Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b)

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Congress enacted the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976\(^1\) to provide an adequate remedy for consumers injured by antitrust violations, and to ensure that violators do not go scot-free merely because each consumer's injury is too small to make litigation worthwhile.\(^2\) The *parens patriae* provisions authorize state attorneys general to bring treble damage suits on behalf of all state residents injured by antitrust violations.\(^3\) Section 4F(b) of the Act assists state attorneys general in the prosecution of such suits by requiring that the United States Attorney General honor, “to the extent permitted by law,” their requests for “any investigative files or other materials” that may be relevant to a state’s cause of action under the Clayton Act.\(^4\)

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4. In full, § 4F provides:
   \(a\) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation
Pursuant to section 4F(b), state attorneys general have requested grand jury materials from the United States Attorney General to expedite discovery in civil parens patriae suits. Such requests are not surprising. Federal grand jury proceedings generate a wealth of documents and testimony. Because civil antitrust actions are frequently based upon the same facts and allegations as those investigated by federal grand juries, the information produced in the grand jury investigation is often directly relevant to the civil action. Although examination of documents subpoenaed by federal grand juries "will not in and of itself solve the problem of establishing liability," these documents may provide plaintiffs with a "shortcut to what may be the heart of the documentary evidence." In fact, grand jury transcripts have been described as "clearly the single most valuable aid in discovering and assessing the facts relating to the merits of an antitrust claim."
This "most valuable aid," however, may be denied to state attorneys general by rule 6(e) of the Federal Rules of Criminal Procedure.10 Rule 6(e)(2) codifies the traditional rule of grand jury secrecy,11 and rule 6(e)(3) provides an exhaustive list of exceptions, none of which permits disclosure by the Attorney General to state attorneys general to aid civil-law enforcement.12 Only rule


10. FED. R. CRIM. P. 6(e). The relevant sections of rule 6(e) state:

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

(3) Exceptions.

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

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

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

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose materials has been so disclosed, with the names of the persons to whom such disclosure has been made.

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

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such a manner, at such time, and under such conditions as the court may direct.


12. FED. R. CRIM. P. 6(e)(3).
6(e)(3)(C)(i), which permits disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding," allows disclosure to state attorneys general for use in civil suits. Although rule 6(e) establishes no standards governing release under this exception, the Supreme Court has long held that courts may grant access to grand jury materials only upon a showing of "particularized need" by the requesting party. Under the "particularized need" standard, courts cannot release grand jury materials to state attorneys general merely to expedite civil discovery, even when such materials would greatly facilitate state civil antitrust actions.

13. FED. R. CRIM. P. 6(e)(3)(C)(i). Rule 6(e)(3)'s exceptions permit disclosure in three other circumstances. First, otherwise prohibited disclosure may be made to an "attorney for the government" for use in the performance of that attorney's duty. FED. R. CRIM. P. 6(e)(3)(A)(ii). Federal Rule of Criminal Procedure 54(e) defines an "attorney for the government" as "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein." The phrase does not include attorneys for state and local governments. Special Feb. 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896 (7th Cir. 1973); In re Holovachka, 317 F.2d 834, 836 (7th Cir. 1963); In re 1979 Grand Jury Proceedings, 479 F. Supp. 93, 95 (E.D.N.Y. 1979); In re Miami Fed. Grand Jury No. 79-8, 478 F. Supp. 490, 492 (S.D. Fla. 1979); In re Grand Jury Proceedings, 445 F. Supp. 349, 350 (D.R.I. 1978); Corona Constr. Co. v. Ampress Brick Co., 376 F. Supp. 598 (N.D. Ill. 1974); United States v. Downey, 195 F. Supp. 581, 584 (S.D. Ill. 1961); I C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE § 107, at 177 (1969). Thus, the "attorney for the government" exception does not authorize disclosure of federal grand jury materials to state attorneys general.

Second, rule 6(e)(3)(A)(ii) permits disclosure of grand jury materials to persons deemed necessary to assist "attorneys for the government" in the enforcement of the federal criminal laws. Finally, rule 6(e)(3)(C)(ii) authorizes courts to disclose grand jury materials to defendants in a criminal case upon a finding that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

14. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Procter & Gamble Co., 356 U.S. 677 (1958). In Procter & Gamble, the Court held that the requesting party must show compelling necessity to obtain disclosure. 356 U.S. at 681-82. In Douglas Oil, the Court further developed the "particularized need" standard, finding that parties seeking disclosure must demonstrate that (1) the material "is needed to avoid a possible injustice in another judicial proceeding;" (2) the need for disclosure is greater than the need for continued secrecy; and (3) their request is structured to cover only materials so needed. 441 U.S. at 222.

15. The need to reduce the cost and delay of civil discovery is not sufficiently particularized to warrant disclosure of grand jury materials. Writing for the Court in United States v. Procter & Gamble Co., 356 U.S. 677 (1958), Mr. Justice Douglas explained:

The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done.

356 U.S. at 682.

Courts disagree as to whether section 4F(b) altered rule 6(e)'s secrecy requirements for states contemplating *parens patriae* suits. One court has held that section 4F(b) abrogates rule 6(e) in this specific context, and requires that the Attorney General disclose grand jury materials to state attorneys general upon request.16 Other courts have found that although section 4F(b) does not authorize the Attorney General to release grand jury materials on his own authority, it nevertheless manifests congressional intent to modify rule 6(e)'s traditional secrecy requirements, permitting the court to disclose grand jury materials without a finding of "particularized need."17 And, finally, still other courts have held that section 4F(b) did not change the disclosure standards for grand jury materials.18

This Note analyzes the controversy and concludes that the latter courts are correct: Congress never intended to abrogate or modify rule 6(e)'s "particularized need" standard when it enacted section

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16. The argument that § 4F(b) abrogated the rule 6(e) disclosure standard assumes that Congress intended to place state attorneys general on an equal footing with the Justice Department, so that both could use grand jury materials to support civil enforcement. *See* Brief for Appellees at 5, United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980) [hereinafter cited as *Goodrich Appellee's Brief*]. The argument further assumes that rule 6(e) does not prohibit disclosure of grand jury materials requested merely to expedite civil discovery. *See* id. at 12-13. Although its opinion lacks clarity, the Ninth Circuit apparently adopted this approach, at least in part, in United States v. B.F. Goodrich Co., 619 F.2d 798 (1980). *See* text at note 23 infra.


18. Under this approach, a traditional showing of "particularized need" would continue to be a prerequisite to disclosure. Courts have grounded the conclusion that Congress did not intend to alter rule 6(e)'s disclosure standards on two different findings. First, some courts have held that grand jury materials are not within the scope of § 4F(b). *See* Illinois Petition v. Widmar, [1980-81] Trade Cas. 78,105, 78,104-07 (N.D. Ill. 1981); Little Rock School Dist. v. Borden, Inc., [1979-80] Trade Cas. 78,715, 78,720-21 (E.D. Ark. 1979); *In re* Grand Jury which presented Criminal Indictments 76-149 and 77-72 in the Middle Dist. of Pa., 469 F. Supp. 666, 671 (M.D. Pa. 1978). Second, courts have held that § 4F(b)'s "to the extent permitted by law" clause incorporates rule 6(e) and the decisions interpreting that rule. *In re* Grand Jury Investigation of Cuisinarts, Inc., [1980-81] Trade Cas. 78,531 (D. Conn. 1981); Illinois Petition v. Widmar, [1980-81] Trade Cas. 78,103, 78,104-07 (N.D. Ill. 1981).

In *Illinois Petition*, the petitioners argued that the juxtaposition of § 4F(b) and rule 6(e) required disclosure of all the grand jury's materials to the Illinois Attorney General upon a showing of relevance. The court held that § 4F(b) did not apply to materials acquired by and belonging to the grand jury itself: "[T]his section cannot be construed . . . to apply to grand jury materials acquired by the grand jury other than by virtue of the investigative work of the attorney and made available to the grand jury as a result of his own voluntary action." [1980-81] Trade Cas. at 78,105. The court further observed that rule 6(e) determines, with the force and effect of law, when there may be disclosure of grand jury materials, [1980-81] Trade Cas. at 78,106, and rejected petitioners' claim that § 4F(b) dispenses with the "particularized need" requirement. [1980-81] Trade Cas. at 78,107-08. Because petitioners failed to demonstrate "particularized need," the court rejected their disclosure request.
Part I discusses whether Congress intended section 4F(b) to require the Attorney General to disclose grand jury materials to state attorneys general upon request, thereby abrogating rule 6(e)'s explicit prohibition against such disclosure. Part II examines the statutory language and legislative history of section 4F(b) to determine whether Congress intended section 4F(b) to modify rule 6(e)'s "particularized need" standard. Finally, Part III evaluates the policies affected by liberalized disclosure of grand jury materials to state attorneys general. It concludes that liberalized disclosure will not substantially further the Hart-Scott-Rodino Act's purposes, but will undermine the grand jury's effectiveness as an aid to antitrust enforcement and impair the interests of both grand jury witnesses and targets.

I. SECTION 4F(b) AS ABROGATING RULE 6(e)

Section 4F(b) states:

(b) To assist a State attorney general . . . in bringing an action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act. 20

The language of section 4F(b) does not explicitly direct the Attorney General to disclose grand jury materials to state attorneys general; indeed, it does not even mention grand jury materials. 21 Instead, section 4F(b) merely directs the Attorney General to cooperate with state attorneys general by releasing relevant investigative materials "to the extent permitted by law." Nevertheless, the Ninth Circuit Court of Appeals concluded in United States v. B.F. Goodrich Co. 22

19. This Note considers only whether grand jury materials are "investigative files or other materials" within the meaning of the section and the impact of § 4F(b)'s "to the extent permitted by law" clause. A further limitation should be noted. Section 4F(b) requires only disclosure of investigative materials that "are or may be relevant or material to the actual or potential cause of action under this Act." 15 U.S.C. § 15f(b) (1976). Although this limitation may determine whether materials will be released, see, e.g., Brief for Appellant at 13-16, United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980) [hereinafter cited as Goodrich Appellant's Brief]; Goodrich Appellee's Brief, supra note 16, at 23-28, discussion of relevance or materiality is beyond the scope of the Note.


