First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. §3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. The Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of ''court'' in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(d) contains a significant change in practice. The revised rule includes language that expands the authority of a United States magistrate judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, the rule authorizes a magistrate judge to grant a continuance only in those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district judge, usually on the same day. The proposed amendment conflicts with 18 U.S.C. §3060, which tracks the original language of the rule and permits only district judges to grant continuances when the defendant objects. The Committee believes that this restriction is an anomaly and that it can lead to needless consumption of judicial and other resources. Magistrate judges are routinely required to make probable cause determinations and other difficult decisions regarding the defendant's liberty interests, reflecting that the magistrate judge's role has developed toward a higher level of responsibility for pre-indictment matters. The Committee believes that the change in the rule will provide greater judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. §2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. §3060.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, ''The finding of probable cause may be based upon hearsay evidence in whole or in part.'' That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In the Committee Note on the 1974 amendment, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary hearing. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to ''preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants.'' The Advisory Committee Note accompanying that rule recognizes that: ''The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable.'' The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION

Rule 6. The Grand Jury

(a) SUMMONING A GRAND JURY.

(1) *In General.* When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) *Alternate Jurors.* When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) OBJECTION TO THE GRAND JURY OR TO A GRAND JUROR.

(1) *Challenges.* Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) *Motion to Dismiss an Indictment.* A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. §1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) FOREPERSON AND DEPUTY FOREPERSON. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) WHO MAY BE PRESENT.

(1) *While the Grand Jury Is in Session.* The following persons may be present while the grand

jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) *During Deliberations and Voting*. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) RECORDING AND DISCLOSING THE PROCEEDINGS.

(1) *Recording the Proceedings*. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) *Secrecy*.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) *Exceptions*.

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. §3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. §3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term ''foreign intelligence information'' means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss

the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) *Sealed Indictment*. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) *Closed Hearing*. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records*. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) *Contempt*. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) INDICTMENT AND RETURN. A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) DISCHARGING THE GRAND JURY. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) EXCUSING A JUROR. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) ''INDIAN TRIBE'' DEFINED. ''Indian tribe'' means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a–1.[1]

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 26 and July 8, 1976, eff. Aug. 1, 1976; Pub. L. 95–78, § 2(a), July 30, 1977, 91 Stat. 319; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Pub. L. 98–473, title II, § 215(f), Oct. 12, 1984, 98 Stat. 2016; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 26, 1999, eff. Dec. 1, 1999; Pub. L. 107–56, title II, § 203(a), Oct. 26, 2001, 115 Stat. 278; Apr. 29, 2002, eff. Dec. 1, 2002; Pub. L. 107–296, title VIII, § 895, Nov. 25, 2002, 116 Stat. 2256; Pub. L. 108–458, title VI, § 6501(a), Dec. 17, 2004, 118 Stat. 3760; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 25, 2014, eff. Dec. 1, 2014; Pub. L. 117–347, title III, § 323(a)(1)(A), Jan. 5, 2023, 136 Stat. 6206.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivision (a). 1. The first sentence of this rule vests in the court full discretion as to the number of grand juries to be summoned and as to the times when they should be convened. This provision supersedes the existing law, which limits the authority of the court to summon more than one grand jury at the same time. At present two grand juries may be convened simultaneously only in a district which has a city or borough of at least 300,000 inhabitants, and three grand juries only in the Southern District of New York, 28 U.S.C. [former] 421 (Grand juries; when, how and by whom summoned; length of service). This statute has been construed, however, as only limiting the authority of the court to summon more than one grand jury for a single place of holding court, and as not circumscribing the power to convene simultaneously several grand juries at different points within the same district, *Morris v. United States*, 128 F.2d 912 (C.C.A. 5th); *United States v. Perlstein*, 39 F.Supp. 965 (D.N.J.).

2. The provision that the grand jury shall consist of not less than 16 and not more than 23 members continues existing law, 28 U.S.C. 419 [now 18 U.S.C. 3321] (Grand jurors; number when less than required number).

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[1] See References in Text note below.

3. The rule does not affect or deal with the method of summoning and selecting grand juries. Existing statutes on the subjects are not superseded. See 28 U.S.C. 411–426 [now 1861–1870]. As these provisions of law relate to jurors for both criminal and civil cases, it seemed best not to deal with this subject.

Note to Subdivision (b)(1). Challenges to the array and to individual jurors, although rarely invoked in connection with the selection of grand juries, are nevertheless permitted in the Federal courts and are continued by this rule, *United States v. Gale*, 109 U.S. 65, 69–70; *Clawson v. United States*, 114 U.S. 477; *Agnew v. United States*, 165 U.S. 36, 44. It is not contemplated, however, that defendants held for action of the grand jury shall receive notice of the time and place of the impaneling of a grand jury, or that defendants in custody shall be brought to court to attend at the selection of the grand jury. Failure to challenge is not a waiver of any objection. The objection may still be interposed by motion under Rule 6(b)(2).

Note to Subdivision (b)(2). 1. The motion provided by this rule takes the place of a plea in abatement, or motion to quash. *Crowley v. United States*, 194 U.S. 461, 469–474; *United States v. Gale, supra*.

2. The second sentence of the rule is a restatement of 18 U.S.C. [former] 554(a) (Indictments and presentments; objection on ground of unqualified juror barred where twelve qualified jurors concurred; record of number concurring), and introduces no change in existing law.

Note to Subdivision (c). 1. This rule generally is a restatement of existing law, 18 U.S.C. [former] 554(a) and 28 U.S.C. [former] 420. Failure of the foreman to sign or endorse the indictment is an irregularity and is not fatal, *Frisbie v. United States*, 157 U.S. 160, 163–165.

2. The provision for the appointment of a deputy foreman is new. Its purpose is to facilitate the transaction of business if the foreman is absent. Such a provision is found in the law of at least one State, N.Y. Code Criminal Procedure, sec. 244.

Note to Subdivision (d). This rule generally continues existing law. See 18 U.S.C. [former] 556 (Indictments and presentments; defects of form); and 5 U.S.C. 310 [now 28 U.S.C. 515(a)] (Conduct of legal proceedings).

Note to Subdivision (e). 1. This rule continues the traditional practice of secrecy on the party of members of the grand jury, except when the court permits a disclosure, *Schmidt v. United States*, 115 F.2d 394 (C.C.A. 6th); *United States v. American Medical Association*, 26 F.Supp. 429 (D.C.); Cf. *Atwell v. United States*, 162 F. 97 (C.C.A. 4th); and see 18 U.S.C. [former] 554(a) (Indictments and presentments; objection on ground of unqualified juror barred where twelve qualified jurors concurred; record of number concurring). Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice.

2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. 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.

3. The last sentence authorizing the court to seal indictments continues present practice.

Note to Subdivision (f). This rule continues existing law, 18 U.S.C. [former] 554 (Indictments and presentments; by twelve grand jurors). The purpose of the last sentence is to provide means for a prompt release of a defendant if in custody, or exoneration of bail if he is on bail, in the event that the grand jury considers the case of a defendant held for its action and finds no indictment.

