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## Silencing Grand Jury Witnesses

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# Silencing Grand Jury Witnesses

R. MICHAEL CASSIDY\*

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## INTRODUCTION

The recent investigations of local police officers for the deaths of unarmed civilians in Ferguson, Missouri and Staten Island, New York, fueled public outrage about the lack of transparency of grand jury proceedings.<sup>1</sup> In Ferguson, St. Louis County Prosecutor Robert McCullough took the highly unusual step, after the grand jury issued a “no bill,” of releasing portions of grand jury transcripts.<sup>2</sup> But during the investigation and deliberations themselves, both grand jury proceedings were kept secret pursuant to the time-honored and accepted tradition of shielding grand jurors from improper influence.<sup>3</sup> Even one of the witnesses in the Missouri case hired by the *victim’s* family—pathologist Michael Baden—was prevented from talking to the media about the substance of his grand jury testimony during that inquiry.<sup>4</sup>

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\* Professor of Law and Faculty Director, Rappaport Center for Law and Public Policy, Boston College Law School. I am grateful to my colleagues Jeffrey Cohen, Judith McMorrow, Mary Ann Neary, David Olson, and Robert Ullmann for their invaluable comments, and to my students Nathan Roberts (J.D. ’15) and Kathryn Ball (J.D. ’17) for their extremely helpful research and editorial assistance.

1. Editorial, *Michael Brown, Eric Garner: Why Killings by Police Cause Public Suspicions*, CHI. TRIB., Dec. 4, 2014, <http://www.chicagotribune.com/news/opinion/editorials/ct-eric-garner-michael-brown-police-kill-edit-1205-jm-20141204-story.html> [https://perma.cc/D7TV-JBFD]; Jennifer Peltz, *After Killings by Police, A Debate Over Grand Jury Secrecy*, DENVER POST (Jan. 28, 2015, 8:23 AM), [http://www.denverpost.com/environment/ci\\_27409802/?source=infinite-up](http://www.denverpost.com/environment/ci_27409802/?source=infinite-up) [https://perma.cc/D9HJ-6MRY].

2. Benjamin Weiser, *Mixed Motives Seen in Prosecutor’s Decision to Release Ferguson Grand Jury Materials*, N.Y. TIMES, Nov. 25, 2014, [http://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html?\\_r=0](http://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html?_r=0) [https://perma.cc/9DNK-5955].

3. See Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 456 (1965). In contrast to the Ferguson, Missouri case, a New York Supreme Court justice refused a petition by the New York Civil Liberties Union and the NAACP to release grand jury transcripts in the investigation into the death of Eric Garner in Staten Island, citing the strong presumption in favor of grand jury secrecy and the “chilling effect” that a release of transcripts would have on witnesses before such a tribunal. *James v. Donovan*, 130 A.D.3d 1032, 1039 (N.Y. App. Div. 2015). For the New York Civil Liberties Union’s arguments, see Brief of Petitioner-Appellant at 15–18, *James v. Donovan*, 130 A.D.3d 1032 (N.Y. App. Div. 2015) (No. 2015-02774).

4. Stephanie Lecci, *Grand Jury Hears Testimony from Brown Family Pathologist*, St.

Missouri is one of a small number of states that expressly prevent grand jury witnesses from disclosing their testimony to the press or to other witnesses.<sup>5</sup> But in New York, as well as in the majority of other states and the federal system, obligations of grand jury secrecy do *not* extend to grand jury witnesses.<sup>6</sup> In these jurisdictions, only persons performing an “official function” before the grand jury are covered by the oath of secrecy.<sup>7</sup> Absent a contract or court order, witnesses are free to talk with each other or with the press. Nevertheless, prosecutors often seek to handcuff grand jury witnesses in their exercise of First Amendment rights by drafting one-sided cooperation agreements or immunity orders that impose obligations of secrecy on grand jury witnesses, even though none exist under governing statutes or rules of criminal procedure.

This Article addresses one crucial aspect of the ongoing debate about grand jury transparency.<sup>8</sup> Assuming that well over half the states and the federal government

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LOUIS PUB. RADIO (Nov. 13, 2014), <http://news.stlpublicradio.org/post/grand-jury-hears-testimony-brown-family-pathologist> [<https://perma.cc/AQ55-UURR>].

5. See MO. ANN. STAT. § 540.110 (West 2002) (providing that the foreperson shall be authorized to administer the following oath to every witness that appears before the grand jury: “Do you further solemnly swear, or affirm, that you will not after your examination here, directly or indirectly, divulge or make known to any person or persons the fact that this grand jury has or has had under consideration the matters concerning which you shall be examined, or any other fact or thing which may come to your knowledge while before this body, or concerning which you shall here testify, unless lawfully required to testify in relation thereto?”). See also SARA SUN BEALE, WILLIAM C. BRYSON, JAMES E. FELMAN, MICHAEL J. ELSTON & KATHERINE EARLE YANES, GRAND JURY LAW AND PRACTICE § 5.5, Westlaw (database updated Nov. 2015) (describing twelve states impose obligation of secrecy on grand jury witnesses).

6. See BEALE ET AL., *supra* note 5, § 5.5 n.23. While twelve states include witnesses before the grand jury in the obligation of secrecy, most states that do so typically provide an express exception for communications between the witness and their counsel. *Id.* § 5.5 n.22. See *infra* note 64 and accompanying text.

7. Traditional justifications for grand jury secrecy include protecting the witnesses or jurors from intimidation, safeguarding the putative target from injury to reputation should he not be indicted, and preventing flight, obstruction of justice, or the subornation of perjury. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983).

8. See, e.g., Paul Cassell, *Achieving Transparency for the Grand Jury's Decision on the Michael Brown Shooting*, WASH. POST: THE VOLOKH CONSPIRACY (Nov. 19, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/19/achieving-transparency-for-the-grand-jurys-decision-on-the-michael-brown-shooting/> [<https://perma.cc/63YC-K6F6>]; Chris Dolmetsch, *N.Y. Police Evidence Request Furthers Grand Jury Debate*, BLOOMBERG BUS. (Dec. 12, 2014, 11:01 PM), <http://www.bloomberg.com/news/articles/2014-12-12/grand-jury-evidence-in-nypd-killing-sought-by-official> [<https://perma.cc/A32K-TA53>]; Kristine Guerra & Jill Disis, *Was Shooting Self-Defense or Manslaughter? Case Reflects Debate over Grand Juries*, INDIANAPOLIS STAR (Jan. 2, 2015, 11:12 AM), <http://www.indystar.com/story/news/crime/2015/01/02/self-defense-shooting-case-illustrates-debate-grand-juries/21102797/> [<https://perma.cc/LNT3-HLUW>]; Peltz, *supra* note 1; R.W., *How a Grand Jury Works*, THE ECONOMIST: THE ECONOMIST EXPLAINS (Dec. 7, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/12/economist-explains-3> [<https://perma.cc/FTR3-3ABF>].

continue to employ the grand jury to investigate felony offenses,<sup>9</sup> and assuming that these proceedings continue to be shielded from public view,<sup>10</sup> should witnesses *themselves* be allowed to discuss their testimony with the press or with each other? This larger question raises two narrow but very important subsidiary issues. First, does a prosecutor who conditions a written proffer or cooperation agreement with a grand jury witness on the witness's promise not to inform other targets, subjects, or witnesses about what information he provided to the government violate Model Rule of Professional Conduct 3.4(f)<sup>11</sup> by impeding another party's access to information in litigation? Second, does a judge who issues a grant of judicial immunity under 18 U.S.C. § 6003<sup>12</sup> or its state analogue and includes an order prohibiting the grand jury witness from talking to any other potential witnesses or to the media about the subject matter of the government's investigation exceed his or her authority under Federal Rule of Criminal Procedure 6(e)?<sup>13</sup> Both of these scenarios implicate not only the public interest in being informed about governmental affairs, but also the ability of putative targets of an investigation to work together to gather, preserve, and submit potentially exculpatory information that may help influence the grand jury not to indict, or to indict for a lesser offense. In this Article, I will argue that efforts by prosecutors and judges to impose extrastatutory secrecy obligations on grand jury witnesses undermine the independence of the grand jury, and thwart its proper screening function.<sup>14</sup>

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9. See BEALE ET AL., *supra* note 5, § 1.7. Forty-eight states and the District of Columbia continue to use grand juries, although these jurisdictions differ in exactly how they are utilized. In nineteen states grand jury indictment is required for all felonies, in four states it is required only for particularly serious named felonies such as murder, and in twenty-five states (so called "information" states) the prosecutor may elect to charge by either grand jury indictment or information. See Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 19 & nn.85–87 (2002). Connecticut has abandoned the use of the grand jury altogether for criminal cases, see CONN. GEN. STAT. ANN. § 54-47(b)–(e) (2009), and in Pennsylvania the government may only petition the court to convene a grand jury in special circumstances. See 42 PA. CONS. STAT. ANN. § 4543 (West 2004).

10. Calkins, *supra* note 3, at 458–59; see Editorial, *A Judge's Idea for Grand Jury Reform*, N.Y. TIMES, Feb. 19, 2015, [http://www.nytimes.com/2015/02/19/opinion/a-judges-idea-for-grand-jury-reform.html?\\_r=2](http://www.nytimes.com/2015/02/19/opinion/a-judges-idea-for-grand-jury-reform.html?_r=2) [<https://perma.cc/WNA3-GHVZ>]; James Queally, *Grand Juries Are 'Relic of Another Time': New York's Top Judge Urges Reform*, L.A. TIMES, Feb. 17, 2015, <http://www.latimes.com/nation/nationnow/la-na-nn-ny-grand-jury-reform-20150217-story.html> [<https://perma.cc/LYE9-NVFA>].

11. MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (1983).

12. 18 U.S.C. § 6003 (2012).

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

14. See generally *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 430 (1983) (describing the relationship between prosecutor and grand jury); *Branzburg v. Hayes*, 408 U.S. 665, 686–88 (1972) (describing the purposes and powers of a grand jury).

## I. SCOPE OF THE PROBLEM

It is generally conceded that at the grand jury phase of a criminal proceeding, the prosecutor is the writer, director, producer, and star of her own show.<sup>15</sup> Prosecutors try to control the flow of information to and from the grand jury in order to reduce the risk of target flight, witness tampering, and the destruction of evidence. These are legitimate concerns that are reflected in the Federal Rules of Criminal Procedure pertaining to grand jury secrecy.<sup>16</sup> Yet “secrecy” is sometimes an overstated, if not talismanic, justification for excessive prosecutorial control. Prosecutors routinely try to inhibit the dissemination of information about the grand jury’s inquiry because it gives them the tactical advantage of surprise when examining witnesses, it contributes to the power of the prosecutor to catch witnesses in the “perjury trap” and thereby secure their cooperation,<sup>17</sup> and it makes it difficult for witnesses who share common interests to work together to prepare their defense.

