

Access by State Attorneys General to Federal Grand Jury Antitrust Investigative Materials

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Section 4F(b) of the Clayton Act¹ requires the Attorney General of the United States to assist state enforcement of the antitrust laws by providing state attorneys general with federal investigative materials relevant to antitrust actions brought or being considered by the states. The Ninth Circuit recently became the first federal appellate court to consider the application of that provision to traditionally secret grand jury materials. In *United States v. B.F. Goodrich Co.*,² the court ruled that section 4F(b) authorizes the release of such materials to state attorneys general without the ordinarily required showing of a compelling and particularized need for such access.³ *B.F. Goodrich* was soon followed by the Fourth Circuit in *United States v. Colonial Chevrolet Corp.*⁴ Other courts, however, have reached contrary results.⁵ This Article addresses the issues raised by these conflicting decisions.

Part I reviews the presumption of secrecy that attaches to grand jury proceedings and the extent to which disclosure has been permitted, principally for access under Rule 6(e) of the Federal Rules of Criminal Procedure.⁶ Part II explores the merits of the argument that section

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1. 15 U.S.C. § 15f(b) (1976).

2. 619 F.2d 798 (9th Cir. 1980).

3. *Id.* at 801. One lower federal court had reached the same conclusion two years earlier. *In re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54 (D. Md. 1978).

4. 629 F.2d 943 (4th Cir. 1980).

5. *Little Rock School Dist. v. Borden, Inc.*, 1979-2 TRADE CAS. (CCH) ¶ 62,809 (E.D. Ark. 1979); *In re Grand Jury* which presented Crim. Indictments 76-149 and 77-72, 469 F. Supp. 666 (M.D. Pa. 1978).

6. An extensive literature exists on the secrecy attached to grand jury proceedings and access by private and public litigants to grand jury materials. *E.g.*, Brown, *Ten Reasons Why the Grand Jury in New York Should Be Retained and Strengthened*, 22 RECORD OF N.Y.C.B.A. 471 (1967); Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Murray & Conway, *Pre-Trial Discovery of Federal Grand Jury Minutes*, 49 L.A. B. BULL. 172 (1974); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962); Unikel, *Discovery of Grand Jury Transcripts in Civil Antitrust Cases in the Seventh Circuit: Fair Use or Abuse?*, 66 ILL. B.J. 706 (1978); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Crim-*

4F(b) modifies or overrides the restrictive access standard of Rule 6(e) and concludes that the *B.F. Goodrich* reasoning on this point cannot withstand examination. Part III suggests a reconciliation of the competing policies of section 4F(b) and Rule 6(e).

I

DISCLOSURE UNDER RULE 6(e) AND GRAND JURY SECURITY

Historically, grand jury materials have been protected from disclosure.⁷ The Supreme Court has "consistently . . . recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."⁸ Rule 6(e) of the Federal Rules of Criminal Procedure codifies and enforces the requirement of secrecy by providing that grand jurors and others involved in grand jury proceedings "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules" and further providing that "[a] knowing violation of Rule 6 may be punished as a contempt of court."⁹

inal Sanctions, 92 HARV. L. REV. 1227, 1312-20 (1979); Comment, *Texas v. United States Steel Corp. and Illinois v. Sarbaugh: The Disclosure and Use of Grand Jury Transcripts in Private Antitrust Litigation*, 9 LOY. CHI. L.J. 984 (1978); Comment, *Grand Jury Secrecy: Should Witnesses Have Access to Their Grand Jury Testimony as a Matter of Right?*, 20 U.C.L.A. L. REV. 804 (1973); Comment, *Administrative Agency Lawyers' Presence in the Grand Jury Room: Rules to Prevent Abuse*, 128 U. PA. L. REV. 159 (1979); Note, *Administrative Agency Access to Grand Jury Material Under Amended Rule (6)(e)*, 29 CASE W. RES. L. REV. 295 (1978); Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162 (1975); Note, *Discovery by a Criminal Defendant of His Own Grand Jury Testimony*, 68 COLUM. L. REV. 311 (1968); Note, *Disclosure of Federal Grand Jury Material*, 68 J. CRIM. L. 399 (1977); Note, *Grand Jury Secrecy: A Grand Jury Witness' Right to His Own Testimony*, 55 N.C. L. REV. 675 (1977); Note, *Criminal Procedure—The Policy of Barring a Witness' Access to His Own Grand Jury Testimony*, 13 WAKE FOREST L. REV. 216 (1977).

7. See generally Calkins, *supra* note 6, at 456-60.

8. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979), and cases cited therein.

9. FED. R. CRIM. P. 6(e) provides in relevant part:

(e) Recording and Disclosure of Proceedings.

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

(3) *Exceptions.*

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

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

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

The original purpose of such secrecy was to protect grand jurors and the criminally accused from the oppression of the Crown.¹⁰ With time, quite different justifications have replaced those initially advanced. Courts now generally recognize the following reasons for the policy of grand jury secrecy:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."¹¹

The requirement of secrecy, however, at least in the federal system, is not absolute.¹² Access to federal grand jury materials is governed principally by subsection (3) of Rule 6(e), which permits disclosure of "matters occurring before the grand jury" in particular

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

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

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

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

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

10. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. at 219 n.9; Calkins, *supra* note 6, at 457; Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1108-09 (1955) (describing the Peter Zenger case).

11. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)); *Texas v. United States Steel Corp.*, 546 F.2d 626, 629 n.7 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977). See also *U.S. Indus. Inc. v. United States Dist. Court*, 345 F.2d 18, 22 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1229 (D.D.C. 1974).

12. For example, *FED. R. CRIM. P. 6(e)(2)*, which generally prohibits disclosure of grand jury matters, does not require that a witness maintain secrecy as to his testimony before the grand jury. *NOTES OF ADVISORY COMMITTEE ON RULES* (original note to Rule 6, subdivision (e)(2)); *In re Grand Jury Summoned October 12, 1970*, 321 F. Supp. 238 (N.D. Ohio 1970).

circumstances.¹³ Rule 6(e)(3) has several provisions authorizing disclosure of grand jury materials to federal criminal prosecutors and defendants.¹⁴ However, only the "judicial proceeding" clause, contained in subsection (3)(C) (i), provides for access by state officials. That provision, which has been extensively applied,¹⁵ provides: "Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . . when so directed by a court preliminarily to or in connection with a judicial proceeding"¹⁶

It is now axiomatic that anyone seeking disclosure of grand jury materials under the judicial proceeding clause must demonstrate a "particularized need" for the materials. The seminal decision on this

13. See note 9 *supra*.

14. Such authorized disclosure is narrowly confined. The authority under Rule 6(e)(3)(A)(i) to disclose grand jury matters to "an attorney for the government" permits such disclosure only to attorneys working for the United States Department of Justice. FED. R. CRIM. P. 54(c); *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962); *In re Grand Jury Investigation*, 414 F. Supp. 74, 76 (S.D.N.Y. 1976). The similar authority under Rule 6(e)(3)(A)(ii) to make disclosure to "government personnel" necessary to assist such government attorneys extends only to such government employees as FBI and IRS agents who act as investigators of suspected federal crimes in order to assist government attorneys in prosecuting cases involving grand jury proceedings, see S. REP. NO. 95-354, 95th Cong., 1st Sess. 6, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 529-30; *United States v. Evans*, 526 F.2d 701, 707 (5th Cir.) (en banc), cert. denied, 429 U.S. 818 (1976); *United States v. Anzelmo*, 319 F. Supp. 1106, 1116 (E.D. La. 1970), and only to disclosure for the purpose of assisting the enforcement of federal criminal law. See FED. R. CRIM. P. 6(e)(3)(B); Note, *Administrative Agency Access to Grand Jury Materials*, *supra* note 6, at 178-80; *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, *supra* note 6, at 1314-15. The disclosure permitted by Rule 6(e)(3)(C)(ii) is also narrowly confined. That subsection authorizes disclosure of grand jury materials "when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

15. Courts have applied the judicial proceeding clause to requests for access made by the criminal defendant, see, e.g., *Dennis v. United States*, 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), by actual or potential plaintiffs, whether private or governmental, see, e.g., *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211 (1979) (private); *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.) (state attorney general), cert. denied, 434 U.S. 889 (1977); *In re Grand Jury*, September 20, 21, 22, and 25, 1967, 82 F.R.D. 70, 73 (N.D. W. Va. 1979) (Civil Division of Department of Justice); *In re Grand Jury Investigation of Uranium Industry*, 1978-2 TRADE CAS. (CCH) ¶ 62,329 (D.D.C. 1978) (Tennessee Valley Authority), or by any other interested party, *In re Grand Jury Investigation of Uranium Industry*, 1979-2 TRADE CAS. (CCH) ¶ 62,798 (D.D.C. 1979) (congressional committee).

16. The extent to which various kinds of actions qualify as "judicial proceedings" and the extent to which various kinds of requests for disclosure qualify as being made "preliminarily to" or "in connection with" such proceedings have been the subjects of considerable debate. Compare Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896-97 (7th Cir. 1973) and *United States v. Salanitro*, 437 F. Supp. 240 (D. Neb. 1977) (disciplinary and disbarment proceedings are within the rule), with *United States v. Bates*, 1980-2 TRADE CAS. (CCH) ¶ 63,297 (D.C. Cir. 1980) and *In re Grand Jury Proceedings*, 309 F.2d 440, 443-44 (3d Cir. 1962) (agency adjudicatory proceeding and ex parte administrative investigation are not within the rule). See also Note, *Administrative Agency Access to Grand Jury Materials*, *supra* note 6, at 170-72. There is little doubt that requests for access to assist a state in commencing or pursuing a civil antitrust action qualify as being made "preliminarily to or in connection with a judicial proceeding."

point is *United States v. Procter & Gamble Co.*,¹⁷ where the defendants in an antitrust action sought discovery of the grand jury transcript the Government was using to prepare its case. On review of an order dismissing the action because of the Government's refusal to produce the transcript, the United States Supreme Court established the basic standard: "This 'indispensable secrecy of grand jury proceedings,' . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity."¹⁸

Recently, in *Douglas Oil Co. v. Petrol Stops Northwest*,¹⁹ the Court made it clear that the particularized need standard also governs requests by civil plaintiffs. In that case, a private antitrust plaintiff filed a petition under Rule 6(e) seeking federal grand jury transcripts of testimony by employees of certain companies it had named as defendants in its suit. On appeal from an order requiring disclosure, the Court approved the district court's adoption of the particularized need standard.²⁰

Douglas Oil specifically addresses only requests by private civil litigants. Lower court decisions, however, uniformly hold that Rule 6(e) requests by government officials must be judged by the same standard of compelling and particularized need.²¹

17. 356 U.S. 677 (1958).

