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AND THE WALLS CAME TUMBLING DOWN: SHARING GRAND JURY INFORMATION WITH THE INTELLIGENCE COMMUNITY UNDER THE USA PATRIOT ACT

Jennifer M. Collins*

As a British politician supposedly once stated, democracies respond when there is blood in the streets.¹ In response to the tragic and horrifying events of September 11, Congress moved with virtually unprecedented speed to enact a sweeping new piece of anti-terrorism legislation known as the USA PATRIOT Act.² One critically important provision of that legislation allows prosecutors, under certain circumstances, to disclose grand jury information to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official.³ As a result of this exception to grand jury secrecy, federal prosecutors are now authorized to disclose grand jury material—testimony before the grand jury as well as documents produced in response to grand jury subpoenas—that contains foreign intelligence or counterintelligence information. Moreover, unlike the previous exceptions to grand jury secrecy, this new exception requires neither judicial pre-approval nor detailed post-disclosure reporting. In its starkest terms, therefore, this legislation, for the first time, gives the Central Intelligence Agency (“CIA”) and our nation’s other intelligence and defense agencies entry into the grand jury—one of the most powerful and secretive domains of domestic law enforcement.⁴ Moreover, this access to the grand jury is essentially unsupervised.

This Article analyzes the dramatic new exception to the long-standing tradition of grand jury secrecy implemented by the USA PATRIOT Act. Part I discusses the tradition of grand jury secrecy as codified by Rule 6(e) of the Federal Rules of

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1. *Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium Transcript*, 21 MICH. J. INT’L L. 527, 564 (1999) (remarks of Steve Emerson).

2. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter “USA PATRIOT Act” or “the Act”].

3. *Id.* § 203(a), 115 Stat. at 278-80.

4. Jim McGee, *An Intelligence Giant in the Making*, WASH. POST, Nov. 4, 2001, at A4. The American Civil Liberties Union was even more blunt in its assessment of the Act, proclaiming that the USA PATRIOT Act “puts the Central Intelligence Agency back in the business of spying on Americans.” American Civil Liberties Union Freedom Network, *How the Anti-Terrorism Bill puts the CIA Back in the Business of Spying on Americans*, (Oct. 23, 2001) at 1, at <http://www.aclu.org/congress/1102301j.html>.

Criminal Procedure,⁵ noting in particular the limited exceptions to such secrecy in place before the USA PATRIOT Act. Part II summarizes the changes to Rule 6(e) adopted in the USA PATRIOT Act. Part III analyzes this new exception in light of the traditional concerns—furtherance of the government’s investigative capabilities and protection of the innocent accused—that have animated the policy of grand jury secrecy. This Article concludes that, while the new exception created by the USA PATRIOT Act to the traditional secrecy rules that protect the work of the grand jury is, on balance, justified by the national security concerns that animated the Act, Congress failed to include sufficient safeguards within the Act to guard against the kinds of abuses that drove Congress to separate domestic law enforcement and the intelligence community twenty-five years ago. As a result, Part IV suggests that the Act should be modified in order to ensure greater accountability. Specifically, prosecutors should be required both to obtain prior approval from a special court before disclosing grand jury information to the intelligence community and to maintain sufficient records to permit searching congressional oversight.

I. THE PRIOR REGIME

Section 203 of the USA PATRIOT Act amends Rule 6(e) of the Federal Rules of Criminal Procedure. Rule 6(e) codified a longstanding tradition of diligently preserving the secrecy of grand jury proceedings.⁶ Secrecy has been an important component of the grand jury process since at least the seventeenth century, when grand jurors successfully objected to the king’s efforts to publicize—and thereby politicize—grand jury proceedings.⁷ This tradition of secrecy was incorporated by

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

6. See *United States v. Sells Eng’g*, 463 U.S. 418, 425 (1983). The history of the grand jury itself has been described in exhaustive detail elsewhere and need not be repeated in its entirety here. See, e.g., 1 SARA SUN BEALE, ET AL., *GRAND JURY LAW AND PRACTICE* §§ 1:1-1:8 (2d ed. 1997). For the purposes of this article, it is sufficient to note that the modern grand jury can trace its origins as far back as the twelfth-century English “accusing jury,” whereby men from local townships gathered together at the king’s directive to levy accusations against their neighbors. *Id.* § 1:2. Each of the original English colonies in North America used some version of a grand jury system, with the colony of Virginia initiating the tradition possibly as early as 1625. *Id.* § 1:3. Grand juries were used for various administrative matters in the different colonies as well as for the initiation of criminal prosecutions. *Id.* After the Revolutionary War, each state and the new federal government ultimately instituted grand jury systems. *Id.* § 1:4. Commentators of the period emphasized the importance of the grand jury in protecting the innocent accused from accusations later determined to be unfounded. *Id.* (citing Coke’s Institutes, Henry Care, and Blackstone). Although the original version of the Constitution did not contain a grand jury provision, objections from various states ultimately led to the adoption of the Fifth Amendment. *Id.* The federal government and approximately half of the states maintain some requirement of indictment by grand jury today. *Id.* § 1:7.

7. SUSAN W. BRENNER & GREGORY G. LOCKHART, *FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE* § 7.02 (1996). See also Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 13 (1996) (explaining that “[w]ith the shroud of secrecy came independence from the king”).

the American colonies into their own grand jury systems.⁸ Challenges to the principle of grand jury secrecy began almost immediately,⁹ with courts typically determining that the government's interest in maintaining the secrecy of grand jury proceedings trumped the defendant's need for access to those proceedings.¹⁰ This common law tradition of safeguarding grand jury secrecy was codified in 1946 when the Federal Rules of Criminal Procedure took effect.¹¹

In essence, Rule 6(e) orders prosecutors and grand jurors, although not the witnesses themselves,¹² to keep information related to a grand jury investigation secret. The rule provides that these individuals, and other administrative and investigatory personnel, "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."¹³ Although courts have often struggled with the definition of what constitutes "matters occurring before the grand jury,"¹⁴ it is incontrovertible that the substance of any testimony given before the grand jury may not be disclosed to anyone except under very limited circumstances, such as to another grand jury¹⁵ or when ordered to do so by a judge in connection with a judicial proceeding.¹⁶ Perhaps the most commonly used

8. See *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.9 (1979) (noting importation of secrecy into American grand jury proceedings); SUSAN W. BRENNER & GREGORY G. LOCKHART, *supra* note 7, § 8.1 (tracing history of principle of grand jury secrecy).

9. See *Kadish*, *supra* note 7, at 16 n.113 (discussing successful attempt by defendant in 1806 to pierce veil of grand jury secrecy to determine whether an indictment was secured on basis of illegal evidence).

10. *Id.* at 17-18, n.122 (citing cases supporting idea that courts upheld secrecy of grand jury).

11. *Id.* at 23.

12. See FED. R. CRIM. P. 6(e)(2) (providing that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule"). Notwithstanding this language in Rule 6(e), there is a conflict in the caselaw as to whether the courts retain some residual authority to issue orders silencing witnesses in exceptional cases. Compare *United States v. Kilpatrick*, 821 F.2d 1456, 1472 (10th Cir. 1987) (finding prosecutors acted improperly in imposing secrecy obligation on grand jury witnesses), and *In re Grand Jury Subpoena*, 103 F.3d 234, 240 (2d Cir. 1996) (noting district court cannot prohibit witness from disclosing testimony), with *In re Subpoena to Testify Before the Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1563-64 (11th Cir. 1989) (affirming order preventing grand jury witnesses "from disclosing materials prepared for or testimony given in the grand jury proceedings or related proceedings"). See generally *In re Grand Jury Proceedings*, 814 F.2d 61, 69 (1st Cir. 1987) (discussing conflicting approaches of various courts).

13. FED. R. CRIM. P. 6(e)(2). Rule 6(e)(2) applies to "[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 other person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision." *Id.*

14. See, e.g., *In re Sealed Case No. 99-3091* (Office of Independent Counsel Contempt Proceeding), 192 F.3d 995, 1001-05 (D.C. Cir. 1999) (attempting to define, in context of alleged media leaks during Independent Counsel's investigation into possible acts of perjury and obstruction of justice by President Clinton, what constitutes matters occurring before the grand jury); *In re Grand Jury Subpoena*, 103 F.3d at 238-39 (discussing meaning of "matters occurring before the grand jury").

15. See FED. R. CRIM. P. 6(e)(3)(C)(iii) (authorizing disclosure "by an attorney for the government to another federal grand jury").

16. See FED. R. CRIM. P. 6(e)(3)(C)(i) (authorizing disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding"). In addition to the exceptions to secrecy set forth in Rule 6(e), several courts have also held that they possess "inherent power" to order the release of grand jury information even in circumstances not contemplated by Rule 6(e). See, e.g., *In re Petition of Craig*, 131 F.3d 99, 102-03 (2d Cir. 1997) (holding that a district court had authority to release grand jury material in "special circumstances," even when

exception to Rule 6(e)'s general policy of secrecy is that permitting disclosure to law enforcement personnel assisting a prosecutor with a criminal investigation.¹⁷ Any prosecutor making a disclosure to law enforcement personnel under this section must "promptly" provide to the district court that impaneled the grand jury the names of the individuals to whom grand jury information was disclosed and the prosecutor must also certify to the district court that she has advised those individuals of their secrecy obligations.¹⁸

In interpreting Rule 6(e), the Supreme Court has repeatedly reaffirmed the importance of preserving the secrecy of grand jury proceedings.¹⁹ In *Sells Engineering*, for example, the Court refused to permit Justice Department prosecutors to give automatic access to grand jury materials even to their own colleagues in the Justice Department's Civil Division.²⁰ The only way such attorneys can gain access to grand jury materials is to make a "strong showing of particularized need" to a judicial officer.²¹ The *Sells* Court emphasized that the grand jury would in fact be unable to function if the secrecy of its proceedings were not carefully maintained.²² Indeed, the Court has gone so far as to call grand jury secrecy "indispensable."²³

The federal courts have traditionally cited five different interests that are served by maintaining the secrecy that protects the work of the grand jury. These interests are: (1) preventing the escape of putative defendants who are being investigated by the grand jury; (2) preventing such defendants from suborning perjury or otherwise tampering with potential witnesses; (3) preventing such defendants from

exceptions in Rule 6(e)(3) did not apply); *In re* Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261, 1267-69 (11th Cir. 1984) (affirming order releasing grand jury material to judicial investigating committee under court's inherent power, even though release for such purposes was not set forth in Rule 6(e)(3)).

