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PREINDICTMENT PROSECUTORIAL CONDUCT IN THE FEDERAL SYSTEM REVISITED¹

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INTRODUCTION BY JUDGE HOLDERMAN

In 1980, the *Journal of Criminal Law & Criminology* published an article I authored entitled “Preindictment Prosecutorial Conduct in the Federal System.”⁴ That 1980 article was cited thereafter by various federal and state courts in published judicial opinions⁵ and was chosen for republication in the *National Law Review Reporter*.⁶

At the time I wrote The 1980 Article, I had personally dealt with many of the preindictment issues which I discussed because I had previously supervised lengthy grand jury investigations into corruption by high-

¹ The authors gratefully acknowledge and thank Jessica R. Mullan and Jonathan Van Loo, Northwestern University School of Law Class of 2007; Charlie M. Evans, Law Clerk to the Honorable James F. Holderman, 2003-2005; Halley B. Guren, Law Clerk to the Honorable James F. Holderman, 2005-2007; and the *Journal of Criminal Law and Criminology* editorial board for their invaluable assistance on this article. Of course, any errors or omissions are the sole responsibility of the authors.

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⁴ James F. Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & CRIMINOLOGY 1 (1980) [hereinafter *The 1980 Article*].

⁵ See, e.g., *Gray v. Bell*, 712 F.2d 490, 501 n.34 (D.C. Cir. 1983); *United States v. Smith*, 687 F.2d 147, 152 (6th Cir. 1982); *United States v. Santucci*, 674 F.2d 624, 627-28 (7th Cir. 1982); *United States v. Udziela*, 671 F.2d 995, 998 (7th Cir. 1982); *United States v. Santucci*, 504 F. Supp. 1072, 1075 (N.D. Ill. 1980); *Schwartz v. Dep't of Justice*, 494 F. Supp. 1268, 1274 (E.D. Pa. 1980); *Gershon v. Broomfield*, 642 P.2d 852, 857 (Ariz. 1982) (en banc).

⁶ James F. Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 1 NAT'L L. REV. REP. 1375 (1980) (reprinting *The 1980 Article*).

ranking public officials as the head of the Public Corruption Section of the United States Attorney's Office for the Northern District of Illinois in Chicago.⁷ I also personally prosecuted a variety of public corruption cases while in the United States Attorney's Office.⁸ After that, I became a partner with the law firm of Sonnenschein, Nath & Rosenthal where I specialized in federal court litigation and dealt with issues in both criminal⁹ and civil cases.¹⁰ Now having spent the last twenty years on the federal district bench in Chicago presiding over hundreds of cases, I have come to the conclusion that although a lot has happened in federal criminal law over the last quarter century, the introductory premise of The 1980 Article remains true today:

The potential and capacity for prosecutorial abuse is heightened at the preindictment stage of the federal criminal process, which historically has been carried on largely in secret. A defendant's rights may be irreparably prejudiced at this phase of the criminal process without the defendant, his lawyer, or the court ever finding out. It is, therefore, necessary for federal prosecutors at the preindictment stage to be particularly scrupulous in their conduct.¹¹

Consequently, at the urging of my co-author and senior law clerk, Charles Redfern, we have attempted in this article to revisit the topic of preindictment prosecutorial conduct in the federal system to discuss the law as it exists today with emphasis on the changes that have occurred since 1980. This Article, therefore, follows the general outline of The 1980 Article, and with pertinent historical deference, sets forth the law as it now exists. It is our hope that all counsel who work in the federal system will find our discussions useful as they proceed at the preindictment stage of the criminal process.

⁷ See, e.g., *In re Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978) (grand jury investigation of Illinois Attorney General).

⁸ See, e.g., *United States v. McNary*, 620 F.2d 621 (7th Cir. 1980) (mayor of Lansing, Illinois); *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977) (elected Illinois state legislators); *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974) (police officers in Chicago).

⁹ See, e.g., *United States v. Boykin*, 688 F.2d 842 (7th Cir. 1982); *United States v. Peller*, 685 F.2d 434 (7th Cir. 1982); *United States v. Gregory*, 656 F.2d 1132 (5th Cir. 1981); *United States v. Smith*, 633 F.2d 739 (7th Cir. 1980).

¹⁰ See, e.g., *In re Folding Carton Antitrust Litig.*, 609 F.2d 867 (7th Cir. 1979); *In re Shopping Cart Antitrust Litig.*, 95 F.R.D. 309 (S.D.N.Y. 1982); *In re Elec. Weld Steel Tubing Antitrust Litig.*, 512 F. Supp. 81 (N.D. Ill. 1981); *Bartnikas v. Clarkliff of Chi. N.*, 508 F. Supp. 959 (N.D. Ill. 1981).

¹¹ *The 1980 Article*, *supra* note 4, at 1.

I. IMPACT OF PUBLISHED STANDARDS FOR PROSECUTORIAL CONDUCT

Government attorneys acting in a preindictment setting can now look to a greater variety of sources for guidance as to what is proper prosecutorial conduct than they could in 1980. Federal statutes, Department of Justice policy statements, state laws, and local court rules are applicable to such conduct and provide ethical guidelines.

At the time of The 1980 Article, no federal statute existed dealing with prosecutorial conduct. However, Congress in the late 1990s enacted laws to address legislative concern on the subject.¹² The first enactment occurred in 1997 when Congress authorized the awarding of reasonable attorney's fees and other litigation expenses to a prevailing criminal defendant when a federal district court found that the position of the United States in the criminal litigation was "vexatious, frivolous, or in bad faith," unless the court found that special circumstances made the award unjust.¹³ The legislation has been interpreted as an effort by Congress to address prosecutorial misconduct, not to curb zealous, yet appropriate, prosecutions.¹⁴ The circuits currently disagree over the question of the level of prosecutorial impropriety required under the statute for the awarding of

¹² See *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999); Elkan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecutions*, CHAMPION, Mar. 1998, at 22, 23.

¹³ Department of Justice Appropriations Act of 1998, Pub. L. No. 105-119, tit. IV, § 617, 111 Stat. 2440, 2519 (1997), reported in the Historical and Statutory Notes to 18 U.S.C. § 3006A (2006), states:

During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under 28 U.S.C. § 2412. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

This legislation is commonly referred to as the "Hyde Amendment," after Illinois Republican Congressman Henry Hyde, who chaired the House Judiciary Committee at the time of the legislation's passage. See *Gilbert*, 198 F.3d at 1299-1303 (providing extensive discussion of the Hyde Amendment's legislative history).

¹⁴ See, e.g., *Gilbert*, 198 F.3d at 1304 (noting that the act is to "sanction and deter prosecutorial misconduct, not prosecutorial zealotry *per se*").

attorney's fees and costs to the aggrieved defendant.¹⁵ Future litigation of the issue, with perhaps an ultimate determination by the Supreme Court of the United States, may be necessary to resolve the conflict among the circuits.

The other congressional action of the late 1990's addressing federal prosecutorial conduct occurred in 1998 when Congress mandated, in legislation entitled "Ethical Standards for Attorneys for the Government," 28 U.S.C. § 530B, that federal government attorneys, including federal prosecutors, be subject to local state laws and ethical requirements as well as to local federal court rules.¹⁶ Before Congress enacted § 530B, the

¹⁵ See *United States v. Carlson*, No. Crim. A. 04-370-09, 2005 WL 2989671, at *2-5 (E.D. Pa. Nov. 2, 2005) (Baylson, J.) (citing *United States v. Schneider*, 395 F.3d 78, 86-88 (2d Cir. 2005); *United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003); *United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1181 (9th Cir. 2003); *United States v. Knott*, 256 F.3d 20, 29 (1st Cir. 2001); *Gilbert*, 198 F.3d at 1299). Judge Baylson noted (1) a disagreement between the Ninth and Eleventh Circuits over the question of whether a party seeking attorney's fees and costs must demonstrate all three elements of vexatious, frivolous and bad faith or whether demonstrating one of three was sufficient to satisfy the statute, *id.* at *2, (2) a disagreement over the meaning of vexatious under the statute with the Fourth, Sixth and Eleventh Circuits applying an "ordinary meaning" definition to "vexatious suit" as being "instituted maliciously and without good cause," while the First and Ninth Circuits "held that a finding of "vexatious" under the Hyde Amendment "requires both a showing that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and a showing that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass and annoy," *id.* at *4 (citations omitted), and (3) a disagreement over the meaning of frivolous, with the Sixth Circuit defining frivolous as "lacking a reasonable legal basis or where the government lacks a reasonable expectation of attaining sufficient material evidence by the time of trial," while the Eleventh Circuit's definition is "one that is groundless . . . with little prospect of success; often brought to embarrass or annoy the defendant," *id.* at *5.

28 U.S.C. § 1927, a comparable statute used in civil cases, allows for the sanctioning of an attorney who unreasonable or vexatiously multiplies a proceeding. 28 U.S.C. § 1927 (2000). Although § 1927 is applied in civil litigation, while the Hyde Amendment is applied in criminal proceedings, the circuits are also currently split over the question of the mental state needed to find an attorney culpable for violating § 1927. See James F. Holderman, *Section 1927 Sanctions and the Split Among the Circuits*, 32 LITIG. 44 (Fall 2005).

¹⁶ 28 U.S.C. § 530B, passed by Congress as part of the Omnibus Consolidated and Emergency Appropriations Act of 1998, Pub. L. 105-277, 112 Stat. 2681 (1998), states that:

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

Department of Justice argued that federal prosecutors were exempt from the requirements of state bar and local court ethics rules under both the Supremacy Clause and separation of powers.¹⁷

Federal courts, in construing 28 U.S.C. § 530B, have rejected attempts to have that law impose ethical obligations on federal prosecutors that are inconsistent with federal law.¹⁸ This judicial interpretation is based on the view that Congress was not delegating to the states or local courts authority to make rules that would expand a prosecutor's ethical obligations in the federal courts.¹⁹ Instead, § 530B has been recognized as a general declaration from Congress that federal government prosecutors must follow the ethical requirements applicable to all attorneys practicing law.²⁰ The Department of Justice has also issued official guidance in the Code of Federal Regulations on how Department attorneys should implement 28 U.S.C. § 530B.²¹

(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of Title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

The statute has been referred to as both the "Citizens Protection Act" and the "McDade Amendment." See *N.Y. State Bar Ass'n v. F.T.C.*, 276 F. Supp. 2d 110, 131 (D.D.C. 2003); *United States v. Straub*, No. 5:99-10, 1999 WL 33495606, at * 2 (N.D. W. Va. June 14, 1999).

¹⁷ See *N.Y. State Bar Ass'n*, 276 F. Supp. 2d at 131-33.

¹⁸ See *Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 19 (1st Cir. 2000) ("[I]t simply cannot be said that Congress, by enacting section 530B, meant to empower states (or federal district courts, for that matter) to regulate government attorneys in a manner inconsistent with federal law."); *United States v. Condon*, 170 F.3d 687, 690 (7th Cir. 1999) (holding that § 530B involves rules of conduct, not rules of evidence); *United States v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999) (holding that § 530B is not a delegation by Congress to the states to create professional rules that would regulate what evidence should be admitted in federal court).

¹⁹ *Lowery*, 166 F.3d at 1125; cf. *United States v. Plumley*, 207 F.3d 1086, 1095 (8th Cir. 2000) (citations omitted) ("The interpretation of state disciplinary rules as they apply to federal criminal law practice should be and is a matter of federal law.").

²⁰ See *Judicial Administration*, 28 C.F.R. § 77.1(c) (2005) ("Section 530B imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but should not be construed to impose greater burdens on Department attorneys than those on non-Department attorneys or to alter rules of professional responsibility that expressly exempt government attorneys from their application.").

²¹ 28 C.F.R. § 77.4 states:

Section 77.4 Guidance.

(a) Rules of the court before which a case is pending. A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.

(b) Inconsistent rules where there is a pending case.

The central source of internal guidance for federal prosecutors is the same now as it was in 1980, the United States Attorneys' Manual ("Manual").²² The Manual is a primary source of policies and procedures for the United States Attorneys' offices.²³ Throughout this Article, reference will be made to applicable sections of the Manual because federal prosecutors are to follow its guidance in carrying out all phases of their official responsibilities, including during the preindictment phase of a federal criminal investigation. The Manual, however, only provides

(1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:

- (i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;
- (ii) Whether the local federal court rule preempts contrary state rules; and
- (iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.

(2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(c) Choice of rules where there is no pending case.

(1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

(2) In the process of considering the factors described in paragraph (c)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(d) Rules that impose an irreconcilable conflict. If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(e) Supervising attorneys. Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct. Department attorneys shall not direct any attorney to engage in conduct that violates section 530B. A supervisor or other Department attorney who, in good faith, gives advice or guidance to another Department attorney about the other attorney's ethical obligations should not be deemed to violate these rules.

(f) Investigative Agents. A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

²² U.S. ATTORNEYS' MANUAL (2000), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam (last visited March 5, 2006). Federal prosecutions are also carried out by other components of the Department of Justice such as the Criminal, Tax and Antitrust Divisions.

²³ *Id.* tit. 1, § 1.100.

internal Department of Justice guidance and does create any rights that a party can rely upon in either a civil or criminal proceeding.²⁴ Federal courts have uniformly applied the Manual's statement in holding that the Manual does not create enforceable rights for criminal defendants.²⁵

Federal prosecutors may also look beyond the federal statutes and Department of Justice policy statements to secondary ethical sources with regard to their pre-indictment conduct, most notably the American Bar Association's Criminal Justice Section Prosecution Function Standards.²⁶ Although federal prosecutors are not required to adhere to the ABA Prosecution Standards, the Manual recommends that federal prosecutors be familiar with these standards since courts have referred to them when evaluating prosecutorial conduct.²⁷

II. THE DECISION TO INVESTIGATE AND EMPLOY THE GRAND JURY

The decision to investigate and prosecute a suspected crime is inherently the province of the executive branch.²⁸ Although the Attorney

²⁴ *Id.*; cf. 28 C.F.R. § 77.5 (noting that the regulations interpreting 28 U.S.C. § 530B are solely for the guidance of government attorneys and do not create rights or benefits for others).

²⁵ *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005) (citing *United States v. Gomez*, 237 F.3d 238, 241 n.1 (3d Cir. 2000); *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000); *United States v. Blackley*, 167 F.3d 543, 548-49 (D.C. Cir. 1999); *United States v. Myers*, 123 F.3d 350, 356 (6th Cir. 1997); *United States v. Piervinanzi*, 23 F.3d 670, 682 (2d Cir. 1994); *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990) ("Thus, although we do not endorse the Department's failure to follow its own policies . . . we are constrained to conclude that any such failure that may have occurred here nevertheless does not mandate (or even allow) relief for the [defendant]."); cf. *United States v. Lee*, 274 F.3d 485, 493 (8th Cir. 2001) (failure to follow DOJ death penalty protocol does not create individual rights that the defendant can enforce and therefore the district court cannot order a new death penalty hearing on that basis).

²⁶ AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.5 (1993) [hereinafter STANDARDS FOR CRIMINAL JUSTICE].

²⁷ U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 2.101 ("The American Bar Association Standards for Criminal Justice have not been adopted as official policy by the Department; however, since the courts utilize the Standards in determining issues covered by them, it is recommended that all United States Attorneys familiarize themselves with them."); *see, e.g.*, *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (applying ABA standards in evaluating prosecutorial conduct); *United States v. Zehrbach*, 47 F.3d 1252, 1266 (3d Cir. 1995); *United States v. Morris*, 988 F.2d 1335, 1340 (4th Cir. 1993); *United States v. Martino*, 825 F.2d 754, 759 (3d Cir. 1987).

²⁸ *See In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) ("The Constitution's 'Take Care' clause (art. II, § 3) places the power to prosecute in the executive branch.");

The decision to indict, allege specific charges or dismiss charges is inherently an exercise of executive power, and the prosecutor has broad discretion in these matters. The executive can

General of the United States is the head of the Department of Justice of the United States, the United States Attorneys of the federal judicial districts throughout the country are the chief federal law enforcement officers of the United States within their particular jurisdiction,²⁹ and serve as the nation's principal federal litigators under the direction of the Attorney General.³⁰ Congress has statutorily directed the United States Attorneys to prosecute all offenses against the United States that occur in their districts.³¹

United States Attorneys and the federal prosecutors who work with them enjoy broad discretion in exercising their authority to decide whether to investigate and prosecute with very limited judicial review in this area.³²

choose not to prosecute one case, yet prosecute vigorously another involving the same issues. The judiciary cannot compel prosecutions.

United States v. Martin, 287 F.3d 609, 623 (7th Cir. 2002) (citing Newman v. United States, 382 F.2d 479, 480-82 (D.C. Cir. 1967)) (citations omitted); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.2(a) (1999) ("There is no question that prosecutors in this country have long exercised this discretionary authority.").

²⁹ U.S. ATTORNEYS MISSION STATEMENT (2005), available at www.usdoj.gov/usao/. The United States Attorneys' offices also interact with other parts of the Department of Justice and other federal government agencies. The United States Attorneys are authorized to request the appropriate federal investigative agency to investigate alleged or suspected violations of federal law. U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 2.010. There are also certain notification and pre-approval requirements imposed on the United States Attorneys' Offices in conjunction with their relationship with the Department of Justice, Criminal Division and Office of the Solicitor General. *See id.* tit. 9, §§ 1.000, 2.000.