In *Douglas Oil Co. v. Petrol Stops Northwest*,<sup>18</sup> the Supreme Court identified five specific interests advanced by keeping grand jury proceedings secret.

First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.<sup>19</sup>

The Court ruled that civil litigants seeking to gain access to the transcripts of grand jury proceedings in related criminal litigation must show a particularized need for disclosure that outweighs these strong public interests.<sup>20</sup>

In most jurisdictions, witnesses are not persons who perform an “official function” before the grand jury, and therefore, they are under no express obligation to maintain confidentiality under applicable statutes or rules of criminal procedure.<sup>21</sup>

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15. See Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 3–4 (2004); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 305 (1995).

16. FED. R. CRIM. P. 6(e)(2)(B) (“Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury . . .”).

17. Jessica Fischweicher, *Perjury*, 45 AM. CRIM. L. REV. 799, 820 (2008).

18. 441 U.S. 211 (1979).

19. *Id.* at 219.

20. *Id.* at 223–24.

21. See, e.g., FED. R. CRIM. P. 6(e); BEALE, ET AL., *supra* note 5, § 5.5. For example, in the Eric Garner death investigation in Staten Island, the man who took the now infamous video of the police placing a chokehold on the victim spoke at memorials, vigils, and other public events after Garner’s death. Estevan Bassett-Nembhard, *Remembering Eric Garner, African American Father of Six*, PEOPLE’S WORLD (July 31, 2014), <http://www.peoplesworld.org>

A witness may have legal interests that prompt him to discuss with others what occurred in the grand jury room (such as where the government is investigating joint conduct among associates), he may have economic or personal interests that motivate him to share what transpired (such as with an employer or a loved one), or he may have a motive to disseminate his story to the media in order to influence debate about public affairs. Nonetheless, prosecutors often try to curtail these free speech rights. This Article examines whether such prosecutorial control is a form of overreaching that impedes the legitimate function of the grand jury, by isolating and insulating the grand jury from potentially exculpatory information that might be forthcoming if grand jury witnesses were allowed more freedom to share their stories with others.

The issue of whether a grand jury witness can be “gagged” may arise in a number of contexts. The prosecutor may issue a letter to the witness accompanying a grand jury subpoena exhorting the witness not to reveal to anyone else that they have received the subpoena or not to discuss the subject of the investigation.<sup>22</sup> The prosecutor may orally instruct the witness outside or inside the grand jury room that they may not discuss their testimony with others.<sup>23</sup> The prosecutor may draft a proffer letter or cooperation agreement that contains obligations of secrecy on the part of the witness.<sup>24</sup> Or, the prosecutor may ask a court to impose such a restriction when the

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/remembering-eric-garner-african-american-father-of-six/ [https://perma.cc/BE8Z-VWC9]; *Funeral Held for Man Who Died in NY Police Custody*, YAHOO NEWS (July 23, 2014), <http://news.yahoo.com/funeral-held-man-died-ny-police-custody-000218940.html> [https://perma.cc/C8YU-J8VR]. After the grand jury returned a no-bill against the officers, Ramsey Orta once again made a statement to the media, saying that the grand jury proceeding “wasn’t fair from the start” and the jurors were not “even paying attention.” “It was bullshit,” Mr. Orta claimed. Erik Badia, Tina Moore & Corky Siemaszko, *Man Who Filmed Eric Garner in Chokehold Says Grand Jury Was Rigged*, N.Y. DAILY NEWS (Dec. 5, 2014, 5:02 AM), <http://www.nydailynews.com/new-york/eric-garner-grand-jury-rigged-man-filmed-chokehold-article-1.2033257> [https://perma.cc/X764-UBJA].

22. See BEALE ET AL., *supra* note 5, § 5.5 (noting that although it is now widely understood that it is improper for a federal prosecutor to advise grand jury witnesses that they may not disclose the substance of their testimony to others, “the practice [still] lingers.”). Compare *United States v. Bryant*, 655 F.3d 232, 239–40 (3d Cir. 2011) (finding that the prosecutor did not violate Rule (6)(e) or the Due Process Clause by sending the grand jury a subpoena with a cover letter requesting the witness not to disclose the existence or the content of the subpoena), with *In re Grand Jury Proceedings*, 814 F.2d 61, 68–70 (1st Cir. 1987) (finding that a letter instructing witnesses not to disclose the existence of a subpoena or the fact that they had complied with the subpoena for a period of ninety days impermissibly conveyed that witnesses were obliged to remain silent).

23. SUSAN W. BRENNER & LORI E. SHAW, 2 FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 16.10, Westlaw (database updated Sept. 2014). See *United States v. Clemones*, 577 F.2d 1247, 1251 (5th Cir. 1978) (describing an instance where a magistrate issued an order that the prosecutor must reinstruct grand jury witnesses); *In re Proceedings Before the Grand Jury Summoned October 12, 1970*, 321 F. Supp. 238, 240–41 (N.D. Ohio 1970) (granting a motion restraining the prosecutor from instructing grand jury witnesses that they must report back to the prosecutor’s office if any party interrogated them about what questions they were asked in the grand jury).

24. See JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 2.24 (4th ed. 2008) (lamenting that prosecutors still persist in attempting to seal the lips of witnesses despite the language in Rule 6(e) of the Federal Rules of Criminal Procedure). See also *United States v.*

prosecutor brings a motion before the court to immunize the witness and/or compel his testimony.<sup>25</sup> The first two situations present examples of soft intimidation that may be difficult to detect and control.<sup>26</sup> The latter two examples—what I shall call formal but “extrastatutory” secrecy obligations—are the subject of this Article.

As a way to illustrate the complexity of this issue and the situations in which it may arise, consider the following two hypotheticals.

*Hypothetical one.* An employee of a major pharmaceutical company is subpoenaed to testify before a grand jury investigating health care fraud. Represented by counsel, the employee asserts his Fifth Amendment right before the grand jury and declines to testify. The prosecutor wishes to entertain a “proffer” from the witness, under which the witness will give a complete and candid disclosure of all relevant information known to him in exchange for the government’s promise not to

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Skilling, 554 F.3d 529, 569–71 (5th Cir. 2009), *aff’d in part, vacated in part*, 561 U.S. 358 (2010) (involving Enron defendant alleging that the prosecution impeded access to witnesses in the manner in which it drafted cooperation agreements; the court of appeals affirmed judgment of conviction on the grounds that the district court remedied any potential prejudice by writing all witnesses a letter prior to trial explaining that they were not limited in what information they shared with defense); *United States v. Salcedo-Smith*, 461 F. Supp. 2d 1090, 1091–92 (W.D. Mo. 2006) (denying motion to prohibit the government from sending proffer agreements that required the suspect to keep content of the proffer interview confidential and not disclose it to any nongovernment representative without approval of an Assistant U.S. Attorney). It is difficult to ascertain how frequently federal and state prosecutors include secrecy provisions in their cooperation agreements because such letters are not public documents unless and until there is a trial on the merits, the witness testifies, and a copy of the agreement is introduced into evidence. The author is personally aware of instances in the District of Massachusetts where prosecutors presented defense attorneys with draft cooperation agreements that contained secrecy obligations. Moreover, the U.S. Attorneys’ Manual encourages prosecutors to be aggressive about protecting the secrecy of grand jury proceedings. For example, section 9-11.142 provides that every financial institution that is served with a subpoena for financial records should be advised that civil and criminal penalties exist in certain circumstances for notifying their account holders of the receipt or content of that subpoena. OFFICE OF THE U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-11.142 (1997). The relevance of the Financial Privacy Act to grand jury secrecy will be discussed *infra* Part III.

25. BRENNER & SHAW, *supra* note 23, § 16.10. See *In re Grand Jury Proceedings*, 417 F.3d 18, 28 (1st Cir. 2005) (granting the government’s motion to compel grand jury testimony over a claim of privilege and including order of nondisclosure). It is difficult to determine exactly how often gag orders are sought in the immunity application context because immunity applications and judicial immunity orders are typically placed under seal. See, e.g., *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 112–13 (2d Cir. 2006); *United States v. Smith*, 985 F. Supp. 2d 506, 517–19 (S.D.N.Y. 2013); *In re Antitrust Grand Jury Investigation*, 508 F. Supp. 397, 397 (E.D. Va. 1980).

26. I am not conceding that a prosecutor’s instructions to a witness (orally or by letter) not to talk to others about the content of their testimony is a benign practice. Especially if the witness is not represented by counsel, he or she may interpret the instruction “please keep the contents of this subpoena and your testimony thereunder confidential because there are criminal consequences for obstruction of justice” as an authoritative command rather than a request.

use this information against the witness.<sup>27</sup> The prosecutor includes language in the proffer agreement whereby the witness agrees not to tell his employer or anyone else in the company what questions the government asked or what information the witness provided during the proffer session. After obtaining such a proffer and interviewing the witness, the prosecutor determines that the government would like to secure the witness's testimony before the grand jury notwithstanding the witness's assertion of the Fifth Amendment privilege. The prosecutor then enters into a nonprosecution agreement with the witness, whereby the witness agrees to cooperate with the government and testify in the grand jury and at any future proceedings, in exchange for an agreement by the government not to prosecute him. Again, the prosecutor includes in this written nonprosecution agreement a promise by the witness not to talk with others about the content of his testimony during the pendency of the grand jury proceeding.

*Hypothetical two.* A United States senator approaches authorities with a claim that he is being extorted. According to the purported victim, he fathered a child with a woman with whom he was having an extramarital relationship, and he has been secretly supporting that child for the past three years. Recently the senator was contacted by the woman's current boyfriend, a body builder and personal trainer, and threatened with public exposure and physical violence unless he pays the boyfriend \$1 million. The senator is represented by counsel. Prosecutors begin a grand jury investigation into the allegation of extortion and threats on a public official. They subpoena the alleged mother of the senator's child to testify before the grand jury. The woman asserts her Fifth Amendment protection against self-incrimination. The prosecutor petitions a judge to issue an immunity order under 18 U.S.C. § 6003.<sup>28</sup> Under pressure from the senator's lawyer, who wishes to shield his client from embarrassing publicity for as long as possible, the prosecutor requests that the judge considering the immunity application also issue a "gag order" on the witness, preventing her from disclosing to the media or to any third parties information that is the subject of the grand jury inquiry for the duration of the investigation.

In both of the above scenarios, an agent of the state is imposing an obligation of secrecy on a witness before the grand jury. In jurisdictions that have a rule of criminal procedure that defines the parameters of grand jury secrecy and *excludes* grand jury witnesses, the question is whether some other source of authority allows the prosecutor (in hypothetical one) or the court (in hypothetical two) to prevent the witness from releasing information. Or, stated another way, are prosecutors and courts simply "going rogue" when they impose secrecy obligations on witnesses beyond those expressly contemplated by the applicable rules of criminal procedure? In Part II below I will analyze the professional responsibility of prosecutors, and in Part III I will address the scope and limits of judicial authority.