17. See FED. R. CRIM. P. 6(e)(3)(A)(ii) (authorizing disclosure to "[s]uch government personnel . . . as are deemed necessary . . . to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law").

18. See FED. R. CRIM. P. 6(e)(3)(B). This certification provision was not added to Rule 6(e) until 1985. See Kadish, *supra* note 7, at 62 (noting that "the Supreme Court . . . strengthened the secrecy language of Rule 6(e)" in 1985).

19. See, e.g., *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211 (1979) (holding district court abused its discretion in releasing grand jury transcripts to plaintiffs in civil antitrust action); *United States v. Proctor & Gamble*, 356 U.S. 677 (1958) (holding defendants in civil antitrust suit had not established "good cause" sufficient to justify disclosure of grand jury materials); see also Kadish, *supra* note 7, at 34-40 (containing an exhaustive discussion of *Proctor & Gamble* litigation).

20. *United States v. Sells Eng'g*, 463 U.S.418, 427 (1983). See also Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699, 703-07 (2002) (discussing *Sells Engineering* decision).

21. *Sells Eng'g*, 463 U.S. at 442.

22. *Id.* at 424 (citing *Douglas Oil*, 441 U.S. at 218-19).

23. See *United States v. Johnson*, 319 U.S. 503, 513 (1943). For other discussions of the importance of grand jury secrecy, see, e.g. *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991); *In re Petition of Craig*, 131 F.3d 99, 101-02 (2d Cir. 1997); *In re EyeCare Physicians of Am.*, 100 F.3d 514, 518 (7th Cir. 1996); *In re North*, 16 F.3d 1234, 1242 (D.C. Cir. 1994); *In re Grand Jury Proceedings*, 942 F.2d 1195, 1198 (7th Cir. 1991).

importuning the grand jurors themselves, and thereby ensuring that grand jurors can deliberate free from improper influence; (4) encouraging frank and fulsome disclosure from witnesses called before the grand jury; and (5) protecting accused individuals later determined to be innocent from public censure and ridicule.²⁴ The adoption of Rule 6(e) ensured that these interests would be protected by strictly limiting the circumstances in which the need for disclosure would be found to “outweigh[] the public interest in secrecy.”²⁵

One of the Supreme Court’s most recent grand jury decisions, *United States v. Williams*,²⁶ sounded the two themes of defense of and deference to grand juries that have resonated throughout the Court’s jurisprudence in this area. In *Williams*, the Court ruled that an otherwise valid indictment could not be dismissed because the prosecutor failed to present exculpatory evidence to the grand jury.²⁷ As usual, the Court defended the unique role of the grand jury in our criminal justice system, remarking that the grand jury is “‘rooted in long centuries of Anglo-American history’”²⁸ and is a “‘constitutional fixture in its own right.’”²⁹ The Court also emphasized the limited nature of the judiciary’s oversight authority in reference to the routine functioning of the grand jury, noting the grand jury’s “tradition of independence”³⁰ and “operational separateness from its constituting court.”³¹ This

24. See *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931) (traditionally recognized as the first judicial opinion setting forth the justifications for maintaining grand jury secrecy). See also *Douglas Oil*, 441 U.S. at 218-19; *Proctor & Gamble*, 356 U.S. at 681-82 (citing these five interests as justifying the preservation of grand jury secrecy); 1 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE* § 106, n.6 (3d ed. 1999) (setting forth chronology of case law incorporating these justifications for grand jury secrecy).

25. *Douglas Oil*, 441 U.S. at 223.

26. 504 U.S. 36 (1992). See generally Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 571 (1994) (containing a lengthy discussion of *Williams* decision and arguing that it had the “significant collateral effect” of “strengthening grand jury secrecy”).

27. *Williams*, 504 U.S. at 52.

28. *Id.* at 47 (quoting *Hannah v. Larche*, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result)).

29. *Id.* (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977) (quoting *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (1973)), *cert. denied*, 434 U.S. 825 (1977)). See also *United States v. Butterworth*, 494 U.S. 624, 629 (1990) (“[h]istorically, the grand jury has served an important role in the administration of criminal justice”); *United States v. Sells Eng’g*, 463 U.S. 418, 423 (1983) (“[t]he grand jury has always occupied a high place as an instrument of justice in our system of criminal law”); *United States v. Calandra*, 414 U.S. 338, 343 (1974) (“[i]n this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by a ‘presentment or indictment of a Grand Jury’”).

30. *Williams*, 504 U.S. at 49.

31. *Id.* See also *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973) (“if [the grand jury] is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it”). In fact, in *Williams*, the Court explicitly said that the courts’ supervisory authority over the grand jury does not include the power to “prescrib[e] . . . standards of prosecutorial conduct in the first instance.” 504 U.S. at 46-47. Rather, the Court noted that such authority was limited to “enforcing or vindicating legally compelled standards of prosecutorial conduct”—that is, standards established by the Constitution or by statute. *Id.*; see also *United States v. Myers*, 123 F.3d 350, 356 (6th Cir. 1997) (noting that in *Williams*, the Court “[e]ssentially remov[ed] all general supervisory authority over the grand jury from the federal courts”). Indeed, the Court

longstanding tradition of judicial deference in matters involving the grand jury, when coupled with an even more powerful tradition of judicial deference in matters involving national security,³² highlights the potential pitfalls in the grand jury provision of the USA PATRIOT Act.

II. THE USA PATRIOT ACT

The USA PATRIOT Act is legislation of almost staggering scope and complexity; at 342 pages long, it covers 350 subject areas and involves forty different federal agencies.³³ Enacted with near-record speed, the USA PATRIOT Act addresses virtually every conceivable area of federal law enforcement authority. The Act dramatically expands the authority of federal agencies to conduct wiretapping and other electronic surveillance while simultaneously curtailing judicial oversight.³⁴ The Act also increases authorization to use more conventional law enforcement tools for intelligence purposes by allowing, for example, greater access to business records³⁵ and increased use of secret searches.³⁶ Additionally, the Act augments and increases the authority of the Attorney General to detain and

contrasted the courts' extremely limited supervisory authority over prosecutors' actions before the grand jury with the broad powers over prosecutors' conduct before the courts themselves. *See Williams*, 504 U.S. at 47. *See generally* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

32. *See generally* Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305-17 (1988) (discussing the judiciary's abdication of its oversight responsibilities regarding the Executive Branch's exercise of authority in matters of national security).

33. *See* Martha Mendoza, *New Anti-Terror Law Brings Consternation: Security Officials and Lawyers Scramble to Decipher Complex Provisions. Federal Guidance is in Short Supply*, L.A. TIMES, Dec. 16, 2001, at A4 (describing length and scope of USA PATRIOT Act).

34. USA PATRIOT Act § 218. This provision will allow the government to use the far easier standards for obtaining authority to conduct electronic surveillance that are set forth in the Foreign Intelligence Surveillance Act ("FISA"), rather than the more stringent standards set forth in Title III, in a far greater number of situations. The USA PATRIOT Act now authorizes the government to use the FISA standard in any situation where the gathering of intelligence information is merely a "significant purpose" of the surveillance, rather than "the purpose" as FISA previously required. *Id.* (emphasis added). Senator Russ Feingold, the lone senator to vote against the USA PATRIOT Act, was particularly concerned about this provision, noting that "the FBI will . . . [now] try to use FISA as much as it can" and therefore "fourth amendment rights will be significantly curtailed in many investigations of terrorist acts." 147 CONG. REC. S10990, 11021-22 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold). Other commentators have expressed concerns about the provisions of the bill that extend roving wiretap authority to FISA wiretaps. *See* Susan Herman, *The USA PATRIOT Act and the US Department of Justice: Losing Our Balances?*, JURIST, Dec. 3, 2001, at <http://jurist.law.pitt.edu/forum/forumnew40.htm> (questioning extension of surveillance into arena of content and whether checks on these new powers exist). *See also* American Civil Liberties Union Freedom Network, *In Congress: USA Patriot Act Boosts Government Powers while Cutting Back on Traditional Checks and Balances*, Nov. 1, 2001, at <http://www.aclu.org/congress/110101a.html>.

35. USA PATRIOT Act § 215. *See* American Civil Liberties Union Freedom Network, *supra* note 34 (arguing the Act gives the FBI power to "force a business to turn over a person's educational, medical, financial, mental health and travel records based on a very low standard of proof and without meaningful judicial oversight").

36. USA PATRIOT Act § 213. This was another provision that was of grave concern to Senator Feingold, who argued that it constituted "a significant infringement on personal liberty." 147 CONG. REC. S10990, 11021-22 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold).

deport non-citizens who are certified as a danger to national security or who belong to certified terrorist organizations, with only minimal provision for judicial review.³⁷ Through a substantial rewriting of Rule 6(e) of the Federal Rules of Criminal Procedure, the Act also authorizes the sharing of domestic grand jury information with the intelligence community.³⁸

Under § 203(a) of the USA PATRIOT Act, when matters occurring before the grand jury involve foreign intelligence or counterintelligence information, disclosure can be made to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official.³⁹ Only three restrictions are placed on the disclosure: the official who receives the information may only use it in the course of his official duties; the use is “subject to any limitations on the unauthorized disclosure of such information”; and “within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed” and the departments to which it was disclosed.⁴⁰ The definition of foreign intelligence information is identical to the extraordinarily broad definition used in the Foreign Intelligence Surveillance Act, which is discussed in greater detail below.⁴¹ It includes information relating to the ability of the United States to guard against actual or potential attack, sabotage or terrorism; clandestine intelligence activities; and information relating to the national defense, security, or foreign affairs of the United States.⁴²

The USA PATRIOT Act was enacted with virtually unprecedented speed, with only six weeks elapsing between the Bush Administration’s initial proposal of

37. USA PATRIOT Act § 412. *See generally* Herman, *supra* note 34.

38. Other provisions of the Act also authorize a greater sharing of information between the domestic law enforcement and the intelligence communities. *See, e.g.*, USA PATRIOT Act § 203(b) (authorizing disclosure of contents of information obtained from Title III wiretaps to the extent those “contents include foreign intelligence or counterintelligence . . . or foreign intelligence information”). The limitation to the disclosure of “contents” presumably means that the grant of disclosure authority under § 203(b) is narrower than that in § 203(a), which contains no such limitation.