³⁰ U.S. ATTORNEYS MISSION STATEMENT, *supra* note 29. "United States Attorneys are appointed by, and serve at the discretion of, the President of the United States, with advice and consent of the United States Senate." *Id.* There are ninety-three United States Attorneys, with one assigned to each judicial district, with the exceptions of Guam and the Northern Mariana Islands, where one United States Attorney serves both districts. *Id.*

³¹ 28 U.S.C. § 547(1) (2000).

The United States Attorney, within his/her district, has plenary authority with regard to federal criminal matters. This authority is exercised under the supervision and direction of the Attorney General and his/her delegates. The statutory duty to prosecute for all offenses against the United States (28 U.S.C. § 547) carries with it the authority necessary to perform this duty. The United States Attorney is invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority. The authority, discretionary power, and responsibility of the United States Attorney with relation to criminal matters encompass . . . : (A) investigation suspected or alleged offenses against the United States, . . . ; (B) causing investigations to be conducted by the appropriate federal law enforcement agencies, . . . ; (C) declining prosecutions, . . . ; (D) authorizing prosecutions, . . . ; (E) determining the manner of prosecutions and deciding trial related questions, . . . ; (F) recommending whether to appeal or not to appeal from an adverse ruling or decision.

U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 2.001.

³² *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing Wayte v. United States, 470 U.S. 598, 607 (1985)); United States v. Romero, 360 F.3d 1248, 1252 (10th Cir. 2004); United States v. Martin, 287 F.3d 609, 623 (7th Cir. 2002) ("The judiciary cannot compel prosecutions."); United States v. Goodson, 204 F.3d 508, 512-13 (4th Cir. 2000)

The Manual does not contain specific policy guidance on when to initiate a criminal investigation but standards have been articulated by the ABA.³³ Some legal scholars have suggested that because grand jury investigations are more time consuming, expensive, and logistically cumbersome than traditional police investigations, prosecutors traditionally use grand jury investigations only when the special setting of the grand jury provides a distinct advantage over traditional police investigations.³⁴

(reversing district court order that precluded prosecutor from dismissing an indictment on the basis that it was “in the public interest”); *Nader v. Saxbe*, 497 F.2d 676, 679 (D.C. Cir. 1974) (dismissing mandamus action to compel Attorney General to prosecute violation of Federal Corrupt Practices Act); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 376 (2d Cir. 1973) (dismissing class action to compel investigation of state officials’ management of correctional facility; held to be solely within prosecutorial discretion); *Newman v. United States*, 382 F.2d 479, 480-82 (D.C. Cir. 1967).

³³ Standard 3-3.1 Investigative Function of Prosecutor:

(a) A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.

(b) A prosecutor should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or to prosecute. A prosecutor should not use other improper considerations in exercising such discretion.

(c) A prosecutor should not knowingly use illegal means to obtain evidence or to employ or instruct or encourage others to use such means.

(d) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.

(e) A prosecutor should not secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.

(f) A prosecutor should not promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative and enforcement program.

(g) Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor’s own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person.

STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.1 (1993).

³⁴ See LAFAVE, *supra* note 28, § 8.3 (noting that the advantages of the grand jury include (1) witnesses can be compelled to cooperate with the grand jury through subpoenas, contempt power and the elimination of Fifth Amendment privilege through immunization, (2) voluminous business records can be obtained through a grand jury subpoena allowing for the creation of a complex “paper trail” when those same documents would most likely be unavailable to the police when probable cause is not available to search the location where the

III. THE USE OF GRAND JURY INVESTIGATORY POWER

As was the law in 1980, the district court of the judicial district in which the grand jury sits will summon grand juries when required by the public's interest.³⁵ A grand jury must have at least sixteen jurors for a quorum and the number cannot exceed twenty-three.³⁶ A grand jury can be summoned to sit as members of either a "regular" or "special" grand jury.³⁷

The Fifth Amendment establishes the need and existence of the grand jury in the federal system.³⁸ Although the grand jury interacts with both the prosecutor and the courts, federal courts have recognized that the grand jury is not assigned to any of the three branches of government but is instead a constitutional fixture in its own right.³⁹ The grand jury in a particular federal district is responsible for investigating possible criminal violations

documents are located, and (3) the ability to keep sensitive investigations secret through the grand jury's secrecy requirement).

³⁵ FED. R. CRIM. P. 6(a)(1); *see* *United States v. Salgado*, 250 F.3d 438, 454 (6th Cir. 2001) ("[I]t is the district court which has the authority under Rule 6(a) of the Federal Rules of Criminal Procedure to summon the grand jury to which government's evidence must be presented in order to secure an indictment."); *United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749, 753 (10th Cir. 1992).

³⁶ 18 U.S.C. § 3321 (2000); FED. R. CRIM. P. 6(a)(1). The use of alternate jurors is also allowed. *Id.* at 6(a)(2). "The usual practice in some districts is to call four to six alternates, who are sworn and instructed with the regular members. These alternates are then excused with the explanation that they will be subject to call, the order in which they were selected, if it subsequently becomes necessary to excuse one of the regular members and replace that person with an alternate (to facilitate the assemblage of a quorum during the remaining life of the grand jury)." FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 7.04 (March 2000 ed.).

³⁷ Although special grand juries consist of the same number of members as a regular grand jury, special grand juries sit for a longer period of time and for a different purpose than a regular grand jury. SUSAN W. BRENNER & GREGORY G. LOCKHART, *FEDERAL GRAND JURY PRACTICE* § 2.4 (2005). Special grand juries conduct investigations while regular grand juries traditionally consider whether the evidence supports the prosecution's requested charges. *Id.* Special grand juries are limited to sitting in judicial districts containing more than four million people or when the Attorney General or another authorized Department of Justice official states in writing to the chief judge of the district that a special grand jury is needed because of the criminal activity in the district. 18 U.S.C. § 3331. Regular grand juries sit for up to eighteen months with a permissible six-month extension creating a total possible term of twenty-four months. FED. R. CRIM. P. 6(g). Special grand juries sit for an initial term of eighteen months and can be extended on an incremental basis to sit for up to thirty-six months. 18 U.S.C. § 3331.

³⁸ U.S. CONST. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.").

³⁹ *See, e.g., United States v. Navarro-Vargas*, 408 F.3d 1184, 1196 (9th Cir. 2005) (en banc) (citing *United States v. Williams*, 504 U.S. 36, 47 (1992)).

of federal laws and returning indictments after finding probable cause to believe that a crime has been committed.⁴⁰ The grand jury's investigatory power is tremendously broad.⁴¹ Grand juries have jurisdiction to investigate conduct merely because that conduct might have been a federal crime within the jurisdiction of the federal court convening the grand jury.⁴²

Both the prosecutor and the grand jury serve dual roles in the process. Grand juries, while responsible for determining if probable cause exists that a crime has been committed and returning indictments in accordance with those findings, must also act to protect against unfounded criminal prosecutions.⁴³ The prosecutor must seek indictments when warranted and must also be an advisor to the grand jury.⁴⁴ A prosecutor's use of the grand jury's power is limited only by the grand jury's obligation to evaluate evidence to determine whether to return an indictment.⁴⁵ It is not an abuse of the grand jury process if, in addition to conducting investigation, a prosecutor seeks to obtain evidence of additional criminal conduct or seeks to "lock in" witnesses' testimony under oath for further investigation of wrongdoing.⁴⁶ As in 1980, a federal prosecutor cannot use the grand jury for the sole or dominant purpose⁴⁷ of: (1) obtaining additional evidence on

⁴⁰ ANTITRUST DIV., DEP'T OF JUSTICE, GRAND JURY MANUAL I-1 (1991), available at <http://www.usdoj.gov/atr/public/guidelines/206542.pdf> [hereinafter ANTITRUST DIVISION].

⁴¹ See *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)). "The tremendous breadth of the grand jury's investigatory powers is underscored by the [Supreme] Court's often quoted comment that 'such an investigation may [be] triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors.'" *In re Grand Jury Matter*, 770 F.2d 36, 40 (3d Cir. 1985) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)); see, e.g., *United States v. York*, 428 F.3d 1325, 1331-32 (11th Cir. 2005) (citing *United States v. Calandra*, 414 U.S. 338, 344 (1974)).

⁴² *United States v. Brown*, 49 F.3d 1162, 1168 (6th Cir. 1995) (citing *United States v. McInnis*, 601 F.2d 1319, 1327 (5th Cir. 1979)); see, e.g., *United States v. Paxson*, 861 F.2d 730, 733 (D.C. Cir. 1988).

⁴³ *Navarro-Vargas*, 408 F.3d at 1196 (citing *Branzburg*, 408 U.S. at 686-87).

⁴⁴ *Williams*, 504 U.S. at 63 (citing *United States v. Remington*, 208 F.2d 567, 573-74 (L. Hand, J., dissenting)).

⁴⁵ U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.120 (citing *Costello v. United States*, 350 U.S. 359, 362 (1956)); cf. *United States v. Suleiman*, 208 F.3d 32, 40 (2d Cir. 2000) (citations omitted):

The grand jury's investigation of a criminal conspiracy does not cease where, as here, the government has already convicted some persons for participating in that conspiracy. The grand jury can still call witnesses to achieve a "complete" investigation where its inquiry "is directed at persons suspected of no misconduct but who may be able to provide links in a chain of evidence relating to criminal conduct of others."

⁴⁶ *United States v. McLaughlin*, 910 F. Supp. 1054, 1063 (E.D. Pa. 1995).

⁴⁷ The "sole or dominating purpose" test was first developed by the Second Circuit in *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir. 1964).

charges already made against an indicted defendant,⁴⁸ or (2) eliciting evidence for a civil case.⁴⁹ A prosecutor also cannot use the grand jury solely as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest.⁵⁰

IV. THE USE OF GRAND JURY SUBPOENA POWER

The rules governing the use of the federal court's criminal subpoena power, including grand jury subpoena power, are set forth in Rule 17 of the Federal Rules of Criminal Procedure.⁵¹ Rule 17 authorizes nationwide service of subpoenas⁵² but a grand jury's subpoena authority is contingent on issuance by the federal district court that summoned the grand jury.⁵³ The clerk of a federal district court issues blank grand jury subpoenas which are ready for federal prosecutors to fill-in and serve.⁵⁴ The subpoena can order a witness to appear and give testimony⁵⁵ or produce non-

⁴⁸ See *United States v. Wadlington*, 233 F.3d 1067, 1074 (8th Cir. 2000); *United States v. Thompson*, 944 F.2d 1331, 1337 (7th Cir. 1991) (citing *United States v. Scott*, 784 F.2d 787, 792 (7th Cir. 1986); *United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985) ("Once a defendant has been indicted, the government is precluded from using the grand jury for the 'sole or dominant purpose' of obtaining additional evidence against him."); *United States v. Bin Laden*, 116 F. Supp. 2d 489, 491-92 (S.D.N.Y. 2000) (collecting cases); *United States v. Jackson*, 863 F. Supp. 1449, 1453 (D. Kan. 1994); *In re Grand Jury Matter No. 86-525-5*, 689 F. Supp. 454, 463 (E.D. Pa. 1987); SARA SUN BEALE ET AL., GRAND JURY LAW & PRACTICE, § 9:16 n.1 (2d ed. 2004) (collecting cases); cf. *United States v. Avila*, No. 02 CR 464-8, 2004 WL 1698800, at *1 (N.D. Ill. July 27, 2004) ("The inclusion of new defendants or new charges in a superseding indictment undermines the suggestion that the grand jury was used for the primary purpose of gathering evidence against a formerly indicted defendant." (citing *United States v. Badger*, 983 F.2d 1443, 1458 (7th Cir. 1993); *United States v. Scott*, 784 F.2d 787, 792 (7th Cir. 1986))).

⁴⁹ See *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 432 (1983) ("Use of a grand jury proceeding to elicit evidence for use in a civil case is improper *per se*."); ANTITRUST DIVISION, *supra* note 40, at I-37 n.59 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958)).

⁵⁰ U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.120(B) (citing *In re Pedro Archuleta*, 432 F. Supp. 538 (S.D.N.Y. 1977); *In re Wood*, 430 F. Supp. 41 (S.D.N.Y.), *aff'd sub nom. In re Cueto*, 554 F.2d 14 (2d Cir. 1977)).

⁵¹ See, e.g., *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 854 (9th Cir. 1991) ("Rule 17 of the Federal Rules of Criminal Procedure provides that a grand jury may issue a subpoena.").

⁵² FED. R. CRIM. P. 17(e)(1).

⁵³ *Id.* at 6(a)(1).

⁵⁴ *Id.* at 17(a)(1) ("The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.").

⁵⁵ A subpoena ordering a witness to appear and give testimony is referred to as a *subpoena ad testificandum*. BLACK'S LAW DICTIONARY 1440 (7th ed. 1999).

testimonial physical evidence.⁵⁶ Courts have held that properly issued grand jury subpoenas enjoy a presumption of regularity.⁵⁷ Unlike warrants, subpoenas are traditionally issued without prior judicial review and approval.⁵⁸ Prosecutors should be aware of the legal requirements in this area by consulting the local rules of the federal district in which they seek to use subpoenas to obtain the information.⁵⁹

A. PREAPPEARANCE INTERVIEW OR REVIEW AND THE “OFFICE” SUBPOENA

The law has not changed since 1980 in that the issuance of a grand jury subpoena does not necessarily require prior grand jury authorization or awareness.⁶⁰ A prosecutor’s collection of information using a grand jury subpoena without the intended participation of the grand jury, however, is an improper use of the grand jury.⁶¹

⁵⁶ A subpoena ordering the witness to produce “books, papers, documents, data or other objects,” FED. R. CRIM. P. 17(c)(1), is referred to as *subpoena duces tecum*. BLACK’S LAW DICTIONARY, *supra* note 55, at 1440.

⁵⁷ *In re Green Grand Jury Proceedings*, 371 F. Supp. 2d 1055, 1057 (D. Minn. 2005) (citing *United States v. R. Enter., Inc.*, 498 U.S. 292, 300-01 (1991)); *see, e.g.*, *Nat’l Commodity & Barter Ass’n v. United States*, 951 F.2d 1172, 1174-75 (10th Cir. 1991) (citing *First Nat’l Bank of Tulsa v. United States Dep’t of Justice*, 865 F.2d 217, 219 (10th Cir. 1989)); *In re Grand Jury Subpoena*, 920 F.2d 235, 244 (4th Cir. 1990); *In re Grand Jury Proceedings Involving Vickers*, 38 F. Supp. 2d 159, 163 (D.N.H. 1998) (citing *In re Lopreato*, 511 F.2d 1150, 1152 (1st Cir. 1975)).

⁵⁸ *See, e.g.*, *United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993).

⁵⁹ For example, prior judicial approval is required before subpoenaing certain court information, *see, e.g.*, N.D. ILL. L. CRIM. R. 32.1, 57.2 (2003), or an attorney to appear before the grand jury when the prosecutor seeks the attorney to testify about information related to the attorney’s client. *See In re Impounded*, 241 F.3d 308, 315 (3d Cir. 2001) (citing PA. RULES OF PROF’L CONDUCT R. 3.10).

The *United States Attorneys’ Manual* does not require prior judicial approval for the issuance of a subpoena to an attorney but does require prior approval by the Assistant Attorney General of the Criminal Division before a grand jury subpoena may be issued to an attorney seeking information related to the attorney’s representation of a client or fees paid by the client. U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 11.140.

⁶⁰ *See First Nat’l Bank of Tulsa*, 865 F.2d at 220; *Doe v. DiGenova*, 779 F.2d 74, 80 (D.C. Cir. 1985) (“U.S. Attorney may ‘fill in blank grand jury subpoenas without actual prior grand jury authorization’” (quoting *United States v. Santucci*, 674 F.2d 624, 627 (7th Cir. 1982))); *United States v. Kleen Laundry & Cleaner, Inc.*, 381 F. Supp. 519, 523 (E.D.N.Y. 1974) (“Absence of a sitting grand jury when a subpoena is issued is not disturbing if return date is set for a day when grand jurors would be in session.”).

⁶¹ *Lopez v. Dep’t of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) (“The prosecutor may issue the subpoena without the knowledge of the grand jury, but his authority to do so is grounded in the grand jury investigation, not the prosecutor’s own inquiry. Federal prosecutors have no authority to issue grand jury subpoenas independent of the grand jury.” (citations omitted)); *United States v. Smith*, 687 F.2d 147, 151-52 (6th Cir. 1982); FEDERAL

Grand jury subpoenas cannot be served for the exclusive purpose of securing an “office interview” with a witness when the prosecutor does not intend to have grand jury participation.⁶² The ABA’s Prosecution Function Standards explicitly discouraged the practice of “office subpoenas”⁶³ while the Manual does not directly address the issue.⁶⁴ When prosecutors have used “office subpoenas” federal courts have hesitated to dismiss an indictment unless the defendant can show that a resulting prejudice has occurred.⁶⁵

It is proper for prosecutors to conduct valid interviews prior to a grand jury appearance to assist in the grand jury process. It is also permissible for the witness to provide a voluntary pre-appearance interview with the prosecutor after being served with the grand jury subpoena.⁶⁶ Voluntary pre-appearance interviews can assist a witness in determining his or her status in the investigation and the prosecutor can determine if the witness has information of value for the grand jury.⁶⁷ In evaluating whether a

PROCEDURE, LAWYERS EDITION 22:754 (“[F]ederal prosecutors have no authority to issue grand jury subpoenas independent of the grand jury. . . . [I]t is the court’s process which summons the witness to attend and give testimony before a grand jury, and it is the court which must compel the witness to testify if, after appearing, the witness refuses to do so.”).