Note to Subdivision (g). Under existing law a grand jury serves only during the term for which it is summoned, but the court may extend its period of service for as long as 18 months, 28 U.S.C. [former] 421. During the extended period, however, a grand jury may conduct only investigations commenced during the original term. The rule continues the 18 months' maximum for the period of service of a grand jury, but provides for such service as a matter of course, unless the court terminates it at an earlier date. The matter is left in the discretion of the court, as it is under existing law. The expiration of a term of court as a time limitation is elsewhere entirely eliminated (Rule 45(c)) and specific time limitations are substituted therefor. This was previously done by the Federal Rules of Civil Procedure for the civil side of the courts (Federal Rules of Civil Procedure, Rule 6(c) [28 U.S.C., Appendix]). The elimination of the requirement that at an extended period the grand jury may continue only investigations previously commenced, will obviate such a controversy as was presented in *United States v. Johnson*, 319 U.S. 503.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Subdivision (d).—The amendment makes it clear that recording devices may be used to take evidence at grand jury sessions.

Subdivision (e).—The amendment makes it clear that the operator of a recording device and a typist who transcribes recorded testimony are bound to the obligation of secrecy.

Subdivision (f).—A minor change conforms the language to what doubtless is the practice. The need for a report to the court that no indictment has been found may be present even though the defendant has not been ''held to answer.'' If the defendant is in custody or has given bail, some official record should be made of the grand jury action so that the defendant can be released or his bail exonerated.

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Subdivision (b)(2) is amended to incorporate by express reference the provisions of the Jury Selection and Service Act of 1968. That act provides in part:

The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime [or] the Attorney General of the United States * * * may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. [28 U.S.C. §1867(c)]

Under rule 12(e) the judge shall decide the motion before trial or order it deferred until after verdict. The authority which the judge has to delay his ruling until after verdict gives him an option which can be exercised to prevent the unnecessary delay of a trial in the event that a motion attacking a grand jury is made on the eve of the trial. In addition, rule 12(c) gives the judge authority to fix the time at which pretrial motions must be made. Failure to make a pretrial motion at the appropriate time may constitute a waiver under rule 12(f).

NOTES OF ADVISORY COMMITTEE ON RULES—1976 AMENDMENT

Under the proposed amendment to rule 6(f), an indictment may be returned to a federal magistrate. (''Federal magistrate'' is defined in rule 54(c) as including a United States magistrate as defined in 28 U.S.C. §§631–639 and a judge of the United States.) This change will foreclose the possibility of noncompliance with the Speedy Trial Act timetable because of the nonavailability of a judge. Upon the effective date of certain provisions of the Speedy Trial Act of 1974, the timely return of indictments will become a matter of critical importance; for the year commencing July 1, 1976, indictments must be returned within 60 days of arrest or summons, for the year following within 45 days, and thereafter within 30 days. 18 U.S.C. §§3161(b) and (f), 3163(a). The problem is acute in a one-judge district where, if the judge is holding court in another part of the district, or is otherwise absent, the return of the indictment must await the later reappearance of the judge at the place where the grand jury is sitting.

A corresponding change has been made to that part of subdivision (f) which concerns the reporting of a ''no bill,'' and to that part of subdivision (e) which concerns keeping an indictment secret.

The change in the third sentence of rule 6(f) is made so as to cover all situations in which by virtue of a pending complaint or information the defendant is in custody or released under some form of conditional release.

NOTES OF ADVISORY COMMITTEE ON RULES—1977 AMENDMENT

The proposed definition of ''attorneys for the government'' in subdivision (e) is designed to facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation. The phrase ''other government personnel'' includes, but is not limited to, employees of administrative agencies and government departments.

Present subdivision (e) provides for disclosure ''to the attorneys for the government for use in the performance of their duties.'' This limitation is designed to further ''the long established policy that maintains the secrecy of the grand jury in federal courts.'' *United States v. Procter and Gamble Co.*, 356 U.S. 677 (1958).

As defined in rule 54(c), '' 'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam * * *.'' The limited nature of this definition is pointed out in *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962) at 443:

> The term attorneys for the government is restrictive in its application. * * * If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided.

The proposed amendment reflects the fact that there is often government personnel assisting the Justice Department in grand jury proceedings. In *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D.Pa. 1971), the opinion quoted the United States Attorney:

> It is absolutely necessary in grand jury investigations involving analysis of books and records, for the government attorneys to rely upon investigative personnel (from the government agencies) for assistance.

See also 8 J. Moore, Federal Practice ¶6.05 at 6–28 (2d ed. Cipes, 1969):

> The rule [6(e)] has presented a problem, however, with respect to attorneys and nonattorneys who are assisting in preparation of a case for the grand jury. * * * These assistants often cannot properly perform their work without having access to grand jury minutes.

Although case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required. This is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation. The court may inquire as to the good faith of the assisting personnel, to ensure that access to material is not merely a subterfuge to gather evidence unattainable by means other than the grand jury. This approach was taken in *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D.Pa. 1971); *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956); *United States v. Anzelimo*, 319 F.Supp. 1106 (D.C.La. 1970). Another case, *Application of Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956), assumed, without deciding, that assistance given the attorney for the government by IRS and FBI agents was authorized.

The change at line 27 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. §§3146, 3148.

Under the proposed amendment to rule 6(f), an indictment may be returned to a federal magistrate. (''Federal magistrate'' is defined in rule 54(c) as including a United States magistrate as defined in 28 U.S.C. §631–639 and a judge of the United States.) This change will foreclose the possibility of noncompliance with the Speedy Trial Act timetable because of the nonavailability of a judge. Upon the effective date of certain provisions of the Speedy Trial Act of 1974, the timely return of indictments will become a matter of critical importance; for the year commencing July 1, 1976, indictments must be returned within 60 days of arrest or summons, for the year following within 45 days, and thereafter within 30 days. 18 U.S.C. §§3161(b) and (f), 3163(a). The problem is acute in a one-judge district where, if the judge is holding court in another part of the district, or is otherwise absent, the return of the indictment must await the later reappearance of the judge at the place where the grand jury is sitting.

A corresponding change has been made to that part of subdivision (f) which concerns the reporting of a ''no bill,'' and to that part of subdivision (e) which concerns keeping an indictment secret.

The change in the third sentence of rule 6(f) is made so as to cover all situations in which by virtue of a pending complaint or information the defendant is in custody or released under some form of conditional release.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 95–354; 1977 AMENDMENTS PROPOSED BY THE SUPREME COURT

Rule 6(e) currently provides that ''disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties.'' Rule 54(c) defines attorneys for the government to mean ''the Attorney General, an authorized assistant to the Attorney General, a United States attorney, and an authorized assistant of the United States attorney, and when applicable to cases arising under the laws of Guam, means the Attorney General of Guam. . . .''

The Supreme Court proposal would change Rule 6(e) by adding the following new language:

> For purposes of this subdivision, ''attorneys for the government'' includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.

It would also make a series of changes in the rule designed to make its provisions consistent with other provisions in the Rules and the Bail Reform Act of 1966.

The Advisory Committee note states that the proposed amendment is intended ''to facilitate an increasing need, on the part of Government attorneys to make use of outside expertise in complex litigation''. The note indicated that:

> Although case law is limited, the trend seems to be in the direction of allowing disclosure to Government personnel who assist attorneys for the Government in situations where their expertise is required. This is subject to the qualification that the matter disclosed be used only for the purposes of the grand jury investigation.

It is past history at this point that the Supreme Court proposal attracted substantial criticism, which seemed to stem more from the lack of precision in defining, and consequent confusion and uncertainty concerning, the intended scope of the proposed change than from a fundamental disagreement with the objective.

Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees. Federal crimes are ''investigated'' by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is re-

quired during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it. There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws.

The parameters of the authority of an attorney for the government to disclose grand jury information in the course of performing his own duties is not defined by Rule 6. However, a commonsense interpretation prevails, permitting ''Representatives of other government agencies actively assisting United States attorneys in a grand jury investigation . . . access to grand jury material in the performance of their duties.'' Yet projected against this current practice, and the weight of case law, is the anomalous language of Rule 6(e) itself, which, in its present state of uncertainty, is spawning some judicial decisions highly restrictive of the use of government experts that require the government to ''show the necessity (to the Court) for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise'' and that make Rule 6(e) orders subject to interlocutory appeal.

In this state of uncertainty, the Committee believes it is timely to redraft subdivision (e) of Rule 6 to make it clear.

Paragraph (1) as proposed by the Committee states the general rule that a grand jury, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or government personnel to whom disclosure is made under paragraph (2)(A)(ii) shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules. It also expressly provides that a knowing violation of Rule 6 may be punished as a contempt of court. In addition, it carries forward the current provision that no obligation of secrecy may be imposed on any person except in accordance with this Rule.

Having stated the general rule of nondisclosure, paragraph (2) sets forth exemptions from nondisclosure. Subparagraph (A) of paragraph (2) provides that disclosure otherwise prohibited, other than the grand jury deliberations and the vote of any grand juror, may be made to an attorney for the government for use in the performance of his duty and to such 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. In order to facilitate resolution of subsequent claims of improper disclosure, subparagraph (B) further provides that the names of government personnel designated to assist the attorney for the government shall be promptly provided to the district court and such personnel shall not utilize 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. Although not expressly required by the rule, the Committee contemplates that the names of such personnel will generally be furnished to the court before disclosure is made to them. Subparagraph (C) permits disclosure as directed by a court preliminarily to or in connection with a judicial proceeding or, at the request of the defendant, upon a showing that grounds may exist for dismissing the indictment because of matters occurring before the grand jury. Paragraph (3) carries forward the last sentence of current Rule 6(e) with the technical changes recommended by the Supreme Court.

The Rule as redrafted is designed to accommodate the belief on the one hand that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions. It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy.

Congressional Modification of Proposed 1977 Amendment

Pub. L. 95–78, §2(a), July 30, 1977, 91 Stat. 319, provided in part that the amendment proposed by the Supreme Court [in its order of Apr. 26, 1977] to subdivision (e) of rule 6 of the Federal Rules of Criminal Procedure [subd. (e) of this rule] is approved in a modified form.

Notes of Advisory Committee on Rules—1979 Amendment

Note to Subdivision (e)(1). Proposed subdivision (e)(1) requires that all proceedings, except when the grand jury is deliberating or voting, be recorded. The existing rule does not require that grand jury proceedings be recorded. The provision in rule 6(d) that ''a stenographer or operator of a recording device may be present while the grand jury is in session'' has been taken to mean that recordation is permissive and not mandatory; see *United States v. Aloisio*, 440 F.2d 705 (7th Cir. 1971), collecting the cases. However, the cases rather frequently state that recordation of the proceedings is the better practice; see *United States v. Aloisio*, supra; *United States v. Cramer*, 447 F.2d 210 (2d Cir. 1971), *Schlinsky v. United States*, 379 F.2d 735 (1st Cir. 1967); and some cases require the district court, after a demand to exercise discretion as to whether the proceedings should be recorded. *United States v. Price*, 474 F.2d 1223 (9th Cir. 1973); *United States v. Thoresen*, 428 F.2d 654 (9th Cir. 1970). Some district courts have adopted a recording requirement. See e.g. *United States v. Aloisio*, supra; *United States v. Gramolini*, 301 F.Supp. 39 (D.R.I. 1969). Recording of grand jury proceedings is currently a requirement in a number of states. See, e.g., Cal.Pen.Code §§938–938.3; Iowa Code Ann. §772.4; Ky.Rev.Stat.Ann. §28.460; and Ky.R.Crim.P. §5.16(2).

The assumption underlying the proposal is that the cost of such recording is justified by the contribution made to the improved administration of criminal justice. See *United States v. Gramolini*, supra, noting: ''Nor can it be claimed that the cost of recordation is prohibitive; in an electronic age, the cost of recordation must be categorized as miniscule.'' For a discussion of the success of electronic recording in Alaska, see Reynolds, Alaska's Ten Years of Electronic Reporting, 56 A.B.A.J. 1080 (1970).

Among the benefits to be derived from a recordation requirement are the following:

(1) Ensuring that the defendant may impeach a prosecution witness on the basis of his prior inconsistent statements before the grand jury. As noted in the opinion of Oakes, J., in *United States v. Cramer*: ''First since *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), a defendant has been entitled to examine the grand jury testimony of witnesses against him. On this point, the Court was unanimous, holding that there was 'no justification' for the District of Columbia Court of Appeals' 'relying upon [the] ''assumption''' that 'no inconsistencies would have come to light.' The Court's decision was based on the general

proposition that '[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts.' In the case at bar the prosecution did have exclusive access to the grand jury testimony of the witness Sager, by virtue of being present, and the defense had none—to determine whether there were any inconsistencies with, say, his subsequent testimony as to damaging admissions by the defendant and his attorney Richard Thaler. The Government claims, and it is supported by the majority here, that there is no problem since defendants were given the benefit of Sager's subsequent statements including these admissions as Jencks Act materials. But assuming this to be true, it does not cure the basic infirmity that the defense could not know whether the witness testified inconsistently before the grand jury.''

(2) Ensuring that the testimony received by the grand jury is trustworthy. In *United States v. Cramer*, Oakes, J., also observed: ''The recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness. Without the restraint of being subject to prosecution for perjury, a restraint which is wholly meaningless or nonexistent if the testimony is unrecorded, a witness may make baseless accusations founded on hearsay or false accusations, all resulting in the indictment of a fellow citizen for a crime.''

(3) Restraining prosecutorial abuses before the grand jury. As noted in *United States v. Gramolini*: ''In no way does recordation inhibit the grand jury's investigation. True, recordation restrains certain prosecutorial practices which might, in its absence be used, but that is no reason not to record. Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses.''

(4) Supporting the case made by the prosecution at trial. Oakes, J., observed in *United States v. Cramer*: ''The benefits of having grand jury testimony recorded do not all inure to the defense. See, e.g., *United States v. DeSisto*, 329 F.2d 929, 934: (2nd Cir.), cert. denied, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed.2d 747 (1964) (conviction sustained in part on basis of witnesses's prior sworn testimony before grand jury).'' Fed.R.Evid. 801(d)(1)(A) excludes from the category of hearsay the prior inconsistent testimony of a witness given before a grand jury. *United States v. Morgan*, 555 F.2d 238 (9th Cir. 1977). See also *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), admitting under Fed.R.Evid. 804(b)(5) the grand jury testimony of a witness who refused to testify at trial because of threats by the defendant.