39. USA PATRIOT Act § 203(a)(1) (amending FED. R. CRIM. P. 6(e)(3)(C)). As amended, the Rule now reads:

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

(v) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.

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

40. USA PATRIOT Act § 203(a).

41. *See infra* notes 116-21 and accompanying text.

42. *Id.*; *see also* Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(e) (1996 & Supp. 2001) (defining “foreign intelligence information”).

anti-terrorism legislation and the enactment of the bill in its final form.⁴³ As a result, the legislative history is strikingly spartan, particularly considering the expansive nature of the Act.⁴⁴ The original House and Senate versions of the bill initially contained very different versions of the proposal permitting more widespread dissemination of grand jury information. The House version allowed disclosure of grand jury information only when authorized by a court.⁴⁵ The Senate version, by contrast, contained no requirement of prior judicial authorization or even of subsequent judicial notification.⁴⁶ The question of whether to include a judicial authorization requirement within the bill apparently was a point of controversy between the White House and the Senate Judiciary Committee, with the parties ultimately compromising on language mandating only judicial notification.⁴⁷

Senator Patrick Leahy's statement on the day the Senate considered the final version of the Act makes plain that some lawmakers had grave concerns about authorizing the widespread dissemination of grand jury information. Senator Leahy emphasized that permitting foreign intelligence information from domestic law enforcement operations to be shared with the intelligence community constituted a "grave[] departure" from prior practice and was one of the portions of the bill with the "most potential for abuses."⁴⁸ Indeed, Senator Leahy specifically noted that this new statutory authority constituted an "invitation to abuse without special safeguards."⁴⁹

Despite these stern warnings, however, Senator Leahy then seemed to take comfort in the judicial notification provision that was added to the bill by the Senate; this provision was not included in the initial proposal delivered to Congress by Attorney General Ashcroft. The Senator claimed that the judicial notice provision "maintain[ed] some degree of judicial oversight of the dissemination of grand jury information."⁵⁰ He conspicuously failed to address the problem

43. President Bush submitted his anti-terrorism legislation to Congress on September 19, 2001, and signed the final version of the bill on October 26, 2001. *See also* Mendoza, *supra* note 33, at A4 (discussing speed with which the Act was enacted).

44. *See* Mendoza, *supra* note 33, at A4 (citing interview with Erwin Chemerinsky, who notes that Congress held no hearings on the bill that became the USA PATRIOT Act, resulting in very limited legislative history).

45. H.R. 2975, 107th Congress, § 353 (2001).

46. S. 1510, 107th Congress, § 203 (2001).

47. Senator Leahy reported that the Bush Administration agreed, on September 30, 2001, to Leahy's proposal requiring "judicial review" of requests to disclose grand jury information, but that the Administration "renege[d] within two days." *See* 147 CONG. REC. S11002 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy). *See also* John Lancaster, *Anti-Terrorism Bill Hits Snag on the Hill*, WASH. POST, Oct. 3, 2001, at A6; John Lancaster, *Senate Democrats, White House Reach a Deal on Anti-Terror Bill*, WASH. POST, Oct. 4, 2001, at A21; Stewart Baker, *Grand Jury Secrecy Rules Help the Terrorists*, WALL ST. J., Oct. 5, 2001, at A14 (stating "Senate negotiators stalled the entire bill" over proposal authorizing wider disclosure of grand jury information).

48. 147 CONG. REC. S10993 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

49. *Id.*

50. *Id.*

that post hoc judicial notification leaves judges with very little authority to oversee anything at all.

The remainder of the limited commentary that was offered during the legislative process regarding the grand jury provision was generally favorable. For example, Attorney General John Ashcroft informed Congress that allowing more widespread dissemination of intelligence information was a critically important piece of the new authority sought by the administration.⁵¹ Senator Orrin Hatch simply noted the addition of the judicial notification requirement with approval.⁵² Senator Russ Feingold, who cast the lone Senate vote against the USA PATRIOT Act and issued a statement criticizing many of the Act's provisions, failed to address the grand jury provision at all.⁵³ Morton Halperin, testifying on behalf of the Center for National Security Studies, noted that the proposals "concerning the sharing of information on Americans with the intelligence community," which include the grand jury proposal, represent a "sea change in laws that have been on the books for thirty years" segregating domestic law enforcement and the intelligence community.⁵⁴ Although Dr. Halperin urged Congress to move cautiously, ultimately he testified that the Bush Administration's proposal was appropriate, while urging Congress to include language mandating court approval for the disclosure.⁵⁵ Only one commentator, Jerry Berman, strongly condemned the grand jury proposal, noting that it was a "sweeping change in the law" and urging that it be "drastically curtailed."⁵⁶

51. *Administration's Draft, Anti-Terrorism Act of 2001: Hearing Before the House Comm. on the Judiciary; 107th Cong.* (Sept. 24, 2001) (testimony of Attorney General John Ashcroft). Former government officials also spoke out in favor of the grand jury proposal. Stewart Baker, the former general counsel of the National Security Agency, argued vehemently in the proposal's favor, writing that "barriers to information-sharing between intelligence and law enforcement agencies have already cost us dearly in the fight against terror." Baker, *supra* note 47, at A14. Indeed, Baker went so far as to argue, without any cited factual support, that "grand jury secrecy rules may be one reason we didn't anticipate the Sept. 11 attack . . . because the CIA was hobbled in its review of the first attack [on the World Trade Center]—by grand jury secrecy." *Id.* See also Seth Waxman, *Needed: Coordination*, BOSTON GLOBE, Oct. 7, 2001, at D7 (editorial by former Solicitor General arguing that "intelligence and criminal investigations cannot be hermetically sealed and separated").

52. See 147 CONG. REC. S11023 (daily ed. Oct. 25, 2001) (statement of Sen. Hatch).

53. See 147 CONG. REC. S11019-22 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold).

54. *Legislative Proposals in the Wake of September 11, 2001 Attacks: Before the Permanent Select Comm. on Intelligence of the United States Senate*, 107th Cong. (Sept. 24, 2001) (statement of Morton H. Halperin, Chair, Advisory Board, Center for National Security Studies).

55. *Civil Rights and Anti-Terrorism Efforts: Before the United States Senate Judiciary Comm. Subcomm. on the Constitution, Federalism, and Prop. Rights*, 107th Cong. (Oct. 3, 2001) (testimony of Dr. Morton H. Halperin, Senior Fellow, the Council on Foreign Relations and Chair, Advisory Board, Center for National Security Studies). Dr. Halperin also urged restricting the kind of information that could be disclosed to foreign intelligence officials, limiting disclosure to officials "directly involved in a terrorism investigation, and "mark[ing] and safeguard[ing] any disclosed information." *Id.*

56. *Legislative Proposals in the Wake of September 11, 2001 Attacks: Before the Permanent Select Comm. on Intelligence of the United States Senate*, 107th Cong. (Sept. 24, 2001) (testimony of Jerry Berman, Executive Director, Center for Democracy and Technology). Mr. Berman was particularly concerned that the proposal "require[d] no showing of need and include[d] no standard of supervisory review or approval." *Id.*

III. SHARING GRAND JURY INFORMATION WITH THE INTELLIGENCE COMMUNITY

The grand jury provision of the USA PATRIOT Act raises three particular questions: (1) whether permitting prosecutors to share grand jury information with the intelligence community is a sensible policy decision in the abstract; (2) if it is a sensible policy choice, whether Congress drafted § 203 in a manner that effectively protects the core functions and protections of the grand jury process; and (3) whether Congress should consider modifications to § 203 if it revisits this terrorism legislation in the future.

First, is permitting prosecutors to widely share grand jury information with the intelligence community a sensible policy decision? Critics of the grand jury system are obviously legion,⁵⁷ and this is one just one of the many proposals that has been made to modify grand jury practices and procedures.⁵⁸ Although many critics of the grand jury system have advocated passionately for greater access to grand jury proceedings,⁵⁹ giving the CIA, the Immigration and Naturalization Service (“INS”), the Department of Defense, and the National Security Agency, among others, virtually unfettered access to grand jury transcripts, documents, and databases is hardly the kind of reform they had in mind.⁶⁰

Any modification to existing grand jury practices, such as the USA PATRIOT Act, should be analyzed utilizing a three-part framework. The first two parts of the analysis derive from the historical conception of the grand jury as both a sword and a shield: a sword that helps the government ferret out and investigate crimes and a shield that helps prevent the reputations of the innocent accused from being sullied by accusations later determined to be unfounded.⁶¹ Thus, we must consider the extent to which this proposal furthers the government’s ability to investigate criminal activity and the extent to which the proposal undermines the protections

57. See generally, e.g., MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* (1977); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980).

58. See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 288-89 (1995) (cataloging various proposals). Proposals for reform have included requiring prosecutors to present exculpatory evidence to the grand jury, see R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 385-92 (2000) (discussing various state statutes imposing duty of disclosure on prosecutors), and providing targets of a grand jury’s investigation with the opportunity to appear before the grand jury, see *id.* at 384 (listing four states that under certain circumstances permit target of grand jury investigation to appear before grand jury).