⁶² *United States v. Wadlington*, 233 F.3d 1067, 1075 (8th Cir. 2000) (“[Rule 17(a)] does not authorize the Government to use grand jury subpoenas to compel prospective grand jury witnesses to attend private interviews with government agents.” (citing *United States v. LaFuente*, 991 F.2d 1406, 1411 (8th Cir. 1993))); *United States v. Villa-Chaparro*, 115 F.3d 797, 804 (10th Cir. 1997); *United States v. Elliott*, 849 F.2d 554, 557 (11th Cir. 1988) (citing *United States v. DiGilio*, 538 F.2d 972, 985 (3d Cir. 1976)); *United States v. Martino*, 825 F.2d 754, 759 (3d Cir. 1987).

⁶³ STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.1(e) (1993) (“A prosecutor should not secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.”). See generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 3:2-3:24 (2d ed. 2005) (discussing prosecutorial misuses of grand jury subpoenas).

⁶⁴ Section 9-11.140 of the *U.S. Attorneys’ Manual*, entitled “Limitation on Grand Jury Subpoenas,” does not discuss the practice of “office subpoenas.” U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 11.140. The *U.S. Attorneys’ Manual* does recognize that a grand jury’s power is limited by its function of the possible return of an indictment. *Id.* tit. 9, § 11.120 (citing *Costello v. United States*, 350 U.S. 359, 362 (1956)).

⁶⁵ See *Villa-Chaparro*, 115 F.3d at 804; *LaFuente*, 991 F.2d at 1411.

⁶⁶ *Lopez*, 393 F.3d at 1350 (“A prosecutor may interview a potential grand jury witness either as part of a ‘screening’ process in advance of actual grand jury testimony or as part of the prosecution’s own investigation.”) (citations omitted); *United States v. Pang*, 362 F.3d 1187, 1194-95 (9th Cir. 2004) (“Nothing prohibits a subpoenaed grand jury witness from voluntarily consenting to an interview.” (citing *United States v. Duncan*, 570 F.2d 292, 293 (9th Cir. 1978) (per curiam))).

⁶⁷ *United States v. Burke*, 856 F.2d 1492, 1495 (11th Cir. 1988) (per curiam) (“The United States Attorney must regularly interview witnesses prior to appearances before the

subpoena was issued as a pretext for an impermissible office interview, courts have considered the following factors: (1) whether coercive tactics were used to secure the pre-appearance interview,⁶⁸ (2) whether the pre-appearance interview was in relationship to a scheduled grand jury appearance,⁶⁹ and (3) whether it is a routine practice for a witness to appear first at the U.S. Attorney's office prior to an appearance in the grand jury.⁷⁰ If a prosecutor believes that a subpoenaed witness need not testify before the grand jury, it is good practice for the prosecutor, acting as the grand jury's adviser, to inform the grand jury of this fact to ensure that an accurate record of the advisement is made under Rule 6(e)(1).

B. REQUIRING PRODUCTION OF DOCUMENTS AND OTHER MATERIALS⁷¹

Non-testimonial evidence such as a DNA sample, fingerprints, handwriting exemplars, or financial records typically requires analysis to be useful to the grand jury. Courts have held that a prosecutor may first have the subpoenaed materials analyzed, and can even issue the initial subpoena when the grand jury is not in session, as long as the return date on the

grand jury to ensure that grand jurors are not burdened with duplicate information.”); *United States v. Santucci*, 674 F.2d 624, 632 (7th Cir. 1982) (“It can be seen that the United States Attorney, as a practical matter, is allowed considerable leeway in attempting to prepare for a grand jury investigation.”).

⁶⁸ See *United States v. Wadlington*, 233 F.3d 1067, 1075 (8th Cir. 2000) (“[Rule 17] does not authorize the government to use grand jury subpoenas to compel prospective grand jury witnesses to attend private interviews with government agents.”); *Villa-Chaparro*, 115 F.3d at 804. See generally *Hillard v. Commonwealth*, 158 S.W.3d 758, 765 (Ky. 2005) (providing collection of federal cases);

The courts have generally permitted prosecutors to meet with prospective witnesses in advance of their appearances before the grand jury, as long as the interviews with the prosecutors are optional, and as long as the witnesses are given the choice to appear before the grand jury rather than submit to an interview.

BEALE, *supra* note 48, § 6:2.

⁶⁹ *Wadlington*, 233 F.3d at 1075 (witnesses arrived at U.S. Attorney's office a full day before scheduled grand jury appearance, suggesting to the court that the subpoenas were not issued merely for logistical purposes, but instead were improperly used); *United States v. Tropp*, 725 F. Supp. 482, 486 (D. Wyo. 1989) (evaluating whether the return date on the subpoena was for a time when the grand jury was scheduled to be sitting).

⁷⁰ *United States v. Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1980) (witnesses properly directed to U.S. Attorney's office to address administrative issues before testifying before the grand jury).

⁷¹ See U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.254, for the Department of Justice's “Guidelines for Handling Documents Obtained by the Grand Jury.”

subpoena is for a date that the grand jury is in session.⁷² Furthermore, the material may not ultimately be presented to the grand jury if the witness can voluntarily provide the sample to the prosecutor or government agents outside of the grand jury's presence.⁷³ In order to avoid an abuse of the grand jury, however, the prosecutor must have intended to obtain useable evidence for the grand jury when the subpoenas were initially issued.⁷⁴

Rule 17(c)(2) authorizes a court to quash or modify the subpoena if compliance would be "unreasonable or oppressive."⁷⁵ A party moving to quash a subpoena traditionally argues either that the subpoena seeks information that is not relevant or that the information sought cannot be disclosed because it is protected by privilege. In *United States v. R. Enterprises, Inc.*, the Supreme Court held that when a "subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."⁷⁶ "The burden of persuasion to show that a subpoena was unreasonable lies with the party" moving to quash the production.⁷⁷ Given

⁷² *First Nat'l Bank of Tulsa v. United States Dep't of Justice*, 865 F.2d 217, 220 (10th Cir. 1989) (citing *United States v. Thompson*, 251 U.S. 407 (1928)); *Sutton v. United States*, 658 F.2d 782 (10th Cir. 1981); *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519 (E.D.N.Y. 1974); see also *In re Sealed Cases*, 223 F.3d 775, 778 (D.C. Cir. 2000).

⁷³ See *United States v. Santucci*, 674 F.2d 624, 627 (7th Cir. 1982).

⁷⁴ *United States v. Larkin*, 978 F.2d 964, 968 (7th Cir. 1992) ("Settled law provides that the grand jury has the sole authority to compel a witness to participate in a lineup, and that the government may not short-circuit the grand jury process by obtaining its own motion a court order to compel such appearance.") (citation omitted); *United States v. Smith*, 687 F.2d 147, 152 (6th Cir. 1982) (noting that the government intended to bring the witness before the grand jury if he did not voluntarily cooperate and therefore the government was not using the grand jury to obtain evidence that it could not otherwise lawfully obtain); *In re Melvin*, 546 F.2d 1, 5 (1st Cir. 1976) ("The United States Attorney's office [is not] a proper substitute for the grand jury room [and the grand jury subpoena is not] a compulsory administrative process of the United States Attorney's office." (quoting *Durbin v. United States*, 221 F.2d 520, 522 (D.C. Cir. 1954))); *United States v. O'Kane*, 439 F. Supp. 211, 214 (S.D. Fla. 1977) (also quoting *Durbin*, 221 F.2d at 522); see, e.g., *In re Grand Jury Proceedings/Subpoenas*, 593 F. Supp. 92, 95 (S.D. Fla. 1984).

⁷⁵ FED. R. CRIM. P. 17(c)(2); see, e.g., *United States v. Bergeson*, 425 F.3d 1221, 1224 (9th Cir. 2005) ("Rule 17(c)(2) confers discretion on the district court to quash a grand jury subpoena if compliance would be 'unreasonable or oppressive.'"); *In re Grand Jury*, 111 F.3d 1066, 1075 (3d Cir. 1997) ("Grand juries are subject to judicial control and subpoenas to motions to quash." (quoting *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972))).

⁷⁶ *United States v. R. Enter., Inc.*, 498 U.S. 292, 301 (1991); see also *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 8 (D.D.C. 1996); *In re The August 1993 Regular Grand Jury*, 854 F. Supp. 1392 (S.D. Ind. 1993).

⁷⁷ *In re Impounded*, 277 F.3d 407, 415 (3d Cir. 2002) (citing *R. Enter.*, 498 U.S. at 301).

that only the prosecutors, the investigators working with them, and the grand jurors know the scope of the investigation, “the success rate of these types of motions is predictably low.”⁷⁸ It is error for courts to apply the “same requirements of relevancy, admissibility and specificity” that are applied under Rule 17(c) for a motion to quash a trial subpoena because to do so, “would impose an impossible burden on the grand jury, create untoward delays, and threaten the secrecy of the grand jury.”⁷⁹

A party may also challenge a grand jury subpoena on the grounds of privilege by asserting a constitutional privilege or certain evidentiary privileges recognized under Rule 501 of the Federal Rules of Evidence, such as the attorney-client privilege.⁸⁰ The Supreme Court’s pre-1980 position that, in general, grand juries must recognize certain protections of the First, Fourth and Fifth Amendments⁸¹ has not been altered over the past twenty-five years.

In 1972, the Supreme Court in *Branzburg v. Hayes* made it clear that First Amendment protection must be considered but does not provide an absolute protection to reporters against testifying before a grand jury.⁸² After *Branzburg*, the circuits have split over the question of whether some type of qualified immunity exists for reporters in light of *Branzburg*.⁸³ In

⁷⁸ *Constitutional Rights and the Grand Jury: Hearing Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 80 (2000) (statement of Andrew D. Leipold, Professor of Law, University of Illinois College of Law).

⁷⁹ *In re Sealed Case*, 121 F.3d 729, 755 (D.C. Cir. 1997) (citing *R. Enter.*, 498 U.S. at 299).

⁸⁰ *In re Keeper of Records*, 348 F.3d 16, 23 (1st Cir. 2003) (“Despite a grand jury’s vaunted right to every man’s evidence, it must, nevertheless respect a valid claim of privilege.” (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974))); *In re Impounded*, 241 F.3d 308, 316 (3d Cir. 2001); *Coronado v. Bank Atl. Bancorp, Inc.*, 222 F.3d 1315, 1320 (11th Cir. 2000); *United States v. Haynes*, 216 F.3d 789, 798-99 (9th Cir. 2000); *In re Subpoenaed Grand Jury Witness*, 171 F.3d 511, 513 (7th Cir. 1999); *In re Grand Jury Subpoena*, 1 F.3d 87, 94 (2d Cir. 1993).

The circuits have also split over the question of whether a party can challenge a grand jury subpoena on the grounds that the information is restricted by a civil court protective order. See *In re Grand Jury*, 286 F.3d 153, 158-59 (3d Cir. 2002) (discussing a three-way split among the circuits over the issue). The work product doctrine may also be applicable when the grand jury seeks to obtain information from an attorney. LAFAVE, *supra* note 28, § 8.6(b).

⁸¹ *Calandra*, 414 U.S. at 346; *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) (“Grand juries must operate within the limits of the First Amendment as well as the Fifth.”).

⁸² 408 U.S. at 667.

⁸³ Compare *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 973-74 (D.C. Cir. 2005); *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998); *In re Grand Jury Proceeding*, 810 F.2d 580, 583-86 (6th Cir. 1987) (declining to recognize a journalistic privilege) with *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993); *LaRouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *United States v. Cuthbertson*, 630 F.2d 139, 147

recognition of the First Amendment, the Department of Justice has policies regulating the issuance of any subpoenas to members of the news media, including the need for prior approval from the Attorney General in certain situations.⁸⁴

As the Supreme Court made clear in 1974, a grand jury's subpoena power is also limited by the Fourth Amendment.⁸⁵ Fourth Amendment issues can be implicated when the subpoena seeks to obtain evidence that requires "a physical intrusion, penetrating beneath the skin" of the subpoenaed witness.⁸⁶ Courts have recognized that the relevant Fourth Amendment inquiry is not whether the grand jury subpoena is supported by probable cause but instead whether the "subject matter and scope of the subpoena are reasonable under the circumstances."⁸⁷

The Supreme Court has also recognized that certain Fifth Amendment protections must be considered when the prosecutor seeks a witness's testimony or production of documents through a grand jury subpoena.⁸⁸ A witness's voluntary decision to create business records, like a witness's

(3d Cir. 1980) (recognizing the privilege) (reported at BRENNER & LOCKHART, *supra* note 37, § 14.20.1 n.6).

⁸⁴ See Judicial Administration, 28 C.F.R. § 50.10 (2005); U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, §§ 11.255, 13.400. As with other Department of Justice regulations, 28 C.F.R. § 50.10 has not been interpreted to create or recognize any legally enforceable right in any person. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 974-75; *In re Special Proceeding*, 373 F.3d 37, 44 n.3 (1st Cir. 2004); *In re Shain*, 978 F.2d 850, 853-54 (4th Cir. 1992).

⁸⁵ *Calandra*, 414 U.S. at 346 ("The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena *duces tecum* will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment.") (citations omitted).

⁸⁶ *In re Shabazz*, 200 F. Supp. 2d 578, 581 (D.S.C. 2002) (citations omitted); see, e.g., *In re Grand Jury Proceedings Involving Vickers*, 38 F. Supp. 2d 159 (D.N.H. 1998); *In re Grand Jury Proceeding*, 816 F. Supp. 1196 (D. Ky. 1993); *Henry v. Ryan*, 775 F. Supp. 247 (N.D. Ill. 1991).

⁸⁷ *In re Vickers*, 38 F. Supp. 2d at 164. The *Vickers* court also pointed to five factors for determining the reasonableness of a grand jury subpoena:

- (1) Does the subpoena command the production of things relevant to the investigation being pursued by the grand jury?;
- (2) Does the subpoena specify with sufficient particularity the things being sought?;
- (3) Is the subpoena sufficiently narrow in scope to be considered reasonable?;
- (4) Has the subpoena issued for reasons other than to harass the subject; and
- (5) Can the subject provide the requested evidence without unnecessary risk of personal harm (e.g., potentially dangerous invasive surgery) and/or personal humiliation (e.g., unnecessary invasion of bodily integrity or dignitary interests)?

Id. (citations omitted).

⁸⁸ See *United States v. Hubbell*, 530 U.S. 27 (2000); *Braswell v. United States*, 487 U.S. 99 (1988); *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976).

voluntary decision to testify, does not implicate Fifth Amendment protection because there was no compulsion at the time of the testimony or creation of the documents.⁸⁹ However, federal courts have considered whether the act of providing the documents in response to a subpoena may be testimonial and therefore covered under the Fifth Amendment, because the party producing the documents is conceding the existence of the papers demanded along with his or her possession and control of the documents.⁹⁰ When the existence of the document is a “foregone conclusion,” the act of producing the document is not testimony, and the Fifth Amendment is not implicated because the concession adds nothing to the government’s information but is instead merely an issue of surrendering possession of the documents.⁹¹

C. ALLOWING TIME FOR COMPLIANCE WITH SUBPOENA

A prosecutor issuing a subpoena on behalf of the grand jury should provide a reasonable time for the subpoenaed party to either comply with the subpoena or be able to move in federal court to quash the subpoena. The Department of Justice Antitrust Division Grand Jury Practice Manual, which is a separate publication from the U.S. Attorneys’ Manual, states that as a general policy *subpoenas ad testificandum* should be served approximately three weeks prior to a witness appearing to testify and *subpoena duces tecum* should be served one to two months before the deadline for the submission of the subpoenaed documents.⁹²

A federal prosecutor is balancing competing interests when considering the appropriate return date on subpoenas issued on behalf of the grand jury. A failure to provide enough time to comply can limit the subpoena party’s ability to consult an attorney in preparation for his grand jury testimony and can also implicate the Fourth Amendment. On the other hand, a prosecutor must counterbalance the possible harm caused by the grant of time to comply. A subpoenaed party may use the intervening time to destroy documents⁹³ or flee⁹⁴ in order to avoid compliance with the

⁸⁹ *In re Grand Jury Subpoena*, Dated April 18, 2003, 383 F.3d 905, 909 (9th Cir. 2004) (citing *Doe*, 465 U.S. at 610); *see, e.g., Barrett v. Acevedo*, 169 F.3d 1155, 1167-68 (8th Cir. 1999) (citations omitted).

⁹⁰ *United States v. Teeple*, 286 F.3d 1047, 1049 (8th Cir. 2002) (citations omitted); *see, e.g., In re Grand Jury Subpoena Dated April 9, 1996*, 87 F.3d 1198, 1200 (11th Cir. 1996) (citations omitted).