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27. See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 15 (2003); Benjamin A. Naftalis, Note, "*Queen for a Day*" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1, 1 (2003).

28. 18 U.S.C. § 6003 (2012).

## II. MODEL RULE OF PROFESSIONAL CONDUCT 3.4(f)

ABA Model Rule of Professional Conduct 3.4(f) prohibits a lawyer from requesting a person “other than a client” to refrain from voluntarily giving relevant information “to another party” except in certain limited situations of interest alignment (such as where the witness is an employee or relative of the lawyer’s client).<sup>29</sup> As will be discussed below, the purpose of the rule is to prevent advocates from blocking an opponent’s access to information. Whether a prosecutor violates Rule 3.4(f)<sup>30</sup> when she conditions a proffer or nonprosecution agreement on a grand jury witness’s willingness to refrain from talking to other persons about information they provided to the government depends upon a proper construction of the term “another party.” Does the term “party” in Rule 3.4(f) mean a party to ongoing litigation (the narrower sense of the term) or does it mean a person, group or entity (the broader sense of the term)? If the former meaning applies, requesting a witness not to talk to a potential target of a grand jury investigation does not violate the attorney disciplinary rule because prior to indictment the target is not yet a formal “party” to litigation. If the latter meaning applies, requesting a grand jury witness not to talk to other persons or entities about their testimony violates the rule.

Rule 3.4(f) first appeared as part of the Kutak Commission Report in 1981 and was adopted by the ABA in 1983. It had no direct analogue in the Model Code of Professional Responsibility. DR 7-109(B) in the Model Code of Professional Responsibility contained a much narrower provision that only prohibited a lawyer from causing “a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.”<sup>31</sup> The 1983 version of the disciplinary rule is significantly broader because it prevents a lawyer from asking someone not closely related to a client “to refrain from giving relevant information to another party.”<sup>32</sup> The Kutak Commission Report was imprecise about the new rule’s intended breadth, although its purpose clearly was to promote the free flow of information during case preparation.<sup>33</sup>

Several state ethics boards have ruled that it is improper under Rule 3.4(f) for a prosecutor to request victims or witnesses not to talk to the defendant, his counsel, or an investigator working on the defendant’s case after charges have been commenced.<sup>34</sup> Such conduct obviously impedes the defendant’s ability to gather

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29. MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (1983).

30. Under the McDade Amendment, federal prosecutors are obliged to follow the rules of professional responsibility in effect in the states where they conduct their activities. 28 U.S.C. § 530B (2012).

31. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-109(B) (1980).

32. MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (1983).

33. MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 1 (1983) (“The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties.”).

34. See State Bar of Mich., Informal Ethics Op. RI-302 (1997) (stating that it is improper for a prosecutor to advise complaining witness not to talk to a defense lawyer, interpreting Rule 3.4(f)); Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Informal Op. 98-134 (1999) (same, interpreting state variation of Rule 3.4(d)); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 99-14 (1999) (stating that a city solicitor and part-time

evidence to mount a defense. “Another party” in Rule 3.4(f) should also be interpreted to include the *putative target or targets* of a grand jury investigation, who the prosecutor has reason to know may be indicted in the future. This interpretation is consistent with the construction of the rule, its purpose, and its history.

The starting point for an analysis of Rule 3.4(f) must be ABA Ethics Opinion 131 (1935), cited as a leading authority for the prohibition against asking a witness to secrete himself or herself in the 1969 Model Code.<sup>35</sup> In Opinion 131, the Committee on Professional Ethics took the view that it is improper for an attorney to influence persons other than clients or employees to refuse to give information to opposing counsel.<sup>36</sup> In a widely quoted and influential section of this opinion, the committee stated: “All persons who know anything about the facts in controversy are, in simple truth, the law’s witnesses. They are the human instrumentalities through which the law, and its ministers, the judges and the lawyers, endeavor to ascertain truth, and to award justice to the contending parties.”<sup>37</sup>

The committee grounded its analysis in part on the obligation for a lawyer’s conduct “before the [c]ourt and *with other lawyers* [to] be characterized by candor and fairness.”<sup>38</sup> There is language in the opinion that suggests its proscription applies to both pending and contemplated litigation: “No lawyer should endeavor in any way, directly or indirectly, to prevent the truth from being presented to the court *in the event litigation arises*.”<sup>39</sup>

This interpretation of Rule 3.4(f) is also consistent with the Rule’s structure. The title of the Rule is “Fairness to Opposing Party and Counsel.” In the section of the rule dealing with pretrial discovery, drafters prohibited “mak[ing] a frivolous discovery request or fail[ing] to make reasonably diligent effort[s] to comply with a legally proper discovery request by an opposing party.”<sup>40</sup> The drafters clearly knew how to use the term “opposing party” when they meant to limit the prohibition to ongoing litigation, yet they chose to use the term “another party” in section (a) of the rule (pertaining to access to evidence) and section (f) (pertaining to access to witnesses). It is reasonable to conclude from this construction that the “parties” contemplated by the latter two sections include both current litigants and future persons or entities whose legal positions are likely to become adverse. Indeed,

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prosecutor could not advise a municipal public safety officer not to speak to defense attorneys in criminal cases, interpreting Rule 3.4(f)); *see also* Gregory v. United States, 369 F.2d 185, 188–89 (D.C. Cir. 1966) (reversing murder and robbery conviction for prosecutorial misconduct; among other grounds, prosecutor deprived defendant of due process by advising witnesses not to speak to defense counsel unless prosecutor was present); David S. Caudill, *Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victim’s Rights*, 17 GEO. J. LEGAL ETHICS 103, 105 (2003).

35. *See* MODEL CODE OF PROF’L RESPONSIBILITY EC 7-27 & n.45 (1980).

36. ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 131 (1935) (stating that where an attorney influences persons other than his clients and their employees to refuse to give information which may be useful to opposing counsel he violates the principles in Canons 15, 22, 32, 39).

37. *Id.*

38. CANONS OF PROF’L ETHICS Canon 22 (1908) (emphasis added).

39. ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 131 (1935) (emphasis added).

40. MODEL RULES OF PROF’L CONDUCT R. 3.4(d) (1983).

comment 2 to Rule 3.4 implicitly supports this construction. In support of the adoption of the new rule, comment 2 acknowledges that “[a]pplicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding *or one whose commencement can be foreseen*.”<sup>41</sup>

Rule 3.4(f) reflects the principle that attorneys for both current and prospective litigants should be able to conduct interviews with witnesses free of adversarial interference.<sup>42</sup> The purpose of the rule is to allow both sides of a potential dispute to gather evidence that may be useful in asserting or defending a cause. “Witnesses are free agents and may decline to be interviewed, but adversary interference with a witness’s decision whether or not to cooperate undermines the principles of fair competition on which the system depends.”<sup>43</sup> When a prosecutor tells a cooperating witness not to talk to potential targets of the investigation about their grand jury testimony (for example, in the corporate context, the witness’s employer or fellow employees—as in hypothetical one above), she is impeding the ability of that target to gather evidence. Information about what line of inquiry the prosecutor is pursuing and what facts may be relevant to that inquiry could help the target find and preserve documentary evidence and locate other witnesses who may have knowledge of pertinent facts.

Advising witnesses not to talk to the “other side” impedes fact collection in the preliminary hearing context as much as it does in the trial context. In this regard, grand jury proceedings should be treated no differently than probable cause hearings, which occur *after* the initiation of formal charges but perform much the same function. What a prosecutor could not do in the latter instance, she should not be allowed to do in the former instance. Grand jury investigations already give prosecutors a huge head start in collecting evidence, locking in witnesses under oath, and preparing for trial. Including a “gag” provision in a cooperation agreement

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41. MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 2 (1983) (emphasis added).

42. Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics*, 87 OR. L. REV. 481, 532–33 (2008). Professor Bauer argues that a lawyer’s drafting of—or recommendation to his client that the client execute—a civil settlement agreement that prohibits the plaintiff from sharing information with future litigants violates Rule 3.4(f). Analyzing the history and purpose of the rule, Bauer concludes that at least in the civil context, the term “another party” in 3.4(f) should mean a person who has an interest in the dispute or transaction or a potential future claim, regardless of whether the lawsuit has yet been filed. *Id.* at 551.

43. *Id.* at 532. Interestingly, the aspirational and nonbinding Prosecution Standards issued by the American Bar Association phrase this principle in slightly different terms, albeit ones that support my argument that the prohibition on obstructing access to witnesses should apply prior to indictment. Standard 3-3.4(h) now states that “[t]he prosecutor should not advise any person, or cause any person to be advised, to decline to provide *defense counsel* with information which such person has a right to give.” STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE: PROSECUTION FUNCTION, § 3-3.4(h) (AM. BAR ASS’N 1992) (emphasis added). Because this standard uses the term “defense counsel” rather than “another party,” the possible ambiguity of whether it applies prior to the initiation of formal litigation is avoided. Where a defense attorney has notified the prosecutor that he represents a target or subject of the grand jury investigation, and the prosecutor is aware that there is a lawyer involved in the case who may seek to interview witnesses, drafting a cooperation agreement that contains broad secrecy provisions clearly violates this standard.

further exacerbates this advantage because it handcuffs the target of the investigation from talking to witnesses who may help the target understand the nature of the allegations and begin to shape a defense.

In an analogous context, the New Jersey Supreme Court has recognized that it is unethical conduct for a defense attorney representing the subject of a grand jury investigation to recommend that a nonclient witness decline to cooperate with investigating authorities.<sup>44</sup> Even though this conduct occurred prior to charging, the court ruled that an attempt by the defense counsel to block the government's access to witnesses violated a state disciplinary rule.<sup>45</sup> Fair play and adversarial balance certainly suggest that if a defense attorney may not obstruct the government's access to witnesses during a grand jury investigation, the prosecutor may not engage in similar behavior.

Perhaps the most compelling argument that might be advanced for allowing a prosecutor to condition a proffer or nonprosecution agreement on the grand jury witness's promise not to discuss his testimony with others is that such a provision might help prevent targets from fleeing, destroying physical evidence, and intimidating other witnesses. One response to this argument is that in those majority jurisdictions that exempt witnesses from the obligation of grand jury secrecy in their rules of criminal procedure,<sup>46</sup> the legislature has already balanced the competing interests of public safety and freedom of expression, and has come down on the side of the latter.<sup>47</sup> Moreover, criminal penalties exist in most jurisdictions for perjury, intimidation of witnesses, and obstruction of justice.<sup>48</sup> A witness who is not

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44. *In re Blatt*, 324 A.2d 15, 18 (N.J. 1974) (suspending a defense attorney for two years, and resting the decision on "conduct prejudicial to the administration of justice" provisions of MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(5) (1971)).