Commentators have also supported a recording requirement. 8 Moore, Federal Practice par. 6.02[2][d] (2d ed. 1972) states: ''Fairness to the defendant would seem to compel a change in the practice, particularly in view of the 1970 amendment to 18 USC §3500 making grand jury testimony of government witnesses available at trial for purposes of impeachment. The requirement of a record may also prove salutary in controlling overreaching or improper examination of witnesses by the prosecutor.'' Similarly, 1 Wright, Federal Practice and Procedure—Criminal §103 (1969), states that the present rule ''ought to be changed, either by amendment or by judicial construction. The Supreme Court has emphasized the importance to the defense of access to the transcript of the grand jury proceedings [citing *Dennis*]. A defendant cannot have that advantage if the proceedings go unrecorded.'' American Bar Association, Report of the Special Committee on Federal Rules of Procedure, 52 F.R.D. 87, 94–95 (1971), renews the committee's 1965 recommendation ''that all accusatorial grand jury proceedings either be transcribed by a reporter or recorded by electronic means.''

Under proposed subdivision (e)(1), if the failure to record is unintentional, the failure to record would not invalidate subsequent judicial proceedings. Under present law, the failure to compel production of grand jury testimony where there is no record is not reversible error. See *Wyatt v. United States*, 388 F.2d 395 (10th Cir. 1968).

The provision that the recording or reporter's notes or any transcript prepared therefrom are to remain in the custody or control (as where the notes are in the immediate possession of a contract reporter employed by the Department of Justice) of the attorney for the government is in accord with present practice. It is specifically recognized, however, that the court in a particular case may have reason to order otherwise.

It must be emphasized that the proposed changes in rule 6(e) deal only with the recording requirement, and in no way expand the circumstances in which disclosure of the grand jury proceedings is permitted or required. ''Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means.'' *United States v. Price*, 474 F.2d 1223 (9th Cir. 1973). Specifically, the proposed changes do not provide for copies of the grand jury minutes to defendants as a matter of right, as is the case in some states. See, e.g., Cal.Pen.Code §938.1; Iowa Code Ann. §772.4. The matter of disclosure continues to be governed by other provisions, such as rule 16(a) (recorded statements of the defendant), 18 U.S.C. §3500 (statements of government witnesses), and the unchanged portions of rule 6(e), and the cases interpreting these provisions. See e.g., *United States v. Howard*, 433 F.2d 1 (5th Cir. 1970), and *Beatrice Foods Co. v. United States*, 312 F.2d 29 (8th Cir. 1963), concerning the showing which must be made of improper matters occurring before the grand jury before disclosure is required.

Likewise, the proposed changes in rule 6(e) are not intended to make any change regarding whether a defendant may challenge a grand jury indictment. The Supreme Court has declined to hold that defendants may challenge indictments on the ground that they are not supported by sufficient or competent evidence. *Costello v. United States*, 350 U.S. 359 (1956); *Lawn v. United States*, 355 U.S. 339 (1958); *United States v. Blue*, 384 U.S. 251 (1966). Nor are the changes intended to permit the defendant to challenge the conduct of the attorney for the government before the grand jury absent a preliminary factual showing of serious misconduct.

Note to Subdivision (e)(3)(C). The sentence added to subdivision (e)(3)(C) gives express recognition to the fact that if the court orders disclosure, it may determine the circumstances of the disclosure. For example, if the proceedings are electronically recorded, the court would have discretion in an appropriate case to deny defendant the right to a transcript at government expense. While it takes special skills to make a stenographic record understandable, an electronic recording can be understood by merely listening to it, thus avoiding the expense of transcription.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Note to Subdivision (e)(3)(C). New subdivision (e)(3)(C)(iii) recognizes that it is permissible for the attorney for the government to make disclosure of matters occurring before one grand jury to another federal grand jury. Even absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances. See, e.g., *United States v. Socony-Vacuum Oil Co.* 310 U.S. 150 (1940); *United States v. Garcia*, 420 F.2d 309 (2d Cir. 1970). In this kind of situation, ''[s]ecrecy of grand jury materials should be protected almost as well by the safeguards at the second grand jury proceeding, including the oath of the jurors, as by judicial supervision of the disclosure of such materials.'' *United States v. Malatesta*, 583 F.2d 748 (5th Cir. 1978).

Note to Subdivision (e)(3)(D). In *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), the Court held on the facts there presented that it was an abuse of discretion for the district judge to order disclosure of grand jury transcripts for use in civil proceedings in another

district where that judge had insufficient knowledge of those proceedings to make a determination of the need for disclosure. The Court suggested a ''better practice'' on those facts, but declared that ''procedures to deal with the many variations are best left to the rule-making procedures established by Congress.''

The first sentence of subdivision (e)(3)(D) makes it clear that when disclosure is sought under subdivision (e)(2)(C)(i), the petition is to be filed in the district where the grand jury was convened, whether or not it is the district of the ''judicial proceeding'' giving rise to the petition. Courts which have addressed the question have generally taken this view, e.g., *Illinois v. Sarbaugh*, 522 F.2d 768 (7th Cir. 1977). As stated in *Douglas Oil*,

> those who seek grand jury transcripts have little choice other than to file a request with the court that supervised the grand jury, as it is the only court with control over the transcripts.

Quite apart from the practical necessity, the policies underlying Rule 6(e) dictate that the grand jury's supervisory court participate in reviewing such requests, as it is in the best position to determine the continuing need for grand jury secrecy. Ideally, the judge who supervised the grand jury should review the request for disclosure, as he will have firsthand knowledge of the grand jury's activities. But even other judges of the district where the grand jury sat may be able to discover facts affecting the need for secrecy more easily than would judges from elsewhere around the country. The records are in the custody of the District Court, and therefore are readily available for references. Moreover, the personnel of that court—particularly those of the United States Attorney's Office who worked with the grand jury—are more likely to be informed about the grand jury proceedings than those in a district that had no prior experience with the subject of the request.

The second sentence requires the petitioner to serve notice of his petition upon several persons who, by the third sentence, are recognized as entitled to appear and be heard on the matter. The notice requirement ensures that all interested parties, if they wish, may make a timely appearance. Absent such notice, these persons, who then might only learn of the order made in response to the motion after it was entered, have had to resort to the cumbersome and inefficient procedure of a motion to vacate the order. *In re Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973).

Though some authority is to be found that parties to the judicial proceeding giving rise to the motion are not entitled to intervene, in that ''the order to produce was not directed to'' them, *United States v. American Oil Co.*, 456 F.2d 1043 (3d Cir. 1972), that position was rejected in *Douglas Oil*, where it was noted that such persons have standing ''to object to the disclosure order, as release of the transcripts to their civil adversaries could result in substantial injury to them.'' As noted in *Illinois v. Sarbaugh*, supra, while present rule 6(e) ''omits to state whether any one is entitled to object to disclosure,'' the rule

> seems to contemplate a proceeding of some kind, judicial proceedings are not normally *ex parte*, and persons in the situation of the intervenors [parties to the civil proceeding] are likely to be the only ones to object to an order for disclosure. If they are not allowed to appear, the advantages of an adversary proceeding are lost.

If the judicial proceeding is a class action, notice to the representative is sufficient.

The amendment also recognizes that the attorney for the government in the district where the grand jury convened also has an interest in the matter and should be allowed to be heard. It may sometimes be the case, as in *Douglas Oil*, that the prosecutor will have relatively little concern for secrecy, at least as compared with certain parties to the civil proceeding. Nonetheless, it is appropriate to recognize that generally the attorney for the government is entitled to be heard so that he may represent what *Douglas Oil* characterizes as ''the public interest in secrecy,'' including the government's legitimate concern about ''the possible effect upon the functioning of future grand juries'' of unduly liberal disclosure.