59. See, e.g., Bernstein, *supra* note 26, at 563.

60. A more typical example can be found in Washington, D.C., where a court reform organization consisting of judges, academics, and private attorneys has recently proposed a number of grand jury reforms, including giving targets of grand jury investigations the right to testify and requiring prosecutors to present exculpatory evidence. See *THE GRAND JURY OF TOMORROW: NEW LIFE FOR AN ARCHAIC INSTITUTION* (Council for the Court Excellence) (July 2001) (containing recommendations to improve federal and local grand juries).

61. See Leipold, *supra* note 58, at 263; Cassidy, *supra* note 58, at 362.

the grand jury historically has afforded to prospective defendants and witnesses.⁶² The third part of the analysis is perceptual: does turning grand jury material over to the CIA and other agencies undermine the public's faith in the grand jury as an institution?⁶³ After all, as the Supreme Court has told us, the appearance of justice is an important component of any constitutionally and publicly legitimate criminal procedure regime.⁶⁴

On its face, permitting the government to disseminate grand jury information more widely would seem to further the government's interests in successfully investigating and prosecuting crime. If, for example, a witness tells a grand jury the names of some members of a terrorist cell operating overseas, the odds that the government would be able successfully to locate and ultimately prosecute members of that cell are greater if the capabilities of the CIA can be brought to bear on the problem. Interestingly, however, the Supreme Court has expressed the view that wider disclosure of grand jury information would *undermine* the government's ability to investigate crimes,⁶⁵ and indeed four of the five reasons the Court has traditionally cited as justifying its tradition of maintaining the secrecy of grand jury proceedings have favored the prosecution's interests rather than the defendant's.⁶⁶

There are two principal ways in which permitting disclosure of grand jury information to intelligence agencies might compromise the government's ability to investigate allegations of criminal wrongdoing. First, witnesses might be more reluctant to testify fully and candidly if they know that any information they provide could be used not only by the prosecutor's office, but also by the CIA, the INS, and

62. See generally *United States v. Williams*, 504 U.S. 36, 51 (1992) (striking down Tenth Circuit rule requiring prosecutor to disclose exculpatory information to grand jury and noting "[t]he rule would neither preserve nor enhance" the grand jury's "twin historical responsibilities").

63. Because it is the USA PATRIOT Act's potential to entwine the CIA in matters of domestic law enforcement that raises the most concerns among various individuals and organizations that have commented on the Act, this Article focuses on the problems posed by disclosure of grand jury information to the CIA. That focus is not intended to imply that disclosure to other entities, such as the Department of Defense, may not be as problematic. See, e.g., *American Civil Liberties Union Freedom Network*, *supra* note 3, at 1-2 (noting that the Act permits the "wide sharing of sensitive information gathered in criminal investigations by law enforcement agencies including the CIA and the NSA, and other federal agencies, including the INS, Secret Service, and Department of Defense").

64. See, e.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (noting Due Process Clause's neutrality requirement "preserves both the appearance and reality of fairness"). See also *Bernstein*, *supra* note 26, at 566 n.25 (discussing Supreme Court's interest in preserving appearance of justice). Justice Stevens reiterated the importance of this principle in his recent impassioned dissent in *Mickens v. Taylor*, arguing that "justice must satisfy the appearance of justice." *Mickens v. Taylor*, 122 S. Ct. 1237, 1253 (2002) (Stevens, J., dissenting) (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954); see also *Mickens*, 122 S. Ct. at 1265 (Breyer, J., dissenting) (objecting to the Court's holding because it "would diminish that public confidence in the criminal justice system upon which the successful functioning of that system continues to depend").

65. See *United States v. Sells Eng'g*, 463 U.S. 418, 432 (1983) (noting wider disclosure might make witnesses far less willing "to testify fully and candidly").

66. See *Bernstein*, *supra* note 26, at 572 ("secrecy, which historically protected the grand jury's target, now primarily protects the interests of the prosecution").

the Defense Department.⁶⁷ This concern, however, is more theoretical than real, both because most witnesses do not know what disclosures are permitted under Rule 6(e)⁶⁸ and because it strains credulity to suggest that a witness would testify truthfully if only the FBI could see his testimony but would draw the line if he knew the Department of Defense could read it as well.⁶⁹ Second, permitting disclosure might marginally increase the chance that the target of a grand jury investigation would become aware of the proceedings, simply because increasing the number of people with access to information increases the odds that someone will tell the target.⁷⁰ Again, this concern is more theoretical than real; it is hard to imagine that a CIA or Defense Department employee will rush to inform potential targets of their status as such. In fact, the intelligence community is generally much better at—and much more serious about—keeping secrets than the Department of Justice. The CIA, for example, obviously places great emphasis on secrecy.⁷¹

The principles underlying grand jury secrecy can be reduced to two essential premises: (1) to keep the existence of a grand jury investigation a secret from defendants to prevent defendants' intervention;⁷² and (2) to keep the investigation a secret from the media, and thereby from the public, to prevent embarrassment of prospective defendants.⁷³ With respect to the first premise, witnesses who possess

67. *Sells Eng'g*, 463 U.S. at 432 (“disclosure to [other] Government bodies . . . renders considerably more concrete the threat to the willingness of witnesses to come forward and to testify fully and candidly”).

68. I do not believe that prosecutors routinely advise witnesses in detail of the strictures set forth by Rule 6(e). Witnesses are typically advised of their right against self-incrimination, of their right to counsel, and of the prosecutor's and agents' obligation to keep the fact of their appearance and the details of their testimony secret. Witnesses are sometimes told that the Rules of Criminal Procedure do not impose an obligation of secrecy on them. To my knowledge, witnesses are not advised in any further detail about the exceptions to Rule 6(e)'s general secrecy requirement.

69. *See* Beale & Felman, *supra* note 20, at 711 (arguing that because of preexisting exceptions to Rule 6(e), “it seems likely that the incremental added impact on witnesses from the possible disclosure of their testimony to various intelligence and defense agencies will be small”). The one situation in which wider disclosure might raise real concerns for witnesses is in the immigration context. Witnesses who are not American citizens often are acutely sensitive to any possible involvement by the INS in a criminal matter.

70. *Cf. Sells Eng'g*, 463 U.S. at 432 (discussing concerns raised by disclosure to government attorneys).

71. *See generally* Haig v. Agee, 453 U.S. 280 (1981) (discussing revocation of passport of former CIA employee who disclosed confidential CIA information); *Snepp v. United States*, 444 U.S. 507 (1980) (discussing imposition of constructive trust on profits earned by former CIA employee for publication of book in breach of his fiduciary obligation to obtain prepublication authorization). Professor Koh cites these cases as examples of the judiciary's deference to the President in matters of national security. *See* Koh, *supra* note 32, at 1317. *See also* Baker, *supra* note 47, at A14 (questioning whether Department of Justice personnel “will do a better job of protecting a suspect's privacy than CIA analysts who, after all, are in the business of keeping far more important secrets than that”).

72. *See Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979) (discussing role secrecy plays in keeping grand jury investigations free from both taint and retribution).

73. *See Illinois v. Moran*, 740 F.2d 533, 540 (7th Cir. 1984) (noting reputation of person named by a witness in his grand jury testimony “may be at stake if his grand jury testimony is disclosed”); *In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973) (noting tradition of grand jury secrecy rests on, among other interests, the interest of “other persons who may have been unfavorably mentioned by grand jury witnesses”). *See also* Daniel Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 354 (1999) (discussing why witnesses might have special interest in secrecy of grand jury proceedings).

the most incriminating—and thus the most useful—information are often associates and confidantes of the defendant. They are therefore far more likely to leak the existence of a grand jury investigation to a defendant than is an intelligence or defense official.⁷⁴ If we are willing to absorb the costs to law enforcement of permitting witnesses to disclose grand jury information to third parties, it is difficult to understand how permitting prosecutors to share information poses any greater threat to the government's ability to investigate crime.⁷⁵ Although the fact that permitting prosecutors to make these kinds of disclosures will not weaken the government's law enforcement capabilities cannot end our inquiry,⁷⁶ it does indicate that at least one of the grand jury's "twin historical responsibilities" would not only be preserved, but also enhanced, by § 203.⁷⁷

As for the second part of the analysis, it is interesting to note that the traditional complaint of criminal defendants has been that grand jury proceedings are too secret, not that they are not secret enough.⁷⁸ Here, however, there is no question that wider disclosure will significantly undermine even the very few protections that secrecy has traditionally afforded to potential defendants.⁷⁹ First, although increasing the number of people who know about grand jury information may not increase the chances that information will be leaked to the target, it undoubtedly increases the chances that information will be leaked to the media, a development that would obviously threaten the Supreme Court's interest in keeping those individuals who are investigated but ultimately exonerated free from public censure and ridicule.

74. Neither the federal government nor the majority of states with rules analogous to Rule 6(e) subject witnesses to a requirement of secrecy "with respect to their own testimony." *Butterworth v. Smith*, 494 U.S. 624, 634-35 (1990). In *Butterworth*, the Court struck down a Florida state statute that attempted to impose a duty of secrecy on grand jury witnesses by prohibiting witnesses from disclosing their own testimony even after the grand jury's term had expired.

75. Beale and Felman argue that the government's investigative capabilities might in fact be adversely impacted if subsequent grand jury witnesses learn that an earlier witness's testimony was disclosed; those witnesses might then be less likely to cooperate. The authors suggest this possibility highlights the need for procedures to protect grand jury information after the disclosure is made. *See Beale & Felman, supra* note 20, at 711. Again, it seems far more likely that a witness would learn about the existence of a grand jury investigation or of the identities of subpoenaed witnesses from another civilian witness rather than from the CIA.

76. *See Moran*, 740 F.2d at 540 (noting that "maximiz[ing] the grand jury's investigatory effectiveness" is not only justification for grand jury secrecy so that other interests must be considered).

77. *See United States v. Williams*, 504 U.S. 36, 51 (1992).

