effective safeguard.

332. Orfield, supra note 175, at 403-04 (footnote omitted).
The dangers and injustices which result from unauthorized disclosure of grand jury proceedings have been summarized as follows:

1. The reputation of the innocent is ruined when such statements are made public and in fact no wrongdoing may exist or be charged or found.
2. If erroneous, such stories are extremely difficult to rebut because the sources are not stated, and because erroneous assertions could only be contradicted by revealing the very investigative information which is supposed to be secret.
3. Defendants who are in fact charged may be deprived of a fair trial because of the previous notoriety of the publicized version of the pre-indictment investigation.
4. Trial of defendants who are in fact guilty is rendered difficult because of the problem of finding an impartial jury.
5. Premature disclosure of investigations may jeopardize them by making witnesses more difficult to obtain or may lead to the destruction of evidence.

The potential harm for breaches of grand jury secrecy in this context can be great. The courts' reluctance to impose criminal sanctions on government attorneys, coupled with the presumption of regularity of grand jury proceedings, can be insurmountable to a target who suspects prosecutorial misconduct. One of the "catch 22" problems with motions that interfere with the grand jury is the fact that the defendant's action may propel the investigation further into the limelight, somewhat defeating his claim that preindictment publicity is undesirable. If the courts continue to think criminal sanctions too harsh a penalty absent systemic abuse, then targets of grand jury investigations who suspect unlawful disclosures will be less inclined to move forward with any remedies that would benefit the system. Judges may not be aware of prosecutorial misconduct unless it is brought to their attention by those most affected by the abuse.

C. Supervisory Powers and Independence of the Grand Jury

The Supreme Court has recognized that Congress can regulate

336. See generally United States v. Hasting, 461 U.S. 499, 505 (1953) (The Court stated that the purposes of supervisory power are threefold: "to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy
the contempt power.\textsuperscript{337} The federal courts were created by acts of Congress and their power and duties depend upon the act of calling them into existence. However, the Supreme Court has also recognized that the "power to punish for contempts is inherent in all courts."\textsuperscript{338} "These powers of the courts are in general not subject to negation by the higher courts or by outside agencies,"\textsuperscript{339} with the exception of the regulatory statutes that limit but do not define the distinctions between criminal and civil contempt.

The federal statute regulating contempt is 18 U.S.C. section 401. This statute regulates criminal contempt. There is no federal statute regulating civil contempt other than 28 U.S.C. section 1826 covering Recalcitrant Witnesses. This raises the question whether section 401 also regulates civil contempts:

[W]hile a virtual revolution in procedure has transformed the law of criminal contempt during the last decade, little has changed in the procedures for civil contempt. . . . [A]rguments for a unitary proce-

designed to deter illegal conduct." (citations omitted); McNabb v. United States, 318 U.S. 332 (1943) (This case is generally regarded as the one which advanced supervisory power as an independent basis of decision.); Note, The Judge-Made Supervisory Power of the Federal Courts, 53 Geo. L.J. 1050, 1050 (1965) ("[S]upervisory power has become a catch-all doctrine . . . . The sole common denominator of its usage is a desire to maintain and develop standards of fair play in the federal courts more exacting than the minimum constitutional requirements of due process.").

\textsuperscript{337} Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821), which stated:

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation.

\textit{Id.} at 226. \textit{But see} Brautigam, \textit{supra} note 115, at 1514-15, stating that "[o]ne can hardly deny that in creating a judiciary the constitutional framework contemplated that courts must be granted all powers essential to their operation. However, the claim that the contempt power is one such essential power should be accepted only with reluctance."

\textsuperscript{338} Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873). \textit{See generally} Dowling, \textit{Inherent Power of the Judiciary}, 21 A.B.A. J. 635, 636 (1935) (Inherent power is "essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court."); Kuhns, \textit{supra} note 109, at 496, stating:

These [powers] arguably include the power to define and determine penalties for affronts to its authority, both in the absence of any legislation proscribing contumacious conduct and also, perhaps, in situations in which existing legislation either does not proscribe certain conduct deemed contumacious by the judiciary or does not provide a penalty adequate to vindicate the court's authority.