⁹¹ *United States v. Norwood*, 420 F.3d 888, 896 (8th Cir. 2005) (citations omitted); *see, e.g., In re Foster*, 188 F.3d 1259, 1269-70 (10th Cir. 1999).

⁹² ANTITRUST DIVISION, *supra* note 40, Ch. 3(B)(3).

⁹³ An example of where this factual situation played out was in the case of *United States v. Jones*, 286 F.3d 1146 (9th Cir. 2002). *Jones* involved an investigation by the U.S.

subpoena. The issuance of the subpoena also lessens the grand jury's protection of secrecy since it announces the grand jury's existence and its desire to obtain evidence from the subpoenaed individual.

Courts have allowed grand juries to issue "forthwith" subpoenas ordering immediate compliance.⁹⁵ A party who is served with the "forthwith" subpoena may later seek to suppress the subpoena on Fourth Amendment grounds.⁹⁶ "Forthwith" subpoenas are not "*per se* illegal. Rather, the issuance of a 'forthwith' subpoena may be justified by the facts and circumstances of a particular case."⁹⁷ However, due to the potential concerns surrounding its use, the Manual requires pre-approval by the U.S. Attorney before a federal prosecutor uses a forthwith subpoena in a grand jury investigation.⁹⁸

V. INSIDE THE GRAND JURY

A. THE PROSECUTOR'S ROLE AND FUNCTION

When appearing before the grand jury, a federal prosecutor has the dual roles of both pressing for an indictment and being a legal advisor to the grand jury.⁹⁹ Additionally, "[t]he *ex parte* character of grand jury

Attorney's Office into possible wrongdoing by the San Francisco Human Rights Commission's ("HRC") program for certifying minority ownership of businesses that bid on public contracts. *Id.* at 1148. The U.S. Attorney's initial grand jury subpoena was issued on June 25, 1999 and sought production of records from HRC by August 12, 1999. *Id.* On July 30, 1999, the U.S. Attorney's Office issued a "forthwith" grand jury subpoena and executed an immediate search of HRC's office after being informed that documents subpoenaed under the original subpoena were being shredded. *Id.*

⁹⁴ *Cf.* LAFAVE, *supra* note 28, § 8.7(e) (citing *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003) (discussing the use of the material witness statute to detain prospective grand jury witnesses)).

⁹⁵ A "forthwith" subpoena requires the subpoenaed party to comply immediately which usually either means the day the subpoena is served or the next day. BRENNER & LOCKHART, *supra* note 37, § 14.5; *see* *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31 (D. Conn. 2002) (approving of the use of a "forthwith" subpoena when the government had evidence that target of a grand jury investigation was destroying computer files related to the grand jury investigation).

⁹⁶ LAFAVE, *supra* note 28, § 8.7(e).

⁹⁷ *United States v. Lartey*, 716 F.2d 955, 962 (2d Cir. 1983) (citing *United States v. Re*, 313 F. Supp. 442, 448-49 (S.D.N.Y. 1970)).

⁹⁸ U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.140 ("'Forthwith' subpoenas should be used only when an immediate response is justified and then only with the prior approval of the United States Attorney.").

⁹⁹ *See* *United States v. Williams*, 504 U.S. 36, 63 (1992) (Stevens, J., dissenting) (citing *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979) (Friendly, J., dissenting); *United States v. Remington*, 208 F.2d 567, 573-74 (2d Cir. 1953) (L. Hand, J. dissenting)).

proceedings makes it peculiarly important for a federal prosecutor to remember that, in the familiar phrase, the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹⁰⁰

As to balancing the objective of these two roles, the Manual states:

In dealing with the grand jury, the prosecutor must always conduct himself or herself as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape nor innocence suffer. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor’s responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jury.¹⁰¹

The American Bar Association *Prosecution Standard 3-3.5 Relations with Grand Jury* states:

(a) Where the prosecutor is authorized to act as legal advisor to the grand jury, the prosecutor may appropriately explain the law and express an opinion on the legal significance of the evidence but should give due deference to its status as an independent legal body.

(b) The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

(c) The prosecutor’s communications and presentations to the grand jury should be on the record.¹⁰²

B. WHO MAY ATTEND SESSIONS

Rule 6(d) expressly identifies who may be present while the grand jury is in session¹⁰³ and while the grand jury is deliberating and voting.¹⁰⁴ Excluded from Rule 6(d)’s listing of persons allowed to attend grand jury

¹⁰⁰ *Ciambrone*, 601 F.2d at 628-29 (Friendly, J., dissenting) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1938)); *United States v. Gross*, 41 F. Supp. 2d 1096, 1099 (C.D. Cal. 1999) (citations omitted).

¹⁰¹ U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 11.010.

¹⁰² STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.5.

¹⁰³ FED. R. CRIM. P. 6(d)(1) (“The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.”).

¹⁰⁴ *Id.* at 6(d)(2) (“No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.”).

sessions are the putative defendant, an attorney for the witness testifying before the grand jury,¹⁰⁵ and the district court judge responsible for supervising the grand jury. Only one witness may appear at a time before the grand jury and a witness must leave the grand jury once he or she has completed testifying.¹⁰⁶ Not all federal prosecutors may appear as counsel before the grand jury.¹⁰⁷ Instead, the federal attorney must be within the definition of “an attorney for the government” set forth in Rule 1¹⁰⁸ to be lawfully present during proceedings before the grand jury.

The prosecutor has the responsibility to safeguard the propriety of the grand jury’s proceedings by leaving the grand jury room during the grand

¹⁰⁵ Although an attorney for a witness is permitted to accompany the witness to the door of the federal grand jury room and remain outside the grand jury room to be available for consultation with the witness during his or her testimony, the attorney cannot enter into the grand jury room. See *In re Grand Jury Subpoena*, 97 F.3d 1090, 1092-93 (8th Cir. 1996) (citing *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (plurality); *United States v. Brown*, 666 F.2d 1196, 1198-99 (8th Cir. 1981)); see, e.g., *In re Grand Jury Proceedings*, 219 F.3d 175, 187 (2d Cir. 2000); *United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990); *United States v. Gaddy*, 894 F.2d 1307, 1315 (11th Cir. 1990); *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir. 1988); *In re Grand Jury Proceedings*, 842 F.2d 244, 249 (10th Cir. 1988). But see *Conn v. Gabbert*, 526 U.S. 286, 292 (1999) (“A grand jury witness has no constitutional right to have counsel present during the grand jury proceeding, and no decision of [the Supreme Court] has held that a grand jury witness has a right to have her attorney present outside the jury room.”). The witness does not have a right to an attorney during the grand jury proceedings because the “criminal proceedings have not been instituted against the witness and therefore the Sixth Amendment right to counsel has not attached.” *Fuller v. Johnson*, 158 F.3d 903, 907-08 (5th Cir. 1998) (citations omitted). It has been suggested, but not definitively held, by some courts that the grand jury witness would have a Sixth Amendment right to counsel if adversarial judicial proceedings have been initiated against the witness for another matter and the grand jury wished to ask the questions of the witness that touched upon this second matter. See *United States v. Kennedy*, 372 F.3d 686, 692-93 (4th Cir. 2004).

¹⁰⁶ See BEALE, *supra* note 48, § 4:10.

¹⁰⁷ See *United States v. Plesinski*, 912 F.2d 1033, 1038 (9th Cir. 1990); *United States v. Nye*, Nos. CR-01-82-S-BLW, CV-04-248-S-BLW, 2005 WL 1806419, at *4 (D. Idaho July 28, 2005).

¹⁰⁸ The definition was relocated in 2002 from Rule 54 to Rule 1: “‘Attorney for the government’ means: (A) the Attorney General or an authorized assistant; (B) a United States Attorney or an authorized assistant; . . . (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.” FED. R. CRIM. P. 1(b)(1); see also U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 11.241 (discussing Department of Justice procedures relating to “an attorney for the government”). Notable cases involving whether a prosecutor is “an attorney for the government” include *United States v. Smith*, 324 F.3d 922, 926 (7th Cir. 2003) (holding that Special Assistant United States Attorney was “an attorney for the government” even though his salary was paid by the State of Wisconsin), and *United States v. Foreman*, 71 F.3d 1214, 1220 (6th Cir. 1995) (holding that Tax Division attorney was not “an attorney for the government” because he was not authorized to participate in the case).

jury's deliberations and voting.¹⁰⁹ Nor should the prosecutor partake in the presentation of the government's case to the grand jury if that prosecutor will testify as a witness before the grand jury.¹¹⁰ Additionally, a prosecutor who has had some previous involvement with the persons under investigation should not participate in the grand jury investigation and should be screened from it.¹¹¹

C. THE PRESENTATION OF EVIDENCE AND PROSECUTORS' COMMENTS TO THE GRAND JURY

Although the grand jury can consider matters brought to its attention from sources other than the prosecutor, such as the court that impaneled it or from the personal knowledge of a grand jury member, the grand jury's efforts are usually focused on receiving evidence presented by an attorney for the government.¹¹² The Federal Rules of Evidence do not apply in a grand jury proceeding except for the privilege provisions.¹¹³ The prosecutor can present hearsay to the grand jury and the grand jury can use the hearsay as the basis of its indictment.¹¹⁴ The prosecutor's presentation is *ex parte* and he or she can provide legal advice to the grand jury, discuss the prosecution's strategy with grand jury and can respond to grand juror questions.¹¹⁵

¹⁰⁹ FED. R. CRIM. P. 6(d)(2).

¹¹⁰ See *United States v. Wiseman*, 172 F.3d 1196, 1205 (10th Cir. 1999) ("It is not proper for a prosecutor to testify before the grand jury."); MODEL RULES OF PROF'L CONDUCT R. 3.7 (2003).

¹¹¹ See *In re Grand Jury Investigation of Targets*, 918 F. Supp. 1374, 1375 (S.D. Cal. 1996) (holding that the local U.S. Attorney's Office was not disqualified from participating in a grand jury investigation because it effectively screened an Assistant U.S. Attorney who in previous private practice had represented a target of the investigation). *But see In re Special Proceedings*, 373 F.3d 37, 43 (1st Cir. 2004) (upholding a district court's decision to appoint a special prosecutor because the district court had multiple reasons to be concerned that the government's prosecution, even conducted by attorneys from an outside U.S. Attorneys' office, would result in a public impression of a conflict of interest in the case).

¹¹² ADMINISTRATIVE OFFICE OF COURTS, HANDBOOK FOR FEDERAL JURORS 2, available at <http://www.moed.uscourts.gov/Jury/FederalHandbookForGrandJurors.pdf> (last visited April 9, 2006).

¹¹³ FED. R. EVID. 1101(d)(2); *United States v. John Doe, Inc. I*, 481 U.S. 102, 119 (1987) (Brennan, J., dissenting).

¹¹⁴ *United States v. Bergeson*, 425 F.3d 1221, 1226 (9th Cir. 2005). The *U.S. Attorneys' Manual* notes that although "[a]s a general rule, it is proper to present hearsay to the grand jury . . . [e]ach United States Attorney should be assured that hearsay evidence presented to the grand jury will be presented on its merits so that the jurors are not misled into believing that the witness is giving his or her personal account." U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.232.

¹¹⁵ ANTITRUST DIVISION, *supra* note 40, Ch. 4(C)(3)-(5).

D. RECORDING OF PROCEEDINGS

As in 1980, Rule 6(e)(1) continues to require that all grand jury proceedings, other than grand jury deliberation and voting, be recorded by a court reporter or a suitable recording device.¹¹⁶ The attorney for the government is ordered under Rule 6(e)(1) to retain control of the grand jury recording, reporters' notes and any transcripts of grand jury proceedings.¹¹⁷ However, the grand jury's records, although in the government's possession, are the court's records.¹¹⁸

The 1979 Advisory Committee Notes to Rule 6(e)(1) state that the transcribing or recording of grand jury proceedings ensures that: (1) the defendant will be able to later impeach a government witness at trial with a prior inconsistent statement made before the grand jury, (2) the testimony received by the grand jury will be trustworthy, (3) potential prosecutorial abuses are restrained, and (4) evidence will be available for use by the prosecutor at trial.¹¹⁹ Rule 6(e)(1) is in accordance with the ABA's Prosecution Standards.¹²⁰ The prosecutor must ensure that the grand jury proceeding is properly recorded since parties may seek grand jury information in the later criminal trial or in other related matters.¹²¹

Although Rule 6(e)(1) states that an unintentional failure to make a recording of grand jury proceedings does not affect the validity of a prosecution,¹²² prosecutors should be careful to make sure that all discussions with the grand jurors occur on the record. A prosecutor should not "go off the record" while before the grand jury at any time, should minimize engaging in casual conversations with grand jurors before or after proceedings, and should make a record of any inadvertent conversations that occur off the record with a grand juror about an investigation the grand jury is conducting.¹²³

¹¹⁶ FED. R. CRIM. P. 6(e)(1).

¹¹⁷ *Id.*

¹¹⁸ *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 684-85 (1958); *United States v. Penrod*, 609 F.2d 1092, 1097 (4th Cir. 1979).

¹¹⁹ FED. R. CRIM. P. 6(e)(1) (1979 Advisory Committee Note).

¹²⁰ STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.6(e) ("The prosecutor's communications and presentations to the grand jury should be on the record.").

¹²¹ See *infra* Part V.I. (discussing grand jury secrecy and permissible disclosures).

¹²² FED. R. CRIM. P. 6(e)(1).

¹²³ ANTITRUST DIVISION, *supra* note 40, Ch. 4(C)(1).

Cases involving Rule 6(e)(1) violations have focused on the inadvertent failure to record grand jury proceedings.¹²⁴ Under the plain language of Rule 6(e)(1), however, a court should deny a motion to dismiss an indictment if the failure to record the grand jury proceedings was inadvertent. However, Rule 6(e)(1) does not define what constitutes an inadvertent failure to record a grand jury proceeding.

E. SUBPOENAING “TARGETS” OF THE INVESTIGATION

Through the subpoena power, grand juries can compel the attendance of witnesses¹²⁵ including the target of a grand jury’s investigation.¹²⁶ A grand jury may properly subpoena a subject¹²⁷ or a target of the investigation and question a target about his or her involvement in the matter under investigation.¹²⁸ Although the target can be called to testify before the grand jury, there are ethical considerations for subpoenaing a target because the target is a potential future criminal defendant.

The Manual advises federal prosecutors to make an effort to secure a target’s voluntary appearance in front of the grand jury before subpoenaing

¹²⁴ BEALE, *supra* note 48, § 9:13; *cf.* *United States v. Lamoureux*, 711 F.2d 745, 747 (6th Cir. 1983) (determining that prosecutor’s misplacement of grand jury record was inadvertent and therefore dismissal of an indictment was not appropriate).

¹²⁵ LAFAVE, *supra* note 28, § 8.3(a) (“The basic investigative advantage of the grand jury stems from its ability to use the subpoena authority of the court that impaneled it . . . and that court’s authority to hold in contempt any person who willfully refuses, without legal justification, to comply with a subpoena’s directive.”).

¹²⁶ *See, e.g., United States v. Calandra*, 414 U.S. 338, 345 (1974) (“The power of a federal court to compel persons to appear and testify before a grand jury is also firmly established. The duty to testify has long been recognized as a basic obligation that every citizen owes his Government.”); *United States v. Quam*, 367 F.3d 1006, 1008 (8th Cir. 2004) (“When called by the grand jury, witnesses are legally bound to give testimony.” (quoting *United States v. Mandujano*, 425 U.S. 564, 572 (1976)); *United States v. Awadallah*, 349 F.3d 42, 56 (2nd Cir. 2003); *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1016 (11th Cir. 1993); *United States v. Bell*, 902 F.2d 563, 565 (7th Cir. 1990).

¹²⁷ Although often used interchangeably in the grand jury context, the terms “subject” and “target” have different definitions in the *U.S. Attorneys’ Manual*. The *U.S. Attorneys’ Manual* defines a “target” as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” *U.S. ATTORNEYS’ MANUAL*, *supra* note 22, tit. 9, § 11.151. “A ‘subject’ of an investigation is a person whose conduct is within the scope of the grand jury’s investigation.” *Id.*

The *U.S. Attorneys’ Manual* also states that “[a]n officer or employee of an organization which is a target is not automatically considered a target even if such officer’s or employee’s conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.” *Id.* tit. 9, § 11.151. .

¹²⁸ *Id.* tit. 9, § 11.150.

the target to testify.¹²⁹ The Manual comments that the desire to have a target voluntarily appear arises out of a concern that the subpoenaing of a grand jury target may appear “unfair.”¹³⁰ If the prosecutor decides that a subpoena is needed, the Manual requires the United States Attorney or the responsible Assistant Attorney General to preapprove the target subpoena.¹³¹

A prosecutor should also consider the potential impact on the grand jury caused by a target’s invocation of his or her Fifth Amendment rights before the grand jury.¹³² The ABA’s Prosecution Standards counsels that a prosecutor should not compel the appearance of a witness when that witness states in advance that he or she will invoke the constitutional privilege not to testify unless the prosecutor intends to judicially challenge the exercise of the privilege or to seek a grant of immunity according to the law.¹³³

The Manual takes a somewhat different position than the ABA Standards. “If a ‘target’ of the investigation and his or her attorney state in writing, signed by both, that the ‘target’ will refuse to testify by invoking the Fifth Amendment privilege, the witness ordinarily should be excused from testifying unless the grand jury and the United States Attorney agree to insist on the appearance.”¹³⁴ The Manual goes on to state that the United States Attorney may require the target to be questioned before the grand

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

In determining whether to approve a subpoena for a “target,” careful attention will be paid to the following considerations: (1) the importance to the successful conduct of the grand jury’s investigation of the testimony or other information sought; (2) whether the substance of the testimony or other information sought could be provided by other witnesses; and (3) whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

Id.