45. *Id.*

46. *See supra* note 6 and accompanying text.

47. *See King v. Jones*, 319 F. Supp. 653, 657 (N.D. Ohio 1970) (involving Kent State grand jury witnesses who sought a federal injunction vacating a state common pleas court order that prohibited them from talking to the media; the federal court entered an injunction restraining the state defendants from enforcing that order because the Ohio legislature had already made a determination that no such restraint was required of witnesses before grand jury), *rev'd and vacated on other grounds*, 450 F.2d 478 (6th Cir. 1971).

48. *See* John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49, 77-90 (2004) (reviewing federal and state legislation); *see also* *Butterworth v. Smith*, 494 U.S. 624, 633-36 (1990) (striking down a Florida statute that made it a crime for a grand jury witness to *ever* divulge his testimony; the Court noted that the state had enacted substantial criminal penalties for both perjury and tampering with witnesses, and therefore "the additional effect of the ban here in question is marginal at best and insufficient to outweigh the First Amendment interest in speech involved"). A recent high-profile example of an effective obstruction prosecution is the government's decision to charge three college classmates of Boston Marathon bomber Dzhokhar Tsarnaev with the crime of obstruction of justice for, among other conduct, removing their friend's backpack from his dorm room and throwing it in a landfill. Two of the three classmates pleaded guilty and one was convicted after trial. *See* Denise Lavoie, *Boston Marathon Bomber's College Friends Face Sentencing*, CBS BOS. (June 1, 2015, 7:20 PM), <http://boston.cbslocal.com/2015/06/01/boston-marathon-bombers-college-friends-face-sentencing/> [<https://perma.cc/QU5G-HC3U>]; Patricia Wen, *Jurors Convict Friend of Tsarnaev*, BOS. GLOBE (July 21, 2014),

dissuaded by criminal penalties from assisting a target to obstruct a grand jury investigation will not be dissuaded by the terms of a contractual agreement. And since the target is not bound by the cooperation agreement in any event, contractual secrecy provisions add little to the government's ability to detect and prosecute a target's corruption of the grand jury's truth-finding function.<sup>49</sup>

Another reason prosecutors may sometimes overreach and attempt to "gag" grand jury witnesses is that they are attempting to protect their own work product.<sup>50</sup> A witness can often piece together the government's theory of its case from the questions asked and the documents referenced in the grand jury room. If witnesses are allowed to reveal to targets what occurred before the grand jury, the target will get an advance preview of the government's case. However, the attorney work-product doctrine cannot justify prosecutors seeking to silence grand jury witnesses. The Supreme Court has recognized that the work-product doctrine applies to criminal as well as civil cases.<sup>51</sup> This qualified privilege is now reflected in the Federal Rules of Criminal Procedure.<sup>52</sup> Yet both the common law and statutory privileges protect against disclosure of *documents and tangible things* prepared by a lawyer or her agent in anticipation of litigation.<sup>53</sup> A witness's independent recollection of what questions the prosecutor orally asked him in front of the grand jury simply are not protected by the work-product rule.<sup>54</sup>

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<https://www.bostonglobe.com/metro/2014/07/21/jury-resumes-deliberations-trial-azamat-tazhayakov-friend-boston-marathon-bombing-suspect-dzhokhar-tsarnaev/6H10xaskP38B3v15ryzvPJ/story.html> [<https://perma.cc/97NG-6W6N>]; Patricia Wen, *Tsarnaev Friend to Plead Guilty in Obstruction Case*, BOS. GLOBE (Aug. 20, 2014), <http://www.bostonglobe.com/metro/2014/08/20/tsarnaev-friend-dias-kadyrbayev-expected-plead-guilty-obstruction-charges/YgZBn7NGFRX8iigKKBQO1L/story.html> [<https://perma.cc/AE9D-JYN3>].

49. Prosecutors would likely argue that without contractual secrecy obligations in cooperation agreements, a witness may inform a target of the fact and content of their testimony without an intent to obstruct justice (such as out of familial loyalty or business relationship), and then the target may thereafter flee or destroy evidence. That is perhaps the most compelling argument that can be advanced in favor of imposing a secrecy obligation on witnesses. But, as the majority of jurisdictions have recognized in their decision to exclude witnesses from any oath of secrecy, this risk is outweighed by the free speech rights of the witness and by the target's right to honestly gather evidence in his defense.

50. *United States v. Salcedo-Smith*, 461 F. Supp. 2d 1090, 1091–93 (W.D. Mo. 2006) (discussing the government's argument that the standard proffer agreement was justified to protect attorney work product; the court found no due process violation without addressing this work product argument).

51. *United States v. Nobles*, 422 U.S. 225, 238–40 (1975) (holding that while the work-product doctrine applies in criminal cases, respondent waived that privilege when he elected to present his investigator as a witness).

52. See FED. R. CRIM. P. 16(a)(2), (b)(2).

53. See FED. R. CRIM. P. 16 (protecting documents, objects, recordings, and reports); *Nobles*, 422 U.S. at 237–38 (describing the contours of work-product); *Hickman v. Taylor*, 329 U.S. 495, 509–12 (1947) (same); cf. FED. R. CIV. P. 26.

54. The Supreme Court ruled in *Goldberg v. United States* that a prosecutor's notes of a witness interview otherwise producible as a witness statement under the Jencks Act were not protected by the work-product doctrine. 425 U.S. 94, 108 (1976). See also FED. R. CRIM. P. 16(a)(2). If a prosecutor's notes of a witness interview are sometimes discoverable notwithstanding the work-product rule, the witness's independent recollection of their own

Fears of obstruction of justice and work-product revelation are spurious justifications for the practice of including secrecy provisions in proffer and cooperation agreements. Returning to hypothetical one above, in most jurisdictions the pharmaceutical employee has every right to talk to his employer about what questions were asked of him by the government and what information he provided in the grand jury room. Indeed, such discussions could enable the company to marshal evidence that will be useful to the grand jury's investigation by interviewing other employees with knowledge of the situation, locating and scrutinizing pertinent documents, and providing such information and analysis to the government.<sup>55</sup> The employee/witness may choose for tactical, economic, or personal reasons *not* to discuss his testimony with company management, but the government should not be allowed to put its thumb on the scale of this decision in the way that it drafts cooperation agreements.<sup>56</sup>

Prosecutors undoubtedly will argue that "gag provisions" are part of the legitimate give and take of plea bargaining; if cooperating witnesses are willing to agree to them, the law should not stand in the way of obligations freely undertaken in exchange for charging or sentencing considerations. But such a contract analysis misconstrues the purposes and reach of Rule 3.4(f), which is an *ethical* obligation of attorneys. State prosecutors and the Department of Justice lost a similar argument in the 1990s, when they tried to argue that the "no-contact" provisions of Model Rule

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interview with the prosecutor certainly cannot be protected.

55. Jeffery B. Coopersmith & Rachel Herd, *If I Can't Be in the Grand Jury Room, Maybe My PowerPoint Can: Revisiting the Government's Duty To Present Exculpatory Evidence to the Grand Jury*, THE CHAMPION, Sept. 2014, at 36, 37–38 (encouraging defense attorneys to prepare and bring exculpatory information to the attention of federal prosecutors and demand that they fulfill their duty under the U.S. Attorney's Manual to alert the grand jury).

56. In my hypothetical, the lawyer for the employee and the lawyer(s) for the company may have entered into a "joint defense agreement." The subject of joint defense agreements is beyond the scope of this Article. Typically, a joint defense agreement allows the parties thereto to share information with each other in confidence while retaining the right to argue that the attorney-client privilege protects intragroup communications in furtherance of a joint legal strategy. See *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989); *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989). See generally Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871 (1996) (discussing joint defense agreements and arguing they should be recognized independent of work-product doctrine and attorney-client privilege). In the criminal context, a typical joint defense agreement contains a clause obligating a party to withdraw from that agreement and notify the other parties thereto if and when they begin to cooperate with the government. Patrick J. Sharkey, *Unwrapping the Mystery of Joint Defense Agreements*, ALI-ABA COURSE OF STUDY: SECURITIES LITIGATION: PLANNING AND STRATEGIES 181 (2008), Westlaw SN084. Prosecutors justifiably are concerned in the proffer context that, notwithstanding such mandatory withdrawal, a lawyer for a cooperating witness may share information about the questions asked during the proffer interview with lawyers representing other employees of the company or company management. I would argue that the protections against sharing client confidences under ABA Model Rule 1.6(a) and state variations thereto already safeguard against such behavior by criminal defense attorneys once they have withdrawn from a joint defense agreement. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003).

4.2<sup>57</sup> should not impede a prosecutor's investigative ability to debrief a represented defendant who wished to speak to the government without his counsel present.<sup>58</sup> The argument that suspects could "waive" Rule 4.2 misconstrued the purpose of the no-contact rule, which was to impose an obligation on *counsel* not to undertake action that could drive a wedge between a client and his attorney. "The rule against communicating with represented parties is fundamentally concerned with the *duties* of an attorney, not with the *rights* of the parties."<sup>59</sup> Similarly, the argument that a criminal suspect or witness may lawfully agree to a gag provision in a cooperation agreement misconstrues the purpose of Rule 3.4(f), which is to prevent lawyers from intentionally creating barriers to an opposing counsel's access to evidence.

### III. FEDERAL RULE OF CRIMINAL PROCEDURE 6(e) AND THE FIRST AMENDMENT

Before the Federal Rules of Criminal Procedure were adopted, the practice in most federal courts was to require grand jury witnesses to take an oath of secrecy.<sup>60</sup> But Rule 6 expressly altered this common law practice when it was first enacted in 1946. Rule 6(e)(2)(B) prohibits persons performing an "official function" before the grand jury (namely, the government lawyer, stenographer, recorder, interpreter, and jurors themselves) from disclosing what occurred before the grand jury, except as may be authorized by the court or other rules.<sup>61</sup> But Rule 6(e)(2)(A) provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)."<sup>62</sup> The Advisory Committee Note states that the express purpose of section (A) was to *eliminate* the common law practice of ordering secrecy on the part of grand jury witnesses. "The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."<sup>63</sup> Like the federal courts, a majority of states now similarly exclude grand jury witnesses from any obligation of secrecy.<sup>64</sup>

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57. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983).

58. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1461-64 (9th Cir. 1993); *State v. Miller*, 600 N.W.2d 457, 462-64 (Minn. 1999).

59. *Lopez*, 4 F.3d at 1462 (emphasis in original).

60. See *Goodman v. United States*, 108 F.2d 516, 520 (9th Cir. 1939) (discussing practices among the states and federal districts, and concluding that "[i]t would seem to be well within the discretionary power of the court to impose an oath of secrecy not alone upon grand jurors, but upon the witnesses, if the court believes the precaution necessary in the investigation of crime").