The second sentence leaves it to the court to decide whether any other persons should receive notice and be allowed to intervene. This is appropriate, for the necessity for and feasibility of involving others may vary substantially from case to case. In *Douglas Oil*, it was noted that the individual who produced before the grand jury the information now sought has an interest in the matter:

> 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. Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation.

Notice to such persons, however is by no means inevitably necessary, and in some cases the information sought may have reached the grand jury from such a variety of sources that it is not practicable to involve these sources in the disclosure proceeding. Similarly, while *Douglas Oil* notes that rule 6(e) secrecy affords ''protection of the innocent accused from disclosure of the accusation made against him before the grand jury,'' it is appropriate to leave to the court whether that interest requires representation directly by the grand jury target at this time. When deemed necessary to protect the identity of such other persons, it would be a permissible alternative for the government or the court directly to give notice to these other persons, and thus the rule does not foreclose such action.

The notice requirement in the second sentence is inapplicable if the hearing is to be *ex parte*. The legislative history of rule 6(e) states: ''It is contemplated that the judicial hearing in connection with an application for a court order by the government, under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy.'' S.Rep. No. 95–354, 1977 U.S. Code Cong. & Admin. News p. 532. Although such cases are distinguishable from other cases arising under this subdivision because internal regulations limit further disclosure of information disclosed to the government, the rule provides only that the hearing ''may'' be *ex parte* when the petitioner is the government. This allows the court to decide that matter based upon the circumstances of the particular case. For example, an *ex parte* proceeding is much less likely to be appropriate if the government acts as petitioner as an accommodation to, e.g., a state agency.

Note to Subdivision (e)(3)(E). Under the first sentence in new subdivision (e)(3)(E), the petitioner or any intervenor might seek to have the matter transferred to the federal district court where the judicial proceeding giving rise to the petition is pending. Usually, it will be the petitioner, who is seeking disclosure, who will desire the transfer, but this is not inevitably the case. An intervenor might seek transfer on the ground that the other court, with greater knowledge of the extent of the need, would be less likely to conclude ''that the material * * * is needed to avoid a possible injustice'' (the test under *Douglas Oil)*. The court may transfer on its own motion, for as noted in *Douglas Oil*, if transfer is the better course of action it should not be foreclosed ''merely because the parties have failed to specify the relief to which they are entitled.''

It must be emphasized that transfer is proper only if the proceeding giving rise to the petition ''is in federal district court in another district.'' If, for example, the proceeding is located in another district but is at the state level, a situation encompassed within rule 6(e)(3)(C)(i), *In re Special February 1971 Grand Jury v. Conlisk*, supra, there is no occasion to transfer. Ultimate resolution of the matter cannot be placed in the hands of the state court, and in such a case the federal court in that place would lack what *Douglas Oil* recognizes as the benefit to be derived from transfer: ''first-

hand knowledge of the litigation in which the transcripts allegedly are needed.'' Formal transfer is unnecessary in intradistrict cases, even when the grand jury court and judicial proceeding court are not in the same division.

As stated in the first sentence, transfer by the court is appropriate ''unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper.'' (As reflected by the ''whether disclosure is proper'' language, the amendment makes no effort to define the disclosure standard; that matter is currently governed by *Douglas Oil* and the authorities cited therein, and is best left to elaboration by future case law.) The amendment expresses a preference for having the disclosure issue decided by the grand jury court. Yet, it must be recognized, as stated in *Douglas Oil*, that often this will not be possible because

> the judges of the court having custody of the grand jury transcripts will have no first-hand knowledge of the litigation in which the transcripts allegedly are needed, and no practical means by which such knowledge can be obtained. In such a case, a judge in the district of the grand jury cannot weigh in an informed manner the need for disclosure against the need for maintaining grand jury secrecy.

The penultimate sentence provides that upon transfer the transferring court shall order transmitted the material sought to be disclosed and also a written evaluation of the need for continuing grand jury secrecy. Because the transferring court is in the best position to assess the interest in continued grand jury secrecy in the particular instance, it is important that the court which will now have to balance that interest against the need for disclosure receive the benefit of the transferring court's assessment. Transmittal of the material sought to be disclosed will not only facilitate timely disclosure if it is thereafter ordered, but will also assist the other court in deciding how great the need for disclosure actually is. For example, with that material at hand the other court will be able to determine if there is any inconsistency between certain grand jury testimony and testimony received in the other judicial proceeding. The rule recognizes, however, that there may be instances in which transfer of everything sought to be disclosed is not feasible. See, e.g., *In re 1975–2 Grand Jury Investigation*, 566 F.2d 1293 (5th Cir. 1978) (court ordered transmittal of ''an inventory of the grand jury subpoenas, transcripts, and documents,'' as the materials in question were ''exceedingly voluminous, filling no less than 55 large file boxes and one metal filing cabinet'').

The last sentence makes it clear that in a case in which the matter is transferred to another court, that court should permit the various interested parties specified in the rule to be heard. Even if those persons were previously heard before the court which ordered the transfer, this will not suffice. The order of transfer did not decide the ultimate issue of ''whether a particularized need for disclosure outweighs the interest in continued grand jury secrecy,'' *Douglas Oil*, supra, which is what now remains to be resolved by the court to which transfer was made. Cf. *In re 1975–2 Grand Jury Investigation*, supra, holding that a transfer order is not appealable because it does not determine the ultimate question of disclosure, and thus ''[n]o one has yet been aggrieved and no one will become aggrieved until [the court to which the matter was transferred] acts.''

Note to Subdivision (e)(5). This addition to rule 6 would make it clear that certain hearings which would reveal matters which have previously occurred before a grand jury or are likely to occur before a grand jury with respect to a pending or ongoing investigation must be conducted in camera in whole or in part in order to prevent public disclosure of such secret information. One such hearing is that conducted under subdivision (e)(3)(D), for it will at least sometimes be necessary to consider and assess some of the ''matters occurring before the grand jury'' in order to decide the disclosure issue. Two other kinds of hearings at which information about a particular grand jury investigation might need to be discussed are those at which the question is whether to grant a grand jury witness immunity or whether to order a grand jury witness to comply fully with the terms of a subpoena directed to him.

A recent GAO study established that there is considerable variety in the practice as to whether such hearings are closed or open, and that open hearings often seriously jeopardize grand jury secrecy:

> For judges to decide these matters, the witness' relationship to the case under investigation must be discussed. Accordingly, the identities of witnesses and targets, the nature of expected testimony, and the extent to which the witness is cooperating are often revealed during preindictment proceedings. Because the matters discussed can compromise the purposes of grand jury secrecy, some judges close the preindictment proceedings to the public and the press; others do not. When the proceeding is open, information that may otherwise be kept secret under rule 6(e) becomes available to the public and the press . . . .
>
> Open preindictment proceedings are a major source of information which can compromise the purposes of grand jury secrecy. In 25 cases we were able to establish links between open proceedings and later newspaper articles containing information about the identities of witnesses and targets and the nature of grand jury investigations.

Comptroller General, More Guidance and Supervision Needed over Federal Grand Jury Proceedings 8–9 (Oct. 16, 1980).