18. *Id.* at 682 (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)). The Court has applied the compelling and particularized need standard consistently since its adoption in *Procter & Gamble*. See, e.g., *Douglas Oil Co. v. Petrol Stops NW.*, 441 U.S. 211, 222 (1979); *Dennis v. United States*, 384 U.S. 855, 869-72 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). See also text accompanying notes 19-21 *infra*.

19. 441 U.S. 211 (1979).

20. *Id.* at 223. The Court found, however, that the district court had erred in applying the standard and therefore reversed the order granting disclosure. In doing so, the Court refined the standard for use on remand as follows:

Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

Id. at 222 (footnote omitted).

21. E.g., *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); *Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977); *In re California*, 195 F. Supp. 37 (E.D. Pa. 1961); see *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968); *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962). While some courts have suggested that requests for access by *federal* governmental entities should be judged by a less onerous standard, the better reasoned decisions hold that federal civil plaintiffs also must justify disclosure by a showing of compelling and particularized need. See text accompanying notes 45-54 *infra*.

II

B.F. GOODRICH AND ACCESS TO GRAND JURY MATERIALS
UNDER SECTION 4F(b)

In the absence of section 4F(b) of the Clayton Act,²² there would thus be little doubt that a state attorney general, like any other actual or potential civil litigant seeking access to grand jury materials, must demonstrate a compelling and particularized need for the information sought. Section 4F(b), however, provides that in order to assist a state attorney general in bringing a *parens patriae*²³ action under the Clayton Act,

[t]he Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.²⁴

Whether that provision modifies or overrides the necessity under Rule 6(e) of showing compelling and particularized need was the central issue in *United States v. B.F. Goodrich Co.*²⁵ and is the principal focus of this Article.

In *B.F. Goodrich*, the state of California, joined by fifteen other states, moved for an order under section 4F(b) allowing it to inspect and copy materials from a federal grand jury's investigation of the B.F. Goodrich Company. The grand jury had been empaneled in September 1976 to investigate possible violations of the antitrust laws in connection with tire sales. In February 1978 the grand jury completed its term without returning an indictment. Thereafter, in August 1978, the United States filed a civil antitrust action charging Goodrich with price fixing. One month later California filed its own antitrust action against Goodrich.

On the same day it filed its suit, California filed its request for access to the grand jury materials. The motion requested disclosure of "the grand jury materials, including transcripts of the testimony of grand jury witnesses and documents and exhibits gathered or generated

22. 15 U.S.C. § 15f(b) (1976).

23. A *parens patriae* antitrust action is a civil action brought by the state on behalf of state residents injured by an antitrust violation. Such actions are authorized by § 4C of the Clayton Act, which provides in part:

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act].

15 U.S.C. § 15c(a)(1) (1976).

24. 15 U.S.C. § 15f(b) (1976).

25. 619 F.2d 798 (9th Cir. 1980).

pursuant to the federal grand jury's investigation of B.F. Goodrich"²⁶ It sought such access "to assist the California Attorney General in bringing [its] action under sections 4 and 4C of the Clayton Act"²⁷ Fifteen other states, none of which had yet filed an action against Goodrich, joined the motion.

The district court issued an order directing the United States to make the requested materials available to the Attorney General of California and authorizing him to release the materials to the other states.²⁸ Goodrich appealed the order, contending that the disclosure authority of section 4F(b) is qualified by the requirement that a compelling and particularized need be shown for the release of grand jury materials. The court of appeals rejected that argument. Based on the language, legislative history, and purpose of section 4F(b), the court concluded that the section "impliedly directs the Attorney General of the United States to disclose grand jury materials to State attorneys general without the showing of particularized and compelling need which is normally required by Rule 6(e)."²⁹

26. *United States v. B.F. Goodrich Co.*, 1978-2 TRADE CAS. (CCH) ¶ 62,389, at 76,316 (N.D. Cal. 1978), *aff'd*, 619 F.2d 798 (9th Cir. 1980).

27. 619 F.2d at 800. Section 4C of the Clayton Act, 15 U.S.C. § 15c (1976), provides for *parens patriae* antitrust actions by state attorneys general. See note 23 *supra*.

28. 1978-2 TRADE CAS. (CCH) at 76,317.