¹³² See generally Aaron M. Clemens, *Misuse of the Grand Jury: Forcing A Putative Defendant To Appear and Plead the Fifth Amendment*, 28 U. SEATTLE L. REV. 379 (2005).

¹³³ STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.6(e).

¹³⁴ U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 11-154. The Manual goes on to state that

[i]n determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry.

Id.

jury even if the United States Attorney is not prepared to seek a grant of immunity for the target pursuant to 18 U.S.C. § 6003.¹³⁵

F. RIGHT OF PUTATIVE DEFENDANT TO TESTIFY OR PRESENT EVIDENCE

Although a putative defendant has no right to testify in front of the grand jury,¹³⁶ the Manual encourages the prosecutor to allow voluntary appearances by subjects and targets before the grand jury because a prosecutor's refusal of a request to appear before the grand jury may appear unfair.¹³⁷ As one commentator has suggested, a "savvy [defense] counsel will not allow his 'target' clients to testify before the grand jury . . . because it is the rare target who can talk his way out of an indictment."¹³⁸ Therefore, a prosecutor should allow the putative defendant to testify as long as (1) there is no burden on the grand jury or delay of its proceedings, (2) the witness explicitly waives his privilege against self-incrimination on the record before the grand jury, (3) the witness is represented by counsel or voluntarily or knowingly appears without counsel, and (4) the witness consents to a full examination under oath.¹³⁹

It is up to the sound discretion of the grand jury to determine whether to allow a putative defendant to supplement his or her testimony with testimony from third parties.¹⁴⁰ It is also up to the grand jury as to whether the putative defendant can read a prepared statement although there is Department of Justice policy that opposes such a reading.¹⁴¹

¹³⁵ *Id.* tit. 9, § 11-154 ("[O]nce compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself or herself.").

¹³⁶ *United States v. Williams*, 504 U.S. 36, 52 (1992) ("[N]either in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify."); *United States v. Myers*, 123 F.3d 350, 357 (6th Cir. 1997); *United States v. Byron*, 994 F.2d 747, 748 (10th Cir. 1993); *United States v. Isgro*, 974 F.2d 1091, 1096 (9th Cir. 1992).

¹³⁷ U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.152.

¹³⁸ PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE 221-22 (4th ed. 2001).

¹³⁹ U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.152.

¹⁴⁰ *Id.* The Manual also points out "[w]hen passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence." *Id.* (citing *United States v. Calandra*, 414 U.S. 338, 343 (1974)).

¹⁴¹ The Department of Justice, Antitrust Division's policy is to

oppose a request by a target to submit a written request to the grand jury [because] [s]uch statements are fundamentally self-serving, do not allow the jury to weigh the witness' credibility,

G. WARNING "TARGETS" AND "SUBJECT" OF THE GRAND JURY INVESTIGATION

Department of Justice policy encourages the prosecutor to notify a target who is unaware of his status as a target of a grand jury investigation within a reasonable time before seeking an indictment in order to afford the target an opportunity to testify before the grand jury.¹⁴² The typical means of notification is called the "target notification letter." A target notification letter typically informs the recipient about the existence of the grand jury investigation, the target's status as a target of the investigation, and the voluntary opportunity to testify before the grand jury if the target desires.¹⁴³ Department of Justice policy accords the United States Attorney discretion¹⁴⁴ to notify an individual, after previously being notified that he is a target of a grand jury investigation, that the individual is no longer considered a target of an investigation.¹⁴⁵ This notice must also be tailored to the specific case, and notice to a person who has previously been a prior target of a grand jury investigation does not preclude recommencement of the investigation without additional notice of the new investigation.¹⁴⁶

Department of Justice policy also requires prosecutors to provide a series of warnings to targets and subjects of the grand jury investigation as to their rights as a witness if they appear to testify before the grand jury.¹⁴⁷

and cannot ordinarily be used to develop a case for perjury or false declaration, unless the statement is made under penalty of perjury.

ANTITRUST DIVISION, *supra* note 40, Ch. 4(F)(4)(d).

¹⁴² U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.153. However, the Manual does not counsel for notification "in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice." *Id.*

¹⁴³ BEALE, *supra* note 48, § 6:32.

¹⁴⁴ The United States Attorney can decline to provide the notification if the notification would adversely affect the integrity of the investigation, the grand jury process or other appropriate reason. U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.155.

¹⁴⁵ Notification of discontinuation of target status may be appropriate when (1) the individual was previously notified that he was a target of the investigation and (2) the investigation involving the individual has been discontinued without an indictment being returned charging the individual. *Id.* tit. 9, § 11.155.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* tit. 9, § 11.151 ("It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a 'target' or 'subject' of a grand jury investigation."). The previous Department of Justice policy was to give warning to all witnesses regardless of their status instead of just to targets and subjects of the grand jury investigation. See BEALE, *supra* note 48, § 6:24.

The ABA's position is that

The prosecutor must provide the warnings¹⁴⁸ on the record pursuant to Rule 6(e)(1) and the witness should be asked to affirm that he or she understands the warnings.¹⁴⁹

Federal courts have not definitively held what type of warning is constitutionally required in order to inform a witness of his or her rights when appearing before the grand jury and therefore there is some uncertainty in this area of the law.¹⁵⁰ Some circuits have held that the Fifth Amendment privilege against compelled self-incrimination applies to witnesses appearing before the grand jury.¹⁵¹ The Supreme Court in the *Miranda* case itself held that pre-interrogation warnings are required for custodial interrogations.¹⁵² Given that the Supreme Court's indications in dicta and at least one plurality opinion that less than full *Miranda* warnings

if the prosecutor believes that a witness is a potential defendant, the prosecutor should not seek to compel the witness's testimony before the grand jury without informing the witness that he or she may be charged and that the witness should seek independent legal advice concerning his or her rights.

STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.6(d) (1993).

¹⁴⁸ The Manual refers to the warnings given to the witness as the "Advice of Rights." U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.151. The "Advice of Rights" given to the witness are

(1) the grand jury is conducting an investigation of possible violations of Federal Criminal laws involving: (State here the general subject matter of inquiry, e.g., conducting an illegal gambling business in violation of 18 U.S.C. § 1955), (2) you may refuse to answer any questions if a truthful answer to the question would tend to incriminate you, (3) anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding, (4) if you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

Id. The Advice of Rights also includes a supplemental warning given to targets that their "conduct is being investigated for possible violation of federal criminal law." *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ An exception is in the area of target warnings where the federal courts have definitively decided that a warning to a witness that he or she is the target of the grand jury's inquiry is not constitutionally required. *See* *United States v. Bollin*, 264 F.3d 391, 414 (4th Cir. 2001); *United States v. Myers*, 123 F.3d 350, 354-55 (6th Cir. 1997); *United States v. Goodwin*, 57 F.3d 815, 818 (9th Cir. 1995); *United States v. Gillespie*, 974 F.2d 796, 800 (7th Cir. 1992) (citing *United States v. Washington*, 431 U.S. 181, 189 (1977); *United States v. Burke*, 781 F.2d 1234, 1245 (7th Cir. 1985)).

¹⁵¹ *United States v. Kennedy*, 372 F.3d 686, 691 (4th Cir. 2004); *United States v. Gomez*, 237 F.3d 238, 240 (3d Cir. 2000); *Myers*, 123 F.3d at 359 ("[I]t is well established that the Fifth Amendment privilege against self-incrimination extends to grand jury proceedings.") (citing *United States v. Williams*, 504 U.S. 36, 49 (1992); *United States v. Calandra*, 414 U.S. 338, 346 (1992); *Counselman v. Hitchcock*, 142 U.S. 547, 562-63 (1892)).

¹⁵² *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 458 (1966)).

may survive constitutional scrutiny,¹⁵³ it is not hard to predict that full *Miranda* warnings in the grand jury may not be constitutionally necessary. Without deciding the extent of the Fifth Amendment's application to grand jury proceedings, the federal courts that have considered the issue to date have held that the Department of Justice's "Advice of Rights" warning given to grand jury witnesses is sufficient.¹⁵⁴ Regardless of the extent of the Fifth Amendment rights applicable to grand jury proceedings, the Supreme Court has held that a violation of a witness's Fifth Amendment rights does not require the exclusion of the witness's false statement during his perjury trial.¹⁵⁵

Traditionally, the Sixth Amendment right to counsel has been held to be inapplicable in the grand jury since adversary judicial proceedings have not yet commenced. However, the "right to counsel is offense specific,"¹⁵⁶ and therefore a witness's Sixth Amendment rights may apply in the grand jury if the prosecutor seeks to question the witness about events relating to an alleged offense in which adversary judicial proceedings have already commenced.

¹⁵³ See, e.g., *Myers*, 123 F.3d at 360 (citing *United States v. Washington*, 431 U.S. 181, 186 (1977)); *United States v. Gillespie*, 974 F.2d 796, 802 (7th Cir. 1992) (citing *United States v. Washington*, 431 U.S. 181, 86 (1977); *United States v. Mandujano*, 425 U.S. 564, 582 n.7 (1974) (plurality opinion)).

¹⁵⁴ See, e.g., *Myers*, 123 F.3d at 361-62; *Gillespie*, 974 F.2d at 803. Courts of appeal have also held that the United States Attorney Office's failure to provide the written "Advice of Rights form" to the witness before his testimony, although a violation of Department of Justice policy, does not require the suppression of the grand jury testimony or dismissal of the indictment when the Assistant United States Attorney provided an oral warning to the witness before the witness testified before the grand jury. *United States v. Long*, 977 F.2d 1264, 1276 (8th Cir. 1992); see *United States v. Bollin*, 264 F.3d 391, 414 (4th Cir. 2001) (warnings were constitutionally adequate when grand jury witness was informed of his right not to incriminate himself, his right to counsel, and that anything he said could be used against him); *Myers*, 123 F.3d 350 (prosecutor's warning was constitutionally adequate when prosecutor orally warned the target that he had a right not to answer any questions that could incriminate him and that his answers could be used to convict him of a crime, even though the target did not receive an "Advice of Rights form"); *United States v. Goodwin*, 57 F.3d 815 (9th Cir. 1995) (prosecutor's warning was constitutionally adequate when prosecutor orally warned the target that he had a right not to answer any questions that could incriminate him, even though the prosecutor did not warn the target that his answers could be used to convict him of a crime, and the target did not receive an "Advice of Rights form") see also *United States v. Quam*, 367 F.3d 1006 (8th Cir. 2004) (no constitutional violation when the Assistant United States Attorney failed to inform a grand jury witness of her right against self-incrimination or any right to consult counsel).

¹⁵⁵ *Kennedy*, 372 F.3d at 694-95 (citing *United States v. Wong*, 431 U.S. 174, 178-79 (1977); *Mandujano*, 425 U.S. at 576-78, 582-84 (plurality opinion)).

¹⁵⁶ *Kennedy*, 372 F.3d at 692 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)).

H. THE DUTY TO PRESENT FAVORABLE EVIDENCE TO THE GRAND JURY

As discussed in the 1980 article,¹⁵⁷ since a putative defendant has no right to present any evidence to the grand jury, it is up to the prosecutor to decide whether to present evidence favorable to the putative defendant to the grand jury.¹⁵⁸ The Department of Justice's policy is that a prosecutor must disclose to the grand jury, before seeking an indictment, "substantial evidence that directly negates the guilt of the subject of the investigation" when the prosecutor is "personally aware" of that evidence.¹⁵⁹ The ABA Prosecution Standards go further by prohibiting the prosecutor from knowingly not disclosing favorable evidence to the grand jury.¹⁶⁰

Despite Department of Justice policy, the law is settled that a prosecutor is not constitutionally required to include exculpatory evidence in the presentation to the grand jury.¹⁶¹ Once the grand jury indictment is returned and the case proceeds through the pretrial discovery stage, the prosecutor faces the due process requirement of having to disclose this same material pursuant to the Federal Rules of Criminal Procedure¹⁶² and to the Supreme Court's decision in *Brady v. Maryland*,¹⁶³ which preceded the 1980 Article and was reaffirmed by the Supreme Court in its 1985 decision of *United States v. Bagley*.¹⁶⁴ Thus, a prosecutor who fails to disclose exculpatory evidence to the grand jury not only violates Department of Justice policy but also will not gain any advantage in the trial of the case.

I. REQUIREMENT THAT PROSECUTORS MAINTAIN GRAND JURY SECRECY

The Supreme Court has consistently recognized the importance of secrecy in the grand jury system.¹⁶⁵ Rule 6(e)(2)(B) of the Federal Rules of

¹⁵⁷ See *The 1980 Article*, *supra* note 4, at 23-24.

¹⁵⁸ See *infra* Part VF.

¹⁵⁹ U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 11.233.

¹⁶⁰ STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.6(b) (1993) ("No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.").

¹⁶¹ *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999) (citing *United States v. Williams*, 504 U.S. 36, 51 (1992)); see, e.g., *United States v. Angel*, 355 F.3d 462, 475 (6th Cir. 2004); *United States v. Haynes*, 216 F.3d 789, 798 (9th Cir. 2000); *United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir. 1997); *United States v. Stout*, 965 F.2d 340, 343-44 (7th Cir. 1992)).

¹⁶² See FED. R. CRIM. P. 16, 26.2.

¹⁶³ 373 U.S. 83 (1963).

¹⁶⁴ 473 U.S. 667, 676 (1985).

¹⁶⁵ The reasons for grand jury secrecy include:

Criminal Procedure imposes the requirement of grand jury secrecy on specified individuals.¹⁶⁶ Rule 6(e) also requires a court to close any ancillary court hearing¹⁶⁷ and seal any record, order and subpoena¹⁶⁸ necessary to prevent the unauthorized disclosure of a matter occurring before the grand jury. The seal protecting grand jury secrecy “must be kept . . . to the extent and as long as necessary to prevent unauthorized disclosure of matter occurring before the grand jury.”¹⁶⁹ Rule 6(e) also provides for acceptable disclosures under the exceptions section in Rule 6(e)(3).¹⁷⁰

(1) To prevent the escape of those who indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. John Doe, Inc., 481 U.S. 102, 110 (1987) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958)); see, e.g., United States v. Sells Eng’g, Inc., 463 U.S. 418, 424 (1983); Illinois v. Abbot & Assocs., Inc., 460 U.S. 557, 566 n.11 (1983); Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 219 n.10 (1979); cf. *In re* Motions of Dow Jones & Co., 142 F.3d 496, 499 (D.C. Cir. 1998) (“There is no First Amendment right of access to grand jury proceedings. . . . A grand jury is a body that conducts its business in private.”).

Grand jury secrecy also promotes:

(1) the government’s need to know what transpires before the grand jury to prosecute cases effectively and to assist the grand jury in its deliberations; (2) the need to protect the grand jury process from prosecutorial abuse; and (3) the need for government attorneys to adhere to established procedures that limit the government’s power of discovery and investigation.

ANTITRUST DIVISION, *supra* note 40, Ch. 2(A)(1) (citing collection of case law).

¹⁶⁶ FED. R. CRIM. P. 6(e)(2)(B)

Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (i) a grand jury; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

¹⁶⁷ *Id.* at 6(e)(5). Ancillary court proceedings are non-grand jury court proceedings that are covered by grand jury secrecy and therefore closed to the public due to the need to protect from the unauthorized disclosure of matters occurring before the grand jury. See *In re* Newark Morning Ledger Co., 260 F.3d 217, 221 (3d Cir. 2001); *In re* Motions of Dow Jones & Co., 142 F.3d at 500-02; United States v. Smith, 123 F.3d 140, 148-52 (3d Cir. 1997).

¹⁶⁸ FED. R. CRIM. P. 6(e)(6).

¹⁶⁹ *Id.* “The secrecy protection of Rule 6(e)(6) endures beyond the term of the grand jury.” *In re* Federal Grand Jury Proceedings 03-01, 337 F. Supp. 2d 1218, 1220 (D. Or. 2004) (citing *Abbott & Assocs.*, 460 U.S. at 566 n.11; *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003)).

¹⁷⁰ FED. R. CRIM. P. 6(e)(3).