61. FED. R. CRIM. P. 6(e)(2)(B).

62. FED. R. CRIM. P. 6(e)(2)(A).

63. See FED. R. CRIM. P. 6(e), advisory committee's note 2 (1944).

64. See BEALE ET AL., *supra* note 5, § 5.5. Nine states impose an obligation of secrecy on witnesses, but exempt communication between the witness and his attorney, and three impose an obligation of secrecy on witnesses without such an exemption. Compare ALA. CODE §§ 12-16-215, -216, -222 (LexisNexis 2012), and COLO. R. CRIM. P. 6.3, and FLA. STAT. ANN. § 905.27(1), (3) (West 2014), and IND. CODE ANN. §§ 35-34-2-5.5, -34-2-10(a) (2014), and KY. R. CRIM. P. 5.24(1), and LA. CODE CRIM. P. art. 434(A), and MICH. COMP. LAWS ANN. § 767.19f (West 2000 & Supp. 2015), and N.C. GEN. STAT. ANN. § 15A-623(e), (g) (West 2009), and N.D. CENT. CODE § 29-10.1-30(4) (2006), with MISS. UNIF. R. CIR. AND CTY. CT. 7.04, and MO. ANN. STAT. § 540.110 (West 2002), and WASH. REV. CODE ANN. § 10.27.090(3)

An early commentator on the Federal Rules of Criminal Procedure, Professor George Dession, wrote that under the new rules, “requiring witnesses before the grand jury to take an oath of secrecy is therefore no longer authorized, such restriction being considered impractical and unfair.”<sup>65</sup> He quoted with approval Judge George Zerdin Medalie, also a member of the Advisory Committee:

I know that some of the judges in some of the district courts have refused to administer such an oath, and have set themselves against punishment for contempt for breach of that oath, if taken. Others, however, have believed in that oath, and have enforced it by contempt orders. . . . It was impractical and unreal—a partner, an employee, a relative, a friend called on to testify will come back and tell the person concerning whom he testified, and it should be so.<sup>66</sup>

A more direct statement of the intent behind the language of Rule 6(e)(2)(A) would be very difficult to imagine.

The issue that has bedeviled the federal appeals courts is whether Rule 6(e) simply states a default position that certain persons appearing before the grand jury are automatically subject to a secrecy obligation and certain persons are not, or whether the rule further curtails the power of a court—even when presented with compelling circumstances—to issue an order of secrecy to a grand jury witness in the context of a particular case. Some courts have taken the former position, maintaining that courts have inherent authority to protect the integrity of the grand jury proceedings notwithstanding the express exemption in Rule 6(e) where disclosure of information would jeopardize the grand jury’s investigation.<sup>67</sup> Other courts have ruled that the language “no obligation of secrecy may be imposed” is clear, and when coupled with

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(West 2002 & Supp. 2015).

65. George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 204 (1947) (footnote omitted).

66. *Id.* at 204 n.100 (citing Address by Medalie, FEDERAL RULES OF CRIMINAL PROCEDURE: WITH NOTES PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE APPOINTED BY THE UNITED STATES SUPREME COURT AND PROCEEDINGS OF THE INSTITUTE 155 (Alexander Holtzoff ed., 1946)).

67. *See, e.g., In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) (“[C]ourts have inherent power, subject to the Constitution and federal statutes, to impose secrecy orders incident to matters occurring before them.”); *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559, 1563 (11th Cir. 1989) (upholding the district court’s discretion to enter order prohibiting the university from discussing subject matter of testimony before the grand jury or disclosing materials prepared in response to a grand jury subpoena); *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680 (8th Cir. 1986) (“We therefore conclude that, upon a proper showing in an appropriate case, the district court may direct a grand jury witness to keep secret from targets of the investigation the existence of a subpoena, the nature of the documents subpoenaed, or testimony before the grand jury, for an appropriate period of time.”); *In re Swearingen Aviation Corp.*, 486 F. Supp. 9, 11 (D. Md. 1979) (“In light of the court’s conclusions that it has supervisory powers over the grand jury and that Rule 6(e) is not an impediment to the issuance of the orders under the circumstances of this case, the court has the power under the All Writs Act, 28 U.S.C. § 1651, to issue the orders involved.”).

the Advisory Committee note referenced above expressly limits the court's authority to gag grand jury witnesses.<sup>68</sup>

The latter position in this circuit split is the better interpretation of the two. The lower federal courts derive their powers from Congress.<sup>69</sup> Although the Supreme Court has recognized that there are certain fundamental powers that are "inherent" to functioning as a court under Article III,<sup>70</sup> the doctrine of inherent powers itself is a "shadowy" and "nebulous" concept.<sup>71</sup> The Court has upheld a district court's supervisory power over the administration of criminal justice,<sup>72</sup> but "it has rejected attempts to invoke such power in defiance of positive federal law, either constitutional or statutory."<sup>73</sup> Where Congress has spoken directly on a particular

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68. See, e.g., *United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir. 1976) (refusing to compel witness to testify before grand jury when foreman of grand jury had included in witness's oath an obligation not to discuss the subject of his testimony: "We must agree the admonition to the witness is contrary to the provisions of Rule 6(e)"); *In re Vescovo Special Grand Jury*, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979) ("Under Rule 6(e) no obligation of secrecy may be imposed upon grand jury witnesses. Witnesses may be interviewed after their appearance and repeat what they said before the grand jury or relate any knowledge they have on the subject of the inquiry." (citations omitted)).

69. *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution.").

70. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42–58 (1991) (upholding a court's use of its inherent power to impose payment of attorney's fees to sanction misconduct before it).

71. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

72. See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1433–34 (1984).

73. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 781 (2001) (footnotes omitted). Professor Pushaw argues that our constitutional structure and the fact that Article I contains a Necessary and Proper Clause while Article III does not suggests that the inherent powers doctrine should best be understood by recognizing two distinct categories of inherent judicial authority: (1) implied indispensable powers are those ancillary to actions that are absolutely essential to fulfill the Article III mandate to exercise "judicial power," and (2) "beneficial" inherent powers are those that are merely helpful, useful, or convenient for federal judges. *Id.* at 741–43. Pushaw argues that Congress can restrict or even eliminate powers merely asserted for the sake of convenience or utility, for doing so does not seriously impair or destroy the Article III role. *Id.* at 834. "[F]ederal courts should defer to procedural and evidentiary statutes (or derivative rules), even if they would prefer a different legal standard, except in the rare instance where Congress has attempted to eliminate or impair an implied indispensable power." *Id.* at 851. In *Carlisle v. United States*, the Supreme Court concluded that federal district courts lack "inherent supervisory power" to establish rules that regulate their own proceedings if that action circumvents or conflicts with express Federal Rules of Criminal Procedure. 517 U.S. 416, 425–28 (1996) (finding that a court is without the power to entertain a motion for judgment of acquittal filed by the defendant one day late under Federal Rule of Criminal Procedure 29(c)). "Whatever the scope of this 'inherent power,' however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Id.* at 426.

subject, a court's inherent power is at its weakest.<sup>74</sup> Powers that are "inherent" only in the sense that they are useful in the pursuit of a just result (such as gagging witnesses) may only be exercised in the absence of a contrary legislative directive.<sup>75</sup> Rule 6(e), approved by Congress pursuant to the Rules Enabling Act, is just such a contrary legislative directive—the clear language of the rule ("no obligation *may be imposed*") speaks to the power of the government, not the power of the witness.

Several of the decisions that recognized the inherent authority of federal courts to gag grand jury witnesses were decided before the Supreme Court's 1992 decision in *United States v. Williams*.<sup>76</sup> In *Williams*, the Supreme Court granted certiorari to resolve the issue of "[w]hether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury."<sup>77</sup> The respondent argued that imposing such an obligation on prosecutors was mandated by the Fifth Amendment's guarantee of indictment by a grand jury for serious crimes, or in the alternative was authorized by the Tenth Circuit's general supervisory power over the grand jury.<sup>78</sup> The Court rejected both arguments, ruling that dismissal of a federal indictment due to the prosecutor's failure to disclose exculpatory evidence to the grand jury was improper.<sup>79</sup> The majority concluded that a court's power to regulate grand jury proceedings is not as broad as its supervisory power over its own proceedings.<sup>80</sup> Writing for the majority, Justice Scalia reasoned that federal courts lack general supervisory power over the grand jury because grand juries are not "judicial" proceedings under Article III of the Constitution.<sup>81</sup> Therefore, the Court proclaimed that the judiciary's supervisory power over the grand jury should be limited to situations where the Constitution, a statute, or an express rule has been violated in the way the grand jury proceeding was conducted.<sup>82</sup> Since the grand jury is not an Article III tribunal, after *Williams* a lower court has no inherent power to act to protect those proceedings.

Moreover, some of the early federal court decisions that recognized the inherent authority of a district court to gag grand jury witnesses—notwithstanding a rule of criminal procedure that points precisely in the opposite direction—involved grand jury subpoenas for bank records.<sup>83</sup> These decisions predated a crucial 1986

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74. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (rejecting court's reliance on inherent authority to dismiss an indictment for prosecutorial misconduct in contravention of procedure set out in FED. R. CRIM. P. 52(a)); *Palermo v. United States*, 360 U.S. 343, 355–56 (1959) (upholding Jencks Act and Congress's ability to limit the Court's supervisory authority over prosecution's disclosure of witness statements).

75. *Eash*, 757 F.2d at 562.

76. 504 U.S. 36 (1992).

77. *Id.* at 40.

78. *Id.* at 45.

79. *Id.* at 51.

80. *Id.* at 50.

81. *Id.* at 47. Justice Scalia relied on the fact that the grand jury is not mentioned in the body of the Constitution, but only in the Bill of Rights, to support his conclusion that it belongs to none of the three branches of government. *Id.* He also pointed both to the scope of the grand jury's power, and to the manner in which it was exercised, to distinguish it from Article III courts. *Id.* at 48.

82. *Id.* at 46.

83. See BEALE ET AL., *supra* note 5, § 5.17. See also, e.g., *In re Grand Jury Subpoena*

amendment to the Right to Financial Privacy Act.<sup>84</sup> That Act provides for confidentiality of customer financial records and limits when and how they may be disseminated. When the statute was first enacted in 1978, it required financial institutions to notify customers if they turned over customer records in response to a subpoena.<sup>85</sup> But grand jury subpoenas were expressly exempted from that provision of the Act.<sup>86</sup> They were also exempted from a section of the Act that allowed prosecutors to request a court to order delay of notification for ninety days if there was reason to believe that such notice could result in flight, destruction of evidence, intimidation of a witness, and so forth.<sup>87</sup> So banks were not required to notify their customers about grand jury subpoenas, but there was also no judicial mechanism for *preventing* them from doing so.<sup>88</sup> In 1986, Congress resolved this ambiguity by passing an amendment that included grand jury subpoenas in the section of the Act authorizing the government to petition a court for delayed disclosure.<sup>89</sup> This amendment makes clear that where Congress believes that grand jury investigations might be jeopardized by loose lips on the part of those who receive a subpoena, they know how to intervene.<sup>90</sup> And such action would not have been needed with regard

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Duces Tecum, 797 F.2d 676, 678–80 (8th Cir. 1986); *In re Swearingen Aviation Corp.*, 486 F. Supp. 9, 10–12 (D. Md. 1979).