The provisions of rule 6(e)(5) do not violate any constitutional right of the public or media to attend such pretrial hearings. There is no Sixth Amendment right in the public to attend pretrial proceedings, *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, (1980), only recognizes a First Amendment ''right to attend criminal trials.'' *Richmond Newspapers* was based largely upon the ''unbroken, uncontradicted history'' of public trials, while in *Gannett* it was noted ''there exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings.'' Moreover, even assuming some public right to attend certain pretrial proceedings, see *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982), that right is not absolute; it must give way, as stated in *Richmond Newspapers*, to ''an overriding interest'' in a particular case in favor of a closed proceeding. By permitting closure only ''to the extent necessary to prevent disclosure of matters occurring before a grand jury,'' rule 6(e)(5) recognizes the longstanding interest in the secrecy of grand jury proceedings. Counsel or others allowed to be present at the closed hearing may be put under a protective order by the court.

Subdivision (e)(5) is expressly made ''subject to any right to an open hearing in contempt proceedings.'' This will accommodate any First Amendment right which might be deemed applicable in that context because of the proceedings' similarities to a criminal trial, cf. *United States v. Criden*, supra, and also any Fifth or Sixth Amendment right of the contemnor. The latter right clearly exists as to a criminal contempt proceeding, *In re Oliver*, 333 U.S. 257 (1948), and some authority is to be found recognizing such a right in civil contempt proceedings as well. *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982). This right of the contemnor must be requested by him and, in any event, does not require that the entire contempt proceedings, including recitation of the substance of the questions he has refused to answer, be public. *Levine v. United States*, 362 U.S. 610 (1960).

Note to Subdivision (e)(6). Subdivision (e)(6) provides that records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for so long as is necessary to prevent disclosure of matters occurring before a grand jury. By permitting such documents as grand jury subpoenas and immunity orders to be kept under seal, this provision addresses a serious problem of grand jury secrecy and expressly au-

thorizes a procedure now in use in many but not all districts. As reported in Comptroller General, More Guidance and Supervision Needed over Federal Grand Jury Proceedings 10, 14 (Oct. 16, 1980):

> In 262 cases, documents presented at open preindictment proceedings and filed in public files revealed details of grand jury investigations. These documents are, of course, available to anyone who wants them, including targets of investigations. [There are] two documents commonly found in public files which usually reveal the identities of witnesses and targets. The first document is a Department of Justice authorization to a U.S. attorney to apply to the court for a grant of immunity for a witness. The second document is the court's order granting the witness immunity from prosecution and compelling him to testify and produce requested information. * * *
>
> Subpoenas are the fundamental documents used during a grand jury's investigation because through subpoenas, grand juries can require witnesses to testify and produce documentary evidence for their consideration. Subpoenas can identify witnesses, potential targets, and the nature of an investigation. Rule 6(e) does not provide specific guidance on whether a grand jury's subpoena should be kept secret. Additionally, case law has not consistently stated whether the subpoenas are protected by rule 6(e).
>
> District courts still have different opinions about whether grand jury subpoenas should be kept secret. Out of 40 Federal District Courts we contacted, 36 consider these documents to be secret. However, 4 districts do make them available to the public.

Note to Subdivision (g). In its present form, subdivision 6(g) permits a grand jury to serve no more than 18 months after its members have been sworn, and absolutely no exceptions are permitted. (By comparison, under the Organized Crime Control Act of 1970, Title I, 18 U.S.C. §§3331–3334, special grand juries may be extended beyond their basic terms of 18 months if their business has not been completed.) The purpose of the amendment is to permit some degree of flexibility as to the discharge of grand juries where the public interest would be served by an extension.

As noted in *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974), upholding the dismissal of an indictment returned 9 days after the expiration of the 18–month period but during an attempted extension, under the present inflexible rule ''it may well be that criminal proceedings which would be in the public interest will be frustrated and that those who might be found guilty will escape trial and conviction.'' The present inflexible rule can produce several undesirable consequences, especially when complex fraud, organized crime, tax or antitrust cases are under investigation: (i) wastage of a significant amount of time and resources by the necessity of presenting the case once again to a successor grand jury simply because the matter could not be concluded before the term of the first grand jury expired; (ii) precipitous action to conclude the investigation before the expiration date of the grand jury; and (iii) potential defendants may be kept under investigation for a longer time because of the necessity to present the matter again to another grand jury.

The amendment to subdivision 6(g) permits extension of a regular grand jury only ''upon a determination that such extension is in the public interest.'' This permits some flexibility, but reflects the fact that extension of regular grand juries beyond 18 months is to be the exception and not the norm. The intention of the amendment is to make it possible for a grand jury to have sufficient extra time to wind up an investigation when, for example, such extension becomes necessary because of the unusual nature of the case or unforeseen developments.

Because terms of court have been abolished, 28 U.S.C. §138, the second sentence of subdivision 6(g) has been deleted.

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Note to Subdivision (e)(3)(A)(ii). Rule 6(e)(3)(A)(ii) currently provides that an attorney for the government may disclose grand jury information, without prior judicial approval, to other government personnel whose assistance the attorney for the government deems necessary in conducting the grand jury investigation. Courts have differed over whether employees of state and local governments are ''government personnel'' within the meaning of the rule. Compare *In re Miami Federal Grand Jury No. 79–9*, 478 F.Supp. 490 (S.D.Fla. 1979), and *In re Grand Jury Proceedings*, 445 F.Supp. 349 (D.R.I. 1978) (state and local personnel not included); with *In re 1979 Grand Jury Proceedings*, 479 F.Supp. 93 (E.D.N.Y. 1979) (state and local personnel included). The amendment clarifies the rule to include state and local personnel.

It is clearly desirable that federal and state authorities cooperate, as they often do, in organized crime and racketeering investigations, in public corruption and major fraud cases, and in various other situations where federal and state criminal jurisdictions overlap. Because of such cooperation, government attorneys in complex grand jury investigations frequently find it necessary to enlist the help of a team of government agents. While the agents are usually federal personnel, it is not uncommon in certain types of investigations that federal prosecutors wish to obtain the assistance of state law enforcement personnel, which could be uniquely beneficial. The amendment permits disclosure to those personnel in the circumstances stated.

It must be emphasized that the disclosure permitted is limited. The disclosure under this subdivision is permissible only in connection with the attorney for the government's ''duty to enforce federal criminal law'' and only to those personnel ''deemed necessary . . . to assist'' in the performance of that duty. Under subdivision (e)(3)(B), the material disclosed may not be used for any other purpose, and the names of persons to whom disclosure is made must be promptly provided to the court.

Note to Subdivision (e)(3)(B). The amendment to subdivision (e)(3)(B) imposes upon the attorney for the government the responsibility to certify to the district court that he has advised those persons to whom disclosure was made under subdivision (e)(3)(A)(ii) of their obligation of secrecy under Rule 6. Especially with the amendment of subdivision (e)(3)(A)(ii) to include personnel of a state or subdivision of a state, who otherwise would likely be unaware of this obligation of secrecy, the giving of such advice is an important step in ensuring against inadvertent breach of grand jury secrecy. But because not all federal government personnel will otherwise know of this obligation, the giving of the advice and certification thereof is required as to *all* persons receiving disclosure under subdivision (e)(3)(A)(ii).

Note to Subdivision (e)(3)(C). It sometimes happens that during a federal grand jury investigation evidence will be developed tending to show a violation of state law. When this occurs, it is very frequently the case that this evidence cannot be communicated to the appropriate state officials for further investigation. For one thing, any state officials who might seek this information must show particularized need. *Illinois v. Abbott & Associates*, 103 S.Ct. 1356 (1983). For another, and more significant, it is often the case that the information relates to a state crime outside the context of any pending or even contemplated state judicial proceeding, so that the ''preliminarily to or in connection with a judicial proceeding'' requirement of subdivision (e)(3)(C)(i) cannot be met.