21. This omission alone is significant. One court has observed: When "in other matters" Congress has intended to include transcripts of grand jury testimony and matters acquired by grand jury process among materials that are to be produced by the prosecutor under specific circumstances, it has stated so expressly. There is no literal reading of 4F(b) nor traditional concept of statutory construction which supports the petitioner's contention on this point. Illinois Petition v. Widmar, [1980-81] Trade Cas. 78,103, 78,105 (N.D. Ill. 1981) (footnote omitted).

22. 619 F.2d 798 (9th Cir. 1980).
that section 4F(b) abrogated rule 6(e)'s restrictions when state attorneys general seek disclosure of grand jury materials.

*B.F. Goodrich* was an appeal from an order, pursuant to section 4F(b), permitting California and fifteen other states to inspect and copy federal grand jury materials. A grand jury investigating the B.F. Goodrich Company had completed its term in February 1978 without returning any indictments. The United States filed a civil action against the company in August 1978. California filed against Goodrich in September 1978, and moved to inspect and copy all of the grand jury materials gathered during the federal investigation. Fifteen other states that had not filed actions against Goodrich joined in California’s motion. The district court order permitted each state to inspect and copy the materials. The Ninth Circuit affirmed, holding that (1) grand jury materials are “investigative files or other materials” within the meaning of § 4F(b), and (2) grand jury materials are available to state attorneys general without any showing of “particularized need,” “except where specifically prohibited.”

The accuracy of the *B.F. Goodrich* holding can be tested by a two-part inquiry into the language and legislative history of section 4F(b). To fall within the scope of the section, federal grand jury materials must meet two criteria: first, they must be “investigative files or other materials” within the meaning of § 4F(b); and, second, they must be the kind of investigative materials that the Attorney General is permitted by law to disclose. The analysis below concludes that grand jury materials meet neither of these criteria, and that Congress did not intend section 4F(b) to abrogate rule 6(e).

A. *The Meaning of “Investigative Files or Other Materials”*

States that seek grand jury materials under section 4F(b) typi-
cally argue that evidence presented to a grand jury *prima facie* falls within the category of "investigative files or other materials" that the Attorney General is directed to disclose.\(^{24}\) The argument is plausible because a wealth of case law and scholarly commentary recognizes the value of the grand jury as an investigative body.\(^{25}\) Nevertheless, careful attention to the language of section 4F(b) reveals that grand jury records were not the type of "investigative files or other materials" that Congress intended the Attorney General to disclose.

In providing that "the Attorney General . . . shall . . . make available, to the extent permitted by law, any investigative files or other materials,"\(^{26}\) section 4F(b) does not purport to give the Attorney General new disclosure powers; rather, it limits his discretion to refuse requests for materials that he is empowered to disclose. Because section 4F(b) requires the Attorney General to *disclose* relevant materials to the the extent permitted by law and not to *seek disclosure* from other agencies or branches of government, "investigative files or other materials" must refer only to materials of the Justice Department. Otherwise, the Attorney General would violate section 4F(b) by failing to disclose materials over which he has no control.

Although this interpretation of "investigative files and other materials" is facially more restrictive than the language of the statute, the legislative history directly supports it. The only discussion of the meaning of this clause is found in the House Report on the Hart-Scott-Rodino Act. The report states that section 4F(b) requires the Attorney General to make available only "the Justice Department’s investigative files."\(^{27}\) At least one court has endorsed this more restrictive reading of the statute.\(^{28}\)

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While grand jury materials are traditionally property of the Judicial Branch of government, I conclude that Section 4F(b) applies only and exclusively to the investigative files and other materials acquired by and belonging to the Executive Branch, of which the Justice Department is a member. Congress has been careful not to offend the fundamental concept of separation of powers. Courts should be exceptionally careful not to offend that concept in a zealous effort to assist the Executive Branch in the performance of its characteristically executive responsibilities.
The question, then, is whether grand jury proceedings are "investiga­tive files or other materials" of the Justice Department. Although states seeking disclosure debate the point, both the courts and the Congress view grand jury proceedings as records of the judiciary. The courts have traditionally held that the grand jury is an arm of the judiciary, and that grand jurors are officers of the court rather than of the executive or legislative branches of government. They view grand jury proceedings as the court's records, and the decision whether to make them public as the court's responsibility. Mr. Justice Whittaker clearly stated this view in his concurring opinion in *United States v. Procter & Gamble Co.*: "Grand jury minutes [1980-81] Trade Cas. at 78,105-06 (emphasis original).

29. Parties opposing disclosure of grand jury materials pursuant to § 4F(b) argue that the grand jury is an arm of the court and its proceedings constitute a judicial inquiry. They conclude that grand jury materials are investigative files of the court that convened the grand jury rather than of the Justice Department. *See, e.g.*, Brief for Appellees at 10-11, *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1352 (1981) [hereinafter cited as *Colonial Appellee's Brief*]; *Goodrich Appellant's Brief*, *supra* note 19, at 9. In response, state attorneys general advance two arguments. First, they claim that this position is specious because the court cannot act as investigator, prosecutor, and judge in the same litigation. *See, e.g.*, Virginia Reply Brief at 11-12, *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1352 (1981). Second, they argue that once the grand jury proceedings have concluded, its documents are held by the Justice Department for use in enforcement actions. As such, these materials become the Department's investiga­tive files. *See, e.g.*, id., at 12.


Other courts and commentators conclude that the grand jury is a law enforcement agency, and an investigative and prosecutorial arm of the executive branch. *E.g.*, *In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973); *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1119 (E.D. Pa. 1976) ("However, in broad general terms our findings of fact fairly and substantially support the claim that the grand jury is essentially controlled by the United States attorney and is his prosecutorial tool."). *Wilson & Metz, Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 Am. Crim. L. Rev. 651, 683 (1977); *Recent Developments in the Law of the Federal Grand Jury, supra*, at 212. The context in which courts use this description is, however, important. Courts have not characterized the grand jury as an arm of the executive branch in cases involving access to or control of grand jury documents or transcripts. Rather, these cases deal primarily with the scope of the grand jury inquiry, and the court's authority to circumscribe that inquiry.

A third group of courts characterize the grand jury as a preconstitutional institution, not relegated to a position within any of the three branches of government — an independent body. *See, e.g.*, *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).
and transcripts are not the property of the government’s attorneys, agents or investigators. . . . Instead, those documents are the records of the court.32 Similarly, Congress recognized that grand jury materials are records of the court when it enacted rule 6(e). Although the Justice Department actively participates in grand jury investigations,33 and serves as the custodian for certain grand jury materials,34 rule 6(e) vests control over the disclosure of these materials solely in the courts.35 This disclosure scheme indicates that Congress, like the courts, considers grand jury materials to fall within the province of the judiciary, rather than the Justice Department.36

33. The Antitrust Division has legal responsibility for the conduct of grand jury proceedings. See 28 C.F.R. § 0.40(a) (1980).
34. See Fed. R. Crim. P. 6(e)(1).

Rule 6(e)(2) codifies the rule of grand jury secrecy, and rule 6(e)(3) provides two exceptions, each of which is subject to close supervision. First, rule 6(e)(3)(A)(i) allows disclosure to “attorneys for the government” for use in the performance of their duties. Attorneys for the government do not include state attorneys general. See note 13 supra. Similarly, rule 6(e)(3)(A)(ii) permits a government attorney to disclose grand jury materials to government personnel deemed necessary to assist in the enforcement of federal criminal laws. Congress added this exception in 1977 to accommodate government attorneys’ needs to make use of nonattorney expertise in complex criminal litigation. S. Rep. No. 354, 95th Cong., 1st Sess. 8-9, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 530. State attorneys general contemplating civil antitrust actions are not within this exception to the general rule of nondisclosure. If the government attorney makes a disclosure under rule 6(e)(3)(A)(ii), he must immediately report it to the district court. Fed. R. Crim. P. 6(e)(3)(B); United States v. Hogan, 489 F. Supp. 1035, 1038 (W.D. Wash. 1980).

In United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 101 S. Ct. 1352 (1981), the Fourth Circuit analogized disclosure to state attorneys general to the power given by rule 6(e) to disclose grand jury materials to attorneys for the government for use in the performance of their official duties. 629 F.2d at 950 n.21. If the court meant that it could treat a state attorney general as an “attorney for the government,” reliance on this analogy is misplaced. If it meant that state attorneys general are governmental personnel deemed necessary by an attorney for the government to assist in the enforcement of federal criminal law, the court was similarly misguided. The state attorney general was suing under federal civil law, not enforcing federal criminal law. Almost every civil action may add to the deterrent effect of criminal-law enforcement to some degree. If courts permit disclosure for civil use in order to aid federal criminal-law enforcement, the congressionally imposed limitation on disclosure would become meaningless. But see Betts v. Coltes, 449 F. Supp. 751 (D. Hawaii 1978).

The second category of exception falls under rule 6(e)(3)(C)(i), which authorizes court-ordered disclosure of grand jury materials “preliminarily to or in connection with a judicial proceeding.” Such disclosure is to be made “in a manner, at such time, and under such conditions as the court may direct.” Absent an exception, disclosure of grand jury materials violates rule 6(e)(2) and is punishable as a contempt of court. Although rule 6(e) permits “attorneys for the government” to use grand jury materials in performance of their duty, it vests control over the disclosure of these materials solely with the courts.