78. *See Kadish, supra* note 7, at 16 (noting that first challenges to grand jury secrecy were made by criminal defendants alleging that indictments were based on insufficient evidence or prosecutorial misconduct). Of course, criminal defendants typically want greater access to grand jury proceedings for themselves, for purposes of discovery and for the mounting of challenges to the indictment, and not necessarily increased access for the general public. Civil defendants, on the other hand, typically object to the government's attempts to gain access to grand jury information for the purposes of pursuing civil proceedings. *See, e.g., United States v. John Doe*, 481 U.S. 102 (1987) (discussing disclosure of grand jury material); *United States v. Baggot*, 463 U.S. 476 (1983) (same).

79. *See Beale & Felman, supra* note 20, at 712 (arguing that "reputational interests protected by grand jury secrecy" are interests "most likely to suffer" adverse consequences as a result of this legislation). A damaged reputation, however, might ultimately be less troublesome to a grand jury target than the possibility of being subjected to intense scrutiny by the CIA.

More important, even a prospective defendant who is ultimately not indicted will no doubt be dismayed that the CIA is now keeping a file on him.

In order fully to understand the implications of this change to Rule 6(e), it is important to recognize the extent to which this legislation turns domestic law enforcement files over to the intelligence community. To use the example cited above, presumably most members of the public would not object to the CIA being given information about the names or locations of the members of a known terrorist cell and indeed would encourage this kind of information-sharing regardless of how the information originally came into the possession of the government. But this is the easy case. What about a college student subpoenaed to testify who informs the grand jury that his roommate is keeping a number of materials about Islam in his room, an activity that for whatever reason has alarmed this particular student?⁸⁰ Although the USA PATRIOT Act directs the Attorney General to “establish procedures for the disclosure of information pursuant” to § 203 that “identifies a United States person,”⁸¹ these procedures apparently do not yet exist. The Act currently authorizes a prosecutor to call the CIA and provide it with the substance of the college student’s testimony about his roommate, with all the potential consequences for the roommate that the disclosure entails.⁸²

Moreover, disclosure of testimony may be the least problematic aspect of allowing the CIA to have access to grand jury material. Under the Act, prosecutors are free to disseminate documents acquired by or databases accumulated through the use of grand jury subpoenas to the various components of the intelligence community. Giving the CIA access to databases provides it with potentially a much wider swath of information about Americans than giving the CIA access to the testimony of individual witnesses. For example, a prosecutor quite plausibly could issue a grand jury subpoena for the hotel records of every person who stayed in the

80. If the possibility that this testimony might interest the FBI and the CIA seems remote, see Janie Har, *Arab Students Endure Inquiry*, PORTLAND OREGONIAN, Nov. 23, 2001, at C1 (reporting at least fifteen Arab students at the University of Oregon were visited at home by the FBI); Jacques Steinberg, *U.S. Agents Visit College Campuses; Middle Eastern Students Quizzed*, CHI. TRIB., Nov. 12, 2001, at 8 (reporting federal investigators “have contacted administrators on more than 200 college campuses to collect information about students from Middle Eastern countries”); Beth Kassab, *Arab Students Flee Tension*, ORLANDO SENTINEL, Sept. 19, 2001, at D1 (reporting that a Florida college student was stopped and questioned by the FBI because he had a picture of a political figure from the United Arab Emirates on his car window).

81. USA PATRIOT Act § 203(c).

82. At a minimum, federal investigators would probably interview this student. His friends might be questioned and his college records reviewed. See Har, *supra* note 80, at C1 (reporting story of student from Saudi Arabia who said FBI interviewed at least six of his friends about him); Steinberg, *supra* note 80, at 8 (reporting federal investigators asked college administrators about subjects students from Middle Eastern countries were studying and where those students were living). Senator Leahy expressed concern about the wide scope of information that will now be subject to disclosure to the intelligence community, noting that “whenever a criminal investigation acquires information about an American citizen’s relationship with a foreign country or its government, that information is eligible to be disseminated widely as ‘foreign intelligence information’ even if the information is about entirely lawful activities, business transactions, political relationships, or personal opinions.” 147 CONG. REC. S10992 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

same hotel as one of the September 11th hijackers during the same week⁸³ or for the application submitted by every person who attended one of the hijacker's flight schools during the same six-month period as a hijacker.⁸⁴ If the databases that were compiled as a result of these subpoenas were turned over to the CIA, the CIA would then be in possession of the names of and personal or financial information about hundreds of completely innocent Americans with no connection whatsoever to terrorism. Although § 203 may nonetheless be the wise policy choice, we cannot conduct an informed analysis of § 203 without recognizing the enormous potential this grant of authority has to expose the personal lives of private citizens to scrutiny by the CIA and numerous other federal agencies.

Finally, does permitting this kind of unfettered access to the grand jury undermine the public's faith in the grand jury as an institution? As a practical matter, it is unlikely that the public has much confidence in the grand jury in the first place because commentators for decades have proclaimed that the grand jury is no more than a "rubber stamp" for the prosecution, willing to indict the proverbial "ham sandwich."⁸⁵ Contrary to this perception, however, the grand jury both serves an important screening function and works as a powerful investigative tool for the government, and thus remains worthy of protection. In the screening context, one reason that the percentage of indictments that a grand jury returns is so high is that a prosecutor ordinarily will not waste the grand jury's time, or her own reputation, by presenting a case before it is strong enough to warrant the return of an indictment.⁸⁶ The fact that a case will be reviewed by a grand jury at a minimum causes a prosecutor to engage in some internal screening to discard those cases that for whatever reason run a serious risk of being no-billed by a grand jury.⁸⁷ In the investigative context, even critics of the grand jury system acknowledge that "[g]rand juries are undeniably effective in helping the government investigate crimes."⁸⁸ Grand juries can compel witnesses to testify who would otherwise have no obligation to speak to law enforcement agents and they can also

83. See, e.g., *Analysis: War Against Terrorism Could Change How Government Assembles and Maintains its Databases*, 2001 WL 9330112 (Nat'l Public Radio broadcast, Dec. 13, 2001) (quoting attorney Jim Dempsey suggesting that law enforcement might be interested in such a database).

84. It seems quite unlikely in the current political climate that either the hotel or flight school would challenge these subpoenas as overbroad.

85. See Leipold, *supra* note 58, at 263 n.15 (citing cases referring to the "ham sandwich"); Benjamin Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443, 1443 nn.4-5 (2001) (discussing origins of these clichés).

86. See Leipold, *supra* note 58, at 275-76 n.79 (noting that a "prosecutor whose charges frequently turn out to be meritless would likely face severe reputational and professional difficulties").

87. Prosecutors, like any other group in the criminal justice process, are governed by social norms. Prosecutors who fail routinely to secure indictments or convictions would obviously be viewed with some disfavor by their supervisors and would eventually be given less important and less desirable cases. See generally Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355-75 (1997) (arguing norms arise out of desire for esteem of others).

88. Leipold, *supra* note 58, at 314. See also Beale & Felman, *supra* note 20, at 700-02 (describing wide reach of grand jury's investigative authority).

compel the production of documents inaccessible through other means.⁸⁹

Assuming for purposes of this Article that the public's faith in the grand jury system is worth preserving to whatever extent it may exist, § 203 is a double-edged sword. Much of the public would no doubt be quite outraged if the government did not use all the weapons at its disposal to thwart another terrorist attack. Failing to permit a prosecutor to share foreign intelligence or national security information also leads to the somewhat absurd result that a civilian witness who possesses such information that is revealed only to the grand jury could call the CIA and report the information, but the prosecutor, who is after all a federal law enforcement officer, could not. The rejoinder, of course, is that disclosure of grand jury information by witnesses does not present the same threat to the principles underlying secrecy that disclosure by prosecutors does because witnesses do not have the same obligation as federal officers to protect the rights and reputations of private citizens.

The biggest concern raised by § 203 is that wider disclosure could undermine the integrity of the grand jury in that the government will be enticed into using the unique weapons available to the grand jury to gather evidence in cases where no criminal prosecution is contemplated. One of the concerns driving the Supreme Court in *Sells Engineering* was that giving civil Department of Justice employees access to grand jury information might tempt prosecutors "to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely."⁹⁰ Indeed, the Court noted that this kind of activity "poses a significant threat to the integrity of the grand jury itself."⁹¹ Under § 203, prosecutors might be tempted to use the grand jury to gather information solely for use by the CIA, and the CIA could even become involved in directing the course of the investigation by asking the prosecutors to call particular witnesses or subpoena particular documents, thus circumventing longstanding restrictions on the CIA's domestic role.⁹² The concern about preventing future terrorist activity is understandably so great that the temptation to use the grand jury for intelligence gathering, regardless of whether a criminal prosecution is possible or even contemplated, could be overwhelming.

89. See Leipold, *supra* note 58, at 314-15 nn.248-49 (noting grand juries may "demand production of evidence even if it is burdensome, embarrassing, or expensive," compel testimony of witnesses, and compel production of documents without a showing of relevance).

90. *United States v. Sells Eng'g*, 463 U.S. 418, 423 (1983).

91. *Id.* (discussing need to limit use of grand jury testimony).

92. The National Security Act of 1947, which established the CIA, expressly states that the Agency "shall have no police, subpoena, or law enforcement powers, or internal security functions." 50 U.S.C. § 403-3(d)(1) (1994). Not surprisingly, the events of September 11 have caused at least some commentators to urge the CIA to seek legislative revisions of this longstanding prohibition. See, e.g., Frederick P. Hitz, *Unleashing the Rogue Elephant: September 11 and Letting the CIA Be the CIA*, 25 HARV. J.L. & PUB. POL'Y 765, 774 (2002) (calling for "legislative clarification and amendment of the prohibition against domestic law enforcement powers"); see also Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 483-84 (2002) (noting that the CIA "may need to be freed of even the possibility of a statutory disability barring it from domestically-oriented surveillance").