29. 619 F.2d at 801. The court also concluded, without discussion, that "[t]he words 'investigative files or other materials' include the grand jury materials the states seek in this action." *Id.* at 800; *accord*, *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 946-47 (4th Cir. 1980). In *Little Rock School Dist. v. Borden, Inc.*, 1979-2 TRADE CAS. (CCH) ¶ 62,809 (E.D. Ark. 1979), the court reached the opposite conclusion, reasoning that grand jury transcripts belong to the court rather than to the government, and that, therefore, they are not the Attorney General's to release. *Id.* at 78,720. See also *In re Grand Jury* which presented Crim. Indictments 76-149 and 77-72, 469 F. Supp. 666, 671 (M.D. Pa. 1978). One may question whether such reasoning is correct and whether it would extend to materials other than transcripts of testimony. Compare *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) (subpoenaed documents are not "matters occurring before the grand jury") with *In re Grand Jury* which presented Crim. Indictments 76-149 and 77-72, 469 F. Supp. at 671, and cases cited therein (subpoenaed documents are "matters occurring before the grand jury"). In any event, the issue whether, within the meaning of § 4F(b), "investigative files or other materials" encompass grand jury materials is principally a matter of congressional intent and policy that is not profitably separated from analysis of the central issue, whether § 4F(b) establishes an exception to the secrecy provisions of Rule 6(e).

The court did not address the preliminary issue of whether § 4F(b) authorizes disclosure where the state requesting access is not suing as *parens patriae*. The issue, which arguably was presented by the facts in *B.F. Goodrich* since numerous states that had not yet filed any action against the company had requested access, has arisen in only one reported case. See *In re Grand Jury* which presented Crim. Indictments 76-149 and 77-72, 469 F. Supp. at 671. There, however, the court found it unnecessary to decide the issue in view of its conclusion that § 4F(b) did not authorize disclosure of grand jury materials absent a showing of particularized need. *Id.* But the court's dictum, indicating that § 4F(b) does not apply where a state brings an action on behalf of itself, appears correct. The legislative history makes clear that § 4F(b) authorizes disclosure to assist state attorneys general only in connection with actual or potential *parens patriae* actions. That intent was manifest in the language the House first adopted for the provision. See H.R. 8532, 94th Cong., 1st Sess. (1975), *reprinted in* H.R. REP. NO. 94-499, 94th Cong., 1st Sess. 2 (1975)

The court rested its conclusion first on its reading of the section's admittedly equivocal legislative history³⁰ and second on its policy judgment that states have a greater need for access to grand jury materials than do ordinary individuals.³¹ Neither of these underpinnings withstands examination.

A. Legislative History

By permitting access only "to the extent permitted by law," the plain language of section 4F(b) appears to engraft the access restrictions of Rule 6(e) onto the disclosure authority of section 4F(b). The *B.F. Goodrich* court, however, rejected that reading, relying in part on the scant legislative history of section 4F(b).³² The court placed great emphasis on the statement in the House Committee Report that the phrase "to the extent permitted by law" means "that the files are to be made available except where specifically prohibited."³³ The court apparently reasoned that unless a disclosure prohibition is absolute, which Rule 6(e) is not, it is not "specific" within the meaning of the House Committee Report and therefore does not qualify whatever disclosure authority section 4F(b) otherwise provides.³⁴

Such reasoning can be criticized as a matter of logic and common sense. Plainly a statutory prohibition such as Rule 6(e) may be both specific and qualified. Moreover, given the clarity of the provision's language and the ambiguity of the Report's explanation, the court's reasoning may also be challenged as a matter of statutory interpreta-

(as introduced); H.R. 8532, 94th Cong., 2d Sess., 122 CONG. REC. 7037 (1976) (as passed). In changing that language to its final form, the Senate indicated that it did not intend any substantive change. See 122 CONG. REC. 1757 (1976).

30. 619 F.2d at 800.

31. The Fourth Circuit in *Colonial Chevrolet* essentially followed *B.F. Goodrich's* first ground, delving more deeply into the legislative history. See text accompanying notes 38-41 *infra*.

32. For a general discussion of the legislative history of the Hart-Scott-Rodino legislation, see Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1 (1977).

33. H.R. REP. NO. 94-499, 94th Cong., 1st Sess. 17, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2586-87.

34. While only implicit in *B.F. Goodrich*, this reasoning was explicitly stated in *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 948 (4th Cir. 1980). Similarly, in *In re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54 (D. Md. 1978), the district court, in concluding that § 4F(b) creates "an exception to the general rule of grand jury secrecy," held: "The provision in the statute requiring disclosure of investigative files 'to the extent permitted by law' does not run contrary to this conclusion. There is no provision specifically prohibiting the disclosure of grand jury materials to the state. Fed. R. Crim. P. 6(e) places such disclosure within the court's power." *Id.* at 62. In *Little Rock* the court expressly rejected the reasoning in *In re Montgomery County* as "unpersuasive." 1979-2 TRADE CAS. (CCH) ¶ 62,809, at 78,721 (E.D. Ark. 1979). That court held that "'specific prohibitions' do exist with regard to the release of grand jury testimony and there is no expression in the legislative history to counter the seemingly plain intent of the statutory language not to abrogate long standing policies with regard to grand jury secrecy." *Id.* at 78,720.

tion.³⁵ The most serious deficiency in the reasoning, however, is its failure to acknowledge subsequent legislative history that reconciles the House Report's equivocal statement with the plain meaning of section's language in a manner inconsistent with the court's conclusion.