36. In an analogous context, the Justice Department and the courts have not considered grand jury materials records of the Justice Department, despite the Justice Department’s use and possession of such materials. The Freedom of Information Act (FOIA), 5 U.S.C. § 552
If grand jury materials belong to the courts rather than to the Justice Department, they are not among the “investigative files or materials” that the Attorney General can disclose pursuant to section 4F(b).\textsuperscript{37} State attorneys general have briddled at this conclusion.\textsuperscript{38} They complain that exempting grand jury materials would com-

(1976), makes available certain “agency records” to any person upon request. Although in some cases mere agency possession has sufficed to make materials “agency records,” this is not always true. Note, The Definition of “Agency Records” Under the Freedom of Information Act, 31 Stan. L. Rev. 1093, 1106-09 (1979). In Walter, Conston, Schurtman & Gumpel v. Department of Justice, 79 Civ. 2918 (S.D.N.Y. Oct. 3, 1979) (slip opinion), the plaintiff served a FOIA request on the Justice Department seeking materials that the government admittedly possessed. The government noted that many of the requested documents had been presented to a grand jury and were grand jury exhibits, and argued that since the grand jury is a branch of the judiciary and not a part of the Justice Department, its exhibits did not constitute “agency records” and could not be disclosed. The court agreed, holding that agency possession of grand jury documents did not convert them into agency records.

Valenti v. Department of Justice, 503 F. Supp. 230 (E.D. La. 1980), presented the same issue. Plaintiff, a former grand jury witness, sought a transcript of his testimony under the FOIA and rule 6(e). The court held that the grand jury was an appendage of the court; therefore, its records were court records. The plaintiff argued that because the Justice Department exercised substantial control over the transcript, it should be considered an agency record subject to disclosure under the FOIA. In response, the court noted:

It is true that Rule 6(e)(1) places any notes, recording, or transcript prepared from the grand jury proceedings “in the custody or control of the attorney for the government.” The provision does not, however, change the essential nature of the transcript from a court record to an agency record, and the mere physical location of the transcript in the office of the local United States Attorney does not render it an agency record for FOIA purposes. See Kissinger v. Reporters’ Committee for Freedom of the Press, 445 U.S. 136, 100 S.Ct. 960, 972, 63 L.Ed.2d 267 (1980). . . . [T]he local United States Attorney is the physical custodian of grand jury transcripts; his use of those records is limited by Rule 6(e), and the court retains ultimate control over the documents. Plaintiff’s grand jury transcript is a court record generated by an arm of the court, and it remains a court record despite the fact that the local United States Attorney is its physical custodian.

503 F. Supp. at 233.

Although agency records for FOIA purposes may differ from “investigative files or other materials” for § 4F(b) purposes, the court’s analysis supports this Note’s argument that mere use and possession of grand jury materials do not transform them from court records into materials of the Justice Department. The rationale for such a conclusion is the same in both contexts: although the Attorney General has possession of grand jury materials, the grand jury is an arm of the judiciary, and the court retains ultimate control over such documents. A number of courts in other contexts have also held that agency possession and use do not transform court documents into “agency records.” See Warth v. Department of Justice, 595 F.2d 521 (9th Cir. 1979) (trial manuscript); Cook v. Willingham, 400 F.2d 885 (10th Cir. 1968) (presentence investigation report); Smith v. Flaherty, 465 F. Supp. 815 (M.D. Pa. 1978) (presentence reports and probation officer’s memorandum).


38. States argue that if grand jury materials are not investigative files, they are certainly “other materials.” See, e.g., Maryland Brief, supra note 24, at 21. They claim that Congress added this phrase to insure disclosure of all relevant information. See Brief for Appellant at 16, United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 101 S. Ct. 1352 (1981) [hereinafter cited as Colonial Appellant’s Brief]. But see Illinois Petition v. Widmar, [1980-81] Trade Cas. 78,103, 78,105 (N.D. Ill. 1981) (phrase “other materials” does not relate to “materials presented to the grand jury and in particular does not relate to matters acquired by grand jury process only”).
pletely frustrate Congress’s intent to encourage antitrust enforcement and would nullify the effect of section 4F(b). In truth, however, a wide range of useful materials would remain available under section 4F(b) even if grand jury materials were excluded. State attorneys general could obtain information from complaints to the government by businessmen and other private parties, government economic data and analysis, information obtained through investigations by the Justice Department staff and the Federal Bureau of Investigation, staff memoranda on points of law, and information that the Justice Department obtained through civil discovery. The phrase “investigative files and other materials” is, therefore, far from gutted by a reading that excludes grand jury materials. Such a reading, supported by the language of section 4F(b) as well as its legislative history, promotes state parens patriae suits without invading the traditional province of the judiciary.


40. This often quite detailed information could be disclosed unless the Justice Department has promised confidentiality to the source. See J. von Kalinowski, 16L BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATIONS § 91.02 (1980).


42. The Justice Department uses the Federal Bureau of Investigation and its own staff extensively in the investigation of antitrust violations. See J. von Kalinowski, supra note 40, at §§ 91.03-91.04; Antitrust Improvements Act Hearings, supra note 9, at 175 (statement of J.W. Riehm & J.R. Wilson); Mahaffie, Criminal Antitrust Investigations, 41 ANTITRUST L.J. 521, 521 (1972); Recraft, Criminal Antitrust Proceedings, 1963 ANTITRUST L. SYMP. 64, 66; Steinhouse, The Effect of Justice Department and FTC Cases on Private Antitrust Litigation, 34 OHIO ST. L.J. 490, 492 (1973). These investigations frequently include extensive interviews with industry members and others with relevant information, see J. von Kalinowski, supra note 40, at § 91.04, and this information would be available for disclosure under § 4F(b). See Illinois Petition v. Widmar, 1980-81 Trade Cas. 78,103, 78,105 (N.D. Ill. 1981). A substantial amount of FBI materials was apparently available for disclosure in Colonial Chevrolet. With reference to that case, Attorney General Griffin Bell advised Congress of the importance of such interviews to investigations of the Antitrust Division:

[In a recent investigation in the Norfolk, Virginia area, the FBI conducted simultaneous interviews with a large number of persons involved in a particular industry, and at the same time executed a search warrant on a trade association headquarters. This joint effort by the Division and the FBI, it seems to me, is something we shall look for more of in the future.]

Oversight of Antitrust Enforcement, Hearings Before the Subcomm. on Antitrust and Monopolies of the Senate Judiciary Comm., 95th Cong., 1st Sess. 492 (1977) [hereinafter cited as Oversight Hearings].

43. The Justice Department’s investigative files also may include substantial amounts of information obtained through civil discovery under the Federal Rules of Civil Procedure. See Sloan, Antitrust: Shared Information between the FTC and the Department of Justice, 1979 B. Y.U. L. Rev. 883, 886-87. Staff memoranda developing legal theories would also be available under § 4F(b) (to the extent that they do not incorporate information obtained through a grand jury).
B. The Meaning of "to the Extent Permitted by Law"

Even if mere possession and use of grand jury materials transformed them into "investigative files or other materials" of the Justice Department, 44 states would still have to show that disclosure of grand jury materials is "permitted by law." Section 4F(b) states that upon request by a state attorney general, the Attorney General shall make available, "to the extent permitted by law," any relevant investigative materials. The "to the extent permitted by law" proviso can pose a considerable obstacle to state discovery efforts. Indeed, the Justice Department's Antitrust Division takes the position that this restriction incorporates by reference rule 6(e)(2), and, therefore, prohibits the Attorney General from disclosing grand jury materials. 45

On its face, the language of section 4F(b) suggests that Congress intended to require the Attorney General to disclose relevant materials except where prohibited by other laws. The legislative history supports this reading of the statute. The House Report interpreted section 4F(b)'s "to the extent permitted by law" restriction to mean "that the files are to be made available except where specifically prohibited." 46

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45. When the Division's investigative files requested by a state attorney general contain grand jury materials . . . , it is the Division's position that such disclosure is prohibited without a court order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. While there may be some dispute whether Section 4F(b) creates an exception to the application of Rule 6(e), the Division interprets Rule 6(e) as covering grand jury materials sought by state attorneys general under Section 4F. This interpretation is justified and warranted by the objectives embodied in the grand jury secrecy rule and such an interpretation is in the best interests of protecting the efficiency and integrity of grand jury investigations as a law enforcement tool.


Section 4F promotes parens patriae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation. The section provides that whenever the United States has brought suit in its proprietary capacity under § 4A of the Clayton Act, and the U.S. Attorney General believes that the same antitrust violation may have given rise to potential parens patriae claims, he shall notify the appropriate State attorneys general. Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a parens patriae action, section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general "to the extent permitted by law." This means that the files are to be made available except where specifically prohibited.

Section 4F(b) reflects the committee's desire that the Federal Government cooperate fully with State antitrust enforcers.

The benefits of increased Federal-State cooperation and coordination of antitrust enforcement are obvious, and are achieved in H.R. 8532 without the expenditure of additional Federal funds.

Id. at 17, [1976] U.S. CODE CONG. & AD. NEWS at 2586-87.
If grand jury materials are within its scope, section 4F(b) incorporates by reference rule 6(e)(2), which specifically prohibits the Attorney General from disclosing grand jury materials to state attorneys general for use in civil suits. Rule 6(e)(2) states the general rule of secrecy: "[a]n attorney for the government . . . shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. A knowing violation . . . may be punished as a contempt of court." Unless one of the rule 6(e)(3) exceptions applies, rule 6(e)(2) specifically prohibits the Attorney General from disclosing grand jury materials to state attorneys general to promote civil actions. Rule 6(e)(3) contains no such exception.

Thus, the Attorney General is specifically prohibited from disclosing grand jury materials to state attorneys general under rule 6(e)(2), and, therefore, is not "permitted by law" to make available such materials under section 4F(b).