Historical experience teaches us that the danger of involving the CIA in domestic law enforcement activities is very real. Twenty-five years ago, Congress exposed a startling “record of Cold War abuses of investigative powers by Federal agencies acting in the name of national security.”⁹³ In 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church, conducted a fifteen-month investigation⁹⁴ and issued a six-volume report detailing numerous illegal operations conducted by the CIA and FBI, among other government agencies, against Americans.⁹⁵ One of the CIA’s most extensive domestic operations was Operation CHAOS, a program created to determine the extent of “hostile foreign influence on domestic unrest among students, opponents of the Vietnam War, minorities, and the ‘New Left.’”⁹⁶ During Operation CHAOS’s seven-year duration, the CIA “amassed thousands of files on Americans, indexed hundreds of thousands of Americans into its computer records, and disseminated thousands of reports about Americans to the FBI and to other government offices.”⁹⁷ Pursuant to Operation CHAOS, the CIA also “serviced the FBI’s own requirements for information about foreign contacts and travel of Americans,”⁹⁸ and “received extensive reporting from the FBI and the military . . . on critics of government policy.”⁹⁹

It is unquestionable that allowing federal agencies like the CIA, the Department of Defense and the NSA to receive grand jury material raises the specter of entangling the intelligence community deeply into the realm of domestic law

93. See 147 CONG. REC. S10992 (daily ed. Oct. 25, 2001) (statement of Senator Leahy) (referring to Church Committee Report, which found that FBI “compiled massive files on activities protected by the First Amendment”). Senator Leahy’s statements reflect genuine concern about the potential of the intelligence-sharing provisions in the USA PATRIOT Act to recreate the abuses documented in the 1970s; he spoke at length about this issue in his remarks on the day of the Senate’s vote on the USA PATRIOT Act. See *id.* Dr. Halperin was also very concerned about the implications of the intelligence-sharing proposals in light of the lessons learned from the Church Committee reports. See Halperin, *supra* note 54 (Sept. 24 testimony); Halperin, *supra* note 55 (Oct. 3 testimony). See also American Civil Liberties Union Freedom Network, *supra* note 3, at 1-2 (arguing that abuses documented by Church Committee highlight danger posed by USA PATRIOT Act).

94. See William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 33-35 (2000) (describing Church Committee investigation).

95. See FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) [hereinafter “Church Committee Report”]. See generally LOCH JOHNSON, A SEASON OF INQUIRY (1985) (discussing history of Church Committee investigation). These activities included opening mail sent between the United States and the Soviet Union and maintaining intelligence files about Americans. See Church Committee Report, Book II, at 167-69; see also Commission on CIA Activities Within the United States, Report to the President (1975) (commonly referred to as Rockefeller Commission Report) (describing same activities). See generally Koh, *supra* note 32, at 1270-73 (noting that abuses documented by Church Committee did not result in significantly improved legislative oversight of intelligence community).

96. Church Committee Report, Book III, at 688.

97. *Id.* at 682.

98. *Id.* at 693.

99. 147 CONG. REC. S10992 (daily ed. Oct. 25, 2001) (statement of Senator Leahy) (noting that during 1960s and 1970s government did far “more than just gather information about protest and dissent. The FBI developed a systemic program to disrupt domestic groups and discredit their leaders”).

enforcement. It is also likely that the very limited protection that grand jury secrecy offers to defendants and witnesses may be weakened by § 203. But at the same time, the material compiled by a grand jury might well include information essential to our nation's ability to identify future terrorist and national security threats and to protect our country from future attacks. After weighing these conflicting concerns against one another, allowing law enforcement officials to share grand jury information with intelligence officials is the most reasonable policy choice that we can make in these particular and difficult circumstances. Refusing to allow one agency to share lawfully obtained information with another agency when the security of our nation and the safety of our citizens are at stake simply puts unacceptable constraints on our nation's ability to investigate, to prevent, and to prosecute terrorist activity or other threats to our national security.¹⁰⁰ It is critically important, however, that this new exception to grand jury secrecy be both limited to the concerns that animated § 203 and no broader than necessary to address those concerns. The events of September 11, 2001, do not warrant a wholesale abandonment of the limits created by 6(e), even though it would obviously make the lives of the Internal Revenue Service agents and Department of Justice Civil Division employees easier if they were able to have easy and unfettered access to grand jury materials. In the civil enforcement context, the traditional methods of civil discovery continue to be sufficient; it is only when the benefits of weakening the traditional protections of Rule 6(e) are sufficiently weighty and when the possibilities of obtaining information via other channels are sufficiently remote—such as in the national security context—that our nation can justify the costs associated with tearing down the walls that have traditionally protected the work of the grand jury. The potential dangers of this provision, however, make the method of its implementation critically important, both in terms of the statute as currently enacted and in terms of potential modifications that Congress might consider in the future.

IV. SUGGESTED MODIFICATIONS TO § 203

Although § 203 is not subject to the sunset provisions explicitly attached to some other sections of the USA PATRIOT Act,¹⁰¹ the fact that Congress will have to revisit much of this legislation as the year 2005 approaches obviously will give the Congress the opportunity to make some changes to § 203 as well. The

100. See Waxman, *supra* note 51, at D7 (stating that “[s]tatutory provisions that permit information-sharing relating to terrorism do not eviscerate constitutional freedom; they merely permit information already legally obtainable by one agency to be shared with another when paramount national interests are at stake”).

101. See, e.g., USA PATRIOT Act § 224(a) (stating that a number of provisions in Title II of the Act, which enhance government's surveillance authority, will cease to have effect on December 31, 2005). There is nothing in the Act's sparse legislative history to explain why § 203 is not subject to a sunset provision. Senator Leahy simply noted, without further explanation, that the sunset provision “does not apply to other controversial provisions in the bill” such as the grand jury provision. 147 CONG. REC. S10992 (daily ed. Oct. 25, 2001) (statement of Senator Leahy).

controversial question with respect to possible modification of § 203 is the extent to which judicial review and authorization should be prerequisites for any disclosure; presumably no one would object to the Act's requirement that grand jury information should be used only as necessary in the conduct of official duties. As currently enacted, § 203 does not require judicial authorization at all. The only requirement imposed on the government is that after the fact of a disclosure, the government needs only to notify a court under seal that a disclosure was made and to identify the agency to which it was made.¹⁰² The government does not need to obtain judicial approval before making a disclosure and it never needs to inform a court of the substance of the information that was disclosed or even the names of the persons to whom the information was provided. As currently enacted, this judicial notification requirement is a meaningless formality, really no more effective than no notification at all. Its only conceivable benefit is that it will provide a record of the number of disclosures that are made, which might be relevant in terms of congressional oversight of the uses of § 203, although the USA PATRIOT Act, of course, contains no mechanism for ensuring that this information is collected and transmitted to Congress.

There are two possible alternatives. One option is to look to the judicial notification provision already contained within Rule 6(e) and to utilize its requirements in order to make § 203's judicial notification provision more meaningful. This alternative could presumably be accomplished simply through the Attorney General's promulgation of procedures, as directed by the USA PATRIOT Act, for handling the disclosure of grand jury information that identifies a United States person. As discussed above, Rule 6(e) contains a provision authorizing prosecutors to disclose grand jury information to other government personnel "deemed necessary" to assist the prosecutor's efforts "to enforce federal criminal law."¹⁰³ Under this exception, prosecutors are required "promptly" to provide the district court with the names of persons receiving grand jury information and to certify to the district court that the prosecutors have advised the relevant government employees of their secrecy obligations.¹⁰⁴ No judicial approval of the disclosure is required.¹⁰⁵ This exception is essential to prosecutors; without it, asking an FBI agent to serve a grand jury subpoena would arguably be a violation of Rule 6(e) because that request discloses to the agent a "matter occurring before the grand

102. See USA PATRIOT Act § 203(a)(1) ("within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made").

103. See FED. R. CRIM. P. 6(e)(3)(A)(ii). For a lengthy discussion of the history and purposes of this exception, see *In re Grand Jury Proceedings*, 158 F. Supp. 2d 96 (D. Mass. 2001) (stating judiciary's role in disclosure of grand jury proceedings is only to prevent improper disclosure, not to authorize disclosure).

104. See FED. R. CRIM. P. 6(e)(3)(B).

105. See *In re Grand Jury Proceedings*, 158 F. Supp. 2d at 100-01; *United States v. Pimental*, 199 F.R.D. 28, 32 n.8 (D. Mass. 2001) (holding government does not have to seek authorization before disclosing grand jury proceedings; rule is self-executing).

jury”; namely, that a particular witness will appear and give testimony. In practice, the exception permits prosecutors to disclose grand jury information to a wide range of government employees—including employees who otherwise have no responsibility for enforcing federal criminal law—so long as their use of grand jury material is limited to this purpose.¹⁰⁶

It is inexplicable why § 203 does not contain a similar certification obligation and duty specifically to identify to the court the precise identities of the individuals receiving grand jury information. The individuals who are receiving information under § 203—who after all could be Department of Defense or National Security Agency employees—are far less likely to be familiar with the requirements of grand jury secrecy than are the FBI agents or police officers who are the typical recipients of grand jury information. Requiring prosecutors to inform individuals privy to disclosure of grand jury information under § 203 of their secrecy obligations would at least serve to minimize the possibility of leakage of this information to the media or even to other government agencies not authorized to receive this information.

The other advantage of requiring the government specifically to identify those persons receiving grand jury material is that the requirement might give more meaning to the provision of § 203 that states that an official’s use of that material is “subject to any limitations on the unauthorized disclosure of such information.”¹⁰⁷ Senator Leahy’s remarks on the day of the Senate vote on the USA PATRIOT Act makes plain that he believed that the intelligence, immigration or defense officials who received grand jury information would themselves be subject to “contempt penalties for unauthorized disclosure.”¹⁰⁸ The Supreme Court has noted that the use of a contempt sanction and internal or bar discipline against a prosecutor for a knowing violation of Rule 6(e) “allow[s] the court to focus on the *culpable individual* rather than granting a windfall to the unprejudiced defendant” by

106. See, e.g., *United States v. Kilpatrick*, 821 F.2d 1456, 1471 (10th Cir. 1987) (approving disclosure of grand jury proceedings to civil IRS agents only if they were assisting with the criminal investigation); *United States v. Jones*, 766 F.2d 994, 1000 (6th Cir. 1985) (authorizing disclosure to ATF agent who supervised criminal investigation leading to indictment). Most of the litigation regarding this provision involves the question of whether prosecutors may disclose grand jury information to private parties assisting prosecutors. The courts have uniformly rejected such requests. See, e.g., *In re Grand Jury Proceedings*, 158 F. Supp. 2d at 103-05 (stating that the Court has interpreted “government personnel” to include only public entities and employees); *In re November 1992 Special Grand Jury*, 836 F. Supp. 615, 616-17 (N.D. Ind. 1993) (holding Congress did not include non-governmental employees in exception for disclosure of grand jury materials).