During the Senate debate, then-Senator James Abourezk, the floor manager of the compromise legislation that was to become the Hart-Scott-Rodino Antitrust Improvements Act,³⁶ spoke directly to the meaning of the "extent permitted by law" language of section 4F(b). He stated that "[t]he section specifically limits the Attorney General's power to release documents to whatever his powers are under law. Under existing law, he cannot turn over materials given in response to a grand jury demand"³⁷ That statement arguably discloses a congressional intent to retain the restrictions imposed by Rule 6(e); at a minimum, it militates against the interpretation of the earlier House Report developed by the Ninth Circuit.

The Fourth Circuit in *Colonial Chevrolet* apparently agreed with this interpretation.³⁸ The court, however, rejected the conclusion that state attorneys general would have to show a particularized need to gain access to grand jury transcripts. Its rationale was that the language of section 4F(b) originated in the House of Representatives and that Senator Abourezk's statement is therefore somehow irrelevant.³⁹ For guidance the court turned to the same passage in the House Report that the *B.F. Goodrich* court relied on,⁴⁰ concluding that "specifically prohibited" means "absolutely prohibited."⁴¹

35. Ordinarily, if statutory language is unambiguous, resort to legislative history as a means of interpretation is precluded. *E.g.*, *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Montgomery Charter Serv., Inc. v. Washington Metrop. Area Transit Comm'n*, 325 F.2d 230, 233 (D.C. Cir. 1963). In language the Ninth Circuit itself recently reaffirmed in *Church of Scientology v. United States Dep't of Justice*, 612 F.2d 417, 421 (9th Cir. 1979), the Supreme Court has held that:

[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.

United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929).

36. See note 32 *supra*.

37. 122 CONG. REC. 29160 (1976).

38. *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 947-48 (4th Cir. 1980) ("The language of Senator Abourezk thus presents no impediment to authorizing disclosure in a proper case meeting the criteria stated in Rule 6(e)(3).") (emphasis added).

39. *Id.* at 948.

40. H.R. REP. NO. 94-499, 94th Cong., 1st Sess. 17, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2586-87, cited in *United States v. Colonial Chevrolet Corp.*, 629 F.2d at 948 & n.11, and *United States v. B.F. Goodrich Co.*, 619 F.2d 798, 800 (9th Cir. 1980).

41. 629 F.2d at 948. Compare, however, the language in the text at 948—"specifically (or absolutely) prohibited"—with that in the cited legislative history; the parenthetical is completely absent. Thus, the legislative history remains equivocal, as was admitted by the *B.F. Goodrich* court. 691 F.2d at 800.

Neither the Ninth Circuit nor the Fourth Circuit has adequately analyzed the legislative intent inherent in the Abourezk statement. That statement clarifies rather than contradicts the House Report. In addition, the statement is the more recent of the two. Not only is the Abourezk interpretation consonant with the plain meaning of the "extent permitted by law" language, but, unlike the House Report, it specifically relates the current restrictions on grand jury access—*i.e.*, those flowing from Rule 6(e)—to the language of section 4F(b). And because Abourezk served as floor manager of the legislation,⁴² his statement, like that of a bill's sponsor or of the chairman of the committee to which a bill is referred, commands special deference and should be considered as authoritative as if issued in a Senate report.⁴³

B. States' Greater Need for Access

The Ninth Circuit's other ground for concluding that section 4F(b) establishes an exception to the general rule of grand jury secrecy was its policy judgment that "[t]he need for access to grand jury materials is greater for states than for ordinary individuals because of the important place State attorneys general occupy in Congress' scheme for anti-trust enforcement."⁴⁴ This aspect of the court's reasoning is also debatable.

The court's policy judgment rests on the assumption that governmental requests for access should, as a general matter, be tested against a different, less rigorous standard than that applied to requests by private parties. *In re December 1974 Term Grand Jury Investigation*⁴⁵ makes the best argument for such a lesser standard. In that case, the IRS sought access to grand jury materials to assist it in determining whether to assess civil tax liabilities against the person who had been indicted by the grand jury for mail fraud and subsequently convicted.

42. See 122 CONG. REC. 28569 (1976). See also *id.* at 28257 (1976) (remarks of Senator Allen).

43. See *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976); *Doherty v. United States*, 404 U.S. 28, 34 (1971) (Douglas, J., concurring); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 475 (1921); *Binns v. United States*, 194 U.S. 486, 495 (1904). See generally 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 48.14, at 220 (4th ed. 1973) (statements by members of the committee in charge of a bill "are regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports.").

In re Montgomery County Real Estate Antitrust Litigation, 452 Supp. 54 (D. Md. 1978), the only other decision lending support to *B.F. Goodrich's* reading of the legislative history of § 4F(b), also ignores the unusual circumstances under which the Senate considered the legislation and the preeminent role then-Senator Abourezk played in those deliberations. See *id.* at 62 n.5.

44. 619 F.2d at 801. *Accord*, *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 949-51 (4th Cir. 1980).

45. 449 F. Supp. 743 (D. Md. 1978).