This conclusion is supported by the only specific reference to grand jury materials in section 4F(b)’s legislative history. Senator Abourezk, the Senate floor manager for the conference committee bill, stated:

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47. Rule 54(c) of the Federal Rules of Criminal Procedure defines "attorney for the government" as "the Attorney General, an authorized assistant of the Attorney General . . . ." See note 13 supra.


49. Rule 6(e)(3)’s exceptions permit the Attorney General to disclose grand jury materials only to government personnel deemed necessary to assist in the enforcement of the federal criminal law. Fed. R. Crim. P. 6(e)(3)(A)(ii). Pursuant to this exception, the Attorney General could disclose grand jury materials to state attorneys general to aid the enforcement of federal criminal law. But, the Attorney General may not disclose grand jury materials to state attorneys general to expedite discovery in civil antitrust suits.

50. Decisions on the effect of rule 6(e) on the FOIA’s disclosure requirement, 5 U.S.C. § 552 (1976), support the finding that rule 6(e) specifically prohibits disclosure of grand jury materials. The FOIA’s disclosure mandate does not apply to matters that are specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3) (1976). The FOIA’s “specifically exempted” restriction is similar in language and purpose to § 4F(b)’s restriction. Congress limited the scope of both statutes by reference to external statutory prohibitions. As applied to grand jury materials, both statutes are limited by rule 6(e). The government has opposed FOIA requests for grand jury materials on the ground that rule 6(e) “specifically exempts” grand jury materials from disclosure, and the courts have uniformly agreed. See Thomas v. United States, 597 F.2d 656, 657 (8th Cir. 1979); Librach v. FBI, 587 F.2d 372, 373 (8th Cir. 1978); Piccolo v. Department of Justice, 49 U.S.L.W. 2722 (D.D.C. May 13, 1981); Murphy v. FBI, 490 F. Supp. 1138, 1140-41 (D.D.C. 1980); Walter, Conston, Schurtman & Gumpel v. Department of Justice, 79 Civ. 2918 (S.D.N.Y. Oct. 3, 1979) (slip opinion); Fund for Constitutional Govt. v. National Archives & Records Serv., 485 F. Supp. 1, 10-12 (D.D.C. 1979); Hiss v. Department of Justice, 441 F. Supp. 69, 70 (S.D.N.Y. 1977). But cf. Founding Church of Scientology v. Bell, 603 F.2d 945, 951-52 (D.C. Cir. 1979) (Federal Rules of Civil Procedure do not constitute a statute for purposes of FOIA exemption). If rule 6(e) "specifically exempts" grand jury materials from disclosure under the FOIA, it follows that rule 6(e) "specifically prohibits" disclosure under § 4F(b).
The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law he cannot turn over materials given in response to a grand jury demand or a civil investigative demand. Therefore, the section is limited by law to cases where materials were turned over voluntarily. These remarks indicate that Congress was well aware that the "to the extent permitted by law" provision would prohibit the disclosure of grand jury materials under section 4F(b). Recognizing that rule 6(e) prohibits the Attorney General from disclosing grand jury materials to state attorneys general for use in a civil suit, states have argued that because a court could disclose grand jury materials under rule 6(e)(3)(C)(i), disclosure is not specifically prohibited for the purposes of section 4F(b). In other words, since a court can disclose grand jury materials upon a finding of


A few courts have erroneously concluded that Senator Abourezk's statement does not indicate that Congress intended to bar disclosure of grand jury materials. Because the remarks were made in the course of a floor debate, one court felt that they were less reliable indicators of congressional intent than the House Report, and that they could not alter the "plain language" of the statute. In re Montgomery County Real Estate Antitrust Litigation, 452 F. Supp. 54, 62 n.5 (D. Md. 1978). This decision is incorrect for several reasons. First, as the Note indicates, § 4F(b) is subject to more than one interpretation; its "plain language" contains no reference to grand jury materials. Second, the House Report does not indicate that Congress intended the Attorney General to release grand jury proceedings pursuant to § 4F(b). See text at notes 27-28 supra. Third, courts generally regard the floor manager's interpretation of a bill as authoritative and give weight to statements made during floor debates when construing statutes. See, e.g., United States v. Oates, 560 F.2d 45, 70 n.26 (2d Cir. 1977); Pan Am. World Airways, Inc. v. CAB, 380 F.2d 770, 782 (2d Cir. 1967).

Another court concluded that Senator Abourezk meant only that the Attorney General could not voluntarily turn over grand jury materials; since a court could order disclosure under rule 6(e), § 4F(b) authorized disclosure in proper cases. United States v. Colonial Chevrolet Corp., 629 F.2d 943, 947-48 (4th Cir. 1981), cert. denied, 101 S. Ct. 1352 (1981). The court appears to have twisted the Senator's language to obtain the conclusion that it desired. Senator Abourezk's remarks indicate that only materials that the Attorney General may disclose without a court order are within the scope of § 4F(b). He did not say the Attorney General could not voluntarily turn over grand jury materials; rather, he indicated that the Attorney General could only disclose materials turned over voluntarily. (Presumably the Justice Department could also disclose any product of its investigations that was not obtained by a grand jury subpoena or a civil investigative demand.)

52. The Antitrust Division Manual also recognizes that rule 6(e) prohibits the disclosure of grand jury materials by the Attorney General under § 4F(b). See note 45 supra. Others familiar with the legislation have reached similar conclusions. John Shenefield of the Antitrust Division observed that the "to the extent permitted by law" clause of § 4F(b) indicated congressional intent that the rule 6(e) grand jury secrecy requirements "remain in full force and effect." [1977] ANTITRUST & TRADE REG. REP. (BNÁ) No. 822, July 14, 1977, at D-1. Shenefield later observed:

We interpret Rule 6(e) of the Federal Rules of Criminal Procedure to prohibit the disclosure of grand jury materials without a court order. However, if our investigation or any resulting prosecution has terminated, we will usually join in an application by the state attorney general to the court for their disclosure under 4F(b).

"particularized need," the states assert that section 4F(b) requires the Attorney General to make such materials available to state attorneys general merely upon request. 53 This argument fails for two reasons. First, the "to the extent permitted by law" clause specifically restricts disclosure by the Attorney General. Rule 6(e) may grant discretion to the courts to disclose grand jury materials, but it specifically prohibits the Attorney General from making such disclosure. Logically, the extent to which a court or other governmental entity could order disclosure of grand jury materials has no bearing on the extent to which the law permits the Attorney General to make such disclosure. To interpret section 4F(b) to require the Attorney General to make available materials whenever another entity can legally disclose them, even though the Attorney General is specifically prohibited from doing so, does not comport with a rational reading of the statute or its legislative history. 54

Second, the state's argument fails because rule 6(e) prohibits even court-ordered disclosure of grand jury materials to state attorneys general to expedite civil discovery. 55 The need to expedite civil discovery does not satisfy the "particularized need" requirement. 56 Although a court may release grand jury materials on an appropriate


54. See notes 46-52 supra and accompanying text.


Most courts have been equally unwilling to permit disclosure of grand jury materials to expedite civil discovery whether the party seeking access is a governmental body or a private party. See, e.g., Texas v. United States Steel Corp., 546 F.2d 629 (5th Cir.), cert. denied, 434 U.S. 889 (1977); Illinois Petition v. Widmar, [1980-81] Trade Cas. 78,103 (N.D. Ill. 1981); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Application of Cal. to Inspect Grand Jury Subpoenas, 195 F. Supp. 37 (E.D. Pa. 1961). And Congress clearly rejected the states' position with respect to federal agencies. See note 82 infra. Finally, disclosure to state attorneys general may result in disclosure to other private parties; the need for secrecy is thus no less important in a state suit than in a private suit. See text at notes 116-24 infra.

56. In contrast to a desire to expedite civil discovery, a need to use the grand jury transcript to impeach a witness at trial, to refresh his memory, or to test his credibility may constitute "particularized need." See United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958). Such uses of transcripts may be necessary to avoid misleading the trier of fact, and the court
showing of need, the states cannot show that need in these cases. Rule 6(e), therefore, specifically prohibits both the Attorney General and the courts from disclosing grand jury materials to state attorneys general to expedite discovery. Not even the state’s creative interpretation of the “to the extent permitted by law” restriction would permit the Attorney General to disclose grand jury materials under section 4F(b). 57

In summary, the language and legislative history of section 4F(b) explain that the “to the extent permitted by law” restriction forbids any disclosure of “investigative files or other materials” that is specifically prohibited by law. Under rule 6(e)(2), the Attorney General is specifically prohibited from disclosing grand jury materials to state attorneys general for civil law enforcement purposes. States seeking disclosure of grand jury materials under section 4F(b) have argued that rule 6(e)(2) does not specifically prohibit disclosure because the courts can order disclosure under rule 6(e)(3). However, section 4F(b) is addressed to the Attorney General, not the courts, and rule 6(e)(3)’s “particularized need” standard specifically prohibits even court-ordered disclosure of grand jury materials to state attorneys general to expedite discovery. Even if grand jury materials are “investigative files or other materials,” section 4F(b)’s “to the extent permitted by law” restriction prohibits the Attorney General from making grand jury materials in his possession available to state attorneys general.

II. Section 4F(b) as Modifying Rule 6(e)’s “Particularized Need” Requirement

Although section 4F(b) does not authorize the Attorney General can limit disclosure to the portions of a witness’s testimony that bear directly on his testimony at trial. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 221, 222 n.12 (1979).


Other factors may constitute “particularized need” as well. The job of the courts is to “weigh carefully the competing interests in light of the relevant circumstances and the standards announced by [the Supreme Court].” Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 223.