84. 12 U.S.C. §§ 3401–3422 (2012). See BEALE ET AL., *supra* note 5, § 5.17.

85. 12 U.S.C. §§ 3403–3407 (1982), amended by Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1353(a), 100 Stat. 3207.

86. 12 U.S.C. § 3413(i) (1982), amended by Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1353(b), 100 Stat. 3207.

87. 12 U.S.C. § 3409(a) (2012).

88. Because the old statute did not expressly prevent banks from notifying their clients that their accounts were subject to a subpoena, many federal prosecutors sought a court order at the time of issuance of the subpoena forbidding such notice. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 575 F. Supp. 1219, 1220–21 (E.D. Pa. 1983); *In re Vescovo Special Grand Jury*, 473 F. Supp. 1335, 1335–36 (C.D. Cal. 1979). That led to the rise of litigation and resulting circuit court split about whether federal courts had independent authority under Rule 6(e) or the All Writs Act to order the delay of disclosure. See generally Norman A. Bloch, *Gagging Bankers: Grand Jury Nondisclosure Statutes and the First Amendment*, 107 BANKING L.J. 441, 445–52 (1990) (discussing laws in effect at the time related to grand jury nondisclosure).

89. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1353(b), 100 Stat. 3207. In 1989, the statute was further amended to mandate secrecy (with no need to petition court for order) for grand jury subpoenas seeking financial records pertaining to certain crimes, including crimes against financial institutions, crimes under the Controlled Substance Act, money laundering, and IRS currency violations. See 12 U.S.C. § 3420(b) (2012).

90. Congress has also allowed the government to move for delayed disclosure of subpoenas for third-party records of electronic and wire communications. See 18 U.S.C. § 2705(b) (2012). Delayed disclosure orders for document subpoenas do not implicate First Amendment concerns to the same extent as gag orders for fact witnesses. First and foremost, the limitation is temporary. Second, the limitation is on disclosing the fact that the record holder has been subpoenaed and the contents of the subpoena, rather than on disclosing underlying facts. Finally, where the target of the grand jury investigation is the account holder, he or she has access to the underlying information that is the subject of the subpoena. Delayed disclosure to the target that their records have been subpoenaed will not shield them from any information helpful in preparing their defense. Where the target of the potential investigation

to bank records under the Financial Privacy Act if federal courts retained independent authority to gag witnesses whenever they felt it necessary.

Even if I am wrong and courts do retain some inherent authority to silence grand jury witnesses, they certainly cannot do so where such an order would violate the First Amendment.<sup>91</sup> “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, *its subject matter*, or its content.”<sup>92</sup> Prior restraints on speech are presumptively unconstitutional,<sup>93</sup> and the party moving for such a restriction bears a heavy burden of establishing that it is narrowly tailored to meet a compelling state interest.<sup>94</sup> While the Supreme Court has recognized in dicta the authority of courts to gag *trial* witnesses in order to shield the petite jury from improper influence and protect the defendant’s Sixth Amendment right to a fair trial,<sup>95</sup> even those orders may be entered only in extraordinary circumstances, and only after a detailed and compelling showing of potential prejudice.<sup>96</sup> The state’s interests in protecting grand jury secrecy

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is someone other than the account holder, the target would have no right to access that client’s account information even absent a court order.

91. “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (“There is no force in respondent’s argument that the constitutional limitation[] . . . appl[ies] only to Congress . . .”).

92. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (emphasis added) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (internal quotation marks omitted)) (remanding to the Third Circuit for determination whether the Child Online Protection Act survives strict scrutiny).

93. *Landmark Comm’n, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (ruling that it is unconstitutional to prohibit a newspaper from publishing an article that accurately reported on an inquiry into judicial misconduct); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 558–59, 570 (1976) (striking down a gag order preventing the media from publishing any inculpatory details of an alleged murder or admissions made by the defendant pending the outcome of trial).

94. *See United States v. Alvarez*, 132 S. Ct. 2537, 2549–51 (2012) (invalidating *Stolen Valor Act*); *see also Williams-Yulee v. Florida Bar*, No. 13–1499, slip op. at 6–7 (U.S. Apr. 29, 2015) (resulting in five justices agreeing that strict scrutiny should be applied to judicial campaign speech).

95. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (“The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, *witnesses*, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.” (emphasis added)).

96. Numerous appellate courts have reversed gag orders on trial witnesses on the grounds that those orders were entered prematurely and/or upon an inadequate showing of potential prejudice. *See, e.g., Atlanta Journal-Constitution v. State*, 596 S.E.2d 694, 696–97 (Ga. Ct. App. 2004) (holding that the trial court failed to apply the requisite legal standard before imposing a gag order directed at witnesses and others); *State ex rel. Missoulain v. Mont. Twenty-First Judicial Dist. Court, Ravalli Cnty.*, 933 P.2d 829, 841 (Mont. 1997) (reversing order and remanding for further proceedings because the court below did not make “specific findings that there is a *substantial probability* that the defendant’s right to a fair trial will be prejudiced by publicity that the gag order would otherwise prevent” (emphasis in original)); *State ex rel. NBC v. Court of Common Pleas*, 556 N.E.2d 1120, 1124 (Ohio 1990) (*per curiam*) (prohibiting the enforcement of a gag order due to lack of specific, on the record

is both different from, and less compelling than, its interest in promoting fairness in the ultimate criminal trial.

In *Butterworth v. Smith*,<sup>97</sup> the Supreme Court struck down a Florida statute that prohibited a grand jury witness from ever disclosing his testimony before that body.<sup>98</sup> A reporter who testified before the grand jury about alleged improprieties at the county sheriff's and state attorney's offices later sought to write a book about the subject of his grand jury testimony after the panel had terminated its investigation into public corruption without indictment.<sup>99</sup> The reporter unsuccessfully sought a declaration before the district court that the Florida grand jury statute was an unconstitutional abridgement of speech, as well as an injunction preventing the State from prosecuting him under it.<sup>100</sup> The Supreme Court agreed with the Eleventh Circuit that such a blanket and indefinite prohibition on a grand jury witness from ever disclosing the contents of his testimony to the grand jury violated the First Amendment.<sup>101</sup> Without expressly deciding what level of compelling interest was necessary to justify a prior restraint on a person not a party to a judicial proceeding,<sup>102</sup> the Court ruled that none of the state's purported interests in grand jury secrecy, taken individually or collectively, were compelling enough to save Florida's statute from constitutional infirmity.<sup>103</sup> "[T]he invocation of grand jury interests is not 'some

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findings demonstrating that order is "essential to preserve higher values and is narrowly tailored to serve that interest" (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). Courts disagree whether the appropriate constitutional standard that must be met before imposing gag orders on trial witnesses is "clear and present danger" or the less stringent "substantial likelihood of prejudice." David D. Smyth III, *A New Framework for Analyzing Gag Orders Against Trial Witnesses*, 56 BAYLOR L. REV. 89, 93, 102 (2004) (arguing for "clear and present danger" standard). Compare *United States v. Ford*, 830 F.2d 596, 598-99 (6th Cir. 1987), with *United States v. Brown*, 218 F.3d 415, 428 (5th Cir. 2000). There is some suggestion in Supreme Court precedent that courts may impose gag orders on parties to the proceeding and their lawyers, upon a lesser showing of substantial likelihood of material prejudice, because they have obligations towards the tribunal that the court may properly regulate. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1057 (1991) (opinion of Kennedy, J.).

97. 494 U.S. 624 (1990).

98. FLA. STAT. § 905.27 (1989).

99. *Butterworth*, 494 U.S. at 628.

100. *Id.*

101. *Id.* at 636.

102. The parties in *Butterworth* urged the Court to apply differing First Amendment standards for prior restraints on speech. The respondent urged the Court to adopt a "clear and present danger" standard, as applied in *Landmark Communications*. 435 U.S. at 845 (holding unconstitutional a state statute making it a crime to divulge information from proceedings before a state judicial review commission). The petitioner urged the Court to uphold the restriction on speech of participants in a pending judicial proceeding so long as those restrictions advanced a substantial governmental interest and were no broader than necessary to advance those interests. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-34 (1984) (holding that a protective order prohibiting a newspaper from publishing information which it had obtained through discovery procedures as the defendant in a defamation suit did not offend the First Amendment). In striking down the Florida grand jury statute as applied to respondent, the Court in *Butterworth* did not choose between those two standards, or adopt an alternative.

103. *Butterworth*, 494 U.S. at 633-35.

talisman that dissolves all constitutional protections.”<sup>104</sup> The Court examined the five interests purportedly served by grand jury secrecy that it had previously acknowledged in *Douglas Oil Co. of California v. Petrol Stops Northwest*.<sup>105</sup> The Court reasoned that three of these interests—namely, preventing target flight, preventing the importuning of grand jurors, and protecting prospective witnesses from being pressured in their testimony—were irrelevant once the grand jury had terminated its inquiry and been discharged.<sup>106</sup> Two interests were relevant, but were deemed by the Court “insufficient to outweigh the First Amendment interest in speech involved.”<sup>107</sup> While Florida’s interest in preventing the subornation of perjury at trial continues beyond indictment, the Court noted that most modern criminal discovery rules provide the accused with notice of the government’s witnesses against him prior to trial, and therefore grand jury secrecy provisions do little to shelter trial witnesses from pressure or intimidation.<sup>108</sup> The Court acknowledged that the Florida statute protected exonerated individuals from having unproven allegations exposed to the public, but “absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.”<sup>109</sup> The Court also noted approvingly that Federal Rule of Criminal Procedure 6(e) and its analogues in many states do not impose any obligation of secrecy on grand jury witnesses: “While these practices are not conclusive as to the constitutionality of Florida’s rule, they are probative of the weight to be assigned Florida’s asserted interests and the extent to which the prohibition in question is necessary to further them.”<sup>110</sup> The reporter-witness in *Butterworth* was thus free to publish information in his possession about alleged improprieties by county officials, insofar as they were facts “he was in possession [of] before” the grand jury investigation<sup>111</sup> and/or involved “his own testimony”<sup>112</sup> before the grand jury. The Court held that “insofar as the Florida law prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution.”<sup>113</sup>

There are at least three possible ways to read the *Butterworth* decision. One reading suggests that the Florida statute was overbroad because it barred grand jury witnesses *indefinitely* from revealing or discussing the contents of their testimony.