In granting the petition, the district court rejected the use of the particularized need standard in such cases:

As long as the material as to which disclosure is sought was obtained in a bona fide, good-faith grand jury proceeding directed toward ultimate criminal prosecution, there is no legitimate end to be served by requiring the government in a later civil action, or in connection with a prospective or existing later civil action, to again assemble and have produced testimony and documentary material which already exists by virtue of having been produced to the grand jury.⁴⁶

Other courts, however, have properly concluded that, when acting as a civil plaintiff, a governmental entity should be required to satisfy the particularized need standard like any other civil litigant.⁴⁷ The interest of the public in preventing the escape of those about to be indicted, the interest of the grand jury in receiving full and trustworthy testimony and in having the freedom to deliberate the evidence before it, and the interest of witnesses and innocent suspects in being protected from the risks and potential stigma of their association with the grand jury⁴⁸ remain equally compelling whether the request for access is made by a private party, a federal agency, or a state attorney general. The particularized need test has developed as a means to serve those interests.

There is another reason why grand jury material should be generally unavailable to civil litigants as a class. The grand jury, because of "the singlemindedness of [its] function in accusing individuals of criminal acts"⁴⁹ and the importance society attaches to that function,⁵⁰ has been given exceptional investigatory powers that are unavailable to private or governmental civil litigants. For example, witnesses before the federal grand jury generally may not cite irrelevance as a reason for refusing to answer questions, have no right to be accompanied by counsel while testifying, and may be compelled to testify by a grant of immunity.⁵¹ These exceptional powers, many of which would be unconstitutional in any other investigative setting, are justified only to the extent they are used solely to aid the grand jury in its investigations. Ready access to grand jury materials by civil litigants, whether private or governmental, would functionally extend the grand jury's excep-

46. *Id.* at 750 (footnote omitted); accord *In re Grand Jury Subpoenas*, April 1978, 581 F.2d 1103, 1110 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

47. See notes 52-54 and accompanying text *infra*.

48. See text accompanying note 11 *supra*.

49. *In re Grand Jury*, J.R. Simplot Co., 77-1 U.S. TAX CAS. (CCH) ¶ 9,146, at 86,198 (9th Cir. 1976) (denying IRS access to grand jury materials).

50. *E.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

51. See Note, *Administrative Agency Access to Grand Jury Materials*, *supra* note 6, at 175-78; Note, *United States v. Dionisio: The Grand Jury and the Fourth Amendment*, 73 COLUM. L. REV. 1145, 1145-47 (1973).

tional powers beyond the limitations that make them tolerable. Without the application of the particularized need test to requests for access from governmental entities acting as civil litigants, these enormous powers—which properly are denied private litigants—could be routinely used for purposes other than those for which they were intended. Thus, in *In re Grand Jury Investigations*,⁵² the district court, in denying a Rule 6(e) petition filed by the SEC, concluded that:

[T]he grand jury is not an investigative tool at the disposal of the SEC or any other government agency, and the grand jury process may not be abused by allowing its work-product to be funneled to other government agencies which happen to have an interest in a subject which a grand jury has examined. Accordingly, Rule 6(e) empowers a judge to exercise his discretion in favor of disclosure only where the party seeking disclosure has shown that "a particularized need" exists for the minutes which outweighs the policy of secrecy.⁵³

That conclusion is just as valid when the civil litigant seeking access is a state.⁵⁴

That Title III of the Hart-Scott-Rodino Antitrust Improvements Act "places the State attorneys general on a different footing than private parties seeking redress for antitrust violations"⁵⁵ cannot seriously be questioned.⁵⁶ Moreover, to the extent that it serves to ease the states' investigative burden without undermining statutory or more fundamental protections otherwise afforded, the federal assistance mandated by section 4F(b) makes good sense. But the leap from those premises to the conclusion that section 4F(b) overrides long standing policies with respect to grand jury secrecy simply cannot be justified, as the Ninth Circuit has attempted to do, by asserting that such a result is required by the statutory scheme of federal-state cooperation.

The issue is not whether the states will be granted or denied access to particular evidence altogether. State attorneys general plainly have adequate authority and means of their own to develop civil actions

52. 414 F. Supp. 74 (S.D.N.Y. 1976).

53. *Id.* at 76. See also *In re Grand Jury*, September 20, 21, 22 and 25, 1967, 82 F.R.D. 70, 72-73 (N.D. W. Va. 1979).

54. See *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); *Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977); *In re California*, 195 F. Supp. 37 (E.D. Pa. 1961).

55. *United States v. B.F. Goodrich Co.*, 619 F.2d at 800; *accord*, *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 949-51 (4th Cir. 1980).

56. The *parens patriae* provisions of Title III were the most controversial subject of the Hart-Scott-Rodino legislation. Much debate focused on the limits of the special position the provisions envisioned for state attorneys general. While there was give and take over the extent to which the provisions were creating or merely codifying law, there was no real dispute that under Title III state attorneys general would occupy a different and, for certain purposes, more important position than private parties with respect to antitrust enforcement. See generally Kintner, Griffin, & Goldston, *supra* note 32, at 18-31.

contesting anticompetitive activities affecting their states.⁵⁷ Rather, the question is whether the interest in avoiding duplicative investigation justifies an abrogation of the strict standard that has been developed judicially to guard grand jury secrecy. Under Rule 6(e) the law is clear that the former interest alone does not justify invasion of grand jury secrecy,⁵⁸ even where the request is made by a state.⁵⁹ Neither the scheme of Title III nor its legislative history provides convincing evidence that Congress' adoption of section 4F(b) was intended to elevate the interest in investigatory efficiency to such a commanding position.