57. In short, because the states cannot demonstrate “particularized need” in these cases, rule 6(e) prohibits disclosure. Release by a court absent “particularized need” would constitute an abuse of discretion. See In re June 20, 1977 Concurrent Grand Jury Investigation, J. Ray McDermott & Co., 622 F.2d 166, 172 (5th Cir. 1980). To say that disclosure in these cases is not “specifically prohibited” because a court may authorize disclosure under a different set of facts is to blur the distinctions on which rule 6(e) cases turn.
to release grand jury materials to state attorneys general without a court order, it may have altered the standards under which court orders are to be granted. Traditionally, courts have required that state attorneys general, as well as private parties, demonstrate “particularized need” before obtaining access to federal grand jury materials.58 The central element of the “particularized need” test is a requirement that the need for disclosure outweigh the need for continued secrecy.59 The Fourth Circuit and several other courts have held that although section 4F(b) did not abrogate rule 6(e), it nevertheless represents a congressional judgment that state attorneys general should have access to federal grand jury materials under rule 6(e)(3)(C) without a demonstration of “particularized need.”60


In Colonial Chevrolet, the Fourth Circuit asserted that the “particularized need” standard applied only when “disclosure is sought by private parties engaged in private litigation.” 629 F.2d at 949 (emphasis original). Although the Supreme Court has never decided this question, the weight of authority and the Court's rationale in Procter & Gamble and Douglas Oil reject this assertion. With one exception (a case decided before the Supreme Court's Procter & Gamble decision) the party seeking disclosure satisfied the “particularized need” standard in every case cited by the Colonial Chevrolet court. See 629 F.2d at 947 n.9. And Colonial Chevrolet did not rest its result upon a conclusion that the “particularized need” standard was generally inapplicable to requests by state attorneys general. Instead, it held that § 4F(b) eliminated the need for a demonstration of “particularized need” in this specific context. 629 F.2d at 950.

59. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). Although the Court placed the burden of demonstrating the balance between the need for grand jury materials and the public interest on the party seeking disclosure, it noted that: “As the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.” 441 U.S. at 223.


In Colonial Chevrolet, the Attorney General of Virginia and the United States appealed from denial of a petition for disclosure of grand jury materials pursuant to § 4F(b). The district court had accepted the defendants' nolo contendere pleas in the earlier federal criminal antitrust case that had resulted from the grand jury investigation. Virginia sought the materials in order to evaluate the possibilities for such a parens patriae action. The court of appeals reversed, holding that § 4F(b) was an explicit congressional statement of the legitimate and proper need of the state attorney general for disclosure of grand jury materials, which relieved
Under the Fourth Circuit's approach, courts treat section 4F(b) as a congressional directive that they exercise their discretion to disclose grand jury materials without a showing of "particularized need" whenever the United States has in its possession materials that may be relevant to a state's parens patriae suit. These courts recognize that rule 6(e)(2) prohibits disclosure by the Attorney General under section 4F(b) absent a court order, but they assert that the congressional purpose underlying section 4F(b) — to provide state attorneys general with all materials relevant to state civil enforcement of federal antitrust laws — "resolved the public interests consideration" that the "particularized need" standard would otherwise require. This approach would leave the court free to exercise its discretion to deny disclosure, but would shift the burden of proof from the parties seeking disclosure to those opposing disclosure.

The Fourth Circuit's approach to disclosure of grand jury materials is troublesome because it rests on a conclusion that Congress intended section 4F(b) to modify the very laws that it incorporated by reference to limit the section's scope. Of course, if this Note's finding that grand jury materials are not "investigative files or other materials" for section 4F(b) purposes is correct, the section could in no way indicate congressional intent to relax the "particularized need" standard. But, even assuming that grand jury materials fall within section 4F(b)'s scope, courts would have to find something in the section's language and legislative history to indicate that Congress intended section 4F(b) to modify the standards that courts apply when evaluating rule 6(e)(3)(C) requests for grand jury materials. The evidence suggests a quite different conclusion: Congress intended only to incorporate existing law as a limitation on section 4F(b)'s disclosure command and did not plan to liberalize rule 6(e)(3)'s disclosure standards.

The first problem with the Fourth Circuit's interpretation lies in the language of the parens patriae statute. If grand jury proceedings are "investigative files or other materials" under section 4F(b), rule 6(e) is implicated in the section's statutory scheme only by virtue of the "to the extent permitted by law" restriction. While acknowledging that Congress intended this restriction to limit section 4F(b)'s disclosure mandate by referring to rule 6(e) and other statutes that limit disclosure of Justice Department materials, the Fourth Cir-
cuit claims that section 4F(b) also liberalized the rule 6(e) disclosure limitations. Such a claim seems implausible because Congress addressed section 4F(b) not to the district courts that administer the "particularized need" standard, but to the Attorney General. Section 4F(b) refers neither to court ordered disclosure nor to judicial cooperation with the Attorney General to facilitate civil antitrust suits. Nothing in section 4F(b)'s language suggests that district courts should cease to apply the "particularized need" standard to requests for disclosure by state attorneys general.

The sparse legislative history also discredits any inference that Congress intended section 4F(b) to relax the disclosure requirements of other statutes in general, or of rule 6(e)(3)(C) in particular. Senator Abourezk commented on the Senate floor that "[s]ection 4F(b) specifically limits the Attorney General's power to release documents to whatever his powers are under existing law." At the time of enactment, as now, state attorneys general could obtain grand jury materials under rule 6(e)(3)(C) only upon a showing of "particularized need." Both the statutory language and the legislative history, therefore, indicate that section 4F(b) left intact the requirement that state attorneys general demonstrate "particularized need" before obtaining access to federal grand jury materials.

Several other congressional actions support the conclusion that Congress did not intend to modify rule 6(e)'s disclosure limitations. First, the Senate version of the Hart-Scott-Rodino Act, of which section 4F(b) was a part, included a section that would have guaranteed all civil antitrust plaintiffs access to grand jury materials after completion of the federal case. Although Congress did not enact this provision, it sparked emotional debate. The debate indicated that Congress merely limits the Attorney General's discretion to refuse to make available "investigative files or other materials" that he may lawfully disclose. See notes 46-52 supra and accompanying text.

64. The statute merely limits the Attorney General's discretion to refuse to make available "investigative files or other materials" that he may lawfully disclose. See notes 46-52 supra and accompanying text.

65. See note 51 supra.

66. § 202(f) of S. 1284 provided: Any person that institutes a civil action under this Act may, upon payment of reasonable charges therefore and after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding, inspect and copy any documentary material, produced in and the transcript of such grand jury proceeding concerning the subject matter of such person's civil action. Any action under this subsection shall be brought in the United States district court for the district in which the grand jury proceeding occurred. The court may impose conditions upon the grant of access and protective orders that are required by the interests of justice.


67. The Judiciary Committee's majority report stated:

§ 202 is a determination by the Committee that, generally, the reasons for grand jury secrecy are no longer relevant when . . . a private plaintiff files a motion for leave to inspect such grand jury evidence after the Department [of Justice] has completed any civil
in considering the Hart-Scott-Rodino Act, Congress was well aware of the burdens that the "particularized need" standard imposed on civil litigants. After upholding the "particularized need" standard by rejecting the provision, it is unlikely that Congress would have intended section 4F(b) to modify that standard without expressly stating so.

Congressional treatment of the disclosure of civil investigative demand materials provides a second indication that Congress did not intend section 4F(b) to modify rule 6(e)'s disclosure requirements. In addition to its parens patriae provisions, the Hart-Scott-Rodino Act contained amendments to the Antitrust Civil Process Act that increased the Justice Department's civil investigative demand power.

Although civil investigative demand materials would assist state enforcement of federal antitrust laws, the Hart-Scott-Rodino Act requires strict confidentiality of such materials. In so doing, it protects the legitimate rights of persons under investigation, and the interests of witnesses in freedom from retaliation. It would be anomalous to interpret section 4F(b) impliedly to liberalize rule 6(e)'s disclosure requirements and not to interpret it also to lib-

See Note, supra note 4, at 661-62. Although courts should exercise caution in relying on changes in a statute during the course of enactment to determine legislative intent, the rejection of a specific provision may be significant. See Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935); People for Environmental Progress v. Leisz, 373 F. Supp. 589, 592 (C.D. Cal. 1974). Moreover, courts generally do not presume that the common law is changed by the passage of a statute that gives no indication that it proposes such a change. If a change is to be made in the common law, the legislature must clearly and plainly express its purpose to do so. See Atkins v. United States, 556 F.2d 1028, 1039-40 (Cl. Cl. 1977); 3 C. Sands, STATUTES AND STATUTORY CONSTRUCTION § 61.01, at 41-45 (4th ed. 1974).

68. Under existing law a private plaintiff must file a motion to inspect the transcripts of grand jury testimony and the documents in the district court where the investigation took place. The judge has the discretion to grant access upon a showing of "particularized and compelling need." See Senate Report, supra note 66, at 33; 122 Cong. Rec. 15,311-12 (1976) (statement of Sen. Hart).

69. See Note, supra note 4, at 661-62. Although courts should exercise caution in relying on changes in a statute during the course of enactment to determine legislative intent, the rejection of a specific provision may be significant. See Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935); People for Environmental Progress v. Leisz, 373 F. Supp. 589, 592 (C.D. Cal. 1974). Moreover, courts generally do not presume that the common law is changed by the passage of a statute that gives no indication that it proposes such a change. If a change is to be made in the common law, the legislature must clearly and plainly express its purpose to do so. See Atkins v. United States, 556 F.2d 1028, 1039-40 (Cl. Cl. 1977); 3 C. Sands, STATUTES AND STATUTORY CONSTRUCTION § 61.01, at 41-45 (4th ed. 1974).