107. USA PATRIOT Act § 203(a)(1).

108. 147 CONG. REC. S11002 (daily ed. Oct. 25, 2001) (statement of Senator Leahy); see also FED. R. CRIM. P. 6(e)(2) (“[a] knowing violation of Rule 6 may be punished as a contempt of court”). The contempt remedy is the most commonly employed sanction for violations of the government’s secrecy obligations, although other sanctions, such as suppression of the disclosed testimony, may be available. See *United States v. Coughlan*, 842 F.2d 737, 740 (4th Cir. 1988) (holding a district court has many options when deciding how to punish an illegal disclosure of grand jury proceedings under Rule 6(e) and discussing policies behind different punishments).

imposing a more extreme sanction such as dismissal of the indictment.¹⁰⁹ Requiring a prosecutor to identify those individuals receiving grand jury information will allow a court reviewing any leaks some basis to determine the source of those leaks and accordingly determine whether any sanctions are appropriate against that source.¹¹⁰

As a practical matter, even with such a reporting requirement, it may be difficult to enforce a secrecy obligation on intelligence agents who receive grand jury information. The usual method of enforcing Rule 6(e)—criminal contempt—simply does not appear to be available as a sanction for the release, whether authorized or not, of grand jury material by intelligence or defense agents. Rule 6(e)(2) imposes a secrecy requirement *only* on specified categories of individuals: “[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.”¹¹¹ Under § 203 of the USA PATRIOT Act, disclosure is not made pursuant to Rule 6(e)(3)(A)(ii), nor do intelligence or defense officials fall into the other named categories of individuals explicitly subject to the secrecy requirement. Intelligence or defense officials who receive grand jury material therefore do not appear to be subject to Rule 6(e)’s secrecy requirement, because “no obligation of secrecy may be imposed on any person except in accordance with this rule,”¹¹² and, therefore, such officials could not be charged with contempt for release of grand jury information.¹¹³ Nor does § 203 itself contain an explicit secrecy requirement. It does subject recipients of grand jury material “to any limitations on the unauthorized disclosure of such information.”¹¹⁴ But this ambiguous restriction would appear to refer only to statutes or regulations apart from Rule 6 itself—such as the Privacy Act of 1974¹¹⁵ or secrecy regulations promulgated by the defense or intelligence agency employing the official who receives grand jury

109. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) (italics added) (holding that under Rule 6 a court may hold prosecutor in contempt rather than taking more drastic action when looking for a way to remedy a grand jury disclosure violation).

110. Courts have disagreed as to whether a person harmed by a violation of the secrecy requirement of Rule 6(e) can assert a civil cause of action against the violator. *Compare* *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989) (permitting civil cause of action under Rule 6(e)(2)), *with* *Finn v. Schiller*, 72 F.3d 1182 (4th Cir. 1996) (refusing to permit a civil cause of action under Rule 6(e)), *and* *In re Grand Jury Investigation*, 748 F. Supp. 1188, 1195-1206 (E.D. Mich. 1990) (same). *See generally* JoEllen Lotvedt, Note, *Availability of Civil Remedies under the Grand Jury Secrecy Rule*, 47 CATH. U. L. REV. 237 (1997).

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

112. *Id.*

113. *See* *United States v. Jeter*, 775 F.2d 670, 674-75 (6th Cir. 1985) (holding that Rule 6(e)(2) provides exclusive means of punishment for categories of people listed within and that those not listed in the rule can be punished by other means). *See also* *United States v. Forman*, 71 F.3d 1214 (6th Cir. 1996) (reversing criminal contempt conviction of Department of Justice attorney not officially assigned to work on case that was the subject of grand jury proceedings); *United States v. Sells Eng’g*, 463 U.S. 418, 432 (1983).

114. USA PATRIOT Act § 203(a)(1).

115. *See, e.g.*, 5 U.S.C. § 552 (2000).

information. In short, it simply does not appear that § 203 would bar an intelligence official obtaining grand jury information from disclosing that information in full detail to, for example, the *New York Times*, so long as the official making the disclosure was acting in the course of his official duties.

Intelligence officials acting with the full authority of their agencies, therefore, seem immune from criminal contempt sanctions for release of grand jury information, as the USA PATRIOT Act amended Rule 6(e). This is not necessarily the case with agents who act improperly, either without authorization of their governmental agency or outside the scope of their official duties. As noted, such disclosure might violate secrecy regulations imposed by their employers. In addition, it might be possible to charge intelligence agents improperly disclosing grand jury information in such circumstances with a violation of substantive criminal laws, such as obstruction of justice¹¹⁶ or theft of government property.¹¹⁷ Such charges, however, are considerably more difficult to prove than criminal contempt for a violation of Rule 6(e).

Thus, simply requiring greater post-disclosure judicial notification will not function in a material way to deter misuse of grand jury material by intelligence or defense officials. A more ambitious, and ultimately more satisfactory, alternative would be to require judicial authorization *before* any disclosure of grand jury information can be made.¹¹⁸ This approach would be most workable if particular judges were designated to hear all of these requests, an approach similar to that employed under the Foreign Intelligence Surveillance Act ("FISA").¹¹⁹ Requiring individual judges in each judicial district to rule upon these requests puts them in an impossible position. How could a district judge in Montana, who might receive one request every few years, possibly have a sufficient basis of knowledge with which to make an informed decision about whether a particular piece of information is appropriate for disclosure?¹²⁰ A better approach would be to designate

116. See, e.g., *Jeter*, 775 F.2d at 675-79 (finding obstruction of justice in illegitimate disclosure of grand jury material); *United States v. Howard*, 569 F.2d 1331, 1333-35 (5th Cir. 1978) (finding obstruction of justice in attempts to sell transcripts of grand jury testimony).

117. See, e.g., *Jeter*, 775 F.2d at 679-82 (holding that unauthorized use of grand jury information constituted theft of government property); *United States v. Friedman*, 445 F.2d 1076, 1087 (9th Cir. 1971) (holding that possession of unreleased grand jury transcript supports § 641 conviction for theft of government property); see also *United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir. 1979) (holding theft of information from DEA computers constituted theft of governmental property); *United States v. DiGilio*, 538 F.2d 972, 976-78 (3d Cir. 1976) (holding theft of grand jury information from FBI files constituted theft of government property). Compare *United States v. Collins*, 56 F.3d 1416, 1419-20 (D.C. Cir. 1995) (finding § 641 applies to intangible property) with *United States v. Tobias*, 836 F.2d 449, 450-52 (9th Cir. 1988) (finding § 641 does not apply to intangible property).

118. This approach would obviously require an amendment to the Act. See generally Beale & Felman, *supra* note 20, at 713-14 (calling for judicial approval of these disclosures, but suggesting approval function should be performed by the grand jury's constituting judge).

119. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1829 (1994 & Supp. 1999).

120. Of course, the individual district judges might object to a procedure that sends these requests to a special court, as it is the individual districts that summon their own grand juries and exercise the limited degree of judicial

particular judges to hear all such requests, as FISA does, so these judges could develop some expertise in specialized matters.

FISA was initially enacted in 1978 and was itself substantially amended by the USA PATRIOT Act.¹²¹ In its current form, FISA governs the efforts of the government to secure judicial approval for wiretaps and physical searches seeking foreign intelligence information.¹²² FISA requires the Chief Justice of the United States to designate eleven judges “to hear applications for and grant orders approving electronic surveillance”¹²³ and “physical search[es] for the purpose of obtaining foreign intelligence information anywhere within the United States”¹²⁴ Judges appointed to the Foreign Intelligence Surveillance Court are appointed for seven-year terms and thus are able to develop expertise in this unique area of the law.¹²⁵ Designating particular judges in advance to hear applications seeking authorization to disclose grand jury information would also help alleviate concerns that a judicial authorization requirement would impose too much delay in cases that are perhaps uniquely time-sensitive.

Perhaps the most valuable lesson we can take from the experience with FISA, however, is that even requiring prior judicial authorization for the disclosure of grand jury information to the intelligence community has the potential to be a

authority available to oversee the work of the grand jury. *See* FED. R. CRIM. P. 6(a) (discussing summoning of grand juries); *United States v. Williams*, 504 U.S. 36, 47-50 (1992) (discussing limited way in which judges are directly involved in operation of grand jury). An individual judge might well argue that she is in the best position to supervise the disclosure of matters occurring before her “own” grand jury. However, because these disclosure questions fundamentally involve issues of national rather than local interest, such issues would be better analyzed by a national court analogous to that employed by FISA.

121. *See, e.g.*, USA PATRIOT Act § 207 (extending duration for which surveillance under FISA can be authorized); *id.* § 208 (increasing number of judges to review government applications). Most significantly, FISA was amended to expand the application of FISA to situations where the gathering of foreign intelligence information is simply a “significant purpose” of the surveillance, rather than “the purpose.” USA PATRIOT Act § 218 (amending 50 U.S.C. §§ 1807(a)(7)(B) and 1823(a)(7)(B) (1994 & Supp. 1999)). This change increases the likelihood that FISA will be used to gather evidence for domestic law enforcement purposes. *See Analysis of Provisions of the Proposed Anti-Terrorism Act of 2001 Affecting the Privacy of Communications and Personal Information*, Electronic Privacy Information Center, Sept. 24, 2001, at 6, at http://www.epic.org/privacy/terrorism/ata_analysis.html (highlighting this concern).