III

RECONCILING SECTION 4F(b) AND RULE 6(e)

Section 4F(b) and Rule 6(e) address fundamentally different interests. The purpose of section 4F(b) is to foster and institutionalize federal assistance to state antitrust enforcement by relieving the states, when appropriate, of an investigatory burden. Principally it serves the interest of efficiency. Rule 6(e), on the other hand, serves both individual and institutional interests. Its severe restrictions on access to grand jury materials seek not only to protect witnesses and the innocent accused, but more basically, as the Supreme Court has made clear,⁶⁰ to make possible the very functioning of our grand jury system. The fundamental conflict between section 4F(b)'s interest in information sharing and Rule 6(e)'s interest in information restriction can be resolved, however, without disserving the core purposes of either provision.

A useful first step in reconciling the conflict would be a general rule that grand jury materials will not be released pursuant to a section 4F(b) request until the grand jury either has returned all the indictments contemplated by its investigation or has finished its term.⁶¹ Many of the interests served by grand jury secrecy dissipate once the

57. The legal authority of state attorneys general to prosecute civil antitrust actions on behalf of residents of the state, which had once been in doubt, is now assured by § 4C of the Clayton Act, 15 U.S.C. § 15c (1976). Testimony given by a number of state attorneys general during hearings on predecessor legislation to the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 demonstrates that, as a practical matter as well, the states are fully capable of investigating, developing, and presenting such cases. *Antitrust Parens Patriae Amendments: Hearings on H.R. 12528 and H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93rd Cong., 2d Sess. 55-117 (1974).

58. *United States v. Procter & Gamble Co.*, 356 U.S. at 682; *In re Grand Jury*, September 20, 21, 22, and 25, 1967, 82 F.R.D. 70, 73 (W.D. Va. 1979); *SEC v. National Student Mktg. Corp.*, 430 F. Supp. 639, 641 (D.D.C. 1977); *A.B.C. Great Stores, Inc. v. Globe Ticket Co.*, 309 F. Supp. 181, 183 (E.D. Pa. 1970); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 581 (D. Minn. 1968).

59. *In re California*, 195 F. Supp. 37, 41 (E.D. Pa. 1961) ("the avoidance of expense and additional work . . . [does] not outweigh the policy of secrecy.").

60. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. at 218.

61. Such a rule was adopted as a protective provision in *B.F. Goodrich*, 619 F.2d at 801. In

grand jury has completed its function.⁶² The need to prevent the escape of the accused, to ensure grand jury freedom to deliberate as it sees fit, and to prevent the subornation of perjury or tampering with grand jury witnesses is diminished, if not eliminated, where disclosure is delayed until the grand jury's work is over. At the same time, such delay should rarely, if ever, impose any significant hardship on states seeking to supplement their civil enforcement activities by obtaining access to federal investigatory materials.⁶³

Stringent restrictions on the uses that states may make of grand jury materials and on the subsequent disclosure of such materials to other entities would also serve to reconcile the provisions' competing interests. In this regard, *B.F. Goodrich* provides sound guidance.⁶⁴ In granting access to the grand jury materials, the Ninth Circuit approved the district court's protective provisions, which limited the number of copies that could be reproduced for the state attorneys general and the persons to whom material contained in those copies could be revealed. The restrictions also provided that names and testimony taken from the material could be disclosed during discovery only if "subject to a protective order or a stipulation between counsel ensuring its confidentiality."⁶⁵ The appellate court imposed the additional requirement that "state attorneys general may use the grand jury materials only to investigate or bring civil antitrust actions; they may not use the materials in

Colonial Chevrolet, the grand jury had completed its work, the prosecution having been successful. See 629 F.2d at 945.

In most cases, such a rule will not be necessary. Section 4F(a) of the Clayton Act, 15 U.S.C. § 15f(a) (1976), requires that the Attorney General notify the states of federal antitrust activity only when a federal action is filed. Assuming that § 4F(b) is invoked primarily in response to § 4F(a) notices, most states will not become interested in grand jury materials until the federal government actually files an action. Presumably most actions, civil or criminal, will not be filed until after the grand jury has completed its antitrust investigations, which, because of their complexity and depth, could easily run to the end of the grand jury's term. Indeed, this was the case in *B.F. Goodrich*. 619 F.2d at 799.

62. *Dennis v. United States*, 384 U.S. 855, 871-74 & n.18 (1966); *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 950 (4th Cir. 1980); *Illinois v. Sarbaugh*, 552 F.2d 768, 775 (7th Cir.), cert. denied, 434 U.S. 889 (1977); *U.S. Indus., Inc. v. United States Dist. Court*, 345 F.2d 18, 22 (9th Cir.), cert. denied, 382 U.S. 814 (1965); cf. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979) (such interests are "reduced").