A knowing violation of grand jury secrecy may be punished by contempt of court.¹⁷¹ The requirement of grand jury secrecy, however, only applies to individuals covered under Rule 6(e)(2)(B)¹⁷² and to “matters occurring before the grand jury.”¹⁷³ Notably, witnesses are not covered by

¹⁷¹ *Id.* at 6(e)(7); *see, e.g.*, *United States v. Girardi*, 62 F.3d 943, 945 (7th Cir. 1995) (grand juror convicted of contempt of court, bribery, and obstruction of justice and sentenced to ninety-seven months’ imprisonment for unlawfully disclosing grand jury information in exchange for money); *United States v. Holloway*, 991 F.2d 370, 371 (7th Cir. 1993) (grand juror pleaded guilty to one count of criminal contempt of court and sentenced to seven days of home confinement as part of a two-year period of probation when grand juror violated secrecy requirement by discussing ongoing federal drug investigation with a person who turned out to be a confidential government informant); *United States v. Smith*, 815 F.2d 24 (6th Cir. 1987) (DEA agent convicted of contempt of court for disclosure of grand jury witnesses’ identities and substance of their testimony to a newspaper reporter); *United States v. Smith*, 992 F. Supp. 743 (D.N.J. 1998); *cf.* *United States v. Bellomo*, 944 F. Supp. 1160, 1168 (S.D.N.Y. 1996) (holding that accidental disclosure of 6(e) material is not punishable by contempt of court).

¹⁷² An interesting case illustrating the extent of who is covered by grand jury secrecy and the ability to punish violations of grand jury secrecy under contempt of court is *United States v. Forman*, 71 F.3d 1214 (6th Cir. 1995). Theodore Forman worked in the U.S. Department of Justice as a trial attorney in the criminal enforcement section of the Tax Division in 1990 in Washington, D.C. *Id.* at 1215. Forman’s office mate at the Tax Division was involved in a criminal tax investigation of a reputed mafia leader in Detroit, Michigan, Forman’s hometown. *Id.* Forman’s office mate kept grand jury material from the investigation in an open location in the office thus allowing Forman to make a photocopy of grand jury material in the case including an IRS Special Agent’s report. *Id.* at 1215-17. Forman then delivered the copy of the grand jury material to an alleged mafia leader under investigation by the grand jury. *Id.* at 1217.

At trial, Forman argued that he acted under duress because the mafia official had threatened to harm his family. *Id.* Forman was found guilty of one count of criminal contempt of court but not guilty on one count of obstruction of justice. *Id.* at 1217. The Sixth Circuit reserved the criminal contempt of court conviction because Forman was not covered under the listing of people covered by the requirement of grand jury secrecy under Rule 6(e)(2)(B). *Id.* at 1217. Although Forman was a government attorney, he did not meet the definition of a “attorney for the government” under Rule 6(e)(2)(B)(vi) because he was not authorized to have access to the grand jury material. *Id.* at 1219-20. The government was, however, able to obtain a conviction against Forman for one count of conveying government property in violation of 18 U.S.C. § 641. *United States v. Forman*, 180 F.3d 766 (6th Cir. 1999).

The *Forman* case is instructive in that it demonstrates that the ability to prosecute for contempt of court is limited to those parties covered under the secrecy requirements of Rule 6(e)(2)(B). However, the government can prosecute for other crimes, such as obstruction of justice, bribery or unauthorized transfer of government property, even if contempt of court is not available.

The Department of Justice Criminal Division issued a memorandum on the subject of grand jury secrecy requirements in the wake of the *Forman* case. The substance of that memorandum is contained at U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 156.

¹⁷³ FED. R. CRIM. P. 6(E)(2)(B).

Rule 6(e)'s grand jury secrecy requirement.¹⁷⁴ A prosecutor may, however, ask a witness not to make disclosures,¹⁷⁵ and the witness, unless compelled by a court order, may refuse to reveal both that he testified before the grand jury and the substance of the testimony outside of the grand jury.¹⁷⁶ The *Department of Justice Antitrust Division Grand Jury Manual* states that the grand jury foreman or government attorney should be absolutely clear that it is only a request, and that there is no express or implied coercion, when a witness is requested not to make unnecessary disclosures of his or her grand jury testimony.¹⁷⁷

Rule 6(e) does not define what is a "matter occurring before the grand jury"¹⁷⁸ despite the fact that the concept is a central part of Rule 6(e)'s secrecy requirement. Federal courts have held that if the information or item would reveal anything about the substance of the grand jury investigation, the information or item is subject to Rule 6(e)'s secrecy requirement.¹⁷⁹ The mere fact that an item was submitted to a grand jury, or

¹⁷⁴ *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983) ("Witnesses are not under [Rule 6(e)(2)'s secrecy] prohibition unless they also happen to fit into one of the enumerated classes."). See, e.g., *Lockheed Martin Corp. v. Boeing Co.*, 393 F. Supp. 2d 1276, 1279-80 (M.D. Fla. 2005) (citing *In re Subpoena (Univ. of Fla. Athletic Program)*, 864 F.2d 1559, 1564 (11th Cir. 1989)); *S.E.C. v. Oakford Corp.*, 141 F. Supp. 2d 435, 437 (S.D.N.Y. 2001); *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 283 (S.D.N.Y. 1999); *In re Catfish Antitrust Litig.*, 164 F.R.D. 191, 193 n.2 (N.D. Miss. 1995) (citing *McDonnell v. United States*, 4 F.3d 1227, 1246 (3d Cir. 1993)); *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1195 n.7 (E.D. Mich. 1990) (citing *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976)); FED. R. EVID. 6(e) advisory committee's note (1944) ("The rule does not impose any obligation of secrecy on witnesses."). But see *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) (holding that Rule 6(e)(2)(A) sets a default rule of permitting disclosure of grand jury testimony by a witness but the Rule still leaves courts the authority to use their inherent powers to fashion restrictions on the witness disclosing his or her testimony in "particular and compelling circumstances"); *Univ. of Fla. Athletic Program*, 864 F.2d at 1564 (11th Cir. 1989) ("We hold that the district court had the authority to prevent witnesses from disclosing materials prepared for or testimony given in the grand jury proceedings or related proceedings."); *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680 (8th Cir. 1986).

¹⁷⁵ LAFAVE, *supra* note 28, § 8.5(d).

¹⁷⁶ *United States ex. rel. Robinson v. Northrop Corp.*, No. 89 C 6111, 1998 WL 183903, at *3 (N.D. Ill. Apr. 14, 1998) (citing *Bd. of Educ. of Evanston Twp. High School No. 202 v. Admiral Heating & Ventilation, Inc.*, 513 F. Supp. 600, 604 (N.D. Ill. 1981)).

¹⁷⁷ ANTITRUST DIVISION, *supra* note 40, ch. 2(A)(5).

¹⁷⁸ In other parts, Rule 6(e) uses the phrase "grand-jury matter." FED. R. CRIM. P. 6(e)(3).

¹⁷⁹ See *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1001 (D.C. Cir. 1999) ("Matters occurring before the grand jury . . . encompass 'not only what has occurred and what is occurring, but also what is likely to occur,' including 'the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'" (quoting *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998))); *In re Grand Jury Subpoena*, 103

is somehow related to a grand jury, is not sufficient by itself to mean that the item is covered by grand jury secrecy.¹⁸⁰ Documents provided to the grand jury, government memoranda, interviews, subpoenas, names of witnesses and the grand jury's ministerial records may or may not be "matters occurring before the grand jury" depending on the information contained in the item, the reason for the creation of the item, the extent that the item reveals information about the grand jury, and whether the information was obtained by the government through the grand jury or a second unrelated matter.¹⁸¹

Grand jury secrecy does not automatically mean that the matter will remain secret forever since appropriate disclosures are permitted by Rule 6(e)(3), other rules of federal criminal procedure,¹⁸² and various federal statutes.¹⁸³ As one commentator has written, "[l]ike the hearsay rule, the rule of grand jury secrecy is rife with exceptions. Although these

F.3d 234, 239 (2d Cir. 1996) ("The determination of whether a particular matter is related to a matter occurring before a grand jury is one that depends entirely upon a fact-specific inquiry and the district court's judgment."); *United States v. Phillips*, 843 F.2d 438, 441 (11th Cir. 1988) ("The term 'matters occurring before a grand jury' has been defined to include anything that will reveal what transpired during the grand jury proceedings.") (citations omitted); *United States v. Smith*, 992 F. Supp. 743, 753 (D.N.J. 1998) (quoting *United States v. Smith*, 787 F.2d 111, 115 (3d Cir. 1986)); *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980) (holding that a matter occurring before the grand jury includes the "essence of what takes place in the jury room, in order to preserve the freedom and integrity of the deliberative process."); *LAFAVE*, *supra* note 28, § 8.5(c) ("The first lesson of the federal precedent is that the phrase 'matter occurring before the grand jury' is a term of art, not to be construed literally as encompassing only events that have taken place before the grand jury."); Brian L. Porto, Annotation, *What Are "Matters Occurring Before Grand Jury" Within Prohibition of Rule 6(e) of Federal Rules of Criminal Procedure*, 154 A.L.R. FED. 385 (2005) ("[Rule 6(e)] protects any information that would reveal the identities of grand jury members or witnesses, the substance of testimony, the strategy or direction of the investigation, the grand juror's deliberations or questions, or any comparable matter.").

¹⁸⁰ See *United States v. Lopez*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) ("There is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers.") (quoting *Senate of the Commonwealth of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987)).

¹⁸¹ See Porto, *supra* note 179 (providing a collection of cases where the courts have found these items either to be or not to be, "matters occurring before the grand jury"); see, e.g., ANTI-TRUST DIVISION, *supra* note 40, ch. 2(B)(2) ("The courts differ widely as to the extent that documents are considered 'matters occurring before the grand jury.'").

¹⁸² A criminal defendant will gain access to certain grand jury material through pretrial discovery. See FED. R. CRIM. P. 16, 26.2.

¹⁸³ *In re Grand Jury Matter*, 682 F.2d 61, 63 (3d Cir. 1982) ("[G]rand jury secrecy does not foreclose from all future revelations to proper authorities the same information or documents which were presented to the grand jury. . . . Secrecy is not absolute, and Rule 6(e) has built-in exceptions.") (citations omitted).

exceptions have liberalized disclosure, they are strictly construed: the presumption in favor of grand jury secrecy remains strong.”¹⁸⁴

Rule 6(e)(3)’s permissible disclosures are subdivided between those allowed without prior court authorization,¹⁸⁵ and those that require a court order before the government attorney can make the disclosure.¹⁸⁶ Disclosures that can be made without a court order generally allow such material to be used in investigating criminal conduct.¹⁸⁷ Disclosures requiring a court order authorize disclosure of grand jury material in relation to other proceedings.

The district court may also authorize disclosure of grand jury materials if the disclosure is preliminary to or in connection with a judicial proceeding,¹⁸⁸ is to a defendant seeking to dismiss an indictment because of a matter occurring before the grand jury¹⁸⁹ or is at the request of the prosecutor for use in other investigations involving the enforcement of domestic, tribal, foreign, or military criminal law.¹⁹⁰ A petition to the court may require prior notice to affected third parties, or may be obtained *ex parte* by agreement without prior notice, depending on the information sought and whether the government is the moving party.¹⁹¹ A court evaluating the disclosure request must also balance several interests when determining whether to allow the disclosure.¹⁹²

¹⁸⁴ PAUL S. DIAMOND, *FEDERAL GRAND JURY PRACTICE AND PROCEDURE* 286 (4th ed. 2001); *see, e.g., In re Sealed Cases*, 250 F.3d 764, 768 (D.C. Cir. 2001) (“Congress and the [Supreme] Court have consistently stood ready to defend grand jury secrecy against unwarranted intrusion. In the absence of a clear indication in a status or Rule, [a court] must always be reluctant to conclude that a breach of this secrecy has been authorized.”) (quoting *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 425 (1983)).

¹⁸⁵ FED. R. CRIM. P. 6(e)(3)(A)-(D).

¹⁸⁶ *Id.* at 6(e)(3)(F)-(G).

¹⁸⁷ *See Sells Eng’g, Inc.*, 463 U.S. at 418 (Department of Justice attorney working on grand jury matter cannot disclose grand jury information to a Department of Justice attorney working on a related civil case without prior court approval); *United States v. Pimental*, 380 F.3d 575, 594-96 (1st Cir. 2004) (discussing the history of Rule 6(e)(3)(ii) authorization of disclosure to non Department of Justice personnel assisting Department of Justice Attorneys in a grand jury investigation); *In re Sealed Cases*, 250 F.3d at 764; *In re Grand Jury Subpoena*, 175 F.3d 332, 337 (4th Cir. 1999); *United States v. Forman*, 71 F.3d 1214, 1218 (6th Cir. 1995); U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 727 (discussing authorized disclosures under Rule 6(e)(3)).

¹⁸⁸ FED. R. CRIM. P. 6(e)(3)(E)(i).

¹⁸⁹ *Id.* at 6(e)(3)(E)(ii).

¹⁹⁰ *Id.* at 6(e)(3)(E)(iii)-(v).

¹⁹¹ *Id.* at 6(e)(3)(F).

¹⁹² A matter occurring before a grand jury may not be disclosed unless there is a “particularized need” therefor; that is, only if the “material [sought] is needed to avoid a possible injustice in

J. SUBMISSION OF THE PROPOSED INDICTMENT TO THE GRAND JURY

As mandated by the Constitution, the grand jury's return of an indictment is essential for the prosecution of capital and infamous crimes to proceed in court.¹⁹³ The grand jury may also report the results of its investigation pursuant to Federal Rule of Criminal Procedure 6(f) to a magistrate judge in open court. A grand jury's decision to return an indictment is known as a "true bill" while the grand jury's decision not to return an indictment is a "no true bill." Both the grand jury and the prosecutor must participate in the process of approving the proposed indictment. A minimum of twelve of the quorum of sixteen to twenty-three grand jurors must vote in favor of the indictment for it to be returned,¹⁹⁴ and the indictment must be "signed by an attorney for the government."¹⁹⁵

As a practical matter, the prosecutor working with the grand jury on the investigation prepares the proposed indictment for the grand jury's consideration. A question arises as to whether the prosecutor improperly influences the grand jury's deliberations if the prosecutor has pre-signed the proposed indictment that is presented to the grand jury. To alleviate any question of improper influence, a prosecutor should not sign the proposed indictment before submitting it to the grand jury, but should allow the grand jury to arrive at its own decision whether to return the indictment. Despite the fact that the presigning of an indictment may be a questionable practice that diminishes the grand jury's independence, courts have refused to dismiss such an indictment. Moreover, the grand jury is already aware of the prosecutor's position in favor of returning an indictment at the time of the grand jury's consideration of a proposed indictment. In addition, the mere fact that the prosecutor has already signed the proposed indictment does not prevent the grand jury from exercising its independent authority to refuse returning an indictment.¹⁹⁶

another judicial proceeding . . . the need for disclosure is greater than the need for continued secrecy, and . . . the[] request is structured to cover only material so needed."

In re Sealed Case, 250 F.3d at 771 (alterations in original) (quoting *Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979)); *see, e.g., Shields v. Twiss*, 389 F.3d 142, 147-48 (5th Cir. 2004); *United States v. Aisenberg*, 358 F.3d 1327, 1348-49 (11th Cir. 2004); *In re Grand Jury Subpoena*, 103 F.3d at 239-40; *In re Grand Jury Investigation*, 55 F.3d 350, 354-55 (8th Cir. 1995); *United States v. Nix*, 21 F.3d 347, 351 (9th Cir. 1994).

¹⁹³ U.S. CONST. amend. V.

¹⁹⁴ FED. R. CRIM. P. 6(f).

¹⁹⁵ *Id.* at 7(c)(1).

¹⁹⁶ *United States v. Laboy*, 909 F.2d 581, 585 (1st Cir. 1990); *United States v. Krasner*, 841 F. Supp. 649, 654 (M.D. Pa. 1993); *United States v. Gakoumis*, 624 F. Supp. 655, 657 (E.D. Pa. 1985) (reported in *BRENNER & LOCKHART*, *supra* note 37, § 20.5.8 n.2).

VI. OUTSIDE THE GRAND JURY ROOM

A. INTERFERENCE WITH DEFENSE INVESTIGATION

The ABA's Prosecution Function Standards advises prosecutors not to engage in conduct that obstructs communication between prospective trial witnesses and defense counsel.¹⁹⁷ The federal courts have held "that judicial or prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under circumstances, violate the defendant's right to present a defense."¹⁹⁸ Instructions by any lawyer to a witness not to cooperate with the other side or to talk to lawyers from the other side are improper. A witness is free to talk or not to talk to either side of a criminal case unless otherwise compelled by order of the court.¹⁹⁹ Prosecutors should not interfere in any manner with a defendant's abilities to prepare and present a defense and to access witnesses. Some prosecutors in the past have engaged in such conduct in several ways: (1) by deporting illegal alien witnesses,²⁰⁰ (2) by obstructing the defense's attempts to locate witnesses,²⁰¹ (3) by instructing witnesses not to talk to defense counsel,²⁰² (4) by instructing witnesses to report back to the prosecutor after a defense

¹⁹⁷ STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.1(c) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.").