122. There has been surprisingly little attention devoted to FISA in the legal literature. For an overview of FISA, see Banks & Bowman, *supra* note 94, at 74-92; Gerald R. Robinson, *We’re Listening: Electronic Eavesdropping, FISA, and the Secret Court*, 36 WILLAMETTE L. REV. 51 (2000); Daniel J. Malooly, Note, *Physical Searches Under FISA: A Constitutional Analysis*, 35 AM. CRIM. L. REV. 411 (1998); Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793 (1989).

123. 50 U.S.C § 1803(a) (1994 & Supp. 1999).

124. *Id.* § 1822(c).

125. *Id.* § 1803(d) (setting forth tenure procedures for judges). This unique judicial structure has thus far withstood constitutional challenge. *See United States v. Cavanaugh*, 807 F.2d 787 (9th Cir. 1987); *United States v. Nicholson*, 955 F. Supp. 588 (E.D. Va. 1997); *United States v. Johnson*, 1990 WL 78522 (D. Mass. Apr. 13, 1990), *aff’d*, 952 F.2d 565 (2d Cir. 1991), *cert. denied*, 506 U.S. 816 (1992); *United States v. Megahey*, 553 F. Supp. 1180 (E.D.N.Y. 1982), *aff’d*, 729 F.2d 1444 (2d Cir. 1984). *See also* Banks & Bowman, *supra* note 94, at 90-92 (discussing constitutionality of Foreign Intelligence Surveillance Court).

meaningless formality. FISA searches and wiretaps obviously involve the tremendous personal intrusion that lengthy electronic surveillance or secret searches entail, situations where one might expect searching judicial review, yet the degree of deference shown by the FISA judges over the years is truly striking.¹²⁶ In 1999, the government submitted 886 applications for orders authorizing either electronic surveillance or physical searches; all 886 were approved.¹²⁷ In 1998, the government submitted 796 applications for orders; all 796 were approved.¹²⁸ These statistics give us reason to be concerned about whether judges would be any more proactive in the grand jury context; when confronted with a prosecutor saying, “it is essential for purposes of national security that I give this piece of information to the CIA,” what judge can possibly be expected to say no?

Indeed, the specter of September 11 and the ongoing war against terrorism make judicial deference far more likely. The tradition of judicial deference to the Executive Branch in matters of national security is already both deeply entrenched and longstanding.¹²⁹ The Court has been quite blunt in describing the constraints on the judicial role in this area, emphasizing that “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”¹³⁰ Commentators ascribe various motivations to this policy of deference; Professor Harold Koh, for example, has cited “a complex admixture . . . stemming in equal parts from confusion, cowardice, and concerns about judicial competence and the Constitution.”¹³¹ More than a decade ago, Professor Norman Dorsen offered a different, and more charitable, explanation that has striking relevance today in light of September 11: “a blend of institutional insecurity and fear of the consequences of error.”¹³² Judges faced with the decision of whether to overrule requests to disclose grand jury information under the USA PATRIOT Act,

126. The one judge who has spoken most publicly about his experience serving on the FISA court, Judge Royce Lamberth of the District of Columbia District Court, rejects the notion that the FISA court just acts as rubber stamp for the government and insists that FISA judges do closely scrutinize the applications that are presented to them. See Benjamin Wittes, *The FISA Court Speaks*, LEGAL TIMES, Feb. 19, 1996, at 21.

127. See 1999 Annual FISA Report to Congress.

128. See 1998 Annual FISA Report to Congress. In 1997, the government submitted 749 applications; 748 were granted. The court declined to approve one application and gave the government leave to amend it, but the government ultimately withdrew that application for mootness reasons. See 1997 Annual FISA Report to Congress; see also Robinson, *supra* note 122, at 62 (noting that between FISA’s inception in 1978 and 1997, the government had applied for more than 10,201 orders, all of which were granted).

129. See Koh, *supra* note 32, at 1305-17 (describing “the courts’ persistent reluctance to look behind talismanic executive assertions of ‘national security’”). For some representative cases, see *Regan v. Wald*, 468 U.S. 222 (1984) (upholding restrictions on travel to Cuba); *Haig v. Agee*, 453 U.S. 280 (1981) (upholding revocation of passport from former CIA agent); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding order excluding persons of Japanese ancestry from West Coast “Military Areas”).

130. *Agee*, 453 U.S. at 292.

131. Koh, *supra* note 32, at 1316.

132. Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT’L L. 840, 844 (1989). Dorsen notes that mistakes in such circumstances could not only damage the nation’s interests abroad, but—closer to home—could damage the public prestige, and therefore the effectiveness, of the courts. *Id.* at 845. Dorsen cites Justice Blackmun’s dissent in the Pentagon Papers case as an example of this phenomenon:

particularly when confronted with fresh and painful reminders of horrific acts of terrorism committed on American soil and in the face of threats of future violence, simply are going to be afraid to get it wrong. That the strong tradition of deference on national security matters might prevent a consistently vigorous and independent judicial check on the abuse of the new grand jury disclosure authority, however, is not by itself a reason to eliminate a judicial role. Amending the USA PATRIOT Act to require judicial review hopefully would have the dual benefits of weeding out the most egregious cases and serving as an internal check on prosecutors. Just as prosecutors do not want to waste the time of a grand jury on a weak case, they might not want to waste the time of a judge with a request to disclose trivial or frivolous information to the CIA.¹³³

Assuming that we would prefer the most meaningful checks possible on the wholesale disclosure of grand jury information, however, the Act should also be amended to require prosecutors to report statistics regarding the number of disclosures of grand jury information to the intelligence community to Congress.¹³⁴ Moreover, prosecutors should be required to keep a record of the substance of the information that is disclosed, in the event the Senate Select Committee on Intelligence, for example, decides to conduct an audit in order to see if prosecutors are abusing this grant of authority and to have an informed basis

[I]f, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate," to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

Id. (quoting *New York Times Co. v. United States*, 403 U.S. 713, 762-63 (1971) (Blackmun, J., dissenting)).

133. In his 1996 interview, Judge Lamberth endorsed this view, stating that the government's perfect record before the FISA court is a "tribute to the superb internal review process created within the Department of Justice" and suggesting that Department of Justice attorneys might even be "too conservative in what they are presenting to the court . . ." Wittes, *supra* note 126, at 21. Judge Lamberth sounded a similar theme in remarks he gave in 1997 to an American Bar Association committee meeting, saying that "[t]he political accountability that the attorney general must personally assume for each surveillance is an important safeguard, and we consistently find the applications well-scrubbed by the attorney general and her staff before they are presented to us." *Intelligence on the FISA Court*, Verbatim, LEGAL TIMES, Apr. 14, 1997, at 18 (excerpting speech given by Judge Royce E. Lamberth to American Bar Association's Standing Committee on Law and National Security).

134. It is very surprising that § 203 contains no automatic reporting requirement, especially in light of Senator Leahy's repeated exhortations for searching congressional oversight of the Act's new intelligence-sharing authorities. *See, e.g.*, 147 CONG. REC. S10992 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) ("Congressional oversight is especially necessary to monitor the implementation of these new authorities"); *id.* at S11002 (statement of Sen. Leahy) ("I am troubled [that the bill does not provide for any judicial supervision of the new authorization for dissemination of grand jury information throughout the executive branch] and plan to exercise the close oversight of the Judiciary Committee to make sure it is not being abused"). FISA, for example, contains a very explicit reporting requirement. *See* 50 U.S.C. § 1807 (1994 & Supp. 1999) (ordering the Attorney General to submit a report to Congress every April that sets forth the total number of orders sought during the previous year and the total number granted, modified, or denied). Moreover, § 203 conspicuously failed to designate Congress as one of the parties authorized to receive grand jury information.

upon which to make decisions about revising this legislation in the future. As Senator Patrick Leahy emphasized, “[t]here has never been a greater need for Congressional vigilance to ensure against unnecessary and improper use of the wide discretion being granted by a new law.”¹³⁵ Searching congressional oversight is particularly appropriate given the abuses brought to light by the Church Committee in the 1970s.

IV. CONCLUSION

For the past fifty years in this country, ever since the CIA was created, we have attempted to maintain a separation between law enforcement on the one hand and our foreign intelligence agencies on the other. We have therefore erected a wall between the information that we gather to use in criminal prosecutions and the information that we assemble to keep track of the intentions and capabilities of foreign governments and foreign agents. The wall of separation was motivated by powerful civil liberties concerns—concerns validated by the abuses found by the Church Committee. We have not needed to revisit the question of the appropriate limits on grand jury secrecy in this context because for centuries we have deemed the means already available to the intelligence and defense agencies to safeguard the nation’s security adequate without requiring access to the grand jury.

The events of September 11 changed this reality, however. The twenty-first century terrorist threat implicates—in a powerfully intertwined way—both domestic law enforcement and foreign intelligence concerns. Information obtained by defense and intelligence officials increasingly will form the basis for, or at least be used in, criminal prosecutions.¹³⁶ And the nation’s federal grand juries may receive information that is both useful to intelligence and defense agencies and unavailable to such entities from other sources. The continuing threat of terrorism, therefore, necessitates carefully and thoughtfully lowering the wall of separation between the grand jury and other agencies of the government to improve coordination and the sharing of national security information—with the goal of safeguarding the nation’s security and its citizens.¹³⁷ As long as we maintain the appropriate safeguards, our national security undoubtedly requires such an accommodation.

135. 147 CONG. REC. S10994 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

136. See, e.g., *Indictment, United States v. John Phillip Walker Lindh*, Crim. No. 02-51-M (E.D. Va. Feb. 5, 2002).

137. The need to “lower the barriers” was a theme repeatedly sounded in the days and weeks after September 11. See, e.g., McGee, *supra* note 4, at A4 (describing interviews with Assistant Attorney General Michael Chertoff, who stated that “we are going to have to get used to a new way of thinking” and “chang[e] the culture” mandating a division between the intelligence and law enforcement communities, and Senator Orrin Hatch, who argued that “we must lower the barriers that discourage our law enforcement and intelligence agencies from working together to stop these terrorists”); Waxman, *supra* note 51, at D7 (arguing that “law should promote, not impede, the sharing of critical intelligence information”).