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104. *Id.* at 630 (quoting *United States v. Dionisio*, 410 U.S. 1, 11 (1973)).

105. *Id.* at 632–35 (discussing *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211 (1979)). See *supra* note 19 and accompanying text.

106. *Butterworth*, 494 U.S. at 632–33. The concern that some witnesses will be deterred from testifying if they know that their testimony may later be revealed is inapplicable, since grand jury witnesses remain free to choose not to disclose their *own* testimony, and the respondent did not challenge the statute’s prohibition insofar as it prevented the somewhat unusual circumstance of one grand jury witness from being able to reveal the identity or testimony of another. *Id.* at 633.

107. *Id.* at 634.

108. *Id.* at 633.

109. *Id.* at 634.

110. *Id.* at 635.

111. *Id.* at 632.

112. *Id.*

113. *Id.* at 626.

This suggests that a narrower prohibition, limited temporally to the length of the grand jury's inquiry, might survive constitutional scrutiny. This reading has been adopted by the Tenth Circuit.<sup>114</sup> Another reading of *Butterworth*, espoused by Justice Scalia in his concurring opinion, is that witnesses can never be prohibited from discussing facts to which they were called upon to testify before the grand jury, provided that the witness has an independent source for those facts, but that the witness may be barred, even permanently, from discussing what actually occurred during the grand jury proceeding.<sup>115</sup> This reading is supported by the language in Chief Justice Rehnquist's majority opinion distinguishing *Rhinehart*, where the Court stated, "[h]ere, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury."<sup>116</sup> This construction of *Butterworth* has been adopted by the First Circuit and several other courts.<sup>117</sup> The narrowest possible reading of *Butterworth* is that a grand jury witness at most may be barred from publicizing what actually transpired in the grand jury room (that is, questions that were asked, exhibits that were referenced), and only for the life of that inquiry.<sup>118</sup>

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114. See *Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1139 (10th Cir. 2003) (involving the housekeeper for the family of JonBenet Ramsey who sought declaratory judgment that a Colorado Rule of Criminal Procedure was unconstitutional because it prohibited her from writing a book about her experience before a grand jury during a murder investigation; the Tenth Circuit ruled that the Colorado rule was narrower than the Florida statute at issue in *Butterworth* because it prohibited only the disclosure of "grand jury testimony" unless and until an indictment had been returned or a grand jury report had been issued).

115. *Butterworth*, 494 U.S. at 636–37 (Scalia, J., concurring).

116. *Id.* at 632 (majority opinion). See *id.* at 635 ("After giving his testimony, respondent believes he is no longer free to communicate this information since it relates to the 'content, gist or import' of his testimony.")

117. See, e.g., *In re Grand Jury Proceedings*, 417 F.3d 18, 21, 27 (1st Cir. 2005) (regarding a motion to compel an attorney witness to testify before a grand jury despite a claim of attorney-client privilege, the government sought an order forbidding the attorney "from disclosing to anyone . . . what he had been asked in the grand jury or other information pertaining to 'the subject matter' of the grand jury inquiry"; the First Circuit determined that it was "the permanency of the ban that most troubled the Supreme Court" in *Butterworth*, and allowed the gag order on the condition that the attorney witness could petition the district court for a termination of the order whenever the need for it disappeared); *In re Catfish Antitrust Litigation*, 164 F.R.D. 191, 192–93 n.2 (N.D. Miss. 1995) (imposing Rule 6(e) secrecy obligations on witnesses would violate the First Amendment, "at least after the grand jury proceedings have concluded"); cf. *Doe v. Doe*, 127 S.W.3d 728, 736 (Tenn. 2004) (explaining that in the context of attorney disciplinary proceedings, "[t]o the extent that Disciplinary Counsel serves a function analogous to a grand jury, we agree with the Attorney General that confidentiality furthers a legitimate state interest in maintaining the integrity of pending investigations. We do not believe, however, that this interest—even if it were considered to be compelling—warrants a permanent ban on disclosure of information").

118. In *Butterworth*, Justice Scalia agreed with the majority that a state may not prohibit a witness from discussing facts within his independent knowledge (at least after the term of the grand jury's inquiry has ended), but he considered it "[q]uite a different question" whether the state may prohibit a witness from revealing that he told the grand jury those very same facts. *Butterworth*, 494 U.S. at 636 (Scalia, J., concurring). That fine distinction is contrary to the

The latter approach seems to me to be most consistent with First Amendment values. With respect to matters of public concern, a witness before the grand jury should never be prohibited from talking to the media about facts within his own knowledge, even during the pendency of grand jury proceedings, because political speech lies at the heart of First Amendment protection.<sup>119</sup> Prior to an indictment—which may or may not be forthcoming—there are simply no countervailing Sixth Amendment rights to a fair trial that must be balanced against the right to free speech.<sup>120</sup> Empowering the prosecutor or the court to silence a witness from talking about what they *know* would allow law enforcement to squelch information about government misconduct simply by serving a grand jury subpoena on those persons holding relevant information. In hypothetical two, posed at the beginning of this Article, the mother of the senator's child has every right to tell (and to sell) her story about her extramarital affair with a prominent public official, and the government cannot prevent her from doing so simply by launching a grand jury inquiry.

The benefits to the public of enabling grand jury witnesses to talk to the press during the pendency of a criminal investigation should not be underestimated, and

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majority opinion, where Chief Justice Rehnquist concluded that the reporter was free to publish information about “his own testimony” before the grand jury. *Id.* at 632 (majority opinion). It also impresses me as an irrelevant one for constitutional purposes. Witnesses may wish to make known to the media that they testified to a certain fact or set of facts before the grand jury, in order to criticize government inaction. This occurred in the investigation into the choking death of Eric Garner in Staten Island, New York; bystander Ramsey Orta told the media that he had described the videotaped arrest of Garner in great detail to the grand jury, but that they seemed disinterested. *See* Badia et al., *supra* note 21. This is legitimate public discourse about a matter central to the conduct of government; that is, the independence of the grand jury and its continued utility in our criminal justice system. I disagree with Justice Scalia's suggestion that there may be “quite good reasons” why the state would want such information to be kept confidential, so that “grand jurors will not be intimidated in the execution of their duties by fear of . . . criticism to which they cannot respond.” *Butterworth*, 494 U.S. at 636 (Scalia, J., concurring). First, the law is replete with instances in which a government actor's reply to speech is curtailed, even though the speaker has a First Amendment right to make his point (the possession of classified information is but one example). Second, the identity of grand jurors is not public information, but the identity of trial jurors typically is. *See* Scott Sholder, “What's In a Name?": A Paradigm Shift from Press-Enterprise to Time, Place and Manner Restrictions When Considering the Release of Juror-Identifying Information in Criminal Trials, 36 AM. J. CRIM. L. 97, 99–100 (2009) (noting a trend in case law toward allowing press access to juror identities after the verdict). Individual grand jurors are unlikely to be intimidated in the execution of their duties by the public revelation of what evidence has been presented to them because they know that their individual identities will not be revealed.

119. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978). In *Sheppard v. Maxwell*, the Supreme Court stated that “[t]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” 384 U.S. 333, 350 (1966).

120. *See* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (stating that the timing of pretrial disclosure is “crucial in the assessment of possible prejudice”); *Patton v. Yount*, 467 U.S. 1025, 1032–35 (1984) (finding that a lapse in time between pretrial publicity and jury selection was relevant to determining whether the Sixth Amendment right to impartial jury was violated).

can be seen by the varying reactions to the police-involved killings in Ferguson, Missouri and Staten Island, New York.<sup>121</sup> In Ferguson, several eyewitnesses saw Officer Darren Wilson being assaulted by Michael Brown in his police cruiser, and heard Officer Wilson order Brown to stop before he fired the fatal shots.<sup>122</sup> While certainly not uncontroverted, these witnesses supported a theory of justified force, yet they were not allowed to talk publicly during the grand jury proceedings. Citizens in Ferguson thus did not have an accurate picture of the full state of the evidence and felt frustrated by the lack of police accountability. Had witnesses been liberated from the shackles of Missouri Revised Statute section 540.100,<sup>123</sup> some versions of events otherwise undisclosed may have countered, if not quieted, public criticism of the police department—and maybe even have fended off violent riots and arson. In Staten Island, by contrast, witnesses to the arrest of Eric Garner spoke frequently and passionately about his violent arrest to the media during the investigation.<sup>124</sup> This open and honest discourse about Garner’s chokehold death may have led to an environment where members of the public who were dissatisfied with law enforcement at least felt that there was a nonviolent way for their voices to be heard.

Even on matters not so directly of public concern, subjects and witnesses in a criminal investigation have a fundamental due process interest<sup>125</sup> in sharing information with each other. If a prosecutor can silence grand jury witnesses from talking about the facts of the case by requesting gag orders as part of immunity

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121. See *Eric Garner Case: Why Weren’t Protests as Violent as in Ferguson?*, CBS NEWS (December 5, 2014, 7:03 AM), <http://www.cbsnews.com/news/eric-garner-case-why-weren-t-protests-as-violent-as-in-ferguson/> [<https://perma.cc/RR5X-HL6C>] (describing New York protests as “mostly peaceful”).

122. Alberto Cuadra, Lazaro Gamio, Kimbriell Kelly & Scott Higham, *Chaos in a Police Vehicle*, WASH. POST (Dec. 6, 2014), <http://www.washingtonpost.com/wp-srv/special/national/ferguson-reconstruction/> [<https://perma.cc/A5ET-CX7X>]; Eric Eckholm, *Witnesses Told Grand Jury That Michael Brown Charged at Darren Wilson, Prosecutor Says*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/witnesses-told-grand-jury-that-michael-brown-charged-at-darren-wilson-prosecutor-says.html> [<https://perma.cc/6RSP-UXXY>]; Michael S. Schmidt, Matt Apuzzo & Julia Bosman, *Police Officer in Ferguson Is Said to Recount a Struggle*, N.Y. TIMES (Oct. 17, 2014), <http://www.nytimes.com/2014/10/18/us/ferguson-case-officer-is-said-to-cite-struggle.html> [<https://perma.cc/26BC-Q7XJ>].

123. MO. ANN. STAT. § 540.110 (West 2002).

124. Laura Ly, *Can Cell Phones Stop Police Brutality?*, CNN (Nov. 19, 2014, 5:31 PM), <http://www.cnn.com/2014/11/18/us/police-cell-phone-videos/> [<https://perma.cc/5H9H-5VE6>]; Ashley Southall & Marc Santora, *Remembering a Man Whose Death Made Him a Symbol of a Divide*, N.Y. TIMES (July 23, 2014), <http://www.nytimes.com/2014/07/24/nyregion/mans-dying-words-in-police-custody-become-rallying-cry-before-his-funeral.html> [<https://perma.cc/DXK6-8ET5>].