¹⁹⁸ *United States v. Williams*, 205 F.3d 23, 29 (2d Cir. 2000) (citing *United States v. Golding*, 168 F.3d 700, 705 (4th Cir. 1999); *United States v. Vavages*, 151 F.3d 1185, 1190-92 (9th Cir. 1998); *United States v. Heller*, 830 F.2d 150, 153-54 (11th Cir. 1987)); *see, e.g.*, *Webb v. Texas*, 409 U.S. 95 (1972) (*per curiam*); *cf. United States v. Soape*, 169 F.3d 257, 270 (5th Cir. 1999) ("Witnesses . . . are the property of neither the prosecution nor the defense [and] both sides have an equal right, and should have an equal opportunity, to interview them.") (quoting *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966)); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (1980):

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosures to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

¹⁹⁹ *Workman v. Bell*, 178 F.3d 759, 772 (6th Cir. 1998) (citing *United States v. Matlock*, 491 F.2d 504, 506 (6th Cir. 1974)).

²⁰⁰ *See, e.g.*, *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Villanueva*, 408 F.3d 193, 200 (5th Cir. 2005).

²⁰¹ *See, e.g.*, *United States v. Weddell*, 800 F.2d 1404 (5th Cir. 1986) (cited in *GERSHMAN*, *supra* note 63, § 10:63).

²⁰² *See, e.g.*, *United States v. Carrigan*, 804 F.2d 599 (10th Cir. 1986).

interview, and (5) by demanding that the defense interview of a witness be conducted in the prosecutor's presence.²⁰³

B. TIMING OF INDICTMENTS

The statute of limitations is the primary safeguard against unreasonable prosecutorial delay in bringing a criminal allegation to court.²⁰⁴ Even though prosecutors have no obligation to file criminal charges as soon as probable cause is shown to exist,²⁰⁵ a defendant may challenge the prosecutor's delay in bringing an indictment under the Fifth Amendment's due process clause²⁰⁶ even when these charges are filed before the running of the applicable statute of limitations.

The seminal Supreme Court cases regarding when a pre-indictment delay deprives a defendant of due process discussed in *The 1980 Article*²⁰⁷ were *United States v. Marion*²⁰⁸ and *United States v. Lovasco*.²⁰⁹ Since

²⁰³ See, e.g., *United States v. Leung*, 351 F. Supp. 2d 992 (C.D. Cal. 2005).

²⁰⁴ *United States v. Henderson*, 337 F.3d 914, 919 (7th Cir. 2003) (citing *United States v. McMutuary*, 217 F.3d 447, 481 (7th Cir. 2000)); see, e.g., *Doggett v. United States*, 505 U.S. 647, 665 (1992) (Thomas, J., dissenting) (quoting *United States v. Marion*, 404 U.S. 307, 332 (1971) (“[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges.”) (second alteration in original)).

²⁰⁵ *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

²⁰⁶ The Sixth Amendment's speedy trial guarantee “[applies] to the interval between accusation and trial, and does not obligate the United States to make speedy accusations,” *United States v. Vinson*, 414 F.3d 924, 929 (8th Cir. 2005) (citing *United States v. Marion*, 404 U.S. 307, 313 (1971)), and therefore is not implicated in the pre-indictment period. The Speedy Trial Act and Rule 48(b) of the Federal Rules of Criminal Procedure may be implicated in this area when the arrest occurs before the prosecutor's decision to proceed before the grand jury. The Speedy Trial Act requires that “any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.” 18 U.S.C. § 3161(b).

Rule 48(b) states that “[t]he court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial.” FED. R. CRIM. P. 48(b). “Rule 48(b) comes into play only after a defendant has been placed under arrest.” *United States v. Barken*, 412 F.3d 1131, 1136 (9th Cir. 2005) (citing *United States v. Mays*, 549 F.2d 670, 674 n.4 (9th Cir. 1977)); see, e.g., *United States v. Kalady*, 941 F.2d 1090, 1094 (10th Cir. 1991) (citing *United States v. Lovasco*, 431 U.S. 783, 789 n.8 (1977); *United States v. Marion*, 404 U.S. 307, 319 (1971); *United States v. Revada*, 574 F.2d 1047, 1048 (10th Cir. 1978)); *United States v. Rein*, 848 F.2d 777, 781 n.2 (7th Cir. 1988). See generally U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 17.000 (providing guidance on the Speedy Trial Act).

²⁰⁷ *The 1980 Article*, *supra* note 4, at 26-27.

²⁰⁸ 404 U.S. 307 (1971).

²⁰⁹ 431 U.S. 783 (1977).

then, the Supreme Court has handed down two additional opinions on the subject: *United States v. Gouveia*,²¹⁰ and *Arizona v. Youngblood*.²¹¹ Under the holdings of these cases, the standard the courts of appeal, with the exception of the Fourth and Ninth Circuits, have applied to determine if the preindictment delay has deprived a defendant of due process is (1) whether “the defendant may establish a due process violation if the prosecutorial delay caused actual and substantial prejudice to the defendant’s right to a fair trial,”²¹² and (2) whether the “delay was a course intentionally pursued by the government for an improper purpose.”²¹³ There is no *per se* rule establishing the passage of a particular period of time as being presumptively unreasonable. Instead, “[t]o prove actual prejudice, the defendant must identify witnesses or document lost during the period of delay, and not merely make speculative or conclusory claims of possible prejudice caused by the passage of time.”²¹⁴

²¹⁰ 467 U.S. 180, 192 (1984).

²¹¹ 488 U.S. 51, 58 (1988).

²¹² *United States v. Henderson*, 337 F.3d 914, 920 (7th Cir. 2003) (citing *United States v. McMutuary*, 217 F.3d 447, 481-82 (7th Cir. 2000)); *see, e.g., United States v. Perez-Perez*, 337 F.3d 990, 996 (8th Cir. 2003) (citing *United States v. Brockman*, 183 F.3d 891, 896-97 (8th Cir. 1999)).

²¹³ *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999) (citing *United States v. Scarpa*, 913 F.2d 993, 1014 (2d Cir. 1990); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987)); *see, e.g., United States v. Sprouts*, 282 F.2d 1037, 1041 (8th Cir. 2002) (citing *United States v. Sturdy*, 207 F.3d 448, 451-52 (8th Cir. 2000)); *United States v. Mulderig*, 120 F.3d 534, 540 (5th Cir. 1997) (citing *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996) (en banc)). *See Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996) (collecting cases from every circuit except for the Fourth and Ninth Circuit applying the second requirement of intentional governmental delay).

The second prong of the Fourth Circuit’s analysis is, after the defendant’s showing of prejudice, to

balance the defendant’s prejudice against the government’s justification for delay. “The basic inquiry then becomes whether the government’s action in prosecuting after substantial delay violates ‘fundamental concepts of justice’ or ‘the community’s sense of fair play and decency.’”

Jones v. Angelone, 94 F.3d 900, 904 (4th Cir. 1996) (quoting *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. Automated Med. Labs.*, 770 F.2d 399, 404 (4th Cir. 1985)). The *Jones* court recognized that the Fourth Circuit’s second prong splits from the other circuits and appears to be questionable in light of Supreme Court opinions, but refused to overturn its prior case law since the panel was not sitting en banc. *Id.* at 905. The Ninth Circuit follows a standard similar to the Fourth Circuit’s balancing test. *See United States v. Ross*, 123 F.3d 1181, 1184-85 (9th Cir. 1997) (citing *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985); *United States v. Swacker*, 628 F.2d 1250, 1254 n.5 (9th Cir. 1980)).

²¹⁴ *United States v. Sprouts*, 282 F.3d 1037, 1041 (8th Cir. 2002) (citing *United States v. Sturdy*, 207 F.3d 448, 451-52 (8th Cir. 2000)); *see, e.g., Aleman v. Honorable Judges of Circuit Court of Cook County*, 138 F.3d 302, 310 (7th Cir. 1998) (citing *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994)); *United States v. Carlock*, 806 F.2d 535, 549 (5th

C. BARGAINING FOR TESTIMONY UNDER IMMUNITY

Through the use of immunity, a prosecutor can effectively eliminate a witness's right to invoke his or her Fifth Amendment privilege when refusing to testify. Using the powers to subpoena a witness,²¹⁵ to obtain a grant of immunity for the witness, and to seek contempt when a witness continues to refuse to testify, the prosecutor is able to fashion a situation in which the witness must either testify or go to prison.²¹⁶ Immunity is only available to a witness who has invoked the privilege against self-incrimination or has proffered to do so because a grant of immunity removes the privilege.²¹⁷ Immunity may be either (1) use or transactional immunity,²¹⁸ or (2) formal or informal immunity.²¹⁹

Pursuant to 18 U.S.C. §§ 6001-6005, a federal prosecutor, with the advice and consent of the Department of Justice,²²⁰ can grant immunity to a

Cir. 1986) ("The passage of a long period of time between knowledge by the prosecution of indictable conduct and an indictment is not enough, even if the delay was harmful to the defendant." (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977))).

²¹⁵ The power of the subpoena is a powerful tool for the prosecutor since there are few acceptable reasons under the law for not complying with a subpoena. *Cf. In re Grand Jury Proceedings of Special April 2002 Grand Jury*, 347 F.3d 197, 208 (7th Cir. 2003) ("[F]ear for one's own safety and the safety of one's family is not itself 'just cause' for refusing to testify, and thus will not provide a defense to civil contempt in a grand jury proceeding.") (citing *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961)).

²¹⁶ It is well established that the government may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness is not the target of the criminal case in which he testifies Even for persons who have a legitimate fear that their statements may subject them to criminal prosecution, [the Supreme Court has] long permitted the compulsion of incriminating testimony so long as those statements (or evidence derived from those statements) cannot be used against the speaker in any criminal case.)

Chavez v. Martinez, 538 U.S. 760, 767-68 (2003) (citations omitted); U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 727 ("Should the witness refuse to testify pursuant to the immunity order, he or she can be held in civil contempt under the provisions of 28 U.S.C. [§] 1826 and confined for the life of the court proceeding or the term of the grand jury, including extensions."); see *In re Grand Jury Proceedings of the Special April 2002 Grand Jury*, 347 F.3d at 206-07.

²¹⁷ *Taylor v. Singletary*, 148 F.3d 1276, 1283 n.7 (11th Cir. 1998) (citing *Kastigar v. United States*, 406 U.S. 441, 461 (1972)).

²¹⁸ Transactional immunity "protects the witness from prosecution for the offense or offenses involved," while use immunity "only protects the witness against the government's use of his or her immunized testimony in a prosecution of the witness—except in a subsequent prosecution for perjury or giving a false statement." U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 717.

²¹⁹ Formal immunity is immunity procured under statute. See 18 U.S.C. §§ 6001-05 (2000). Informal immunity is immunity that is given by the prosecutor's promise not to prosecute the witness for any crimes that he or she may admit to when testifying. U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 719.

²²⁰ See U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, §§ 720-71.

witness by applying to the appropriate district court. The United States Attorney is statutorily authorized to request an order from the district court providing immunity to a witness who has refused to testify on the basis of self-incrimination.²²¹ Only federal prosecutors have authority under § 6003 to request a court to enter an immunity order; the district court does not have inherent authority to grant immunity.²²²

The law, as it existed in 1980, remains that federal prosecutors can also provide “informal immunity” to a potential witness by assuring the witness that he will not be prosecuted based on the testimony that the

²²¹ 18 U.S.C. § 6003. The United States Attorney’s request must be pre-approved by the appropriate Department of Justice official. *Id.* § 6003(b). The statute instructs the United States Attorney to seek the grant of immunity when “in [the United States Attorney’s] judgment—(1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.” *Id.*

The United States Attorneys’ Manual states that:

[s]ome of the [non-inclusive] factors that should be weighed in making [the judgment that testimony or information to be obtained from the witness may be necessary to the public interest] include

- A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;
- B. The value of the person’s testimony or information to the investigation or prosecution;
- C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
- D. The person’s relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history;
- E. The possibility of successfully prosecuting the person prior to compelling his or her testimony;
- F. The likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.

U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 23.210.

²²² *United States v. Serrano*, 406 F.3d 1208, 1218 (10th Cir. 2005); *see, e.g., United States v. Burke*, 425 F.3d 400, 411 (7th Cir. 2005) (“The United States Attorney has authority to grant immunity to a witness; federal courts, by contrast, play only a ministerial role in ensuring that this power is properly exercised.” (citing *United States v. George*, 363 F.3d 666, 671-72 (7th Cir. 2004))); *United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005) (“[A] district court is without authority to confer immunity on a witness *sua sponte*. . . . [O]nly the prosecution is entitled to seek witness immunity in a federal criminal case.”); *cf. United States v. Moussaoui*, 382 F.3d 453, 467 (4th Cir. 2004) (“The circuits are divided with respect to the question of whether a district court can ever compel the government, on pain of dismissal, to grant immunity to a potential defense witness.”). The *Moussaoui* court also noted that the practice of a court compelling the prosecution to provide immunity to a defense witness implicates separation of powers doctrine. *Id.*

witness provides.²²³ Informal immunity, which is also referred to as “pocket immunity” or “letter immunity,” is “conferred by agreement with the witness” and therefore “[t]estimony given under informal immunity is not compelled testimony, but is testimony pursuant to an agreement and thus voluntary.”²²⁴ Informal immunity agreements are viewed as contracts and are interpreted by the courts under the principles of contract law.²²⁵

The parties traditionally negotiate for immunity through a proffer of the proposed testimony. The proffer process is needed by the prosecutor in order to evaluate the usefulness and believability of the proffered testimony. The prosecutor must be careful as to scope of the information obtained since that may limit future prosecutions against the individual offering the proffer or eventual testimony under *Kastigar*.²²⁶ The prosecutor must also be careful to consider the veracity of the potential witness to ensure that the prosecutor is not allowing the presentation of perjured testimony to the grand jury.

D. THE PROSECUTOR’S DECISION TO SEEK AN INDICTMENT

As was the law in 1980, prosecutors have significant discretion in deciding whether or not to bring a criminal charge.²²⁷ Judicial dismissal of

²²³ See, e.g., *United States v. Quam*, 367 F.3d 1006, 1008 n.2 (8th Cir. 2004).

²²⁴ U.S. ATTORNEYS’ MANUAL, *supra* note 22, tit. 9, § 719. See, e.g., *United States v. McFarlane*, 309 F.3d 510, 513 (8th Cir. 2002) (“Prosecutors often enter into informal immunity agreements with criminal defendants, promising immunity in exchange for information from the defendant about other criminal activity, which information may also incriminate the defendant in the wrongdoing.”); *United States v. Hembree*, 754 F.2d 314, 317 (10th Cir. 1985) (citing *United States v. Feinberg*, 631 F.2d 388, 390 (5th Cir. 1980)).

²²⁵ See *United States v. McFarlane*, 309 F.3d 510, 514 (8th Cir. 2002) (citing collection of cases); *United States v. Aleman*, 286 F.3d 86, 89 (2d Cir. 2002); *United States v. Andreas*, 216 F.3d 645, 663 (7th Cir. 2000); *United States v. Cantu*, 185 F.3d 298, 302 (5th Cir. 1999); *Taylor v. Singletary*, 148 F.3d 1276, 1284 (11th Cir. 1998) (“In determining the extent of immunity afforded a defendant under an [informal] immunity agreement, a court should apply basic principles of contract law.” (quoting *United States v. Thompson*, 25 F.3d 1558, 1561 (11th Cir. 1994))); *United States v. Chiu*, 109 F.3d 624, 625 (9th Cir. 1997); *United States v. Kilroy*, 27 F.3d 679, 684 (D.C. Cir. 1994); *United States v. Hogan*, 862 F.2d 386, 388 (1st Cir. 1988) (citing *United States v. Crisp*, 817 F.2d 256, 258 (4th Cir. 1987)); *United States v. Curry*, Nos. 3:05 CR 10 Jordan; 3:05 CR 10 Guyton, 2005 WL 2100651, at *3 (E.D. Tenn. July 14, 2005).

²²⁶ See *United States v. Daniels*, 281 F.3d 168, 180 (5th Cir. 2002) (citing *Kastigar v. United States*, 406 U.S. 441 (1972) (“If a defendant shows that he has made immunized statements regarding matters related to the federal prosecution, the Government must establish by a preponderance of the evidence that the evidence relied upon by the grand jury was derived from independent, legitimate sources.”)).

²²⁷ See *supra* Part II.

a charge is an available remedy for a prosecutor's "selective prosecution"²²⁸ and "vindictive prosecution."²²⁹ The Supreme Court has not issued a direct holding addressing whether outrageous government conduct can be remedied through judicial dismissal of a subsequent indictment,²³⁰ however,

²²⁸ See *United States v. Armstrong*, 517 U.S. 456, 463 (1996) ("A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.").

To make out a *prima facie* case of selective prosecution, a defendant must show that the government singled him out for prosecution while it did not prosecute similarly situated others, and that it decided to proceed against him based on impermissible grounds of discrimination or because he exercised a constitutionally protected right.

MICHAEL MONICO & BARRY SPEVACK, *FEDERAL CRIMINAL PRACTICE: A SEVENTH CIRCUIT HANDBOOK* 234 (2005 ed.) (citing *United States v. Alanis*, 265 F.3d 576, 585 (7th Cir. 2001); *Jarrett v. United States*, 822 F.2d 1438, 1443 (7th Cir. 1987)). See generally GERSHMAN, *supra* note 63, §§ 4:9-4.32.