73. See Senate Report, supra note 66, at 204.
eralize civil investigative demand restrictions,\textsuperscript{74} especially since similar policies underlie secrecy in both cases.\textsuperscript{75} Yet, such an interpretation would be difficult to reconcile with the restrictions on disclosure of civil investigative demands contained in the same act as section 4F(b).\textsuperscript{76} It is, therefore, not surprising that Senator Abourezk, in discussing section 4F(b)'s "to the extent permitted by law" restriction, stated that the Attorney General "cannot turn over materials given in response to a grand jury demand or a civil investigative demand."\textsuperscript{77}

Liberalized disclosure of grand jury proceedings would also circumvent the clear intent of the Hart-Scott-Rodino Act to guarantee secrecy of civil investigative demand materials. Although the disclosure prohibitions of the Antitrust Civil Process Act bar release of civil investigative demand materials,\textsuperscript{78} the Justice Department may

\textsuperscript{74} See, e.g., id. at 204 (minority report):
There is also a strange inconsistency in the committee's actions. The Justice Department insists on keeping its civil investigations secret in order to protect witnesses — employees, suppliers, customers — against retaliation by firms or individuals under investigation. It even asks for a complete exemption from the Freedom of Information Act for CID material, in order to encourage cooperation by persons concerned about confidentiality. While the committee accepts these concerns with respect to civil investigations, it ignores them in connection with antitrust criminal investigations.
The committee minority based its criticism on a comparison of the civil investigative demand provisions and the committee-endorsed provisions of § 202(f). See notes 66-67 supra. If Congress had enacted § 202(f) despite the minority's objections, this would imply that Congress was aware of the inconsistency but not bothered by it — that it was willing to allow disclosure of grand jury materials while keeping civil investigative demand materials secret. However, Congress rejected § 202(f), possibly suggesting that it was unwilling to tolerate such inconsistency.

And although Congress could reasonably have decided to release grand jury proceedings but protect the confidentiality of civil investigative demand materials, the legislative history suggests that it decided otherwise. If Congress intended parens patriae suits to be primarily a remedy for price-fixing, Congress could have found disclosure of civil investigative demand materials unnecessary to accomplish the objectives of the parens patriae legislation. See Maryland Brief, supra note 24, at 9 n.5. However, Congress envisioned the parens patriae titles as a remedy for a broad range of antitrust violations. See 15 U.S.C. § 15c (1976); HOUSE REPORT, supra note 2, at 3, [1976] U.S. CODE CONG. & AD. NEWS at 2573; 122 CONG. REC. 17,245 (1976) (remarks of Sen. Bartlett).

\textsuperscript{75} The considerations that justify secrecy of civil investigative demand materials, see text at notes 72-73 supra, also justify secrecy of grand jury materials. In fact, one of the sponsors of the Hart-Scott-Rodino Act stressed the similarities between civil antitrust and grand jury investigations. See 122 CONG. REC. 29,341 (1976) (remarks of Sen. Hart). Contra, 122 CONG. REC. 30,884 (1976) (remarks of Rep. Rodino). And whether an alleged violation is investigated civilly or criminally depends upon a potentially arbitrary resolution of a very close question. See Baker, To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement, 63 CORNELL L. REV. 405, 408 (1978). The Justice Department initiates grand jury investigations when there is "some reason to believe that a criminal violation may have taken place. Such a standard inevitably results in authorization of grand jury investigations which in fact lead to civil suits rather than criminal prosecutions." Id. at 413 (emphasis original).


\textsuperscript{77} See note 51 supra.

use these materials in grand jury proceedings.79 Once materials pass into the grand jury's control, document owners and witnesses may be unable to ensure secrecy.80 Liberal disclosure of grand jury proceedings might then result in liberal disclosure of civil investigative demand materials presented to the grand jury.

Finally, the 1977 amendment to rule 6(e) indicates that Congress did not intend to modify rule 6(e)'s disclosure standard. That amendment permits disclosure of grand jury materials to government personnel deemed necessary to assist a government attorney in the enforcement of the federal criminal law.81 When discussing the amendment, Congress specifically indicated that courts should apply the "particularized need" standard to federal agency requests for access to grand jury materials for use in civil proceedings.82 Although the policies supporting Congress's decision to require that federal agencies demonstrate "particularized need" apply with equal force to state attorneys general, Congress never mentioned section 4F(b). If Congress intended the 1976 enactment of section 4F(b) to modify rule 6(e)'s "particularized need" standard and provide priority access to state attorneys general, it is difficult to understand why it made no reference to that liberalized standard during the debates surrounding the enactment of the 1977 amendment to rule 6(e).

Part II has shown that Congress did not intend to modify rule 6(e)'s disclosure requirements when it enacted section 4F(b). The statute's language and legislative history, as well as other congres-
sional actions, reveal that Congress intended to incorporate, without modification, the disclosure prohibitions of existing laws. In the case of grand jury materials, section 4F(b) embraced rule 6(e)'s "particularized need" standard, and courts may, therefore, order disclosure to state attorneys general only when satisfied that a "particularized need" outweighs the need for secrecy.

III. Section 4F(b) and the Need for Grand Jury Secrecy

Although the parens patriae statute and its legislative history indicate that Congress never intended section 4F(b) to abrogate or modify rule 6(e)'s "particularized need" standard, they are not so unambiguous as to prevent courts from looking to the policies behind them to decide whether disclosure of grand jury materials is appropriate.83 This Part, therefore, evaluates the policies that favor liberalized disclosure and those that favor grand jury secrecy. It finds that while liberalized disclosure would aid state attorneys general in the prosecution of civil antitrust suits, it would also decrease the grand jury's effectiveness as an investigative tool and harm the interests of grand jury witnesses and targets. Balancing these considerations, Part III concludes that Congress properly refrained from abrogating or modifying rule 6(e) when it enacted section 4F(b).

Liberalized disclosure of grand jury materials may to some extent further the purpose of the parens patriae provisions, which is to encourage state civil enforcement of the antitrust laws. Section 4F(b) was designed to promote federal-state cooperation by assisting state attorneys general in their enforcement efforts.84 Because rule 6(e)'s "particularized need" standard bars disclosure of grand jury materials to expedite discovery, it may be at cross-purposes with the Act: it makes discovery more difficult and costly for state attorneys general.85 The task of amassing the voluminous data essential to successful antitrust enforcement is of considerable magnitude.86

83. Parts I and II recognize that the limited legislative history of § 4F(b) does not define conclusively the scope of the section. See Kintner, Griffin & Goldston, supra note 4, at 1-3.
85. See Reviving State Enforcement, supra note 3, at 662; Section 4F(b), Natl. A. Attorneys General Antitrust Rep., Dec. 1980, at 3-5.
Permitting states to obtain materials generated by a federal grand jury would save time and money and thus facilitate state civil suits under the federal antitrust laws.87 Nevertheless, a number of factors make it unlikely that states will abandon valid suits merely because they are unable to expedite discovery with federal grand jury materials. First, state attorneys general enjoy access to many sources of information that enable them to assess the strength of their cause of action. Prior to instituting a parens patriae suit, state attorneys general can use not only the wide array of Justice Department materials covered by section 4F(b),88 but also the pre-complaint discovery powers with which many states have endowed them.89 These powers enable state attorneys general to issue broad civil investigative demands without filing an action or convening a grand jury and without court approval.90 Though grand jury materials would be helpful, these other precomplaint discovery devices should provide enough information to enable state attorneys general to determine accurately the strength of their cause of action and to develop an effective discovery strategy.91

Post-complaint discovery procedures also mitigate the burden resulting from rule 6(e)'s “particularized need” standard. Information developed in grand jury investigations may become available through the civil discovery process.92 The Manual for Complex Litigation allows parties to submit interrogatories demanding that defendants identify the documents submitted to government agencies and the persons who testified before the grand jury.93 This information will help state attorneys general obtain the relevant evidence originally introduced to the grand jury. State attorneys general can...
also procure certain investigative materials of the Federal Trade Commission, as well as materials developed in the discovery of other private suits. And, of course, state attorneys general may obtain grand jury materials as soon as they demonstrate a "particularized need." These post-complaint procedures provide state attorneys general with an opportunity not only to obtain materials from other investigations, but also to acquire evidence presented to the grand jury. It is, therefore, unlikely that state attorneys general will refuse to pursue worthy parens patriae suits merely because they cannot obtain grand jury materials to expedite discovery.

Two additional considerations support the conclusion that state attorneys general are unlikely to abandon valid parens patriae actions because of the limited availability of grand jury materials. First, the Hart-Scott-Rodino Act requires a guilty defendant in a state parens patriae suit to pay not only treble damages but also the reasonable attorneys' fees of the prevailing state. This shifts much of the cost of enforcement to guilty defendants and should ameliorate some of the concern over the additional cost of discovery that might result from nondisclosure of grand jury materials. Second, the public resources available for state actions and the political popularity of state antitrust enforcement appear to be increasing. State attorneys general will, therefore, be unlikely to ignore worthy parens patriae suits.

While liberalized disclosure would not significantly increase the incentives to bring worthy parens patriae suits, it could substantially undermine grand jury secrecy. In this context, grand jury secrecy
serves two purposes: it promotes the grand jury’s effectiveness as an investigative tool and, therefore, increases the effectiveness of antitrust enforcement; and it protects the interests of grand jury witnesses and targets. Liberalized disclosure under section 4F(b) would frustrate both purposes.

First, disclosure of grand jury materials to state attorneys general without a showing of “particularized need” could significantly reduce the effectiveness of grand jury investigations. The Justice Department uses the grand jury as a primary tool in antitrust enforcement,102 and the grand jury’s effectiveness as an institution is important not only to the Antitrust Division, but to state attorneys general103 and private antitrust plaintiffs as well.104 Secrecy protects the grand jury’s effectiveness in four ways: it prevents the escape of those whose indictment may be contemplated, insures the utmost freedom to the grand jury in its deliberations by preventing persons

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103. If increased disclosure through § 4F(b) inhibits future grand jury testimony, state attorneys general could eventually be harmed by increased access to grand jury materials. If federal criminal suits never get off the ground because of the reticence of grand jury witnesses, the useful materials that the Justice Department would have developed to prosecute the suits, see notes 40-43 supra, will never be assembled, and states will no longer receive them through § 4F(b) requests.