125. The “fundamental fairness” theory of due process prohibits a prosecutor from obstructing the defendant’s access to evidence in a criminal case. See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (concerning the use of fundamental fairness as it relates to the police’s failure to preserve items seized prior to arrest for forensic testing); see also *Coppolino v. Helpern*, 266 F. Supp. 930, 935 (S.D.N.Y. 1967) (“[A]s to interviewing a prospective prosecution witness, our constitutional notions of fair play and due process dictate that defense counsel be free from obstruction, whether it come from the prosecutor in the case or from a state official of another state acting under color of law”).

applications, they can frustrate the ability of subjects of the grand jury investigation to collect evidence and conduct witness interviews of their own. Especially in the context of corporate and white-collar crime, witnesses often need to enlist the help of colleagues to recall events, to identify other persons with knowledge of a particular subject, and to locate and preserve documents. Such collaboration is essential to the defense counsel's critical role during an investigation of presenting the prosecutor with exculpatory evidence<sup>126</sup> so that the grand jury can be allowed to perform its core function as a "shield"<sup>127</sup> against unfounded prosecution.

The recent murder and racketeering charges stemming from a brawl between rival motorcycle gangs at the Twin Peaks restaurant in Waco, Texas, illustrate the dangers of the government attempting to overreach and silence ordinary witnesses to a crime.<sup>128</sup> After a melee that left nine people dead, the police arrested 177 suspects.<sup>129</sup> Within days of their arrest, the district attorney moved for an order gagging "all attorneys, their staffs, law enforcement officers, and witnesses who had provided statements to law enforcement" from talking to the media about the altercation at Twin Peaks.<sup>130</sup> The judge presiding at a bail hearing granted the gag order proposed by the State, which was drafted by McClennan County District Attorney Abel Renya, the judge's former law partner.<sup>131</sup> Not coincidentally, the State's gag request came just one day after the State was served with a subpoena from an arrested suspect requesting production of the restaurant's videotape of the incident.<sup>132</sup> The defense

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126. See Coopersmith & Herd, *supra* note 55, at 37–38. The United States Attorneys' Manual urges federal prosecutors to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation." OFFICE OF THE U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.233 (1997).

127. See Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1266–67 (2006).

128. See Brief of *Amici Curiae* the Reporters Committee for Freedom of the Press and 15 Media Organizations in Support of Relator's Petition for Writ of Mandamus, *In re Clendennen*, No. 10-15-00235-CR, 2015 BL 254662 (Tex. Crim. App. July 24, 2015); Tommy Witherspoon, *Judge Prevents Public Release of Twin Peaks Video, Issues Gag Order*, WACO TRIB. (June 30, 2015, 12:57 PM), [http://www.wacotrib.com/news/twin-peaks-biker-shooting/judge-prevents-public-release-of-twin-peaks-video-issues-gag/article\\_37bd518d-0c6b-52f8-9374-d573e366f05b.html](http://www.wacotrib.com/news/twin-peaks-biker-shooting/judge-prevents-public-release-of-twin-peaks-video-issues-gag/article_37bd518d-0c6b-52f8-9374-d573e366f05b.html) [https://perma.cc/PW8M-VVPQ].

129. Kelly McEvers, *Texas Bikers Arrested After Waco Shootout Say They Are Innocent*, NPR (July 7, 2015, 10:30 PM), <http://www.npr.org/2015/07/07/420824592/texas-bikers-arrested-after-waco-shootout-say-they-are-innocent> [https://perma.cc/7SZY-PXH7]; Michael E. Miller, *In the Wake of Deadly Waco Biker Shootout, Guns, Knives, Clubs, Chains, but Few Answers*, WASH. POST (May 21, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/21/in-the-wake-of-deadly-waco-biker-shootout-hundreds-of-weapons-but-few-answers/> [https://perma.cc/RRY5-38Z7].

130. Order Prohibiting Attorneys, Law Enforcement and Witnesses from Discussing Case with the Media, *State v. Clendennen*, No. 2015-1955-2 (Tex. Dist. Ct. June 30, 2015).

131. Emily Schmall & Jim Vertuno, *Biker Challenges Judge's Gag Order in Criminal Cases*, ASSOCIATED PRESS (July 1, 2015, 9:12 PM), <http://bigstory.ap.org/article/df7ac00d1ed0482981181e7a9fcd5ea/biker-challenges-judges-gag-order-criminal-case> [https://perma.cc/MDT4-SFE6].

132. Order Prohibiting Attorneys, Law Enforcement and Witnesses from Discussing Case with the Media, *supra* note 130; Lana Shadwick, *Waco Judge Stops Twin Peaks Video Release, Issues Gag Order*, BREITBART (June 1, 2015), <http://www.breitbart.com/texas/2015>

speculates that the district attorney requested the gag order in part to prevent dissemination of a videotape that the State had in its possession and would be using to prepare the government's case and present charges.<sup>133</sup> The Court of Appeals for the Tenth District ruled that this gag order was an abuse of discretion by the trial court and a violation of petitioner's free speech rights under applicable Texas precedent.<sup>134</sup> The gag order is now up for consideration by the Texas Court of Criminal Appeals.<sup>135</sup>

After *Butterworth*, I suspect that at least some of the approaches taken by the twelve states that extend their oath of grand jury secrecy to witnesses might not withstand a First Amendment challenge, depending upon how precisely those statutes are drawn and the exact nature of the speech prohibited.<sup>136</sup> But my focus in this Part has been on the federal system and the thirty-six states that do *not* include witnesses in their oaths of grand jury secrecy. In those jurisdictions, courts should decline an invitation to gag grand jury witnesses by supplemental order, for two primary reasons: 1) the court does not have "inherent authority" to do so, and 2) there are substantial doubts whether such a gag order would survive First Amendment scrutiny. In extraordinary circumstances if a court ever believes that grand jury leaks might jeopardize public safety or national security,<sup>137</sup> the most that a court has the

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/07/01/waco-judge-stops-twin-peaks-video-release-issues-gag-order/ [https://perma.cc/J8UG-E73S].

133. See Witherspoon, *supra* note 128.

134. *In re Clendennen*, No. 10-15-0023-CR, 2015 BL 254662, at \*1 (Tex. Crim. App. Aug. 7, 2015) (citing *In re Graves*, 217 S.W.3d 744 (Tex. App. 2007)).

135. Order Granting Relator's Motion to Stay, *State v. Clendennen*, No. WR-83, 719-01 (Tex. Crim. App. Aug. 13, 2015).

136. Compare IND. CODE ANN. § 35-34-2-4(i) (2015) ("Grand jury proceedings shall be secret, and no person present during a grand jury proceeding may, except in the lawful discharge of his duties or upon written order of the court impaneling the grand jury or the court trying the case on indictment presented by the grand jury, disclose: (1) *the nature or substance of any grand jury testimony*; or (2) any decision, result, or other matter attending the grand jury proceeding.") (emphasis added), with N.D. CENT. CODE § 29-10.1-30(4) (2006) ("A witness *may not disclose any matter about which the witness is interrogated*, or any proceedings of the grand jury had in the witness's presence, except to the witness's attorney or when so directed by the court, until an indictment is filed and the accused person is in custody.") (emphasis added).

137. Although a discussion of national-security investigations is beyond the scope of this Article, my recommendations in this Article are unlikely to hinder counterterrorism investigations because federal statutes contain quite specific rules pertaining to secrecy in the national security context that are broader than Federal Rule of Criminal Procedure 6(e). For a comprehensive analysis of the wide variety of tools available to the government to keep the nature, scope, and content of national-security investigations confidential, see Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 838–65 (2007). For example, the Foreign Intelligence Surveillance Act (FISA) allows the government to conduct electronic surveillance, employ pen registers, seize physical evidence, and demand business records upon approval of the Foreign Intelligence Surveillance Court. 50 U.S.C. §§ 1801–1861 (2012). All four FISA subchapters contain secrecy requirements that impose confidentiality obligations upon the recipients of those subpoenas or court orders. Sales, *supra* at 871. The FBI also has the power to issue "National Security Letters" under the USA Patriot Act to obtain records of third-party providers regarding stored electronic communications and

power to do is to order the witness not to reveal to anyone what actually transpired in the grand jury room (that is, specific questions that were asked by the prosecutor or by a grand juror). A trial court may never order a grand jury witness not to discuss with others or with the media facts that the witness disclosed to the grand jury that were known by him or her independently of the grand jury investigation.

#### CONCLUSION

One important but often overlooked issue in the grand jury transparency debate is the ability of witnesses to talk to each other and to the media about the contents of their testimony. Witnesses often mistakenly conclude that the shroud of grand jury secrecy extends to them when in most jurisdictions it simply does not. Prosecutors sometimes seek to capitalize on this ignorance by affirmatively instructing the witness to remain silent, either informally in their instructions to the witness or more formally in a written plea agreement or judicial immunity application. Counsel representing witnesses before the grand jury should push back against such efforts, on the grounds that they offend the Rules of Professional Conduct, the intent behind the Rules of Criminal Procedure, and the First Amendment.

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financial transactions. *See* 12 U.S.C. § 3414 (2012); 15 U.S.C. §§ 1681u, 1681v (2012); 18 U.S.C. § 2709 (2012). The government may order recipients of a National Security Letter to keep the receipt and content of the letter private whenever an FBI Director or his designee certifies that disclosure may result in a national security threat or damage an ongoing investigation. *See* Michael German, Michelle Richardson, Valerie Caproni & Steven Siegel, *National Security Letters: Building Blocks for Investigations or Intrusive Tools?*, A.B.A. J. (Sept. 1, 2012, 10:10 AM), [http://www.abajournal.com/magazine/article/national\\_security\\_letters\\_building\\_blocks\\_for\\_investigations\\_or\\_intrusive\\_t/](http://www.abajournal.com/magazine/article/national_security_letters_building_blocks_for_investigations_or_intrusive_t/) [<https://perma.cc/3LX8-9Z92>]. One interesting development for the purposes of this Article is that two federal courts have ruled that the nondisclosure provisions of the National Security Letter statutes offend the First Amendment. *Compare* *Doe v. Mukasey*, 549 F.3d 861, 883 (2d Cir. 2008) (enjoining the government from enforcing those provisions of the National Security Letter statutes that placed the burden on the recipient to contest nondisclosure order, and that allowed government to meet its burden in said judicial proceedings through “conclusive” certification by senior government official), *with* *In re* National Security Letter, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013) (finding nondisclosure provisions unconstitutional and nonseverable, enjoining issuance of National Security Letters altogether), *appeal filed*. These two National Security Letter decisions strongly support my argument: if a witness “gag” order fails to promote a compelling state interest in the national security context, it is highly unlikely to survive First Amendment scrutiny in a routine criminal investigation, especially where the witness is a fact witness rather than a third-party record holder.