²²⁹ See *United States v. Falcon*, 347 F.3d 1000, 1004 (7th Cir. 2003) ("A vindictive prosecution claim arises when the government pursues prosecution in retaliation for the exercise of a protected statutory or constitutional right.") (citations omitted); *United States v. Lampley*, 127 F.3d 1231, 1245 (10th Cir. 1997) (citing *United States v. Goodwin*, 457 U.S. 368, 372 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("When a defendant exercises constitutional or statutory rights in the course of criminal proceedings, the government may not punish him for such exercise without violating due process guaranteed by the federal Constitution.")); cf. *United States v. Raymer*, 941 F.2d 1031, 1040 (10th Cir. 1991):

"[I]f a defendant successfully challenges a conviction, a more severe sentence may not be imposed after retrial in the absence of articulated reasons based upon objective information. . . . Likewise, a prosecutor may not "up the ante" by filing felony charges when a convicted misdemeanant exercises his statutory appellate right to trial *de novo*.

Id.;

The provision, [providing a two level enhancement for obstructing or impeding the administration of justice], is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision.

U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.2 (2005). See generally GERSHMAN, *supra* note 63, §§ 4:33-67.

"The Supreme Court has made clear that the law governing plea negotiations is different from the law of vindictive prosecutions." *United States v. Schneider*, 395 F.3d 78, 88 n.5 (2d Cir. 2005). The reason for the difference is that plea negotiations have been recognized by the Supreme Court as a valid process in which the prosecutor may decide to forgo the prosecution of legitimate charges in exchange for the time and expense savings brought forth by the defendant's plea to lesser charges. See *United States v. Goodwin*, 457 U.S. 368, 380 (1982); see also U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, §§ 16.000, 27.330-27.710 (providing policy guidance on plea negotiations and agreements).

²³⁰ See *United States v. Nolan-Cooper*, 155 F.3d 221, 224 (3d Cir. 1998) (citing *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973)); *United States v. Mosely*, 965 F.2d 906, 908 (10th Cir. 1992) ("When the government's

in cases before the lower federal courts, such dismissals are rare and the circuits are currently split over the question of whether the defense exists at all.²³¹

Federal prosecutors considering whether to bring a criminal charge can look to the Department of Justice's "Principles of Federal Prosecution" section of the Manual.²³² The minimum requirement for initiating federal prosecution is the requirement of probable cause. However, a prosecutor may decide to continue an investigation or even decline prosecution even when probable cause exists that a crime has been committed.²³³ The ABA's *Criminal Justice Section Prosecution Function Standards* also provide guidance for prosecutors' charging decisions.²³⁴

conduct during an investigation is sufficiently outrageous, the courts will not allow the government to prosecute offenses developed through that conduct.").

²³¹ Compare *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995), *United States v. Tucker*, 28 F.3d 1420, 1428 (6th Cir. 1994) (rejecting the doctrine completely), and *United States v. Capelton*, 350 F.3d 231, 243 n.5 (1st Cir. 2003) ("[The outrageous government conduct] doctrine is moribund; in practice, courts have rejected its application with almost monotonous regularity.") (quoting *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993)), with *United States v. Berkovich*, 168 F.3d 64, 68-69 (2d Cir. 1999); *United States v. Barbosa*, 271 F.3d 438, 469 (3d Cir. 2001); *United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003); *United States v. Nguyen*, 250 F.3d 643, 645-46 (8th Cir. 2001) (recognizing the existence of the doctrine but noting that it is available in the rarest of circumstances).

²³² U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 27.001 ("These principles were originally promulgated by Attorney General Benjamin R. Civiletti on July 28, 1980. While they have since been updated to reflect changes in the law and current policy of the Department of Justice, the underlying message to Federal prosecutors remains unchanged.").

²³³ *Id.* tit. 9, § 27.200(B) cmt. The *United States Attorneys' Manual* also states that:

The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because: (1) no substantial Federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.

Id. tit. 9, § 27.220.

²³⁴ Standard 3-3.9 Discretion in the Charging Decision:

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obligated to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;

VII. ADDRESSING IMPROPER PREINDICTMENT PROSECUTORIAL CONDUCT

The 1980 Article did not contain a separate section discussing a means for addressing improper preindictment prosecutorial conduct. Fortunately, most federal prosecutors act in accordance with the Constitution, the statutory law, the applicable federal rules of procedure and the Department of Justice's policies. Consequently, the question of what is the appropriate remedy for improper preindictment prosecutorial conduct has arisen infrequently. Because several important developments have occurred in this area of the law over the past twenty-five years, we have added this section.

The 1980 Article cited several cases in which a federal court either dismissed an indictment or recognized the authority of federal courts to dismiss an indictment, because of prosecutorial misconduct in the pre-indictment setting, including: (1) failure to follow ethical requirements set forth in the Code of Federal Regulations;²³⁵ (2) violating Rule 6(d)'s prohibition on the presence of unauthorized individuals in the grand jury room;²³⁶ and (3) improprieties in the prosecutor's presentation to the grand

(iii) the disproportion of the authorized punishment in retaliation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension or conviction of others; and

(vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number or degree than can be reasonably supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

(g) The prosecutor should not condition a dismissal of charges, *nolle prosequi*, or similar action on the accused relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.

STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, § 3-3.9 (1993).

²³⁵ *The 1980 Article*, *supra* note 4, at 3-4 (citing *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979)).

²³⁶ *Id.* at 13 n.99 (citing collection of cases).

jury, including making inflammatory comments to the grand jury, failing to disclose exculpatory evidence to the grand jury, or willfully misleading the grand jury.²³⁷ In the period leading up to the 1980 Article, federal courts were increasingly sensitive to the prejudice that could result to a putative defendant and the appropriateness of federal courts providing a remedy.²³⁸

Two Supreme Court decisions in the late 1980's, *United States v. Mechanik*,²³⁹ and *Bank of Nova Scotia v. United States*,²⁴⁰ and one in 1992, *United States v. Williams*,²⁴¹ have refined the law. Federal courts now have a more limited role in remedying pre-indictment prosecutorial misconduct than in 1980. The lower federal courts have also applied the legal standards enumerated by the Supreme Court in *Mechanik*, *Bank of Nova Scotia*, and *Williams* beyond the factual situations present in those three cases to other types of alleged pre-indictment prosecutorial misconduct.²⁴²

In *Bank of Nova Scotia*, the Supreme Court held that a defendant seeking to dismiss an indictment before trial must demonstrate that the

²³⁷ *Id.* at 16-17 nn.129-33 (citing collection of cases).

²³⁸ See *United States v. Williams*, 504 U.S. 36, 61-63 (Stevens, J., dissenting) (citing *United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979) (failing to inform the grand jury of its authority to subpoena witnesses); *United States v. Lawson*, 502 F. Supp. 158, 162, nn.6-7 (D. Md. 1980) (misstating facts); *United States v. Basurto*, 497 F.2d 781, 786 (9th Cir. 1974) (prosecutor's presentation of perjured testimony); *United States v. Roberts*, 481 F. Supp. 1385, 1389, n.10 (C.D. Cal. 1980) (misstating the law); *United States v. Gold*, 470 F. Supp. 1336, 1346-51 (N.D. Ill. 1979) (operating under a conflict of interest); *United States v. Phillips Petroleum, Inc.*, 435 F. Supp. 610, 615-17 (N.D. Okla. 1977) (questioning a witness outside of the grand jury's presence resulting in exculpatory testimony but failing to inform grand of the exculpatory testimony)).

²³⁹ 475 U.S. 66 (1986).

²⁴⁰ 487 U.S. 250 (1988).

²⁴¹ 504 U.S. 36 (1992).

²⁴² See *United States v. Vincent*, 416 F.3d 593, 602 (7th Cir. 2005) (quoting *United States v. Fountain*, 840 F.2d 509, 515 (7th Cir. 1988) (applying *Mechanik*'s analysis beyond its original factual situation of a violation of Rule 6(d) "to rules that are designed to prevent the indictment of innocent persons"); *United States v. Strouse*, 268 F.3d 767 (5th Cir. 2002) (applying *Mechanik*, *Bank of Nova Scotia* and *Williams* to a case of prosecutorial misconduct involving the presentation of perjured testimony to the grand jury); *United States v. Myers*, 123 F.3d 350, 355-58 (6th Cir. 1997); *United States v. Gillespie*, 974 F.2d 796, 801 (7th Cir. 1992) ("The Supreme Court has delineated a very limited scope for [a federal court's] supervisory powers; *Williams*, in particular, clearly circumscribes the application of that power to cases involving the violation of the Constitution, applicable statutes, and the Federal Rules of Criminal Procedure."); *United States v. Ruedlinger*, Nos. 97-40012-01-RDR, 97-40012-02-RDR, 1997 WL 807911, at *2 (D. Kan. Dec. 3, 1997):

In accordance with *Williams*, the court shall not invoke our supervisory powers to suppress the defendant's testimony for the violations noted by the defendant, even if they did occur, since the prosecutor's alleged misconduct did not violate the Constitution, an applicable statute, or one of the Federal Rules of Criminal Procedure.

prosecutor's misconduct resulted in prejudice.²⁴³ Constitutional errors that diminish the structural protections of the grand jury to the point of rendering the proceeding "fundamentally unfair"²⁴⁴ are presumed to be prejudicial by definition. Dismissal for non-constitutional errors and constitutional errors that do not affect the grand jury's structural protections are only permissible if the error substantially influenced the grand jury's decision to indict or if there is grave doubt that the grand jury's decision to indict was free from these influences.²⁴⁵

The Supreme Court's decision in *Mechanik* addressed the evaluation of pre-indictment misconduct raised by the defendant in the post-trial setting. The Court in *Mechanik* held that a subsequent finding against the defendant of guilty beyond a reasonable doubt rendered the preindictment prosecutorial misconduct harmless.²⁴⁶ The only recognized exception is that a court can set aside a final judgment of conviction because of the racial composition of the grand jury.²⁴⁷ Lastly, in *United States v. Williams*, the Supreme Court held that a federal court does not have inherent authority to fashion rules to remedy misconduct occurring before the grand jury because, despite the grand jury's interaction with the federal court, the grand jury once convened is a separate institution that the convening federal court cannot supervise.²⁴⁸ The *Williams* Court did, however, preserve a federal court's authority to remedy prosecutorial misconduct that occurred before the grand jury in the pre-trial setting when the misconduct involved "one of those 'few, clear rules which were carefully drafted and approved by [the Supreme Court] and by Congress to ensure the integrity of the grand jury's function.'"²⁴⁹

So far, the lower federal courts have interpreted the Supreme Court's decisions to only recognize racial and gender violations in the selection of the grand jurors as fundamental defects that alter the grand jury process so

²⁴³ *Bank of Nova Scotia*, 487 U.S. at 254.

²⁴⁴ *Id.* at 256-57.

²⁴⁵ *Id.* at 256 (citing *United States v. Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor, J. concurring)).

²⁴⁶ But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

Mechanik, 475 U.S. at 70.

²⁴⁷ *Id.* at 70 n.1.

²⁴⁸ 504 U.S. 36, 47 (1992).

²⁴⁹ *Id.* at 46 (quoting *Mechanik*, 475 U.S. at 74 (O'Connor, J., concurring in judgment)).

significantly that a court must presume prejudice.²⁵⁰ Federal courts have held that all other defects, including violations of Rule 6, do not automatically require the dismissal of an indictment, but instead must be evaluated to determine whether prejudice to an indicted defendant has occurred.²⁵¹

The right to be free from racial and gender discrimination is not unique to the grand jury and is instead more appropriately assigned to the Fifth Amendment's Due Process clause which contains the notion of equal protection as applied in the federal system. The right to an independent grand jury is in itself a constitutional right under the Fifth Amendment. Yet if the courts hold that only racial and gender violations are sufficient to allow immediate dismissal of an indictment, and this is coupled with reliance on a subsequent petit jury determination to make grand jury errors harmless, then the question becomes how egregious must the prosecutorial misconduct be for a defendant to demonstrate the prejudice necessary for the dismissal of an indictment?²⁵²

The Federal Rules of Criminal Procedure suggest that a motion to dismiss an indictment based on occurrences before the grand jury may be successful in some situations. Rule 6(e)(3)(E)(ii) allows for the disclosure of grand jury material to a defendant who demonstrates that grounds may exist to dismiss an indictment because of a matter occurring before the grand jury.²⁵³ The Federal Rules of Criminal Procedure are promulgated by the Supreme Court under rule-making authority delegated by Congress.²⁵⁴ The continuing existence of Rule 6(e)(3)(E)(ii) indicates that, despite the requirement of showing prejudice, a dismissal of the indictment for violations of Rule 6 remains a viable sanction under appropriate circumstances.

²⁵⁰ *United States v. Nelson-Rodriguez*, 319 F.3d 12, 29 (1st Cir. 2003); *United States v. Exarhos*, 135 F.3d 723, 726-27 (11th Cir. 1998) (quoting *Bank of Nova Scotia*, 487 U.S. at 257); *United States v. Mazzola*, 183 F. Supp. 2d 195, 200-01 (D. Mass. 2001) (quoting *Bank of Nova Scotia*, 487 U.S. at 256-57).

²⁵¹ See *United States v. Wooten*, 377 F.3d 1134, 1140 (9th Cir. 2004) (applying *Mechanik's* harmless error rule to a Rule 6(d) violation); *United States v. Vincent*, 416 F.3d 593, 600 (7th Cir. 2005) (quoting *Bank of Nova Scotia*, 487 U.S. at 256); *United States v. Geisler*, 143 F.3d 1070, 1072 (7th Cir. 1998); *United States v. Brooks*, 125 F.3d 484, 497 (7th Cir. 1997); *United States v. J.J.K.*, 76 F.3d 870, 872 (7th Cir. 1996) ("Rule 6(e) does not create a right not to be tried.").

²⁵² See *LAFAVE*, *supra* note 28, § 15.6 (discussing whether the federal courts might consider regulating prosecutorial misconduct under the Fifth Amendment right to a grand jury).

²⁵³ FED. R. CRIM. P. 6(e)(3)(E)(ii).

²⁵⁴ 28 U.S.C. § 2071 (2000).

Letting those who have allegedly violated federal criminal law go free because of prosecutorial misconduct at the preindictment stage is a distasteful scenario. Equally unappealing is allowing prosecutors, who represent the public in the pursuant of justice, the freedom to act unethically. In *Bank of Nova Scotia*, the Supreme Court tried to balance these two concerns when it stated:

Errors of the kind alleged in these cases can be remedied adequately by means other than dismissal. For example, a knowing violation of Rule 6 may be punished as a contempt of court. . . . In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.²⁵⁵

Thus, the remedy suggested by the Supreme Court is one that attempts to focus solely on the prosecutor without providing a windfall to the allegedly guilty individual with its associated harm to society. Congress' efforts in passing the Hyde Amendment²⁵⁶ in 1997 and 28 U.S.C. § 530B in 1998 are two examples of attempts to address concerns over prosecutorial misconduct without subjecting the public to the collateral harm of having to let the guilty go free.

VIII. CONCLUSION

In light of the changes in the law over the past twenty-five plus years, one can only begin to speculate as to what the next twenty-five years will bring. What is clear is that the federal courts now have less inherent authority to remedy alleged inappropriate prosecutorial conduct occurring at the pre-indictment stage than in 1980. It is also clear that today's defendant has a lesser chance of success on a motion to dismiss an indictment for prosecutorial misconduct than a defendant bringing the same motion in 1980.

Prosecutors still must do what is fair because they are still first and foremost required to do justice. The overwhelming number of hardworking ethical federal prosecutors seek to do just that, which is, of course, more than merely winning and losing or locking up the bad guy.²⁵⁷ As the Supreme Court stated in *United States v. Berger*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as

²⁵⁵ *Bank of Nova Scotia*, 487 U.S. at 263.

²⁵⁶ See *supra* Part I.

²⁵⁷ See generally Bruce A. Green, *Prosecuting Means More Than Locking Up Bad Guys*, LITIG., Fall 2005, at 12.

compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.²⁵⁸

In light of the changes that have occurred, perhaps Congress may decide to provide additional legislation beyond that which is on the books today. Both the Manual²⁵⁹ and the regulations promulgated by the Attorney General for implementing 28 U.S.C. § 530B²⁶⁰ hold that the respective regulations do not create enforceable rights in parties harmed by prosecutors who violate these regulations. Congress could act to incorporate certain requirements in the Manual into either statutory law or the Rules of Criminal Procedure. The Supreme Court could, in exercising its rule-making authority and acting with the concurrence of Congress, promulgate changes to the Federal Rules of Criminal Procedure. On the other hand, it may be appropriate to leave it to the Department of Justice to provide internal regulation of its prosecutors as it currently does through the Office of Professional Responsibility. It will take the efforts of all three branches of government to develop the proper balance between the societal needs for zealous prosecution of criminal conduct and the protection of the rights of individual defendants.

Regardless of what changes do or do not occur in the future, the central purpose of the federal criminal justice system is to bring forth a just result in each case. The authors hope that this work will assist all persons working within the federal criminal justice system in fulfilling that goal.

²⁵⁸ 295 U.S. 78, 88 (1935).

²⁵⁹ U.S. ATTORNEYS' MANUAL, *supra* note 22, tit. 9, § 1.100.

²⁶⁰ Judicial Administration, 28 C.F.R. § 77.5 (2005).