104. See notes 8-9 supra.
subject to indictment or their friends from importuning the grand jurors, deters perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it, and encourages free and untrammeled disclosure by persons who have information with respect to the commission of crimes. 105 The first three concerns are relevant only during the course of the grand jury proceedings or the criminal cases arising out of the investigation. 106 When state attorneys general request grand jury materials before criminal proceedings have ended, these three factors weigh heavily in favor of secrecy. 107 Most requests for disclosure, however, will come after termination of the grand jury investigation 108 and any federal criminal prosecution. 109 The discussion below, therefore, considers the effect of liberalized disclosure of grand jury materials on persons who have information about antitrust violations.

Grand juries cannot operate effectively unless witnesses are uninhibited in disclosing information about crimes. 110 Witnesses will make full disclosure only when they do not fear that retribution or

105. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 n.10 (1979); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958); United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931). A number of commentators question the relevance of these policies. See note 101 supra. The courts also find that grand jury secrecy protects the innocent accused from stigma and spurious suits, and witnesses from retaliation. See notes 132-44 infra and accompanying text. A recent General Accounting Office report underscored the reality of these concerns. The report accused the Justice Department and the federal courts of failing to protect grand jury secrecy. The GAO said that disclosures had damaged the reputations of persons never indicted, delayed other investigations, and caused some grand jury targets to flee. See NATL. L.J., Nov. 17, 1980, at 3, col. 1.


107. Although the cases to date have not presented the issue, it is conceivable that a state attorney general might request materials produced by an ongoing grand jury investigation or submit a request for disclosure prior to completion of the federal criminal case arising out of the investigation. Such a request would implicate all four of the concerns outlined in the text, as well as interests of the innocent accused and witnesses. See note 105 supra; Brief for the United States at 14-15, United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 101 S. Ct. 1352 (1981). The government argues that a district court should deny a state request while the grand jury is sitting or while trial is in progress or pending. Id. at 15.

108. Because courts must consider the effects of disclosure on the functioning of future grand juries, the need to limit disclosure remains after the grand jury under consideration has completed its term. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979).

109. As a practical matter, the Justice Department may be able to exert some control over when requests will be made by delaying notification under § 4F(a). 15 U.S.C. § 15f(a) (1976) (amended 1980).

social stigma will result from their testimony.111 Grand jury secrecy secures free and untrammeled testimony by protecting witnesses from such retaliation;112 rule 6(e)(3)(C) assures witnesses that their testimony will not be disclosed absent a showing of "particularized need."

Liberalized disclosure threatens the effectiveness of grand jury investigations by increasing the likelihood of retaliation against witnesses. Persons called to testify before a grand jury assess the chances that outside parties will obtain their testimony and take actions against them. Faced with increased prospects of disclosure and retaliation, witnesses who would otherwise fully assist the grand jury may offer what one Senator has labeled "minimum feasible cooperation."113 Unhappy with the choice between retaliation and a contempt charge for not cooperating, witnesses may choose to provide just enough information to avoid a contempt citation.114 Such reticence may irreparably damage the antitrust grand jury's effectiveness and cripple antitrust enforcement efforts.115


But none of these authors addressed the unique features of antitrust litigation; only Knudsen empirically studied the effect of disclosure on witnesses' reluctance to testify, and his results were inconclusive. See Knudsen, supra, at 444-45. Of course, if a witness knew with certainty that he would be required to testify at trial and would give identical testimony before the grand jury and in court, disclosure of grand jury testimony would not increase the fear of retaliation. A witness may, however, be less guarded in his testimony concerning his personal business relations before a grand jury than he would be at trial. See Note, Release of Grand Jury Minutes in the National Deposition Program of the Electrical Equipment Cases, 112 U. PA. L. REV. 1133, 1141 (1964). And in fact, few antitrust grand jury witnesses testify at trial. Although government attorneys inform witnesses that testimony given to the grand jury may also have to be given at trial, see Knudsen, infra, at 444, less than half of all antitrust grand juries return indictments, [1979] ANTITRUST & TRADE REG. REP. (BNA) No. 943, Dec. 13, 1979, at A-7, and if an indictment results, nolo contendere pleas terminate most criminal antitrust cases. Lynch, Three Differences Between Criminal and Civil Pretrial Options in Antitrust Cases, 46 ANTITRUST L.J. 682, 684 (1977). In both instances, the witnesses do not testify in court. The experience of grand juries generally, upon which the commentators relied, is simply not relevant to antitrust grand juries. In 1976, for example, federal grand juries returned approximately 23,000 indictments and reported only 123 no true bills. Grand Jury Reform...
Disclosing grand jury material to state attorneys general will increase disclosure to potential retaliators in three ways. First, the state attorney general may use the materials in discovery and at trial, where they would become public. Second, civil defendants may obtain otherwise unavailable grand jury materials through the discovery process. Grand jury materials relevant to a state's parens patriae suit will also be relevant to the defense, and may be discoverable from the state under the liberal discovery provisions of the Federal Rules of Civil Procedure. By requesting grand jury materials directly from the state attorney general under the less restrictive civil rules, potential retaliators may obtain access even though they are unable to demonstrate a "particularized need." Third, release of grand jury transcripts to state attorneys general may itself constitute a "particularized need" for disclosure to the civil defendant.

Hearings, supra note 11, at 738 (testimony of Benjamin R. Civiletti, Assistant Attorney General).

Similarly, grand jury witnesses do not testify publicly in most civil cases brought by the government because they terminate through consent decrees. See HANDBOOK, supra note 18, at 42; Posner, A Statistical Study of Antitrust Enforcement, 13 J. L. & Econ. 365, 375 (1970). Moreover, prosecutors may promise a witness that he will not have to testify at trial. Note, Civil Discovery of Documents Held by a Grand Jury, 47 U. Chi. L. Rev. 604, 618 n.53 (1980). Because the current likelihood that an antitrust grand jury witness will testify at trial is low, it is only through disclosure of transcripts that retaliation is made possible.

In addition, grand jury transcripts may provoke more reprisals than trial testimony. Grand jury witnesses are denied both the assistance of counsel in the grand jury room, see In re Groban, 352 U.S. 330, 333 (1957), and the traditional evidentiary and procedural safeguards designed to secure the truth. See, e.g., United States v. Calandra, 414 U.S. 338 (1974) (sanctioning use of inadequate and incompetent evidence obtained in violation of the defendant's fifth amendment privilege against self-incrimination); United States v. Levinson, 405 F.2d 971 (6th Cir. 1968), cert. denied, 395 U.S. 906 (1969) (no right to cross examine witnesses). See generally Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing To Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463 (1980). Under these circumstances, grand jury witnesses are more likely to make irrelevant accusations and give answers that are incomplete or require substantial qualification. Nitschke, supra note 101, at 198-99, 205.


117. See Fed. R. Civ. P. 26(b); Colonial Appellant's Brief, supra note 38, at 13 n.4.

118. States may object to such discovery on the ground that the grand jury material is privileged and not discoverable. Fed. R. Civ. P. 26(b). However, the district court in B.F. Goodrich explicitly authorized the state to disclose the names and testimony of grand jury witnesses in the course of discovery, provided that such disclosure is subject to a protective order or stipulation between counsel ensuring its confidentiality. United States v. B.F. Goodrich Co., [1978-2] Trade Cas. 76,316 (N.D. Cal. 1978).

119. Consider, for example, a criminal defendant whose request for disclosure of grand jury materials has been denied for failure to demonstrate "particularized need." Pursuant to § 4F(b), a state attorney general bringing a civil action against the same defendant obtains disclosure without showing need. The defendant could then seek discovery from the state under the Federal Rules of Civil Procedure. Cf. Connecticut v. General Motors Corp., [1974-2] Trade Cas. 97,079, 97,080-81 (N.D. Ill. 1974) (plaintiff may discover grand jury transcripts in defendant's hands under rule 37 of the Federal Rules of Civil Procedure on showing of relevance rather than "particularized need").

120. Cf. note 56 supra (citing cases that stressed the unfairness of permitting one side to
breathing new life into a potential retaliator's rule 6(e) request for access to previously secret grand jury transcripts.

Arguably, courts could remove the threat of retaliation and the chilling effect on grand jury testimony that accompanies it by entering a protective order. Such orders could conceivably reassure witnesses that they will not face retaliation for their testimony. But courts have not issued protective orders prohibiting attorneys general from disclosing grand jury materials in the discovery process. They may believe that such orders would unfairly grant state attorneys general access to large quantities of relevant information while denying access to civil defendants. Even if a court initially issued a protective order upon disclosing grand jury materials to a state attorney general, the unfairness of permitting one side "to have exclusive access to a storehouse of relevant fact" will likely result in the court allowing the civil defendant to obtain such materials at some later time during discovery or at trial. Protective orders are thus an inadequate means to prevent potential retaliators from gaining access to grand jury materials.

Not only would liberalized disclosure to state attorneys general increase the chances that retaliators will obtain grand jury materials, but it would do so in a context where retaliation is especially likely to occur. The Justice Department seeks the testimony of past or present corporate employees who can shed light on the corporation's activities in almost every antitrust investigation. Corporate employees subpoenaed to testify before a grand jury generally fear have exclusive access to a storehouse of relevant facts and allowed disclosure to civil plaintiffs of grand jury materials in hands of civil defendants).


124. See notes 117-20 supra. Denial of access would be inconsistent with the basic principles of our civil discovery rules. "The basic philosophy of the present federal procedure is that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged." C. Wright & A. Miller, Federal Practice and Procedure § 2001 (1970). The Supreme Court has observed that "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." Hickman v. Taylor, 329 U.S. 495, 507 (1947).