\textit{Id. But see id., supra} note 109, at 497 (stating that "the Supreme Court has never struck down any congressional regulation of the contempt power."). The regulations in §§ 401-402 and Federal Rule of Criminal Procedure 42 do not infringe upon any interest the judiciary may have in functioning as an independent branch of the government. \textit{Id.} at 499-500.

\textsuperscript{339} Orfield, \textit{supra} note 175, at 441.
dure . . . were resisted on the grounds that the traditional safeguards then available in criminal contempt were unnecessary in civil contempt proceedings. . . . 340

If such reasoning prevails, then the statutory limitations apply to civil and criminal contempts, and consequently, the procedures used will not be dispositive of the nature of the contempt. In such cases, the distinction once again turns on the relief granted or the purpose of the proceeding: vindication of the court's authority or coercion to enforce the court's orders for the benefit of a petitioner. The regulatory statutes do not specify what type of misbehavior constitutes contempt. In this light, Rule 6(e) is unique because the conduct that brings about the contempt citation is clearly improper disclosure of grand jury materials. The question for the court becomes not what conduct elicits a contempt citation, which can often be the initial inquiry. Rather, the question becomes one of how to proceed, under what statutes, and whose rights are being protected or vindicated. If this is determined at the beginning of the adjudication, the regulatory scheme falls into place.

In addition to contempt, the judiciary under its inherent power can dismiss an indictment for prosecutorial misconduct. 341 The Supreme Court has recently decided that courts should exercise their authority to dismiss indictments only when the alleged misconduct prejudiced the accused. 342 The question in deciding the appropriate-


341. See United States v. Serubo, 604 F.2d 807 (3d Cir. 1979), where the court recognized:

that dismissal of an indictment may impose important costs upon the prosecution and the public. At a minimum, the government will be required to present its evidence to a grand jury unaffected by bias or prejudice. But the costs of continued unchecked prosecutorial misconduct are also substantial. This is particularly so before the grand jury, where the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.

Id. at 817; see also United States v. Samango, 607 F.2d 877 (9th Cir. 1979).

342. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). "[T]he District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial in-
ness of other less drastic relief for the petitioner is whether anything short of dismissal deters future misconduct. Because federal courts have traditionally been reluctant to interfere with the grand jury, the final sentence of Rule 6(e)(2), added in 1977, which permits contempt of court sanctions against those who breach grand jury secrecy, has greater significance as an effort to encourage the courts to use their supervisory powers to correct or punish specific misconduct.

Although the grand jury has historically developed as an independent body, it is under the supervision of the courts. The court has power to enforce the investigative functions of the grand jury, because a grand jury may "so exceed its historic authority as to justify a court in interfering with its investigatorial power." 343 This independence was one of the reasons the grand jury has been accorded such wide latitude. 344 However, the courts are reluctant to directly confront procedures and practices of prosecutors. This reluctance has diminished the importance of the grand jury as "a bulwark against despotism" since the prosecutor can now virtually control the grand jury. "Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any

query must focus on whether any violations had an effect on the grand jury's decision to indict." Id. at 263; see also United States v. Mechanik, 475 U.S. 66 (1986) (The Supreme Court held that a guilty verdict at trial cured any defect relating to lack of probable cause at the grand jury level.). But see United States v. Taylor, 798 F.2d 1337, 1340 (10th Cir. 1986) ("Mechanik was carefully crafted along very narrow lines . . . . The Supreme Court in Mechanik did not hold that a Rule 6 violation of any sort . . . which affects the fundamental fairness of the criminal proceedings discovered prior to trial is not justiciable after conviction."); United States v. Vetere, 663 F. Supp. 381, 386 (S.D.N.Y. 1987) ("Supervisory power can be exercised to impose an 'ad hoc' sanction to enforce the appropriate performance of the government in presenting evidence to the grand jury." (citing United States v. Jacobs, 547 F.2d 772, 778 (2d Cir. 1976), cert. granted, 431 U.S. 937 (1977), cert. dismissed, 436 U.S. 31 (1978))).

343. Cain v. United States, 239 F.2d 263, 269 (7th Cir. 1956); see also United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974) (Hufstedler, J., concurring) ("Our supervisory power is not limited to control of conduct that occurs at trial; we have specifically found it to extend to matters involving the grand jury.").