This inability lawfully to disclose evidence of a state criminal violation—evidence legitimately obtained by the grand jury—constitutes an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws. It would be removed by new subdivision (e)(3)(C)(iv), which would allow a court to permit dis-

closure to a state or local official for the purpose of enforcing state law when an attorney for the government so requests and makes the requisite showing.

The federal court has been given control over any disclosure which is authorized, for subdivision (e)(3)(C) presently states that ''the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.'' The Committee is advised that it will be the policy of the Department of Justice under this amendment to seek such disclosure only upon approval of the Assistant Attorney General in charge of the Criminal Division. There is no intention, by virtue of this amendment, to have federal grand juries act as an arm of the state.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

New subdivision (a)(2) gives express recognition to a practice now followed in some district courts, namely, that of designating alternate grand jurors at the time the grand jury is selected. (A person so designated does not attend court and is not paid the jury attendance fees and expenses authorized by 28 U.S.C. §1871 unless subsequently impanelled pursuant to Rule 6(g).) Because such designation may be a more efficient procedure than election of additional grand jurors later as need arises under subdivision (g), the amendment makes it clear that it is a permissible step in the grand jury selection process.

This amendment is not intended to work any change in subdivision (g). In particular, the fact that one or more alternate jurors either have or have not been previously designated does not limit the district court's discretion under subdivision (g) to decide whether, if a juror is excused temporarily or permanently, another person should replace him to assure the continuity of the grand jury and its ability to obtain a quorum in order to complete its business.

The amendments [subdivisions (c) and (f)] are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101–650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

COMMITTEE NOTES ON RULES—1999 AMENDMENT

Subdivision 6(d). As currently written, Rule 6(d) absolutely bars any person, other than the jurors themselves, from being present during the jury's deliberations and voting. Accordingly, interpreters are barred from attending the deliberations and voting by the grand jury, even though they may have been present during the taking of testimony. The amendment is intended to permit interpreters to assist persons who are speech or hearing impaired and are serving on a grand jury. Although the Committee believes that the need for secrecy of grand jury deliberations and voting is paramount, permitting interpreters to assist hearing and speech impaired jurors in the process seems a reasonable accommodation. *See also United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987) (constitutionally rooted prohibition of non-jurors being present during deliberations was not violated by interpreter for deaf petit jury member).

The subdivision has also been restyled and reorganized.

Subdivision 6(f). The amendment to Rule 6(f) is intended to avoid the problems associated with bringing the entire jury to the court for the purpose of returning an indictment. Although the practice is long-standing, in *Breese v. United States*, 226 U.S. 1 (1912), the Court rejected the argument that the requirement was rooted in the Constitution and observed that if there were ever any strong reasons for the requirement, ''they have disappeared, at least in part.'' 226 U.S. at 9. The Court added that grand jury's presence at the time the indictment was presented was a defect, if at all, in form only. *Id.* at 11. Given the problems of space, in some jurisdictions the grand jury sits in a building completely separated from the courtrooms. In those cases, moving the entire jury to the courtroom for the simple process of presenting the indictment may prove difficult and time consuming. Even where the jury is in the same location, having all of the jurors present can be unnecessarily cumbersome in light of the fact that filing of the indictment requires a certification as to how the jurors voted.

The amendment provides that the indictment must be presented either by the jurors themselves, as currently provided for in the rule, or by the foreperson or the deputy foreperson, acting on behalf of the jurors. In an appropriate case, the court might require all of the jurors to be present if it had inquiries about the indictment.

GAP Report—Rule 6. The Committee modified Rule 6(d) to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 6 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first change is in Rule 6(b)(1). The last sentence of current Rule 6(b)(1) provides that ''Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.'' That language has been deleted from the amended rule. The remainder of this subdivision rests on the assumption that formal proceedings have begun against a person, i.e., an indictment has been returned. The Committee believed that although the first sentence reflects current practice of a defendant being able to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. That is, a defendant will normally not know the composition of the grand jury or identity of the grand jurors before they are administered their oath. Thus, there is no opportunity to challenge them and have the court decide the issue before the oath is given.

In Rule 6(d)(1), the term ''court stenographer'' has been changed to ''court reporter.'' Similar changes have been made in Rule 6(e)(1) and (2).

Rule 6(e) continues to spell out the general rule of secrecy of grand-jury proceedings and the exceptions to that general rule. The last sentence in current Rule 6(e)(2), concerning contempt for violating Rule 6, now appears in Rule 6(e)(7). No change in substance is intended.

Rule 6(e)(3)(A)(ii) includes a new provision recognizing the sovereignty of Indian Tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law. Similar language has been added to Rule 6(e)(3)(D)(iii).

Rule 6(e)(3)(A)(iii) is a new provision that recognizes that disclosure may be made to a person under 18 U.S.C. §3322 (authorizing disclosures to an attorney for the government and banking regulators for enforcing civil forfeiture and civil banking laws). This reference was added to avoid the possibility of the amendments to Rule 6 superseding that particular statute.

Rule 6(e)(3)(C) consists of language located in current Rule 6(e)(3)(C)(iii). The Committee believed that this provision, which recognizes that prior court approval is not required for disclosure of a grand-jury matter to another grand jury, should be treated as a separate subdivision in revised Rule 6(e)(3). No change in practice is intended.

Rule 6(e)(3)(D) is new and reflects changes made to Rule 6 in the Uniting and Strengthening America by

Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The new provision permits an attorney for the government to disclose grand-jury matters involving foreign intelligence or counterintelligence to other Federal officials, in order to assist those officials in performing their duties. Under Rule 6(e)(3)(D)(i), the federal official receiving the information may only use the information as necessary and may be otherwise limited in making further disclosures. Any disclosures made under this provision must be reported under seal, within a reasonable time, to the court. The term ''foreign intelligence information'' is defined in Rule 6(e)(3)(D)(iii).

Rule 6(e)(3)(E)(iv) is a new provision that addresses disclosure of grand-jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§801–946. *See*, e.g., Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

In Rule 6(e)(3)(F)(ii), the Committee considered whether to amend the language relating to ''parties to the judicial proceeding'' and determined that in the context of the rule it is understood that the parties referred to are the parties in the same judicial proceeding identified in Rule 6(e)(3)(E)(i).

The Committee decided to leave in subdivision (e) the provision stating that a ''knowing violation of Rule 6'' may be punished by contempt notwithstanding that, due to its apparent application to the entirety of the Rule, the provision seemingly is misplaced in subdivision (e). Research shows that Congress added the provision in 1977 and that it was crafted solely to deal with violations of the secrecy prohibitions in subdivision (e). *See* S. Rep. No. 95–354, p. 8 (1977). Supporting this narrow construction, the Committee found no reported decision involving an application or attempted use of the contempt sanction to a violation other than of the disclosure restrictions in subdivision (e). On the other hand, the Supreme Court in dicta did indicate on one occasion its arguable understanding that the contempt sanction would be available also for a violation of Rule 6(d) relating to who may be present during the grand jury's deliberations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

In sum, it appears that the scope of the contempt sanction in Rule 6 is unsettled. Because the provision creates an offense, altering its scope may be beyond the authority bestowed by the Rules Enabling Act, 28 U.S.C. §§2071 et seq. *See* 28 U.S.C. §2072(b) (Rules must not ''abridge, enlarge, or modify any substantive right''). The Committee decided to leave the contempt provision in its present location in subdivision (e), because breaking it out into a separate subdivision could be construed to support the interpretation that the sanction may be applied to a knowing violation of any of the Rule's provisions rather than just those in subdivision (e). Whether or not that is a correct interpretation of the provision—a matter on which the Committee takes no position—must be determined by case law, or resolved by Congress.