63. See note 57 *supra*. A federal grand jury may not serve more than 18 months. FED. R. CRIM. P. 6(g). Moreover, requiring that the grand jury complete its term before the state is granted access to its investigative materials does not prevent a state from commencing an antitrust action based on other information available to it if jurisdictional or other considerations dictate such action.

64. In *Colonial Chevrolet*, the court in its remand ordered the district court to consider protective orders. 629 F.2d at 951.

65. 619 F.2d at 801. The restrictions were contained in the district court's order. 1978-2 TRADE CAS. (CCH) ¶ 62,389, at 76,317 (N.D. Cal. 1978). The protective provisions authorized the California Attorney General to release the grand jury materials to the attorneys general of other states subject to the same limitations imposed on him. *Id.*

a criminal prosecution.”⁶⁶ Each of these restrictions seeks to facilitate the federal-state cooperation on which section 4F(b) is bottomed, while affording substantial protection to the vital interests that underlie the policy of grand jury secrecy. Each makes eminent sense, and each is supported by law developed in connection with Rule 6(e) requests.⁶⁷

Such restrictions cannot, however, substitute entirely for the exercise of judicial discretion within the framework that has developed under Rule 6(e) for balancing the important interest in grand jury secrecy against the varied needs for access that parties may assert. Limitations on the timing and extent of initial disclosure, on subsequent disclosure, and on the permissible use of the requested grand jury materials cannot in every instance protect fully the vital interests served by the policy of grand jury secrecy. The interest in encouraging free and untrammelled testimony of witnesses, for instance, is not entirely protected by restricting access to the grand jury only until its work is done. As the Court noted in *Douglas Oil*:

Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. . . . Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.⁶⁸

Nor is there any assurance that restrictions on subsequent disclosure can adequately alleviate such fears. Moreover, the interest of the ultimately unindicted accused and its employees in protecting their reputations is greater than that of unaccused witnesses, and in some instances will be adequately served only by denying access to the damaging materials altogether. The easier it is to obtain grand jury materials, the more these interests are compromised.

Resolution of the complex and exceedingly sensitive conflict between these varied interests in secrecy and the needs for access is best accomplished through the restrained discretion granted the judge supervising the grand jury under the test of compelling and particularized need.⁶⁹ The trial judge is in the best position to assess the competing

66. 619 F.2d at 801.

67. See, e.g., *Illinois v. Sarbaugh*, 552 F.2d 768, 777 (7th Cir.), cert. denied, 434 U.S. 889 (1977); *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1079 (2d Cir. 1974); *SEC v. National Student Marketing Corp.*, 430 F. Supp. 639, 642 (D.D.C. 1977); *In re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings*, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974); *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37, 40 (N.D. Ill. 1969).

68. 441 U.S. at 222. See also *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 (1958); *Illinois v. Sarbaugh*, 552 F.2d 768, 775 (7th Cir.), cert. denied, 434 U.S. 889 (1977).

69. Requests for access under Rule 6(e) should in general “be directed to the court that supervised the grand jury’s activities.” *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223,

interests and, as evidenced by the body of law already developed in connection with Rule 6(e), the cumulative record of those assessments provides informed guidance for future decisions. The particularized need standard can accommodate a deserving governmental request for access made under section 4F(b). A requirement instead that judges, when assessing section 4F(b) requests for disclosure of grand jury materials, must grant access whenever "the United States has in its possession materials which may be helpful to the state in its prosecution of a Clayton Act action"⁷⁰ would only stymie the development of the body of law needed to enlighten these difficult judgments.⁷¹

CONCLUSION

The interaction between section 4F(b)'s policy of federal-state antitrust investigative cooperation and the traditional rule of grand jury secrecy raises important and sensitive issues. The resolution of these issues is not best accomplished by adopting a broad rule, such as that announced in *B.F. Goodrich* and *Colonial Chevrolet*, that section 4F(b) simply displaces Rule 6(e) when state parens patriae antitrust actions underlie requests for grand jury materials. Rather, resolution of the issues should evolve as part of the gradual developmental process inherent in the exercise by trial court judges of restrained discretion guided by a time-honored standard. That process is best suited to evaluating the variety of secrecy interests and access needs that will arise as section 4F(b) becomes better known and more widely used.

225 (1979). There is no sound reason for a different rule with respect to § 4F(b) requests, considering that the same interests as are evaluated in Rule 6(e) cases are present in § 4F(b) cases.

70. *In re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54, 62 (D. Md. 1978).

71. The court in *B.F. Goodrich* noted that materials requested by the states need not be turned over if the Attorney General objects to their disclosure. 619 F.2d at 801. This suggestion results from the same fundamental flaw that underlies the rest of the opinion, *i.e.*, the erroneous premise that the interests surrounding a grand jury investigation can be properly compromised solely on the basis of an executive decision made without any independent balancing of the competing interests. If the court's suggestion is followed, the administrative determination of either the state attorneys general or the United States Attorney General will in practical effect be conclusive. Since such discretionary judgments are practically impossible to overturn, adoption of the court's suggestion would curtail meaningful litigation of what constitutes just cause for refusing a § 4F(b) request. This in turn would further stymie the development of necessary law.