344. See Application of Texas Co., 27 F. Supp. 847 (E.D. Ill. 1939), where the court stated:

A grand jury is a part of the court machinery, an all-important element in the agency of the government endowed with judicial power . . . . It has remained for the courts, tracing the history of the grand jury from the time of early England, to determine for themselves when, upon a particular set of facts and circumstances, a question is presented, just how far a grand jury may properly go or should be allowed to go.

Id. at 850-51; see also United States v. Smyth, 104 F. Supp. 283, 292 (N.D. Cal. 1952) ("[T]here can be no support for the position that the grand jury is an independent planet divorced from the court.").
This transition from the grand jury as a method of protecting the rights of the individual to acting as an arm of the state is striking in light of the historical development of the grand jury. This gradual usurpation of power has resulted in secrecy that now "shields" the actions of the prosecutor.

If the remedies are to be interpreted narrowly, the prosecutor is less likely to have an incentive to respect the target's rights in grand jury investigations. The doctrine of separation of powers may help explain the judicial reluctance. However, considering that some courts will go as far as dismissing indictments for egregious abuse of the system as a way of curtailing prosecutorial misconduct, it is unnecessarily confining to interpret Rule 6(e) as a restriction on judicial discretion. Another possible interpretation from the legislative history of the 1977 amendments is that Congress, given the concerns expressed at the hearings, wanted to encourage the judiciary to use contempt sanctions.

Perhaps the historical respect for the independence of the grand jury is outmoded considering the complicated nature of much modern litigation. Because the prosecutor guides the grand jury, he should be more readily sanctioned for abusing its process. The judiciary, under its inherent power, is in the best position to curtail or prevent such abuse. "The grand jury is under control by the court to the extent

346. See Hale v. Henkel, 201 U.S. 43, 59 (1906) ("[T]he most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused.").
347. Senate Hearing, supra note 335, at 105, which stated:
[T]he grand jury would be "a shield for the innocent and a sword against corruption in high places." How often down through the years have courts invoked these words or similar rhetoric to justify the grand jury's power! But how seldom have these noble words borne any resemblance to the reality of the grand jury's actual role in our criminal justice system!

... We have a situation where an American jurist can accurately assert that "(t)he prosecutor can violate or burn the Bill of Rights seven days out of seven and bring the fruits of unconstitutional activity to a grand jury. No court in the country has the power to look behind what the grand jury considers or why it acts as it does."

Id. at 105-06 (quoting Baltimore Judge Charles E. Moylan, Jr. in Footlick, How to Get Your Man, NEWSWEEK, Dec. 1, 1975, at 113).
348. Note, supra note 336, at 1078, stating:
The supervisory power is often exercised to prevent or correct injustice where existing procedures have proved inadequate. ... [I]t is ... undesirable that an injustice go uncorrected simply because it is not susceptible to correction by traditional remedies. ... [S]upervisory power serves the modern legal system in a
that it is organized by the court and the legality of its proceedings are
determined by the court in accord with the statutes. Its members are
subject to the supervision and control of the court for any violation of
their duties. . . . It may discipline the attorneys, the attendants, or the
grand jurors themselves for breach of secrecy.”349

CONCLUSION

Civil contempt should be a remedy available to those adversely
affected by leaks in grand jury investigations. A narrow interpretation
which precludes civil contempt is not warranted by the legislative his­
tory of the 1977 amendments to Rule 6(e). Additionally, because of
the inherent supervisory powers of the judiciary, such a limitation is
unnecessarily restrictive considering the grand jury’s judicial function
and the ex parte nature of the proceedings. Given the historic reasons
for grand jury secrecy and the stated reasons in Supreme Court deci­
sions, it is unnecessary to give a narrow reading to a rule whose ex­
licit purpose is to protect against further erosion by the government
of the safeguards guaranteed to targets of grand jury investigations.

The secret nature of the preindictment phase of a prosecution al­
lows the government great latitude in the conduct of an investigation
that can irreparably prejudice the defendant both at the grand jury
phase and at trial. Encouraging the court to exercise its discretionary
powers to fashion effective remedies which do not interfere with the
work of the grand jury will protect the defendant, respect the inherent
power of the court, and uphold the fair and effective administration of
justice.

Janice S. Peterson

manner closely resembling the role played by early equity, and represents the
finest feature of modern supervisory power.

Id.

349. Orfield, supra note 175, at 440-41 (footnote omitted).