126. J. Von Kalinowski, supra note 40, at § 91.08[5].

127. Id. at § 95.01[3a].
retaliation from their corporate employer and other members of the industry.128 Furthermore, the Justice Department will often subpoena the customers, competitors, and suppliers of potential defendants.129 These groups may also be subject to economic retaliation by corporate defendants if their testimony becomes available. Thus, liberalized disclosure to state attorneys general would make access to grand jury materials easier in an area where retaliation is likely to occur and is easy to accomplish.130 Aware of this, antitrust grand jury witnesses would be hesitant to testify about potential retaliators. Absent such testimony, the effectiveness of the antitrust grand jury would decline, undermining antitrust enforcement.131


Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

Once the employer has the transcript of these witnesses' testimony, all that remains of the retaliation justification for secrecy is the need to protect the witness against potential adverse effects on his future relationships with members of the industry other than his employer. See Illinois v. Sarbaugh, 552 F.2d 768, 775 (7th Cir.), cert. denied, 434 U.S. 889 (1977) (the court concluded that such interests could be dealt with by a protective order); Texas v. United States Steel Corp., 546 F.2d at 626, 630 (5th Cir.), cert. denied, 434 U.S. 889 (1977). The possibility that disclosure of this grand jury testimony to state attorneys general will cause retaliation is, therefore, reduced.

Recent cases suggest that the availability of grand jury testimony of certain corporate employees to corporate defendants under the Federal Rules of Criminal Procedure may be irrelevant to an evaluation of liberalized disclosure of grand jury materials. These cases hold that a civil defendant's access to grand jury material under rule 16(a)(1)(A) provides civil plaintiffs with "particularized need" for disclosure. See note 56 supra. This trend has been criticized. Allowing automatic discovery in civil proceedings as a consequence of discovery by corporate criminal defendants may "restrict unduly the corporation's use of the criminal defense tool which Congress saw fit to grant in Fed. R. Crim. P. 16(a)(1)(A)." Texas v. United States Steel Corp., 546 F.2d at 630. See Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229, 1234 (N.D. Cal. 1968). If corporate access satisfies the "particularized need" standard, resort to § 4F(b) to liberalize that standard would be unnecessary. And, if state attorneys general can demonstrate "particularized need" in cases where corporate defendants have obtained access, the liberalization of disclosure standards would produce a different result from the rule 6(e) standard only in cases where the defendant had been unable to obtain access to the grand jury materials and the need for secrecy to prevent retaliation remains high.


131. Liberalized disclosure will also discourage nolo contendere pleas and impair the government's consent decree procedure. See Oversight Hearings, supra note 42, at 251 (statement of Ira Millstein). Nolo contendere pleas and consent judgments not only avoid the Clayton
Increased disclosure of grand jury materials would not harm antitrust enforcement alone. Secrecy protects not only the grand jury's effectiveness, but also the interests of witnesses and investigated parties. Because grand jury witnesses are not afforded the assistance of counsel or traditional evidentiary and procedural safeguards, there is a societal interest in protecting witnesses who testify candidly and fully from subsequent retribution and social stigma. As previously discussed, liberalized disclosure of grand jury materials to state attorneys general increases the likelihood of economic retaliation against antitrust grand jury witnesses by the targets of the investigation and other industry members. Disclosing grand jury materials to state attorneys general without a showing of "particularized need" will, therefore, increase the likelihood of injury to grand jury witnesses.

Liberalized disclosure to state attorneys general would also injure innocent parties accused of crimes by prosecutors during an investigation, as well as defendants indicted by the grand jury. Most courts have held that if the grand jury returns no indictment, the need to protect the innocent accused justifies secrecy.

Act's prima facie evidence rule, see 15 U.S.C.A. § 16(a) (1980), but also prevent the introduction of grand jury testimony into the public record. Civil plaintiffs seeking grand jury materials following a nolo contendere plea must show "particularized need," see Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), and grand jury testimony included in a presentence report remains protected by rule 6(e). See Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229 (N.D. Cal. 1968). In fact, the court may strike grand jury testimony from the presentence report entirely. See United States v. Hogan, 489 F. Supp. 1035 (W.D. Wash. 1980). Allowing state attorneys general to obtain grand jury materials without a showing of "particularized need" will reduce the incentive to enter these types of judgments. See Antitrust Improvements Act Hearings, supra note 9, at 84,301 (1975) (statements of Thomas E. Kauper and Milton Handler); Handler, Antitrust — Myth and Reality in an Inflationary Era, 50 N.Y.U. L. Rev. 211, 246-47 (1975).

Contra, Antitrust Improvements Act Hearings, supra note 9, at 150 (statement of Ralph Nader and Mark Green).


133. See notes 125-30 supra and accompanying text.


The recent Ninth and Fourth Circuit decisions directly conflict in their treatment of the interests of the innocent accused. United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980), authorized disclosure only if the grand jury returned no indictments or if the criminal case arising out of an indictment had been terminated. 619 F.2d at 801. United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 101 S. Ct. 1352 (1981), on the other hand, concluded that the public interest and fundamental fairness preclude disclosure if the grand jury returned no indictments. 629 F.2d at 949-50. Neither limitation seems logically consistent with the courts' interpretation of the "to the extent permitted by law" clause; if rule 6(e) does not "specifically prohibit" disclosure when the grand jury returned no indictments (or returned an indictment), it is difficult to see how the rule "specifically prohibits" disclosure when the grand jury reached the opposite conclusion. Although Colonial Chevrolet affords greater protection to the innocent accused than does B.F. Goodrich, its approach may lead to anomalous results. The return of an indictment does not guarantee that no "innocent accused" interest remains. Indictment of one person investigated by the grand jury does not eliminate the need to protect another person who was investigated but not indicted. Simi-
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to the Supreme Court, protects 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.” Of course, even if the grand jury indicts some of the potential defendants, the innocent accused nevertheless retain their interest in secrecy. Moreover, even indicted individuals and corporations have secrecy interests. The grand jury may have investigated a broad range of allegations and returned indictments on only a few. Disclosure of these allegations may embarrass the person who was investigated, force him to defend against these charges in a civil suit, or generally prejudice his case. For these reasons, the Supreme Court in *Douglas Oil Co. v. Petrol Stops Northwest* held that civil defendants who were indicted and pleaded *nolo contendere* in a prior federal criminal antitrust action nevertheless are legally entitled to protection against disclosure of grand jury materials. Because the grand jury may have considered accusations on which it returned no indictment, the Court found disclosure appropriate only upon a showing of “particularized need.” Liberalized disclosure to state attorneys general of information regarding activities for which no indictment was returned thus threatens the interests of both the innocent accused and indicted parties by subjecting them to social stigma and spurious law suits.

Finally, liberalized disclosure of grand jury materials undermines the interests of civil defendants. Grand jury testimony is the


136. For example, the grand jury whose materials were sought by the Virginia Attorney General in *Colonial Chevrolet* had not indicted many of the firms it investigated. *See* Brief for Appellees, Certain Unindicted Individuals and Corporations at 7-8, *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1352 (1981).


139. *See generally* Handler & Blechman, *supra* note 3, at 670. Handler & Blechman suggest that granting the states power to bring *parens patriae* suits for consumers will create pressures on state officials to sue in every colorable case, however questionable the legal or economic rationale for bringing suit might be. Moreover, state attorneys general may well decide that including more counts against known defendants and expanding the total number of defendants will improve the chances for a favorable settlement. *See generally* Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353.

140. 441 U.S. 211, 218 n.8 (1979).

141. 441 U.S. at 222 n.12.
product of a one-sided interrogation by the prosecutor; neither the witnesses nor the targets are represented by counsel, and there are virtually no restraints on the form or content of questioning. For this reason, grand jury transcripts often contain incomplete answers, irrelevant accusations, and untrue statements. The use of such information at trial weakens these defendants' rights to the traditional procedural and evidentiary safeguards designed to ensure accurate factfinding.

In summary, liberalized disclosure of grand jury materials to state attorneys general would undermine the interests of the innocent accused, indicted parties, and grand jury witnesses. Moreover, disclosure in the absence of a "particularized need" would reduce the effectiveness of the grand jury and, therefore, the effectiveness of the overall antitrust enforcement effort. These concerns weigh heavily in favor of grand jury secrecy. And although liberalized disclosure would make discovery easier and in some cases less costly for state attorneys general pursuing parens patriae suits, a number of factors make it unlikely that states will abandon valid suits merely because they fail to obtain federal grand jury materials. Balancing the policies served by liberalized disclosure against those furthered by grand jury secrecy, the scale tips in favor of secrecy.

CONCLUSION

The apparent conflict between the commands of section 4F(b) and rule 6(e) is illusory. As this Note has shown, Congress never intended section 4F(b) to authorize the Attorney General to disclose grand jury materials to state attorneys general or to modify rule 6(e)'s traditional disclosure requirements. Instead, Congress struck the proper balance between policies underlying grand jury secrecy

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143. See Nitschke, supra note 101, at 205-06.

144. Id. at 198-99. The circumstances under which grand jury witnesses testify are particularly significant because this testimony may be used for impeachment purposes, see Fed. R. Evid. 607, 801(d); McClatchey, Defending Criminal Antitrust Investigations, 41 ANTITRUST L.J. 527, 531 (1972), and as substantive evidence. See Fed. R. Evid. 801(d), 804(b)(5); United States v. Garner, 574 F.2d 1141 (4th Cir. 1978); Note, Evidence-Hearsay-Applicability of Federal Rule of Evidence 804(b)(5) to Grand Jury Testimony — United States v. Garner, 15 WAKE FOREST L. REV. 416, 429-30 (1979).
and federal assistance of state antitrust enforcement by leaving intact the requirement that state attorneys general demonstrate "particularized need" before obtaining federal grand jury materials.