Current Rule 6(g) has been divided into two new subdivisions, Rule 6(g), Discharge, and Rule 6(h), Excuse. The Committee added the phrase in Rule 6(g) ''except as otherwise provided by statute,'' to recognize the provisions of 18 U.S.C. §3331 relating to special grand juries.

Rule 6(i) is a new provision defining the term ''Indian Tribe,'' a term used only in this rule.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Subdivision (e)(3) and (7). This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458, Title VI, §6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change is intended.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

Subdivision (f). The amendment expressly allows a judge to take a grand jury return by video teleconference. Having the judge in the same courtroom remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding. But there are situations when no judge is present in the courthouse where the grand jury sits, and a judge would be required to travel long distances to take the return. Avoiding delay is also a factor, since the Speedy Trial Act, 18 U.S.C. §3161(b), requires that an indictment be returned within thirty days of the arrest of an individual to avoid dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment, the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. §3161(b), and preserves the judge's time and safety.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made in the amendment as published.

COMMITTEE NOTES ON RULES—2014 AMENDMENT

Rule 6(e)(3)(D). This technical and conforming amendment updates a citation affected by the editorial reclassification of chapter 15 of title 50, United States Code. The amendment replaces the citation to 50 U.S.C. §401a with a citation to 50 U.S.C. §3003. No substantive change is intended.

REFERENCES IN TEXT

The Uniform Code of Military Justice, referred to in subd. (e)(3)(E)(v), is classified to chapter 47 (§801 et seq.) of Title 10, Armed Forces.

25 U.S.C. §479a–1, referred to in subd. (i), was editorially reclassified as 25 U.S.C. 5131.

CODIFICATION

Another section 895 of Pub. L. 107–296 is classified to section 484a of Title 6, Domestic Security.

AMENDMENT BY PUBLIC LAW

2023—Subd. (e). Pub. L. 117–347, §323(a)(1)(A), repealed Pub. L. 107–296, §895. See 2002 Amendment note below.

2004—Subd. (e)(3)(A)(ii). Pub. L. 108–458, §6501(a)(1)(A), substituted '', state subdivision, Indian tribe, or foreign government'' for ''or state subdivision or of an Indian tribe''.

Subd. (e)(3)(D). Pub. L. 108–458, §6501(a)(1)(B)(i), inserted after first sentence ''An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.''

Subd. (e)(3)(D)(i). Pub. L. 108–458, §6501(a)(1)(B)(ii), struck out ''federal'' before ''official who'' in first sentence and inserted at end ''Any State, State subdivi-

sion, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue.''

Subd. (e)(3)(E)(iii). Pub. L. 108–458, §6501(a)(1)(C)(ii), added cl. (iii). Former cl. (iii) redesignated (iv).

Subd. (e)(3)(E)(iv). Pub. L. 108–458, §6501(a)(1)(C)(iii), substituted ''State, Indian tribal, or foreign'' for ''state or Indian tribal'' and ''Indian tribal, or foreign government official'' for ''or Indian tribal official''.

Pub. L. 108–458, §6501(a)(1)(C)(i), redesignated cl. (iii) as (iv). Former cl. (iv) redesignated (v).

Subd. (e)(3)(E)(v). Pub. L. 108–458, §6501(a)(1)(C)(i), redesignated cl. (iv) as (v).

Subd. (e)(7). Pub. L. 108–458, §6501(a)(2), inserted '', or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6,'' after ''violation of Rule 6''.

2002—Subd. (e). Pub. L. 107–296, §895, which directed certain amendments to subd. (e) and could not be executed because of the amendment by the Court by order dated Apr. 29, 2002, eff. Dec. 1, 2002, was repealed by Pub. L. 117–347, §323(a)(1)(A). Repeal to have no effect on amendment by Pub. L. 107–296, see Construction of 2023 Amendment note set out under section 2517 of this title. Section 895 of Pub. L. 107–296 provided:

''Rule 6(e) of the Federal Rules of Criminal Procedure is amended—

''(1) in paragraph (2), by inserting ', or of guidelines jointly issued by the Attorney General and Director of Central Intelligence pursuant to Rule 6,' after 'Rule 6'; and

''(2) in paragraph (3)—

''(A) in subparagraph (A)(ii), by inserting 'or of a foreign government' after '(including personnel of a state or subdivision of a state';

''(B) in subparagraph (C)(i)—

''(i) in subclause (I), by inserting before the semicolon the following: 'or, upon a request by an attorney for the government, when sought by a foreign court or prosecutor for use in an official criminal investigation';

''(ii) in subclause (IV)—

''(I) by inserting 'or foreign' after 'may disclose a violation of State';

''(II) by inserting 'or of a foreign government' after 'to an appropriate official of a State or subdivision of a State'; and

''(III) by striking 'or' at the end;

''(iii) by striking the period at the end of subclause (V) and inserting '; or'; and

''(iv) by adding at the end the following:

'''(VI) when matters involve a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat.'; and

''(C) in subparagraph (C)(iii)—

''(i) by striking 'Federal';

''(ii) by inserting 'or clause (i)(VI)' after 'clause (i)(V)'; and

''(iii) by adding at the end the following: 'Any state, local, or foreign official who receives information pursuant to clause (i)(VI) shall use that information only consistent with such guidelines as the Attorney General and Director of Central Intelligence shall jointly issue.'.''

2001—Subd. (e)(3)(C). Pub. L. 107–56, §203(a)(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: ''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;

''(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;

''(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

''(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

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.''

Subd. (e)(3)(D). Pub. L. 107–56, §203(a)(2), substituted ''subdivision (e)(3)(C)(i)(I)'' for ''subdivision (e)(3)(C)(i)''.

1984—Subd. (e)(3)(C)(iv). Pub. L. 98–473, eff. Nov. 1, 1987, added subcl. (iv), identical to subcl. (iv) which had been previously added by Order of the Supreme Court dated Apr. 29, 1985, eff. Aug. 1, 1985, thereby requiring no change in text.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub. L. 98–473, set out as an Effective Date note under section 3551 of this title.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment of this rule by order of the United States Supreme Court on Apr. 26, 1977, modified and approved by Pub. L. 95–78, effective Oct. 1, 1977, see section 4 of Pub. L. 95–78, set out as an Effective Date of Pub. L. 95–78 note under section 2074 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment of subd. (f) by the order of the United States Supreme Court of Apr. 26, 1976, effective Aug. 1, 1976, see section 1 of Pub. L. 94–349, July 8, 1976, 90 Stat. 822, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

Rule 7. The Indictment and the Information

(a) WHEN USED.

(1) *Felony*. An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

(2) *Misdemeanor*. An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).

(b) WAIVING INDICTMENT. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.

(c) NATURE AND CONTENTS.

(1) *In General*. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference