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JoEllen Lotvedi

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AVAILABILITY OF CIVIL REMEDIES UNDER THE GRAND JURY SECRECY RULE

JoEllen Lotvedt

The grand jury is an integral part of the American criminal justice system.1 Through the grand jury process, the government has extraordinary

1 J.D. candidate, May 1998, The Catholic University of America, Columbus School of Law.

1. See PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE 1-3 (3d ed. Supp. 1997). Under the Fifth Amendment to the United States Constitution, every person “held to answer for a capital, or otherwise infamous crime,” is granted the right to “a presentment or indictment of a Grand Jury.” U.S. CONST. amend. V. The requirement that a criminal indictment be initiated by a grand jury currently does not exist in the state court system. See Janice S. Peterson, Note, Federal Rule of Criminal Procedure 6(e): Criminal or Civil Contempt for Violations of Grand Jury Secrecy?, 12 W. NEW ENG. L. REV. 245, 254 (1990). Michigan was the first state to eliminate the grand jury procedure in 1859. See MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (1975); Peterson, supra, at 254. In 1884, the United States Supreme Court determined that the grand jury indictment process did not apply to the states. See Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that the Fifth Amendment right to a grand jury is not applicable to prosecutions by the state); see also Ford v. Seabold, 841 F.2d 677, 688 (6th Cir. 1988) (quoting Aldridge v. Marshall, 765 F.2d 63, 68 (6th Cir. 1985)).

There are two types of grand juries in the federal criminal justice system: the “regular” grand jury and the “special” grand jury. See DIAMOND, supra, § 2.01[A], at 2-3. A regular grand jury is impaneled pursuant to Federal Rule of Criminal Procedure 6(a); a special grand jury is impaneled pursuant to 18 U.S.C. §§ 3331-3332 (1994). See id. § 2.01[A][1]-[2], at 2-4 to 2-5.

Rule 6(a) provides that a federal district court “shall order one or more grand juries to be summoned at such time as the public interest requires.” FED. R. CRIM. P. 6(a). A federal court has almost complete discretion with regard to impaneling a grand jury. See DIAMOND, supra, § 2.01[A][1], at 2-4; see also In re A & H Transp., Inc., 319 F.2d 69, 71 (4th Cir. 1963) (underscoring the district court’s discretionary authority under Rule 6 to convene grand juries); O’Bryan v. Chandler, 249 F. Supp. 51, 55 (W.D. Okla. 1964) (stating that a federal district court creates the grand jury, which does not exist independently from the court), aff’d, 352 F.2d 987 (10th Cir. 1965). Federal courts are not limited in the number of grand juries they may impanel. See DIAMOND, supra, § 2.01[A][1], at 2-4. Rule 6 provides only that a court may impanel the number of grand juries as “the public interest requires.” FED. R. CRIM. P. 6(a); see also United States v. Brown, 36 F.R.D. 204, 205 (D.D.C. 1964) (noting that usually the local United States Attorney and the district court consult to determine the number of grand juries needed). The regular grand jury is impaneled for 18 months, which may be extended six months “upon a determination that such extension is in the public interest.” FED. R. CRIM. P. 6(g).

In 1970, Congress created the special grand jury for use in investigating organized crime. See DIAMOND, supra, § 2.01[A][2], at 2-5 (citing 18 U.S.C. §§ 3331-3332 (1994)). At least once every 18 months, each district court sitting in a district with a population of more than 4 million must impanel a grand jury. See id. (citing 18 U.S.C. § 3331(a) (1994)).
power to investigate criminal activities. Federal prosecutors are, however, prohibited from abusing this power or exceeding the authority granted to them under the United States Constitution. A United States Attorney—more than any other public officer in the federal criminal justice system—pursues two substantive ends: the administration of justice and the protection of society. A constant challenge for the legal system is to develop safeguards so that the zealous pursuit of these objectives does not itself become a miscarriage of justice.

The grand jury originated in England as a mechanism to serve the crown. The American grand jury acts as an investigatory body, serving as an investigative arm of the federal government. An Attorney General also can request a grand jury at any time. See id. at 2-6; see also Korman v. United States, 486 F.2d 926, 933 (7th Cir. 1973) (holding that a district court’s decision to extend the term of the special grand jury is unreviewable absent serious abuse of discretion by the court).

Both regular and special grand juries are comprised of 16 to 23 “legally qualified persons” that are summoned by judicial order of the district court. FED. R. CRIM. P. 6(a). Although no specific quorum requirement exists, courts have interpreted Rule 6 to require 16 individuals to be present, 12 of whom must concur in an indictment. See DIAMOND, supra, § 2.02, at 2-9.

2. See DIAMOND, supra note 1, at 1-3 (elaborating upon the grand jury’s immense investigative power by noting that the invocation of privileges rarely interferes with a grand jury inquiry because uncooperative witnesses may be imprisoned to compel their testimony or severely penalized for perjury); 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.2, at 608 (1984) (reasoning that, in practical effect, the prosecutor exercises the grand jury’s broad investigatory powers).

3. See Berger v. United States, 295 U.S. 78, 88 (1935) (explaining that a federal prosecutor has a “duty to refrain from improper methods calculated to produce a wrongful conviction” as well as “to use every legitimate means to bring about a just one”)), overruled on other grounds by Stirone v. United States, 361 U.S. 212 (1960).

4. See id. at 88 (noting that a United States Attorney must simultaneously assure that guilt does not go unpunished and that the innocent do not suffer); cf. BENNET L. GERSHMAN, PROSECUTORIAL MISCONDUCT vii (release No. 11, Sept. 1996).

5. See GERSHMAN, supra note 4, § 6.1, at 6-2 (stating that a prosecutor has a duty “to do justice,” but must refrain from preventing a fair trial or manipulating the media for personal gain).

6. See DIAMOND, supra note 1, § 1.01, at 1-4. Specifically, the Assize of Clarendon, an early grand jury, was created in twelfth century England as an “investigative arm” of the king. See Marvin G. Pickholz & Joyce Merrick Pickholz, Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards, 36 WASH. & LEE L. REV. 1027, 1029 (1979); see also FRANKEL & NAFTALIS, supra note 1, at 6.

7. See Pickholz & Pickholz, supra note 6, at 1029 (noting that the Assize “served by leave of the Crown”); Peterson, supra note 1, at 245; cf. DIAMOND, supra note 1, § 1.01, at 104 (stating that the grand jury was originally created not to protect the public but to protect the power and authority of the king).

8. See Peterson, supra note 1, at 245. The English county sheriffs holding office in Colonial America conducted “grande inquests” to investigate criminal activities. See Lewis Poindexter Watts, Jr., Grand Jury: Sleeping Watchdog or Expensive Antique?, 37
two important, albeit competing, functions. The grand jury advances the prosecutorial needs of the government by assisting the government in its investigation of individuals suspected of engaging in criminal activities. At the same time, the grand jury protects the private interests of these suspected individuals or targets by sheltering them from governmental pressure and adverse publicity whether they testify before, or are investigated by, the grand jury.

N.C. L. REV. 290, 293 (1959). These inquests invoked a presumption of guilt against the target, thereby substantially reducing the chances of acquittal. See DIAMOND, supra note 1, § 1.01, at 1-4 (stating that grand jurors were severely fined for refusing to accuse a "known" criminal; thus, an accusation by a grand jury was the equivalent of a finding of guilt); Peterson, supra note 1, at 251 (noting that such inquests were tantamount to a presumption of guilt). The effect of this process was the crown's increased power over English society. See id.

9. See Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972) (explaining that grand juries simultaneously determine whether sufficient evidence exists to indict while protecting the accused from unsubstantiated criminal charges); see also United States v. Roth, 777 F.2d 1200, 1202 (7th Cir. 1985) (stating that the grand jury is both an investigative mechanism of the government and a protector of an individual's liberty interest); Peterson, supra note 1, at 245 (same).

10. See 1 LAFAVE & ISRAEL, supra note 2, § 8.1, at 599-600 (noting that the grand jury's investigatory powers assist the government in discovering new evidence vital to securing "convictions that might otherwise not be obtained").

11. This Note uses "targets," "targeted individuals," and "accused" to describe persons under investigation by a federal grand jury but not yet indicted. See In re Grand Jury Investigation (90-3-2), 748 F. Supp. 1188, 1195 n.9 (E.D. Mich. 1990) (defining a grand jury target as someone about whom the prosecutor or the grand jury possesses substantial evidence linking the suspect to a crime).

12. See Wood v. Georgia, 370 U.S. 375, 390 (1962) (explaining that the grand jury protects the target against unsubstantiated prosecution by determining whether a charge is supported by reasonable evidence); Hurtado v. California, 110 U.S. 516, 554-55 (1884) (Harlan, J., dissenting) (stating that grand juries provide protection against both governmental oppression and persons who attempt to use the process as a vehicle to satisfy personal vendettas); In re Jordan, 439 F. Supp. 199, 202 (S.D. W. Va. 1977) (stating that grand jury secrecy protects the target prior to a criminal charge).

The Centennial Olympic Park bombing in July 1996 and the subsequent media blitz focusing on Richard Jewell highlight the type of harm an individual can suffer as a consequence of government error and misconduct. See Kevin Sack, U.S. Says F.B.I. Erred in Using Deception in Olympic Bomb Inquiry, N.Y. TIMES, Apr. 9, 1997, at A17 (stating that although the Department of Justice found "no intentional violation of Mr. Jewell's civil rights and no criminal misconduct," it did conclude that agents of the Federal Bureau of Investigation (FBI) made "a major error in judgment" when interviewing Jewell without reading him Miranda warnings during the Olympic Park bombing investigation); see also L. Lin Wood, The Case of David v. Goliath: Jewell v. NBC and the Basics of Defamation in Georgia, 7 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 673, 691, 693 (1997) (quoting Tom Brokaw of NBC News who stated that information concerning the FBI's focus on Jewell was "coming to [NBC] from everywhere, Washington, Atlanta . . . . They are only using one name tonight, and that is Richard Jewell"). Jewell "was not considered a target of the bombing investigation[;] . . . was never arrested; [and] he was never charged with any crime." Wood, supra, at 691. Nevertheless, the FBI overzealously investigated
Secrecy in grand jury proceedings is a critical component of the investigatory process.  

Grand jury secrecy originally developed to facilitate the government’s criminal investigation and to protect the liberty interests of the grand jury target. The secrecy component facilitates the

Jewell and utilized the media to attempt to pressure him into a guilty plea. Cf. id. at 692-93 (quoting Brokaw who stated publicly that the government leaked information concerning Jewell to the news media in order to “sweat [the] guy” by pressuring him publicly to force a confession or guilty plea). The government leaks led to defamatory statements by Brokaw, who announced “that the FBI is close to making the case, in their language. They probably have enough to arrest him right now, probably enough to prosecute him, but you always want to have enough to convict him as well.” Id. These statements “unquestionably injured [Jewell’s] reputation, expos[ing] him to public hatred, contempt, and ridicule, and imputed to him a crime [terrorism] punishable by death.” Id. at 694.

13. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979) (explaining that secrecy is required for the grand jury to function properly); see also id. at 219 (noting that grand jury secrecy encourages potential witnesses to appear voluntarily and testify fully and prevents the targets of investigations from fleeing); United States v. Proc- ter & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (quoting the rationales for grand jury secrecy set forth in United States v. Rose, 215 F.2d 617, 628-29 (3rd Cir. 1954)); Lance v. United States Dept’ of Justice, 610 F.2d 202, 213 (5th Cir. 1980) (stating that the grand jury secrecy rule encourages the uninhibited investigation of suspected crimes).

14. Cf. In re Russo, 53 F.R.D. 564, 568-69 (C.D. Cal. 1971) (explaining that secrecy evolved from a desire to insulate the grand jurors from royal pressures, to protect the target from royal tyranny, and to guard society against an oppressive government).

Secrecy and independence became an important part of British grand jury proceedings after the 1681 trial of the Earl of Shaftesbury. See Peterson, supra note 1, at 252-53; Pickholz & Pickholz, supra note 6, at 1029-30. During the grand jury's investigation of treason charges against the Earl, it prohibited the royal prosecution's presence during witness testimony. See id. at 1029; see also LEROY D. CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER 9-12 (1975) (discussing the investigation of the Earl of Shaftesbury); Peterson, supra note 1, at 252. The grand jury then refused to indict the Earl, effectively asserting its independence from the royal power. See id.; Mike E. Stevenson, Comment, Federal Grand Jury Secrecy, 5 GONZ. L. REV. 255, 256 (1979) (indicating that the grand jury’s actions while investigating the Earl significantly strengthened its future independence from the crown). The key component establishing the grand jury’s new independence was its rule of secrecy. See Peterson, supra note 1, at 252-53.

The British colonists imported the grand jury investigatory process, with the elements of secrecy and independence, to America. See 1 LAFAVE & ISRAEL, supra note 2, § 8.2(b), at 603 (indicating that the colonists adopted the grand jury into their criminal justice process); see also Costello v. United States, 350 U.S. 359, 362 (1956) (asserting that by incorporating the right to a grand jury into the United States Constitution, the drafters intended that it operate similar to its English counterpart). Although the grand jury remains entrenched in the United States' justice system, England abolished the grand jury in 1933. See FRANKEL & NAFTALIS, supra note 1, at 16; William J. Knudsen, Jr., Pretrial Disclosure of Federal Grand Jury Testimony, 48 WASH. L. REV. 423, 423 n.3 (1973), reprinted in 60 F.R.D. 237, 237 n.3 (1974).

America's colonial experience under British rule heightened its distrust of a centralized government. See Peterson, supra note 1, at 253 (explaining that British colonists imported to America their fear of royal repression). This distrust, under British rule, acted to solidify the concept of grand jury secrecy in American criminal procedure. Cf. id. Through
grand jury's ability to act simultaneously as a "sword" and as a "shield." As a "sword," grand jury secrecy aids the government in uncovering new evidence, enabling the prosecution to obtain convictions that otherwise might have been difficult to secure. As a "shield," grand jury secrecy protects the accused from unsubstantiated governmental prosecution, and protects witnesses and grand jurors from governmental pressure and oppression.

The modern grand jury was memorialized in the Fifth Amendment of the United States Constitution. In providing an accused the right to a grand jury, the founding fathers implicitly acknowledged that secrecy was a necessary component of that right. Maintaining secrecy decreases the possibility that a suspect may escape, destroy evidence, or harass adverse witnesses. Secrecy also protects the anonymity of the secret proceedings, the colonial grand jury protected itself against governmental encroachment on its independence and authority. Cf. id. Armed with powers of secrecy and independence, American colonial grand juries also protected the target of the investigation from governmental oppression. See id.; see also 1 LAFAVE & ISRAEL, supra note 2, § 8.2(b), at 603-04 (documenting a colonial grand jury's multiple refusals to grant an indictment against a citizen who was being harassed by royal officials).

15. See 1 LAFAVE & ISRAEL, supra note 2, § 8.1, at 599 (stating that the grand jury is "commonly called ‘the shield and the sword’ of the criminal justice process"); In re Special Grand Jury January, 1969, 315 F. Supp. 662, 671 (D. Md. 1970) (stating the grand jury acts as "both a sword and a shield"); Cf. United States v. Johnson, 319 U.S. 503, 513 (1943) (noting that the tradition of secrecy is important for the “protection of the innocent” as well as for the “pursuit of the guilty”).

16. See United States v. Smyth, 104 F. Supp. 283, 304 (N.D. Cal. 1952) (stating that the secrecy rule helps the government prosecute criminals); cf. 1 LAFAVE & ISRAEL, supra note 2, § 8.3, at 609-10 (noting that grand jury proceedings offer several distinct advantages in investigating crime, including securing the cooperation of victims who are reluctant to come forward).

17. See Smyth, 104 F. Supp. at 304 (stating that secrecy protects grand jurors from "embarrassment, pressure, threats, and reprisals"); cf. 1 LAFAVE & ISRAEL, supra note 2, § 8.1, at 599 (discussing the grand jury’s role in protecting citizens from "oppressive and unfounded government prosecution").

18. See U.S. CONST. amend. V; United States v. Sells Eng’g, Inc., 463 U.S. 418, 423 (1983) (reasoning that the grand jury is so vital to criminal law and justice that it was embodied in the United States Constitution); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959) (same); Costello v. United States, 350 U.S. 359, 362 (1956) (stating that early American colonists imported the grand jury procedure into this country and memorialized it in the Constitution).

19. See Costello, 350 U.S. at 362 (noting that, in both England and the United States, the grand jury long had acted in secret); see also Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 n.9 (1979) (noting that secrecy is considered essential to the grand jury’s operation); 1 LAFAVE & ISRAEL, supra, note 2, § 8.3, at 609 (noting that secrecy is among the five principal components of the grand jury process).

20. See Douglas Oil, 441 U.S. at 219 & n.10 (explaining that secrecy is necessary to prevent publicity of matters prompting targets to escape, tamper with evidence, or influence witnesses); Pittsburgh Plate Glass, 360 U.S. at 405 (same); United States v. Procter &
witness pool and encourages witnesses to appear before the grand jury to speak without fear of public exposure. In addition, secrecy protects grand jurors from injury caused by disclosure of grand jury discussions. Moreover, it prevents the premature disclosure of grand jury information that could prejudice the public against a target and interfere with a defendant's right to a fair trial. Finally, grand jury secrecy prevents the release of derogatory information about an unindicted individual.

In 1946, Congress codified the grand jury secrecy rule in Rule 6(e) of the Federal Rules of Criminal Procedure. Rule 6(e) maintained the

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21. See Douglas Oil, 441 U.S. at 219 (stating that grand jury witnesses would be dissuaded from testifying "fully and frankly" if preindictment proceedings were not conducted in secret because of the risk of retaliation or inducement); Pittsburgh Plate Glass, 360 U.S. at 405 (explaining that secrecy encourages grand jury witnesses to testify freely without fear of harmful consequences); Providence Tribune, 241 F. at 526 (same); see also Richard M. Calkins, Grand Jury Secrecy, 63 MICH. L. REV. 455, 459 (1965) (stating that "[s]ecrecy is the state's inducement for obtaining evidence" because it encourages witnesses to come forth and disclose information).

22. See Douglas Oil, 441 U.S. at 219 n.10 (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)) (stating that secrecy encourages grand jurors to conduct their investigation freely without fear of retaliation); Pittsburgh Plate Glass, 360 U.S. at 405 (explaining that secrecy allows grand jurors to conduct investigations without fear that their deliberations will be disclosed); see also Peterson, supra note 1, at 255 (stating that publicizing grand jury proceedings is prohibited to protect against future injury arising from the public's receipt of this information).

23. See Providence Tribune, 241 F. at 526 (stating that premature disclosure of grand jury information may turn the public's mind against a target and, consequently, prevent a fair trial); In re United Elec., Radio & Mach. Workers, 111 F. Supp. 858, 866 (S.D.N.Y. 1953) (noting that secrecy during grand jury proceedings lessens the risk of prejudice at trial); Knudsen, supra note 14, at 241-42 (noting that grand jury secrecy protects the rights of the accused). Once the grand jury issues an indictment, however, the secrecy requirement no longer exists "as a safeguard for the accused." United States v. Smyth, 104 F. Supp. 283, 304 n.92 (N.D. Cal. 1952).

24. See Douglas Oil, 441 U.S. at 219 & n.10 (explaining that grand jury secrecy is required to protect the reputations of the innocent by preventing public condemnation of persons who are wrongly accused); Pittsburgh Plate Glass, 360 U.S. at 405 (noting that grand jury secrecy protects an unindicted person from disclosure of negative information); United States v. Coughlan, 842 F.2d 737, 739 (4th Cir. 1988) (asserting that the grand jury secrecy rule prevents unindicted targets from damaging publicity); Lance v. United States Dept'of Justice, 610 F.2d 202, 213 (5th Cir. 1980) (stating that the secrecy rule prevents harm to the reputations of unindicted targets); Providence Tribune, 241 F. at 526 (stating that secrecy in grand jury proceedings shields innocent individuals from possible harm to their reputations).

25. The present version of Rule 6(e) states in relevant part:

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or
common law requirement that grand jury proceedings remain secret.\textsuperscript{26} As originally enacted, Rule 6(e) did not contain a statutory remedy for violations of the grand jury secrecy rule.\textsuperscript{27} However, federal district courts, invoking their inherent\textsuperscript{28} and statutory\textsuperscript{29} powers, regularly used any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter’s notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

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

\textit{FED. R. CRIM. P. 6(e)(1)-(2).}

The Supreme Court upheld the need for secrecy in grand jury proceedings even prior to the codification of Rule 6(e). \textit{See United States v. Johnson, 319 U.S. 503, 513 (1943).} In \textit{Johnson,} the Court concluded that the grand jury requirement is an integral part of the Constitution, and that compromising the secrecy of the grand jury proceedings would interfere with its ability to function properly. \textit{See id.}

\textsuperscript{26} \textit{See Blalock v. United States, 844 F.2d 1546, 1556 (11th Cir. 1988) (Tjoflat & Roettger, JJ., specially concurring) (stating that Congress preserved the common law grand jury secrecy rule when it enacted Rule 6(e)); George H. Desson, The New Federal Rules of Criminal Procedure: II, 56 YALE L.J. 197, 203 (1947) (noting that Federal Rule of Criminal Procedure 6(e) basically codified the traditional policy of grand jury secrecy).}

\textsuperscript{27} \textit{See Peterson, supra note 1, at 260. The text of the original Federal Rule of Criminal Procedure 6(e) provided:}

\begin{quote}
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. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the 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. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.
\end{quote}


\textsuperscript{28} \textit{See United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993) (recognizing that a federal district court inherently possesses the power to “impose order, respect, decorum, silence, and compliance with lawful mandates”); Richard B. Kuhns, \textit{Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury,} 73 MICH. L. REV. 484, 496 (1975) (noting that the judiciary has the inherent authority to compel compliance with court orders and the power to guard against disorder in the courtroom). \textit{But cf.} LaGrange v. State, 153 N.E.2d 593, 595 (Ind. 1958) (noting that the legislature may regulate the Indiana court’s inherent supervisory powers).}

\textsuperscript{29} \textit{See 18 U.S.C. § 401 (1994) (providing federal courts with the power to punish}
contempt to sanction violations of Rule 6(e). Congress subsequently added an express contempt remedy to Rule 6(e), providing that "[a] knowing violation of Rule 6 may be punished as a contempt of court." Courts have struggled to determine the scope of Rule 6(e)’s contempt remedy. Several federal circuit courts have implicitly or explicitly addressed the issue of whether the contempt remedy includes civil and criminal contempt sanctions and equitable relief, as well as whether a private right of action is contemplated to pursue such relief. Courts

contempt for official misconduct). Section 401 provides federal courts with the statutory authority to impose contempt sanctions for obstruction of justice, misbehavior of officers of the court or disobedience of a lawful order or decree. See id.

30. See infra note 74 (discussing the scope and role of the court’s contempt powers in the judicial process).

31. See Peterson, supra note 1, at 281 (noting that prior to 1977, courts generally viewed contempt as the proper remedy for Rule 6(e) violations).

32. FED. R. CRIM. P. 6(e)(2); see also supra note 25 and accompanying text (quoting the current grand jury secrecy rule).

33. See infra Part I.B. At least one district court has held that the contempt remedy under Rule 6(e) contemplates only criminal contempt sanctions. See In re Grand Jury Investigation (90-3-2), 748 F. Supp. 1188, 1202 (E.D. Mich. 1990) (holding that Rule 6(e) authorizes only criminal contempt sanctions, not civil contempt sanctions, equitable relief, or a private right of action for such relief). In addition, three federal circuit judges, writing separately, have argued that Rule 6(e) excludes any form of a civil remedy. See Barry v. United States, 865 F.2d 1317, 1326 (D.C. Cir. 1989) (Sentelle, J., dissenting) (arguing that the Rule 6(e) contempt remedy is criminal, not civil); Blalock v. United States, 844 F.2d 1546, 1552-53 (11th Cir. 1988) (Tjoflat & Roettger, JJ., specially concurring) (arguing that neither civil contempt sanctions, equitable relief, nor a private right of action for such relief is available under Rule 6(e)).

Yet other courts have held that Rule 6(e) allows criminal and civil contempt sanctions, including equitable relief, but does not contemplate a private cause of action for such relief. See Finn v. Schiller, 72 F.3d 1182, 1188 (4th Cir. 1996). Other courts have held that Rule 6(e) contemplates both criminal and civil sanctions, equitable relief, and a private right of action for such relief enforceable by civil contempt. See Barry, 865 F.2d at 1321-22; Blalock, 844 F.2d at 1551.

34. See, e.g., Finn, 72 F.3d at 1188 (holding that Rule 6(e) allows for civil and criminal contempt remedies and equitable relief, but does not provide a private right of action); Barry, 865 F.2d at 1321-22 (interpreting Rule 6(e) to include criminal and civil contempt sanctions, as well as a private right of action); Blalock, 844 F.2d at 1551 (same); Lance v. United States Dep’t of Justice, 610 F.2d 202, 220 (5th Cir. 1980) (contemplating civil and criminal contempt sanctions, as well as injunctive relief for violations of Rule 6(e)).

Injunctive relief is a form of equitable relief, but equitable relief is broader, consisting not only of injunctions, but of specific performance, rescission, and declaratory judgments. See 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.1(2), at 59-61 (2d ed. 1993) [hereinafter DOBBS, LAW OF REMEDIES]. Equitable relief also encompasses “sanctions,” which are defined as “mechanisms of enforcement used to provide incentives for obedience with the law or with rules and regulations.” BLACK’S LAW DICTIONARY 1341 (6th ed. 1990); cf. Finn, 72 F.3d at 1191 (concluding that civil and criminal contempt sanctions may be necessary to remedy a Rule 6(e) violation, and that “sanctions” in the form of injunctive relief also may be required to prevent further wrongful disclosures). Courts have used “sanctions” and injunctive relief
generally recognize that the contempt remedy under the Rule contemplates criminal contempt to punish past violations and civil contempt to compel future compliance.\textsuperscript{35} Two circuits have ruled that upon a prima

ther wrongful disclosures). Courts have used “sanctions” and injunctive relief interchangeably. See \textit{Barry}, 865 F.2d at 1324 & n.7 (stating that “civil contempt sanction[s] may include appropriate equitable relief”); \textit{see also infra} note 74 (discussing the nature and scope of contempt sanctions).

Equitable relief in the form of an injunction is defined as “an \textit{in personam} order, directing the defendant to act, or to refrain from acting in a specified way.” Dan B. Dobbs, \textit{Handbook on the Law of Remedies: Damages-Equity-Restitution} § 2.10, at 105 (1973) [hereinafter Dobbs, \textit{Handbook on Remedies}]. An injunction is enforceable through the use of the court’s contempt power. See 1 Dobbs, \textit{Law of Remedies}, \textit{supra}, § 1.1, at 7; \textit{see also supra} notes 28-29 (discussing the inherent and statutory bases for the court’s contempt powers); \textit{infra} note 72 (discussing the nature and scope of the court’s contempt powers). There are several different classifications of injunctions. See 1 Dobbs, \textit{Law of Remedies}, \textit{supra}, § 2.9(1), at 224-26. Injunctions can be classified as prohibitory (forbidding a defendant to act in a certain way) or mandatory (commanding a defendant to act in a certain way). See \textit{id.} § 2.9(a), at 224. Injunctions may also be classified as “reparative” and “preventive.” \textit{Id.} § 2.9(1), at 225. A court issues a reparative injunction to safeguard a plaintiff’s right. See \textit{id.} Preventive injunctions are ordered to block future violations of a right. See \textit{id.} A court can use many kinds of injunctions “to prevent \{a\} violation of rights or to restore the plaintiff to rights that have already been violated.” \textit{Id.} § 2.9(2), at 227. Because injunctive relief is not limited “to any particular kind of case or constellation of facts,” such relief provides courts with a powerful mechanism to do equity in a broad range of circumstances. \textit{Id.}

The grant or denial of injunctive relief is within the court’s discretion. See Dobbs, \textit{Handbook on Remedies}, \textit{supra}, § 2.10, at 110-11. A court may deny an injunction if a plaintiff does not establish an underlying right. See 1 Dobbs, \textit{Law of Remedies}, \textit{supra}, § 2.9(2), at 227. In addition, unless there is some threat that the right will be violated in the future, the court need not enjoin the previously violative behavior. See \textit{id.} § 2.4(7), at 120. Furthermore, if a legal remedy adequately redresses the harm, a court may deny a request for injunctive relief. See Dobbs, \textit{Handbook on Remedies}, \textit{supra}, § 3.6, at 57; \textit{id.} § 2.10, at 108. In other words, under the adequacy test, the court must determine whether the plaintiff would suffer irreparable harm without injunctive relief or whether further harm to the plaintiff is otherwise likely. See 1 Dobbs, \textit{Law of Remedies}, \textit{supra}, § 2.9(2), at 228. In addition to the adequacy or irreparable harm test, the court may consider “the equities, or hardships or practicalities” of granting the injunctive relief. \textit{Id.} If the result weighs in favor of the plaintiff, the court may grant the injunctive remedy, but if it does not, the court may deny injunctive relief. See Dobbs, \textit{Handbook on Remedies}, \textit{supra}, § 2.10, at 108; \textit{see also} 1 Dobbs, \textit{Law of Remedies}, \textit{supra}, § 2.9(2), at 228-30 (discussing additional bases for granting or denying injunctive relief).

A court may invoke the injunctive remedy under its equitable powers or a statute may expressly or impliedly provide for such a remedy. See 1 Dobbs, \textit{Law of Remedies}, \textit{supra}, § 2.10, at 243. If the statute expressly authorizes injunctive relief, courts generally do not apply the adequacy test, irreparable harm rule, or balance the equities or hardships. See \textit{id.} § 2.10, at 243-44. However, if the statute can be construed to authorize an injunction, but does not explicitly provide for such a remedy, the traditional tests governing whether the court should grant injunctive relief can be applied. See \textit{id.} § 2.10, at 246-47.

35. \textit{See Finn}, 72 F.3d at 1188; \textit{Barry}, 865 F.2d at 1323-24. \textit{But see In re Grand Jury Investigation} (90-3-2), 748 F. Supp. at 1202-03 (stating that the grand jury secrecy rule authorizes criminal contempt sanctions for secrecy violations, but not civil contempt sanctions or injunctive relief).
facie showing of a Rule 6(e) violation, a grand jury target has the right to an evidentiary hearing to establish appropriate relief for the violation. 36 Two circuit courts have held that a target has a private right of action 37 to seek injunctive relief and contempt sanctions, but that civil contempt standing alone does not form an independent basis for that action; instead, courts use civil contempt sanctions to insure compliance with equitable orders issued in response to a Rule 6(e) violation. 38

The United States Court of Appeals for the Fourth Circuit in Finn v. Schiller 39 most recently addressed the scope of the contempt remedy under Rule 6(e). In Finn, the target of a grand jury investigation filed a private civil action seeking injunctive relief against a prosecutor for alleged violations of Rule 6(e). 40 The Fourth Circuit ruled that a target has the right to notify the court of alleged Rule 6(e) violations, and that a court has an affirmative duty to investigate charges once a prima facie showing of a violation is made. In addition, the court has a duty to provide the relief necessary to prevent future violations (injunctive relief and/or civil contempt) and/or to punish past violations (criminal contempt). 41 Contrary to prior federal circuit court rulings, however, the Fourth Circuit concluded that a target did not have a private right of action to pursue such relief against an alleged violator under the Rule. 42

36. See United States v. Eisenberg, 711 F.2d 959, 964 (11th Cir. 1983) (stating that if the petitioner establishes a prima facie showing of a Rule 6(e) violation, a court is required to “take steps to stop” further violations following an evidentiary hearing); Lance v. United States Dep't of Justice, 610 F.2d 202, 213, 220-21 (5th Cir. 1980) (indicating that once the petitioner establishes a prima facie case of a Rule 6(e) violation, the court must grant a hearing to determine whether contempt sanctions are necessary).

37. See Barry, 865 F.2d at 1321-22; Blalock, 844 F.2d at 1551. A private right of action is defined as a right to bring suit for “remedy and relief through judicial procedure.” BLACK'S LAW DICTIONARY, supra note 34, at 1325.

38. See Barry, 865 F.2d at 1321-22; Blalock, 844 F.2d at 1551.
39. 72 F.3d 1182 (4th Cir. 1996).
40. See id. at 1185.
41. See id. at 1188.
42. See id. at 1187; see also infra Part II (discussing the Fourth Circuit’s analysis of the scope of relief available under Rule 6(e)). The Fourth Circuit in Finn indicated that such relief may be in the form of civil contempt sanctions or remedial injunctions to stop further violations of the Rule, or in the form of criminal contempt sanctions to punish prior wrongful behavior. See Finn, 72 F.3d at 1188. Contempt sanctions usually take the form of fines or imprisonment to coerce or punish a contemnor for violating a court order or decree or for violating a rule or statute. See infra note 72 and accompanying text (discussing the scope and nature of civil and criminal contempt sanctions, as well as the purposes for which such sanctions are imposed). Furthermore, civil contempt sanctions may encompass equitable relief such as injunctions or other coercive remedies. See Barry, 865 F.2d at 1324 n.7. Injunctive relief is an actual order by the court directing a person to do or refrain from doing a particular act, or to prohibit him from ever doing a particular act again. See supra note 34 and accompanying text (discussing the nature and scope of equi-
This Note will examine the availability of civil remedies, including a private cause of action for equitable relief, to individuals harmed by violations of grand jury secrecy as codified in Rule 6(e). This Note first examines the legislative history of Rule 6(e), discussing the nature and scope of the contempt remedy available under the Rule. This Note next focuses on the parameters of the Rule 6(e) remedy as established by the federal circuit courts in Lance, Eisenberg, Blalock, and Barry. This Note then explores the impact of the Finn decision on the scope of the Rule 6(e) contempt remedy. This Note recognizes that the alternative remedial procedure outlined by the Finn court arguably provides a viable means of pursuing relief against Rule 6(e) violators. This Note argues, however, that broadly construing Rule 6(e) to create a private cause of action for equitable relief allows a grand jury target greater choice in pursuing relief and gives federal courts more flexibility in fashioning remedies consistent with the courts’ inherent supervisory powers and with the philosophy and history underlying the grand jury secrecy rule. This Note concludes that Congress intended to provide a private right of action to seek injunctive relief and contempt sanctions under the Rule, and a grand jury target should not be deprived of that right. Indeed, in the absence of such a right, a grand jury target is limited in his ability to obtain judicial review of prosecutorial misconduct.

I. THE LEGISLATIVE AND JUDICIAL FRAMEWORK OF THE GRAND JURY SECRECY RULE

A. Federal Rule of Criminal Procedure 6(e): Codification of the Common Law Rule of Grand Jury Secrecy

Congress codified the grand jury secrecy rule in Rule 6(e) of the Federal Rules of Criminal Procedure in 1946 to ensure the continued exist-
tence of the common law guarantee of grand jury secrecy.\textsuperscript{45} Codification of the common law rule formalized the prohibition against the improper use of grand jury materials,\textsuperscript{46} but limited the scope of the secrecy protection by providing for limited disclosure of grand jury materials and upholding the secrecy obligation only when the procedures employed complied with the Rule's provisions.\textsuperscript{47} In the 1970s, courts became concerned with the 1946 version of Rule 6(e), stating that it was lacking in two respects.\textsuperscript{48} First, the Rule prohibited non-attorneys who were assisting the government in its criminal investigation from accessing grand jury materials.\textsuperscript{49} Second, it failed to articulate a remedy for violations of grand jury secrecy.\textsuperscript{50} Despite Rule 6(e)'s limit on non-attorney access to grand jury

Committee in 1941 to draft the original Federal Rules of Criminal Procedure. See George H. Dession, The New Federal Rules of Criminal Procedure: 1, 55 YALE L.J. 694, 695 (1946). The Supreme Court approved the draft rules in 1944 and submitted them to Congress. See id. at 696. The rules were published in 1946. See id. at 697.

45. See Blalock v. United States, 844 F.2d 1546, 1555 (11th Cir. 1988) (quoting Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.9 (1979)) (indicating that grand jury secrecy was mandatory under the federal common law and is an important component of America's system of criminal justice).

46. See Peterson, supra note 1, at 260 (explaining that the 1946 version incorporated the common law secrecy rule).

47. See FED. R. CRIM. P. 6(e), 327 U.S. 821, 837-38 (1946); see also Peterson, supra note 1, at 260 (noting that Rule 6(e) provided for limited disclosure and that the secrecy obligation could be invoked only pursuant to the Rule).

48. See Peterson, supra note 1, at 260 (discussing the deficiencies of the original Rule 6(e)); see also infra note 52 (discussing several cases which outline the problematic nature of the 1946 version of Rule 6(e)).

49. See Peterson, supra note 1, at 260. The original Rule restricted grand jury materials to government attorneys "for use in the performance of their duties." FED. R. CRIM. P. 6(e), 327 U.S. 821, 837 (1946) (amended 1977). Despite this prohibition, non-attorneys (for example, specialists and experts) continued to access secret grand jury materials. See United States v. Sells Eng'g, Inc., 463 U.S. 418, 436 (1983) (stating that disclosure of grand jury materials to non-attorneys was common under the original form of Rule 6(e)).

50. See Peterson, supra note 1, at 260; see also supra note 27 (providing the text of the original Rule 6(e) which did not provide for a remedy). In the absence of a statutory penalty, federal courts invoked their inherent powers to enforce Rule 6(e) secrecy obligations. See Peterson, supra note 1, at 281.

Instead of acting as a "shield" to protect targets from unlawful disclosures of grand jury materials, the 1946 version acted more like a "sword," often insulating the actions of government attorneys from judicial scrutiny. See id. Early cases indicate, however, that federal courts were sensitive to the "shield" aspect of the common law secrecy rule and were willing to impose sanctions on persons other than prosecutors who were subject to the rule. See id.; see also Schmidt v. United States, 115 F.2d 394, 396 (6th Cir. 1940) (holding attorneys for grand jury targets guilty of criminal contempt for obstruction of justice); Goodman v. United States, 108 F.2d 516, 517-18 (9th Cir. 1939) (imposing a 30-day determinate sentence on a grand jury witness who refused to take the oath of secrecy); United States v. Providence Tribune Co., 241 F. 524, 528 (D.R.I. 1917) (holding a newspaper in contempt for violating the common law grand jury secrecy rule in connection with a grand jury investigation); In re Summerhayes, 70 F. 769, 773-75 (N.D. Cal. 1895)
materials, complex litigation forced government attorneys to consult specialists who subsequently obtained access to grand jury materials. The increased access these specialists had to secret grand jury materials, coupled with the absence of a specific remedy for violations of the Rule, led to concern that the traditional rule of grand jury secrecy and the protection it afforded individuals and society would disappear.

(holding a grand juror in contempt of court for a breach of secrecy based on the court's statutory authority to prevent obstruction of justice).

51. See Peterson, supra note 1, at 260; Walker, supra note 44, at 106.

52. See Peterson, supra note 1, at 261-63 (discussing several cases that were instrumental in sparking congressional scrutiny of the accessibility of secret grand jury materials, including Simplot Co. v. United States, 1977-1 U.S. Tax Cas. (CCH) ¶ 9146, at 86,195 (9th Cir. 1976); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976); and In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971)).

In Pflaumer, the petitioner submitted materials to the grand jury in response to a subpoena, but sought a protective order to prevent the Internal Revenue Service (IRS) from gaining access to these materials. See Pflaumer, 53 F.R.D. at 467. The district court denied petitioner's motion. See id. at 468. Although the prosecutor had disclosed the documents to the IRS, the court reasoned that if the materials "remain under the aegis of attorneys for the government," a protective order was not necessary. Id. at 477.

Similarly, in Hawthorne, the plaintiff sought to enjoin the continuation of the grand jury proceedings, or in the alternative, to prevent the IRS's use of subpoenaed documents, allegedly obtained through a breach of grand jury secrecy. See Hawthorne, 406 F. Supp. at 1103. The plaintiff argued that the government violated Rule 6(e) by disclosing the subpoenaed materials to the IRS. See id. Specifically, the plaintiff alleged that the IRS agents were not sworn to secrecy, were not informed that the materials were required to remain under the "aegis" of the prosecutor, and did not otherwise advise the relevant persons of their obligations under Rule 6(e). See id. at 1103 n.3.

Although the Hawthorne court denied plaintiff's request for relief, it expressed concern at the government's lack of compliance with Rule 6(e) and advised the government to implement certain procedures to ensure future compliance with the Rule. See id. at 1104. The court first suggested that persons assisting the government should be required to swear to secrecy and should receive written instructions clarifying the restricted use of the materials. See id. at 1125-26. The court also proposed that grand jury materials should be marked and segregated from other government agency files. See id. at 1126. The court then suggested that a government agency should demonstrate that the specialized assistant was necessary before that individual could obtain access to the secret materials. See id. at 1126-27. Further, the court proposed that the prosecutor maintain a detailed docket to keep track of any agency personnel with access to grand jury materials. See id. at 1127.

The Hawthorne court submitted these suggestions for consideration to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. See id. at 1126 n.54.

Like Hawthorne, the petitioner in Simplot protested the IRS's use of confidential grand jury materials. See 1977-1 U.S. Tax Cas. (CCH) at 86,196. The Ninth Circuit concluded that a government agency's access to grand jury materials is substantively different from a federal prosecutor's access to such information and must be restricted. See id. at 86,197. The court explained that the Constitution provides the right to a grand jury. See id. The grand jury acts under the supervision of the courts and not as an instrument for the multifarious purposes of the government. See id. In addition, the court endorsed the procedures suggested by the Hawthorne court, and also suggested that in subsequent cases, the
In the mid-1970s, the Supreme Court’s Advisory Committee attempted to reconcile the need for grand jury secrecy with the government’s need for the assistance of non-attorneys by expanding the list of persons authorized to access grand jury materials. The House Judiciary Committee disapproved of the Advisory Committee’s proposal, voicing concern that allowing such broad access to these materials would undermine the grand jury secrecy requirement. In response, the Senate Judiciary Committee redrafted the initial proposal, balancing the risk of broad access with an express contempt penalty for violations of Rule 6(e).

IRS should be required to establish the source of its information and to prove that this source was independent from the grand jury process. See id. at 86,199 & n.17.

53. See Walker, supra note 44, at 107 (discussing the Advisory Committee’s proposed 1977 amendment to Rule 6(e)). The Advisory Committee’s proposed amendment provided:

6(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. 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. 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. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the 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. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The federal magistrate to whom an indictment is returned may direct that it shall be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.


The Advisory Committee’s proposed amendment expanded the definition of “attorneys for the government” to include the Attorney General, a United States Attorney, and any authorized assistants to such offices. See Walker, supra note 44, at 106. The Advisory Committee also broadened the scope of “other government personnel” to include “employees of administrative agencies and government departments.” See H.R. DOC. NO. 94-464, at 8 (1976) (indicating that the purpose of the amendment was to allow experts and consultants of government attorneys to access grand jury materials); see also S. REP. NO. 95-354, at 6 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 529; H.R. REP. NO. 95-195, at 3, 4 (1977). The 1977 amendment, as originally proposed, did not provide a remedy for secrecy rule violations. See Peterson, supra, note 1, at 263.

54. See H.R. REP. NO. 95-195, at 4. The House Judiciary Committee criticized the proposed changes to Rule 6(e), arguing that the amendment would provide the government with access to secret grand jury materials which could then be exploited in unrelated civil or criminal cases. See id. In this fashion, the government could avoid laws that otherwise prevented access to this information. See id.
The amended Rule 6(e) became effective on October 1, 1977 and both broadened access to grand jury materials and added a contempt remedy. The amendment, however, failed to explicitly define the scope of the contempt remedy.

B. Contempt and Grand Jury Secrecy: The 1977 Amendment and Beyond

The 1977 amendment expressly provided for a contempt of court remedy to punish violations of the grand jury secrecy rule. Some courts

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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.

Id. at 8.


57. See Peterson, supra note 1, at 265.

58. See id. Congress neglected to indicate whether the newly created contempt remedy was criminal or civil and whether it contemplated a private right of action. See id.

59. See id. The 1977 amendment added a provision at the end of the rule stating that "[a] knowing violation of Rule 6 may be punished as a contempt of court." FED. R. CRIM. P. 6(e)(2); see also infra note 74 (discussing the nature and scope of a court's contempt remedy).

Although the Rule expressly provides a contempt remedy to punish secrecy violations, courts also have ordered injunctive relief to remedy violations of the Rule in appropriate circumstances. See Peterson, supra note 1, at 286-87 (stating that most courts do not view contempt as the sole remedy for Rule 6(e) violations); see also supra note 34 (discussing the nature and scope of equitable relief, including injunctive orders). In United States v. Coughlan, the government initiated a civil forfeiture proceeding against a former grand jury witness and introduced a portion of his grand jury testimony into the record. 842 F.2d 737, 739 (4th Cir. 1988). The district court denied the defendant's motion to suppress the grand jury material in the civil suit. See id. The government admitted to violating Rule 6(e) because it disclosed grand jury materials, but argued that contempt was the sole remedy under the Rule. See id. The court disagreed, holding that contempt was not the exclusive remedy because Rule 6(e) states only that the court "may" punish violations as contempt. See id. at 740. The court remanded the case to the trial court with instructions to consider contempt sanctions or other forms of relief, as it deemed appropriate. See id.; see also In re Charlotte Observer, 921 F.2d 47, 50 (4th Cir. 1990) (noting that "in appropriate circumstances" a court might issue an injunction to protect grand jury secrecy).

For other cases in which federal courts have held that injunctive relief may be an appropriate remedy for Rule 6(e) violations, see Advance Publications v. United States, 805 F.2d 155, 169 (6th Cir. 1986) (stating that a court may enjoin the government from dis-
and circuit court judges interpret the contempt remedy under Rule 6(e) as encompassing only criminal contempt. Others construe the contempt remedy as including both civil and criminal contempt, as well as injunctive relief enforceable by civil contempt. Still other courts recognize not only criminal and civil contempt remedies and injunctive relief, but also that Rule 6(e) forms a basis for a private right of action to pursue such relief.

The confusion in interpreting the contempt remedy under the Rule derives from its language. The Rule does not explicitly delineate the scope and extent of the remedy. Moreover, the legislative history of the 1977 amendment does not clarify Congress’s intent. Four federal cir-

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60. See supra note 33 (discussing judicial support for the proposition that criminal contempt is the exclusive Rule 6(e) remedy); see also infra this Part (discussing the scope of the Rule 6(e) contempt remedy as established in case law).

61. See Finn v. Schiller, 72 F.3d 1182, 1188 (4th Cir. 1996) (stating that, in addition to criminal and civil contempt, an injunctive order may be necessary to “stop further or future release of grand jury material”); see also supra notes 32-34 (citing those courts that have found both civil and criminal contempt within the Rule 6(e) remedy); supra note 34 (noting that a court has inherent power to prevent harm or to restore rights that were previously violated by invoking its equitable powers in the form of injunctive relief); supra note 59 (indicating that courts have used injunctive relief to remedy Rule 6(e) violations); infra this Part (discussing the courts’ justifications and rationales for adopting varying interpretations of the courts’ contempt power under Rule 6(e)).

62. See supra note 33 (citing those courts that have found the broadest Rule 6(e) remedy); see also infra this Part (discussing the courts’ justifications and rationales for finding civil and criminal contempt remedies a private cause of action).

63. Cf. Peterson, supra note 1, at 265 (noting that the Rule does not specify whether criminal or civil contempt should be used to punish violations of the Rule).

64. See supra note 25 (quoting the text of current Rule 6(e)). The Rule provides that a violation “may be punished as a contempt of court.” FED. R. CRIM. P. 6(e).

65. See Peterson, supra note 1, at 313 (“If Congress had intended to curtail or limit the judiciary’s use of contempt while striking a balance between government agency access to grand jury materials and grand jury secrecy, the legislative history would presumably have been more clear.”). The legislative history indicates that Congress was sensitive to the rights of persons who may be adversely affected by the improper use or disclosure of grand jury information. See S. REP. NO. 95-354, at 8 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 531-32; see also supra notes 53-54 and accompanying text (explaining that the Rule 6(e) amendment as initially proposed broadened access to grand jury materials but failed to provide penalties to regulate such access so as to protect the secrecy requirement). The Senate Judiciary Committee redrafted the proposed amendment, increasing access to grand jury materials as well as providing a penalty provision to regulate such access. See S. REP. NO. 95-354, at 8; see also supra notes 54-55 (noting the concerns and the rationale for providing a penalty).
circuit courts have addressed the scope of the Rule 6(e) contempt remedy, and, specifically, whether a grand jury target may request civil and criminal contempt sanctions and injunctive relief, and whether a target has standing to pursue such relief in a private suit against the violator.66

1. Lance v. United States Department of Justice: A Precursor to a Private Right of Action

The Fifth Circuit in Lance v. United States Department of Justice67 was the first federal circuit court to acknowledge implicitly a target’s private right of action68 when it allowed him to petition a district court for an evidentiary hearing alleging wrongful disclosure of grand jury matters.69 The court concluded that upon a prima facie showing of a Rule 6(e) violation,70 a district court could require a person who wrongfully disclosed such matters to show cause why he should not be held in civil contempt and sanctioned.71 In Lance, a federal grand jury began investigating certain activities of T. Bertram Lance, a close friend of President Carter and a former Director of the Budget.72 After several attempts to enjoin the extrajudicial publicity by the government’s attorneys,73 Lance

66. See infra Parts I.B.1-4, II (discussing the Lance, Eisenberg, Blalock, Barry, and Finn decisions).
67. 610 F.2d 202 (5th Cir. 1980).
68. See Peterson, supra note 1, at 290.
69. See Lance, 610 F.2d at 220-21; see also Blalock v. United States, 844 F.2d 1546, 1551 (11th Cir. 1988) (“Lance stands for the proposition that a target may bring suit for injunctive relief against the individuals subject to Rule 6(e)(2) and may invoke the district court’s contempt power to coerce compliance with any injunctive order the court grants.”).
70. See infra notes 79-84 and accompanying text (discussing the main elements of the Lance prima facie test).
71. See Lance, 610 F.2d at 220-21. As previously noted, a civil contempt sanction may include injunctive relief. See Barry v. United States, 865 F.2d 1317, 1324 n.7 (D.C. Cir. 1989); see also supra note 34 (discussing the nature and scope of equitable relief, which includes injunctions and sanctions).
72. See Lance, 610 F.2d at 207. The investigation attracted significant local and national media attention. See id. Several major newspapers published reports concerning the grand jury’s investigation of Lance’s activities. See id. at 207 & n.1, 209 n.2, 211 n.3.
73. See id. at 207-11. Lance moved for equitable relief, requesting that the court prohibit anyone, including the government’s attorneys, from disclosing information obtained during the grand jury inquiry. See id. at 207. Although the court granted Lance’s motion, the extrajudicial publicity continued. See id. at 208-09. Instead of filing another motion, Lance responded to the publicity by writing a letter to the court expressing his concern regarding the continuing disclosures. See id. at 209. The court did not issue a new order, but reiterated that the protections afforded by Rule 6(e) would be enforced. See id. at 210. The violations allegedly continued, however, and Lance moved for contempt sanctions to compel compliance with the Rule in accordance with the court’s previous orders. See id. at 211.
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filed a motion for contempt sanctions, alleging that the government's disclosures violated Rule 6(e). Among other things, Lance requested that the court order all government attorneys involved in the investigation to show cause why the court should not impose contempt sanctions for prior wrongful disclosures of grand jury materials. Lance also asked the court to impose any additional sanctions that would remedy a Rule

74. See id. at 207. A court uses its contempt power to vindicate the authority of the court and/or to vindicate the rights of a person pursuant to in personam orders such as injunctions. See 1 Dobbs, Law of Remedies supra note 34, § 2.8(1), at 186-87. A court's contempt power allows it to impose both civil and criminal sanctions. See id. § 2.8(1), at 187. A court may impose civil contempt sanctions to coerce a contemnor to comply with an injunctive order. See id. § 2.8(1), at 186. Civil contempt benefits the party whose rights and remedies were adversely affected by the contemnor. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-42 (1911) (explaining that a civil contempt remedy is imposed to benefit the petitioner by forcing a contemnor's compliance). Courts may use fines, imprisonment, or both to compel compliance. See 1 Dobbs, Law of Remedies, supra note 34, § 2.8(1), at 186-87. However, when issuing a civil contempt sanction, a court is not limited in the types of sanctions that it may impose for criminal contempt of court. See id.; see also Barry, 865 F.2d at 1324 n.7 ("[A] civil contempt sanction may include appropriate equitable relief.").

A court may impose a criminal contempt sanction for the same conduct that might trigger a civil contempt sanction, however, the court's purpose in ordering criminal sanctions is to vindicate the court's authority and is punitive, rather than coercive. See Gompers, 221 U.S. at 441-42; Finn v. Schiller, 72 F.3d 1182, 1188 (4th Cir. 1996) (noting that a court may issue criminal and civil contempt sanctions for past violations of a rule of law, such as Federal Rule of Criminal Procedure 6(e)).

Discerning between civil and criminal contempt is often difficult. See James W. Fox, Jr., The Road Not Taken: Criminal Contempt Sanctions and Grand Jury Press Leaks, 25 U. Mich. J.L. Reform 505, 514 (1992); Joseph Moskovitz, Contempt of Injunctions, Civil and Criminal, 43 Colum. L. Rev. 780, 781 (1943) (noting the confusion in delineating between criminal and civil contempt). Certain conduct has elements of both civil contempt and criminal contempt. See Gompers, 221 U.S. at 441-42 (recognizing that civil and criminal contempt have aspects that are remedial, punitive, or both). When a court imposes either remedial or punitive sanctions on a contemnor, it may be vindicating its authority and coercing compliance. See Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 635 (1988).

Constitutional safeguards attach to criminal contempt proceedings. See Gompers, 221 U.S. at 444 (stating that constitutional protections apply in proceedings for criminal contempt). If a sentence of imprisonment greater than six months is imposed, the criminal contemnor has a right to a jury trial. See Codispoti v. Pennsylvania, 418 U.S. 506, 516-17 (1974).

Civil contempt proceedings do not invoke the substantial rights and constitutional privileges involved in criminal contempt proceedings. See 1 Dobbs, Law of Remedies, supra note 34, § 2.8(1), at 187. If a court imposes a non-determinate sentence on a contemnor to compel compliance with a previous in personam order, the contemnor's liberty interests are not jeopardized. Cf. id. The civil contemnor may be released if he agrees to comply with the court's order. See In re Nevitt, 117 F. 448, 461 (8th Cir. 1902) (noting that civil contemnors "carry the keys of their prison in their own pockets").

75. See Lance, 610 F.2d at 211.

76. See id.
6(e) violation, including an order dismissing the grand jury and barring
the future prosecution of Lance in connection with the investigation. The district court denied Lance’s motion, ruling that he had not presented enough evidence of wrongdoing to warrant an evidentiary hearing on the charges against the government.

On appeal, the Fifth Circuit articulated the factors necessary to establish a prima facie showing of a Rule 6(e) violation warranting an evidentiary hearing. First, the unauthorized disclosures must clearly reveal information concerning “‘matters occurring before the grand jury,’” which were wrongfully disclosed by “‘an attorney for the Government.’” Second, the content or circumstances of the disclosed material must indicate that it was derived from grand jury information protected from disclosure by Rule 6(e). Third, the court will presume that the publicized disclosures are true. Fourth, the court must analyze the scope of the relief sought and the extent to which such relief, if granted, would hinder the grand jury’s investigation. Finally, the court must evaluate whether the

77. See id. Although fines and imprisonment are the most common types of contempt sanctions used by courts, there are “no specific limits placed on the kind of sanction available for contempt.” DOBBS, HANDBOOK ON REMEDIES, supra note 34, § 2.9(1), at 101. Thus, a court has the discretion to issue a contempt sanction in forms that resemble injunctive orders, such as the form of relief requested by Lance. See id. § 2.8(1), at 186; see also Barry, 865 F.2d at 1324 n.7 (“[A] civil contempt sanction may include appropriate equitable relief.”). The Lance court concluded that Rule 6(e) authorized contempt sanctions to compel compliance with Rule 6(e) prohibitions. See Lance, 610 F.2d at 220; see also Blalock v. United States, 844 F.2d 1546, 1551 (11th Cir. 1988) (stating that the Fifth Circuit in Lance held that a target “may seek civil contempt sanctions for a violation of Rule 6(e)(2)”; infra notes 93-109 and accompanying text. (discussing the Eleventh Circuit’s opinion in United States v. Eisenberg and the limits of civil relief available upon a prima facie showing of a Rule 6(e) violation).

78. See Lance, 610 F.2d at 212.

79. See id. at 216-20.

80. Id. at 214 (quoting FED. R. CRIM. P. 6(e)). The Fifth Circuit stated that the Rule 6(e) secrecy requirement applies to information disseminated from grand jury transcripts as well as anything that “may tend to reveal what transpired before the grand jury.” Id. at 216 (citing United States v. Armaco Steel Corp., 458 F. Supp. 784, 790 (W.D. Mo. 1978)). For further discussion of the meaning of “matters occurring before a grand jury,” see Senate of the Commonwealth of Puerto Rico ex rel. Judiciary Comm. v. United States Dep’t of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987) (stating that secrecy is violated when confidential information concerning the grand jury or its investigation is disclosed).

81. See Lance, 610 F.2d at 217. Rule 6(e) prohibits disclosure by “[a] grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the [g]overnment, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision.” FED. R. CRIM. P. 6(e)(2). The Rule does not, however, prevent a grand jury witness from disclosing his testimony. See Lance, 610 F.2d at 217.

82. See Lance, 610 F.2d at 219.

83. See id. The court noted that both a grand jury target seeking a dismissal of his
government presented any evidence to rebut the presumption that the unauthorized disclosures did in fact occur.\footnote{84}

The Fifth Circuit found that if a grand jury target establishes a prima facie case of Rule 6(e) misconduct and the government fails to deny the truthfulness of the disclosures, the target is entitled to an evidentiary hearing.\footnote{85} The Fifth Circuit further held that if the court finds a secrecy rule violation pursuant to the evidentiary hearing, Rule 6(e) authorizes the imposition of civil contempt sanctions to compel compliance with the Rule.\footnote{86} The Fifth Circuit concluded that Lance had established a prima facie case against the government.\footnote{87} However, it remanded to the district court the question of whether Lance's showing would warrant an evidentiary hearing if the government were to file an affidavit denying its improper disclosure of grand jury information.\footnote{88}

The Fifth Circuit did not discuss explicitly the full scope of the contempt remedy under Rule 6(e). By concluding, however, that Lance's motion for sanctions was civil in nature,\footnote{89} that a target has the right to request relief in the form of civil contempt sanctions for a Rule 6(e) violation,\footnote{90} and that a target is entitled to an evidentiary hearing upon a sufficient prima facie showing of a Rule 6(e) violation,\footnote{91} the court implicitly

\footnotesize{\begin{itemize}
  \item \footnote{84}{See id.}
  \item \footnote{85}{See id. at 220-21. In addition, the court noted that, even if the government filed an affidavit denying the Rule 6(e) violations, a target might still be entitled to an evidentiary hearing based on the evidence he presented. \textit{See id.} at 221.}
  \item \footnote{86}{See id. at 219-20. The court stated that the target's purpose in initiating the proceeding is the most important determinant as to whether the proceeding is characterized as civil or criminal. \textit{See id.} at 212. If the target's purpose is remedial, the proceeding is civil. \textit{See id.} The court found that Lance's petition for contempt sanctions was civil in nature. \textit{See id.}}
  \item \footnote{87}{See id. at 220-21.}
  \item \footnote{88}{See id.; \textit{see also supra} note 73 and accompanying text (describing Lance's prior motion and correspondence to the court requesting relief from prosecutorial violations of Rule 6(e)). The Fifth Circuit also concluded that because Lance was likely to suffer continuing harm from the government's repeated violations of Rule 6(e), he had standing to appeal the district court's order before the completion of his criminal trial. \textit{See Lance}, 610 F.2d at 212-13 (stating that Lance would be denied any meaningful remedy for the government's Rule 6(e) violation if he were precluded from appealing the district court's decision until after his acquittal or conviction in a criminal trial).}
  \item \footnote{89}{\textit{See Lance}, 610 F.2d at 212.}
  \item \footnote{90}{See id. at 220-21.}
  \item \footnote{91}{See id.}
\end{itemize}}
recognizes that Rule 6(e) created a private right of action for equitable relief enforceable in a civil contempt proceeding.\(^\text{92}\)

2. United States v. Eisenberg: Limiting the Scope of Equitable Relief Available Under Rule 6(e)

In United States v. Eisenberg,\(^\text{93}\) the Eleventh Circuit specifically addressed the limitations on equitable relief, including injunctive relief and civil contempt sanctions, available to a grand jury target who has made a prima facie showing of a Rule 6(e) violation.\(^\text{94}\) The court held that once the prima facie threshold is met, a district court must hold an evidentiary hearing.\(^\text{95}\) If the court makes certain findings, it may issue sanctions and/or injunctive orders to prevent further wrongful disclosures to the extent that such relief does not interfere with the grand jury process.\(^\text{96}\)

In Eisenberg, the targets filed a motion requesting injunctive relief and other equitable sanctions, alleging that government representatives disclosed grand jury materials to the public in violation of Rule 6(e).\(^\text{97}\) The district court concluded that the targets had established a prima facie case under the Lance guidelines, and ordered the government to give the targets’ counsel a list of government officials who had access to confidential grand jury information.\(^\text{98}\)

The government appealed, and the Eleventh Circuit reversed the district court’s order.\(^\text{99}\) The appellate court agreed with the district court that a prima facie showing of a Rule 6(e) violation required the district court to entertain the targets’ petition and to enjoin the government from instigating further adverse publicity.\(^\text{100}\) The Eleventh Circuit found,

\(^{92}\) \text{See id.; Blalock v. United States, 844 F.2d 1546, 1551 (11th Cir. 1988) (stating that Lance stands for the proposition that a target may bring suit for injunctive relief against the individuals subject to Rule 6(e)(2)). According to the Eleventh Circuit in Blalock, a target has standing to sue for injunctive relief under the Rule, but not for civil contempt. See id. at 1550 (stating that a target has a private right to bring suit for injunctive relief but “there is no such thing as an independent cause of action for civil contempt; civil contempt is a device used to coerce compliance with an in personam order”).}

\(^{93}\) 711 F.2d 959 (11th Cir. 1983).

\(^{94}\) \text{See id. at 960-61.}

\(^{95}\) \text{See id. at 964-65.}

\(^{96}\) \text{See id.; see also infra notes 102-05 and accompanying text (discussing the procedure required to impose the appropriate relief).}

\(^{97}\) \text{See Eisenberg, 711 F.2d at 961-62.}

\(^{98}\) \text{See id. at 961-63. The district court also enjoined any unauthorized persons from publicizing grand jury materials and ordered the government attorneys to instruct grand jurors to ignore any publicity surrounding the investigation. See id. at 961-62.}

\(^{99}\) \text{See id. at 966.}

\(^{100}\) \text{See id. at 964.}
however, that the scope of the civil remedies granted to the targets were too broad under the Rule.  

The Eleventh Circuit first outlined the procedure that a court must follow once a target demonstrates a prima facie case for a Rule 6(e) violation. A court must consider whether the government engaged in the prohibited activities. In addition, the court must determine whether the disclosure concerned ““matters occurring before the grand jury.”” If the court makes affirmative findings on these issues, it is required to order the relief necessary to stop the unlawful disclosures.

The Eleventh Circuit held that in determining the scope of civil remedies under Rule 6(e), a target’s personal interest in protecting his reputation should be weighed against the public’s interest in the investigation of criminal activities. After considering these two competing interests, a court should grant civil remedies that are carefully crafted to prevent prejudicial publicity without interfering with the grand jury process. In Eisenberg, the Eleventh Circuit determined that, while the district court could require the government to furnish a list of names of government agents to the court, it could not force the government to furnish the list to the targets’ counsel because that action would interfere with the investigation.

Although both the Fifth Circuit in Lance and the Eleventh Circuit in Eisenberg implied that a target has a private right of action for civil relief under Rule 6(e), neither circuit adequately explained its reasoning.

101. See id. at 965-66.
102. See id. at 964-66.
103. See id.
104. Id.
105. See id.
106. See id. at 964-66.
107. See id. at 966 (explaining that the court would not countenance violations of the secrecy rule, but a target’s right to seek redress for Rule 6(e) violations is limited).
108. See id. at 964. An unindicted target’s only legitimate interests are to enjoin pretrial publicity and to punish Rule 6(e) violators. See id. Permitting counsel for an unindicted target to receive such a list serves no valid purpose while the grand jury is still investigating the alleged criminal activities. See id. Once the court finds a Rule 6(e) violation, however, the target is entitled to the name(s) of the violator(s) in order to participate effectively in the subsequent evidentiary hearing concerning the scope and nature of relief that may be afforded as a result of the violation. See id. at 965.
109. See Blalock v. United States, 844 F.2d 1546, 1550-51 (11th Cir. 1988) (stating that according to Lance, a target may not seek only civil contempt sanctions for Rule 6(e) violations, but also may initiate a civil action for injunctive relief and use contempt to compel compliance with any court order granted); Eisenberg, 711 F.2d at 964-65.
110. See Eisenberg, 711 F.2d at 964-65 (examining limitations on the court’s supervisory power over the grand jury and the government rather than the limitations on the na-
The courts merely concluded that if the target successfully establishes a prima facie case, an evidentiary hearing must be held to determine the appropriate remedy—contempt sanctions and/or injunctive relief.


Both prior and subsequent to the 1977 amendment of Rule 6(e), federal courts used contempt sanctions against violators of the grand jury secrecy rule. Federal courts also have employed injunctive relief to remedy Rule 6(e) violations. The federal circuit courts prior to Blalock, however, provided little guidance concerning the statutory limits of the Rule 6(e) contempt remedy. In Blalock, the majority and specially concurring opinions provided a framework for discussing the scope of the Rule 6(e) contempt provision.

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111. See Blalock, 844 F.2d at 1551; Eisenberg, 711 F.2d at 964; Lance, 610 F.2d at 220-21. Note, however, that a target who seeks certain forms of pre-indictment relief under Rule 6(e), such as the dismissal of an indictment or the quashing of a subpoena, has a higher prima facie burden of proof than a target who seeks contempt sanctions under this Rule. See Lance, 610 F.2d at 219. Both the Fifth and Eleventh Circuits state that certain pre-indictment requests for injunctive relief may interfere with grand jury proceedings, and, thus, may be inappropriate responses to a Rule 6(e) violation. See Eisenberg, 711 F.2d at 964; Lance, 610 F.2d at 219. Injunctive relief, however, may be appropriate to prevent prejudicial publicity as long as such relief does not conflict with the grand jury process. Cf. Eisenberg, 711 F.2d at 966 (describing the judiciary’s obligation to limit the Rule 6(e) remedies “to the extent necessary to stop the publicity and punish the offenders”); Lance, 610 F.2d at 219-20 (noting that a court is required to take into consideration the scope of the requested relief and whether and to what extent it interferes with the overall process of the grand jury).

112. See Peterson, supra note 1, at 294 (indicating that courts used contempt and other remedies to sanction violations of the grand jury secrecy rule both before and after the 1977 amendment).

113. See supra note 59 and accompanying text (discussing injunctive relief as an appropriate response to Rule 6(e) violations).

114. See Peterson, supra note 1, at 294 (noting that the cases and commentary prior to Blalock provided insufficient insight into congressional intent concerning the scope of contempt remedies under the 1977 Rule 6(e) amendment).

115. See id. at 301 (noting that the Blalock opinion focuses on the scope of the Rule 6(e) contempt power); see also In re Grand Jury Investigation (90-3-2), 748 F. Supp. 1188, 1196 (E.D. Mich. 1990) (stating that the Eleventh Circuit in Blalock “crystallizes the relevant Rule 6 issues”).
a. The Blalock Majority: Rule 6(e) Authorizes a Private Right of Action to Enforce the Contempt of Court Remedy

In *Blalock v. United States*, the target moved to enjoin the grand jury’s investigation of alleged criminal activities, arguing that the government violated Rule 6(e) on several grounds. The district court reviewed the evidence against the prosecutor and denied the target’s motion for injunctive relief.

On appeal, the Eleventh Circuit stated that the Fifth Circuit’s holding in *Lance* was binding precedent and affirmed the district court’s decision denying injunctive relief. The *Blalock* majority found that because *Lance* held that a target has the right to petition the court for civil contempt sanctions for Rule 6(e) violations, it necessarily followed that a target has a private right to bring suit for injunctive relief against Rule 6(e) violators and may invoke the court’s civil contempt power to compel compliance with any injunction the court grants. The court noted that, in seeking injunctive relief, a target must first establish a prima facie case against the alleged Rule 6(e) offender before a court will grant an evi-

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116. 844 F.2d 1546 (11th Cir. 1988).
117. See id. at 1548. First, the target alleged that the prosecutor and several FBI agents leaked confidential grand jury material to unauthorized individuals. See id. Second, the target claimed that the prosecutor informed one of the target’s competitors that the target would soon be indicted by the grand jury. See id. at 1550. Third, the target contended that the government interrogated potential witnesses with unauthorized persons present. See id.
118. See id. at 1549. In discussing the district court’s actions, the Eleventh Circuit stated that, even if the government had violated Rule 6(e), injunctive relief was inappropriate since the target had an adequate remedy at law in the event the grand jury indicted him; for example, he could move to dismiss the indictment. See id. at 1549-50; see also supra note 34 (discussing the various tests, including the adequacy test, that courts will consider in determining the appropriateness of injunctive relief). In addition to the adequacy test, the irreparable harm rule, and the balancing of equities and hardships, courts also have concluded that injunctive relief for violations of Rule 6(e) is inappropriate if it interferes with the grand jury process. See *Blalock*, 844 F.2d at 1549; cf. *Eisenberg*, 711 F.2d at 965-66 (stating that the court is required to limit any civil relief that interferes with the grand jury process); *Lance*, 610 F.2d at 219 (stating that a target must meet a heavier prima facie burden when asking for types of relief that have a greater potential to interfere with grand jury proceedings).
119. See *Blalock*, 844 F.2d at 1548, 1550 & n.6. The Eleventh Circuit was created out of the former Fifth Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). In *Bonner*, the Eleventh Circuit held that all decisions of the former Fifth Circuit that were made before October 1, 1981 were binding precedent on the Eleventh Circuit. See id. at 1209. Thus, the “prior panel rule” dictates that a Fifth Circuit panel decision made on or before September 30, 1981 is binding precedent on all Eleventh Circuit panel decisions until such time as the prior decision is overruled by the circuit sitting en banc. See *Blalock*, 844 F.2d at 1552 n.2.
120. See *Blalock*, 844 F.2d at 1550-51.
dentary hearing.\textsuperscript{121} If the target has made a prima facie showing and the court has granted an evidentiary hearing, the court must then determine at the hearing whether the alleged violator actually breached the Rule and, if so, what relief was necessary.\textsuperscript{122}

If the court ultimately orders the requested relief, the target may then attempt to compel compliance by invoking the court’s contempt powers.\textsuperscript{123} Using the prima facie factors outlined in \textit{Lance},\textsuperscript{124} the Eleventh Circuit found that the target failed to meet the prima facie threshold, and affirmed the district court’s decision denying injunctive relief.\textsuperscript{125}

\textbf{b. The Blalock Special Concurrence: No Injunctive Relief, No Civil Contempt, No Private Right of Action—Only Criminal Contempt Is Contemplated Under Rule 6(e)}

In an unusual decision, Judges Tjoflat and Roettger—the two judges who wrote the \textit{Blalock} majority opinion—expressed a separate view in a concurring opinion.\textsuperscript{126} The judges concurred in the majority’s judgment affirming the district court’s decision to deny injunctive relief to the target.\textsuperscript{127} The \textit{Blalock} special concurrence reasoned, however, that since Rule 6(e) provides no private right of action for equitable relief, there is no corresponding right under Rule 6(e) to invoke civil contempt to com-

\begin{itemize}
  \item [121.] See id. at 1551.
  \item [122.] See id.
  \item [123.] See id. Although Rule 6(e) provides the target with a right of action to seek injunctive relief, civil contempt standing alone does not form a separate basis to bring suit in federal court. See id. at 1550-51. The court specifically stated that civil contempt is used to compel compliance with a prior order, but may not form a basis for an independent cause of action. See id. at 1550.
  \item [124.] See supra notes 79-84 and accompanying text (discussing the requirements for a prima facie showing of a Rule 6(e) violation).
  \item [125.] See \textit{Blalock}, 844 F.2d at 1551-52 (concluding that the target did not meet one of the prima facie requirements—that federal agents had disclosed information concerning “matters occurring before the grand jury”). The court also noted that the target had an adequate remedy at law, thus making injunctive relief inappropriate. See id. at 1549. In addition, the court stated that if certain prerequisites to a finding of injunctive relief were not met (for example, that further injury to the plaintiff was likely), no injunction would issue. See id. Therefore, even if a target establishes a prima facie showing of a Rule 6(e) violation, and the court grants an evidentiary hearing, injunctive relief will not necessarily be ordered. See id. at 1549, 1552; see also supra note 34 (discussing the nature and scope of the injunctive remedy and the factors considered in issuing such relief).
  \item [126.] See \textit{Blalock}, 844 F.2d at 1548, 1552; (Tjoflat & Roettger, JJ., specially concurring). see also Barry v. United States, 865 F.2d 1317, 1327 (D.C. Cir. 1989) (Sentelle, J., dissenting) (noting that the \textit{Blalock} decision was unusual because the same two judges wrote the majority as well as the concurring opinions).
  \item [127.] See \textit{Blalock}, 844 F.2d at 1552 (Tjoflat & Roettger, JJ., specially concurring).
\end{itemize}
pel compliance with such relief. According to the Blalock special concurrence, the target's claim for relief was dismissed properly because the target did not have a private right of action under Rule 6(e). The concurrence concluded that if the Eleventh Circuit had not been bound by Lance pursuant to a prior panel rule, the Blalock majority would have rejected the Lance ruling and underlying rationale as invalid.

The Blalock special concurrence stated that to conclude that the contempt remedy under Rule 6(e) contemplates more than criminal contempt required a convoluted deductive argument. The concurrence concluded that this argument was invalid because it rested upon a false assumption, namely that Rule 6(e) authorizes injunctive relief and that a civil contempt remedy also exists to compel compliance with such relief.

According to the Blalock special concurrence, several reasons support the conclusion that Rule 6(e) contemplates only criminal contempt sanctions and does not include injunctive relief or a corresponding civil contempt remedy. It first noted that courts had been prosecuting violations of the grand jury secrecy rule as criminal contempt for eighty

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128. See id. at 1555. The Blalock special concurrence agreed with the Blalock majority opinion, stating that civil contempt alone does not form a basis for a private cause of action, but may be used to enforce compliance with an injunctive order. See id. The Blalock special concurrence argued, however, that Rule 6(e) does not provide "a target the right to obtain an injunctive order of any kind." Id. Accordingly, the Blalock special concurrence reasoned that because there is no right to an injunctive remedy under Rule 6(e), there is no right to civil contempt sanctions to compel compliance with such relief under Rule 6(e). See id. The concurrence expressly stated that:

Rule 6(e)(2)'s prohibition against grand jury disclosures is not itself an adjudicative order; it did not issue in a "case or controversy" between... the target and the members of the grand jury. The prohibition is statutory. Absent a lawsuit in which the plaintiff seeks an injunction embodying the terms of the prohibition, the prohibition cannot possibly become an adjudicative order.

129. See id. at 1552-53. (Tjoflat & Roettger, JJ., specially concurring).

130. See id.; see also supra note 119 (discussing the prior panel rule).

131. See Blalock, 844 F.2d at 1555. (Tjoflat & Roettger, JJ., specially concurring) The Blalock special concurrence argued that in order for the Lance holding to be valid, the court must assume that: (1) Rule 6(e) allows the imposition of civil contempt to compel compliance with its statutory requirements of secrecy; (2) that Congress empowered courts with the authority to prevent persons subject to the Rule from wrongfully disclosing grand jury materials; (3) that injunctive relief must be entered in Article III litigation because it is adjudicative, not administrative; and (4) that the target is the appropriate party to seek injunctive relief because the secrecy rule is designed to protect such persons. See id.

132. See id.

133. See id. at 1552-62 (discussing the arguments against providing civil relief under Rule 6(e)).
years;\footnote{134} Congress's inclusion of a contempt remedy simply codified common law practice.\footnote{135} Second, the \textit{Blalock} special concurrence noted that the language "knowing" and "punished" in Rule 6(e) further supported the argument that Congress intended only criminal contempt sanctions to apply to Rule 6(e) violations.\footnote{136} Because "knowing" implies that criminal intent is a requirement for Rule 6(e) violations, and only criminal contempt requires criminal intent, the concurrence argued that the "knowing" language means that Rule 6(e) provides only a criminal contempt remedy for its violation.\footnote{137} The concurrence further stated that because criminal contempt is punitive while civil contempt is remedial, the language "punished" means that the contempt remedy is punitive, and thus criminal.\footnote{138} The \textit{Blalock} special concurrence also claimed that civil remedies fail to prevent violations of grand jury secrecy, because such remedies can subvert the secrecy interests that Rule 6(e)(2) attempts to protect.\footnote{139}

\begin{itemize}
  \item \footnote{134} See id. at 1556-57.
  \item \footnote{135} See id. at 1557. The \textit{Blalock} special concurrence noted that even after Congress codified the secrecy rule, courts continued to punish Rule 6(e) violations as criminal contempt. \textit{See id.}
  \item \footnote{136} See id. at 1558.
  \item \footnote{137} See id. (citing \\textit{McComb v. Jacksonville Paper Co.}, 336 U.S. 187, 191 (1949), for the proposition that civil contempt does not require a showing of criminal intent).
  \item \footnote{138} Cf. id. (arguing that criminal contempt is designed to punish a contemptuous act).
  \item \footnote{139} See \textit{Blalock}, 844 F.2d at 1559-60; see also id. at 1560 n.21 (demonstrating by hypothetical the "futility" of invoking civil contempt to guarantee secrecy). The \textit{Blalock} special concurrence stated that a civil contempt proceeding would be ineffective in coercing compliance with Rule 6(c). \textit{See id.} at 1559. To illustrate this point, the concurrence constructed a hypothetical in which a prosecutor is held in civil contempt because he leaked grand jury materials. \textit{See id.} at 1559-60. In this example, the court chose to imprison the government attorney to compel compliance with the grand jury secrecy requirement. \textit{See id.} at 1559. In order to prevent the prosecutor's incarceration from being interpreted as punishment for past misconduct, the court advises the prosecutor, in accordance with traditional civil procedures, that if he stops making further disclosures of grand jury matters, he can be relieved of the contempt and released from imprisonment. \textit{See id.} In this scenario, one possible outcome is that the court accepts the proffered assurances and the contemnor is released from custody. \textit{See id.} at 1559-60. At the other end of the spectrum, the prosecutor's promise to obey the grand jury secrecy requirement is rejected by the court as unworthy of belief on account of the prosecutor's past misconduct. \textit{See id.} at 1560. As analyzed by the \textit{Blalock} special concurrence, either outcome evidences the ineffectiveness of civil contempt as a way to guarantee grand jury secrecy. \textit{See id.} In the worst case, the proceeding is improperly transformed from a civil to a
The Blalock special concurrence concluded that because injunctive relief is unavailable under Rule 6(e), civil contempt remedies also are unavailable.\textsuperscript{140} Thus, when a target of a grand jury investigation seeks injunctive relief, a court must dismiss the application for such relief because it fails to set forth a claim upon which a court may grant relief.\textsuperscript{141}

The concurrence in Blalock specifically focused on the scope of the contempt remedy contemplated under Rule 6(e).\textsuperscript{142} However, the concurring judges stated that the prior panel rule forced the court to follow Lance.\textsuperscript{143} Thus, in light of the prior panel rule qualification and the uncontroversial contempt process in which the prosecutor is punished for past misconduct. See id. In the best case, all that has been accomplished is that a district court has requested and secured a prosecutor's promise to comply with the legal obligation already imposed upon him. See id. at 1559-60.

The Blalock special concurrence noted that an even more onerous outcome can flow from a civil contempt proceeding. See id. at 1560 n.21. In particular, the concurrence constructed another hypothetical in which the target successfully obtains a civil injunction against the prosecutor and subsequently seeks to have the prosecutor held in civil contempt due to a newly alleged breach of the secrecy requirement. See id. As the concurrence explained, the prosecutor cannot effectively defend against the target's contempt motion without explaining that the alleged disclosures "were not disclosures of matters before the grand jury." Id. at 1561 n.21. To do so, however, would require that the prosecutor reveal the substance of the grand jury's investigation to the moving party—the very subject of the grand jury's inquiry—thus frustrating grand jury secrecy. See id. Therefore, according to the Blalock special concurrence, only criminal contempt is contemplated under Rule 6(e). See id. at 1560.

\textsuperscript{140} See id. at 1555.

\textsuperscript{141} See id. at 1561 (citing FED. R. CIV. P. 12(b)(6)). The Blalock special concurrence noted, however, that a target has the means to stop wrongful disclosure of grand jury materials. See id. Even though a target may not apply for civil relief for Rule 6(e) violations, he is allowed to bring the improper disclosure to the attention of the court. See id. Once notified, the court may exercise its inherent supervisory powers over grand jury matters to ensure adherence to the secrecy rule. See id. The concurrence explained that once a court finds sufficient evidence of a violation, it may impose criminal contempt sanctions under 18 U.S.C. § 401. See id. Alternatively, the target may notify the United States Attorney of the improper disclosure, who is empowered to seek an indictment based upon 18 U.S.C. § 401 or under 18 U.S.C. § 1503 for obstruction of justice. See id. & n.22; infra notes 197-200 and accompanying text (noting that the Fourth Circuit in Finn v. Schiller also found that a target has the right to request that the court investigate the alleged violative behavior and issue appropriate civil relief, including injunctions and civil contempt sanctions, but also holding that a target does not have a private right of action to pursue such relief).

The Blalock special concurrence further noted, however, that if the district court or the prosecutor refuses to act subsequent to notice of the improper disclosure, the target has no right of appeal. See 844 F.2d at 1561. The initiation of a criminal contempt proceeding is within the court's or the prosecutor's sole discretion, not the target's. See id.

\textsuperscript{142} See Blalock, 844 F.2d. at 1552-62; see also Peterson, supra note 1, at 301 (noting the concerns of the Blalock special concurrence).

\textsuperscript{143} See Blalock, 844 F.2d at 1552-53 (Tjoflat & Roettger, JJ., specially concurring) (noting that the interpretation of Rule 6(e) to include an injunctive remedy enforceable under the court's power of civil contempt was unreasonable, but that the court was bound
usual special concurrence in *Blalock*, the issue of whether Rule 6(e) contemplated injunctive relief and/or civil contempt remedies, and whether such relief could be pursued through a private action, remained unresolved.

**4. Barry v. United States: A Private Right of Action for Civil Relief is “Cognizable” Under Rule 6(e)**

*a. The Barry Majority: Following the Lance and Blalock Precedent*

Washington, D.C. Mayor Marion Barry, the target of a federal grand jury investigation, brought suit for injunctive relief and contempt sanctions under Rule 6(e) against government attorneys, who allegedly leaked confidential grand jury materials to the press. Barry requested that the court hold an evidentiary hearing to determine whether injunctive relief should be ordered to prevent further Rule 6(e) violations and whether contempt sanctions should be imposed for the government's prior Rule 6(e) violations. The district court dismissed Barry's case, holding that Barry failed to meet the prima facie threshold necessary to pursue relief under Rule 6(e). The United States Court of Appeals for the D.C. Circuit reversed the district court, stating that Barry had established a prima facie case of a violation of the grand jury secrecy rule and was entitled to an evidentiary hearing. In reaching its holding, the court stated that a private cause of action, either for equitable relief or civil contempt, is "cognizable" under Rule 6(e). The D.C. Circuit noted that all circuits that had considered the issue of remedies under Rule 6(e) determined that the Rule contemplates a private cause of action for injunctive relief or civil contempt sanctions. Like *Blalock*, however, it agreed that civil contempt standing alone cannot form the basis for a private cause of action. The D.C.

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by the ruling in *Lance* that Rule 6(e) does provide for injunctive relief enforceable by civil contempt sanctions.

144. See Barry v. United States, 865 F.2d 1317, 1318 (D.C. Cir. 1989).

145. See id. at 1319. Barry requested that the court order the prosecutor to "show cause" why contempt sanctions should not be imposed. See id. He also asked the court to order the prosecutor to stop future wrongful disclosures. See id.

146. See id. at 1318; see also supra notes 79-84 and accompanying text (discussing the factors necessary to establish a prima facie case for a Rule 6(e) violation under *Lance*).

147. See Barry, 865 F.2d at 1326.

148. See id. The D.C. Circuit remanded the case to the trial court for an evidentiary hearing to determine what relief, if any, was appropriate. See id.

149. See id. at 1321-22.

150. See id. at 1321.

151. See id. at 1322. The D.C. Circuit agreed with the Eleventh Circuit's assertion in
Circuit agreed with the decisions in *Lance* and *Blalock*, interpreting those cases to support the proposition that a target may bring a private suit for equitable relief for Rule 6(e) violations and may invoke a court’s civil contempt powers to compel compliance with such orders. The court stated that, depending upon the nature of the violation, the appropriate relief for violations of Rule 6(e) includes both civil and criminal contempt sanctions, as well as equitable relief.

The D.C. Circuit summarized the proper legal framework to be used in the event a target requests relief under Rule 6(e). If the target establishes a prima facie case of a Rule 6(e) violation, the court is required to hold an evidentiary hearing to allow the government to defend its actions. If the government is unsuccessful at the hearing, the court must determine whether equitable relief, civil contempt sanctions, or both are appropriate. The appropriate relief will depend on the extent and nature of the violation, and the likelihood that a particular form of relief will deter future Rule 6(e) violations. Such relief also must be carefully tailored so as to avoid conflicts or unreasonable interference with the grand jury process.

*Blalock* that “there is no such thing as an independent cause of action for civil contempt.” *Id.*; *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988). However, the majority also stated that “a civil contempt sanction may include appropriate equitable relief.” *Barry*, 865 F.2d at 1324 n.7. Therefore, an injunctive-type civil contempt sanction can form the basis for a private of action. *Cf. Id.* at 1321 (stating that a claim “for equitable relief or civil contempt, is cognizable under Rule 6(e)(2)”).

152. See *Barry*, 865 F.2d at 1322; see also *supra* note 59 (discussing other federal circuit decisions which have held that injunctive relief may be available for Rule 6(e) violations).

153. See *Barry*, 865 F.2d at 1321-22. The D.C. Circuit recognized that “the literal terms of Rule 6(e)(2) do not foreclose equitable relief, either in addition to, in conjunction with or in lieu of contempt sanctions, where the trial court finds that such relief is warranted.” *Id.* The court also stated that “a civil contempt sanction may include appropriate equitable relief.” *Id.* at 1324 n.7. Thus, if the target sought to coerce compliance with Rule 6(e), the appropriate remedy, according to the *Barry* majority, would be civil contempt sanctions and/or injunctive relief. *Cf. Id.* at 1321-23, 1324 n.7 (acknowledging that Rule 6(e) contemplates equitable relief or in the form of civil contempt and injunctions to remedy its violation). If the target’s purpose was to punish the contemnor, then the appropriate remedy would be criminal contempt. *Cf. Id.* at 1324 (stating that criminal contempt is a punitive remedy which is meant to punish a contumacious act).

154. See *Id.* at 1322-23.

155. See *Id.*

156. See *Id.* at 1323.

157. See *Id.*

158. See *Id.* For instance, a court may enjoin the government from future disclosures. *See Id.* It may also impose contempt sanctions for Rule 6(e) violations. *See Id.* But it should not, without good reason, order the “dissembling” of the grand jury or other relief which substantially would interfere with the grand jury process. *See Id.*
b. The Barry Dissent: Joining Ranks With the Blalock Special Concurrence

Dissenting, Judge Sentelle acknowledged that the majority decisions in the Fifth and Eleventh Circuits supported the majority holding in Barry. Nonetheless, he agreed with the logic and analysis of the Blalock special concurrence, arguing that injunctive relief and civil contempt sanctions were unavailable under Rule 6(e). Judge Sentelle, like the Blalock special concurrence, concluded that criminal contempt is the exclusive remedy for violations of the grand jury secrecy rule.

The Barry decision substantially contributed to the debate over the scope of the contempt remedy under Rule 6(e). The Barry majority provided further support for the proposition that actions for injunctive relief, enforceable through civil contempt sanctions, were available under Rule 6(e). The evidence suggests, however, that the Blalock court would not have followed Lance in the absence of the prior panel rule requirement. In addition, at the time of the Barry decision, the D.C. Circuit was the only circuit to hold without qualification that Rule 6(e) contemplates a private cause of action for injunctive relief following a violation and that a court's contempt power may be invoked to enforce

159. See id. at 1326 (Sentelle, J., dissenting).
160. See id. at 1327.
161. See id. at 1326 (stating that the contempt sanction provided for in Rule 6(e) is not civil, but criminal in nature); see also supra notes 126-43 and accompanying text (discussing the Blalock special concurrence).
162. See Peterson, supra note 1, at 301 (stating that the decisions in Blalock and Barry focused on the scope of the Rule 6(e) contempt provision); see also supra note 114 (noting that federal circuit court precedent prior to Blalock provided little guidance on the parameters of the Rule 6(e) contempt remedy).
163. See Barry, 865 F.2d at 1321 (stating that all of the federal circuit courts that have addressed the scope-of-contempt issue have indicated that both injunctive relief and civil contempt may be sought in a private cause of action based on Rule 6(e)).
164. See Blalock, 844 F.2d at 1552-53 (Tjoflat & Roettger, JJ., specially concurring); see also Barry, 865 F.2d at 1327 (Sentelle, J., dissenting). The Barry majority, however, disagreed with such a narrow reading of Rule 6(e). See id. at 1324 n.6. The Barry court found that Rule 6(e) contemplates substantially more than criminal contempt. See id. at 1321-22. It argued that the Rule does not expressly or impliedly restrict the contempt remedy. See id. In addition, none of the other circuits has limited the Rule 6(e) remedy to criminal contempt. See id. Finally, limiting Rule 6(e) to criminal contempt would be redundant, as courts already have the inherent and organic power to punish criminal contempt. See id. at 1324 n.6 (citing United States v. United Mine Workers, 330 U.S. 258, 293 (1947)).
the relief obtained. Thus, the scope of the Rule 6(e) contempt remedy remained relatively unclear prior to Finn v. Schiller.

II. Finn v. Schiller: Refining the Scope of the Rule 6(e) Contempt Remedy

The Finn court joined the Fifth, Eleventh, and D.C. Circuits, in part, when it held that the Rule 6(e) contempt remedy includes both criminal contempt, civil contempt, and injunctive relief enforceable by civil contempt. The Fourth Circuit concluded, however, that even though Rule 6(e) provided for civil contempt, this civil contempt remedy did not give rise to a private cause of action for equitable relief.

Mark Finn served on the board of trustees of the Virginia Retirement System (VRS) during the period when it acquired significant stock in a railroad company. David Schiller, an Assistant United States Attorney, initiated a grand jury investigation of the stock acquisitions. Schiller also targeted a third party in connection with the investigation, ultimately charging him with mail fraud. Finn was not named in the

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165. See Barry, 865 F.2d at 1321-22. The Fifth Circuit in Lance held only that a target, upon a prima facie showing of a Rule 6(e) violation, has the right to require the court to hold an evidentiary hearing to allow the alleged offenders to rebut the prima facie case. See Lance v. United States Dep’t of Justice, 610 F.2d 202, 220-21 (5th Cir. 1980). The Lance court noted that if the court finds that a violation has occurred, it may hold the offender in civil contempt and sanction him. See id. Drawing from the Lance decision, the Eleventh Circuit in Blalock implied a target’s private right of action to seek injunctive relief against those subject to Rule 6(e), and that this injunction is enforceable through the court’s contempt powers. See Blalock, 844 F.2d at 1551. However, the Blalock majority specifically concluded that Rule 6(e) does not contemplate a right of action based solely on civil contempt. See id. at 1550.

166. 72 F.3d 1182 (4th Cir. 1996).

167. Cf. id. at 1188 (concluding that Rule 6(e) contemplates both civil and criminal contempt, as well as injunctions to prevent future prohibited disclosures). The Fourth Circuit explained that both criminal and civil contempt are available to remedy Rule 6(e) violations. See id. The court also implied that injunctive relief is a part of the civil contempt relief and, as such, would be available to prevent future Rule 6(e) violations. See id.; see also Barry, 865 F.2d at 1324 n.7.

168. See Finn, 72 F.3d at 1188. In this respect, the outcome pursuant to the Finn holding is paradoxical, because the Fourth Circuit also recognized that, in a case involving egregious facts, a court must take remedial action. See infra note 194 (discussing the rationale for the Finn court’s conclusion); see also infra notes 169-76 and accompanying text (discussing the circumstances surrounding the government’s investigation of Finn).

169. See Finn, 72 F.3d at 1185. From May 1990 through August 1990, the VRS acquired stock on the open market in the Richmond, Fredericksburg & Potomac Railroad Corporation. See id.

170. See id.

171. See id.
criminal information filed against the third party.\textsuperscript{172} Schiller subsequently filed an eighty-three page statement in the government’s case against the third party.\textsuperscript{173} Only six pages of the statement directly concerned the third party.\textsuperscript{174} The remaining seventy-seven pages alleged that Finn conspired to commit fraud with other VRS officials in the stock acquisition.\textsuperscript{175} The following day, a local newspaper published Finn’s picture on its front page under a headline proclaiming the alleged fraudulent stock acquisition.\textsuperscript{176}

Finn filed a civil injunctive action against Schiller, alleging prosecutorial misconduct, and claiming that the statement disclosed secret grand jury materials in violation of Rule 6(e).\textsuperscript{177} In order to stop Schiller from further violating the Rule, Finn sought both preliminary and permanent injunctions.\textsuperscript{178} Finn also requested that the statement be struck from the record and that the grand jurors be polled as to whether they were prejudiced against him by the unauthorized disclosures.\textsuperscript{179} The district court dismissed Finn’s complaint, ruling that it failed to allege a supportable claim for relief.\textsuperscript{180} The court also stated that Rule 6(e) contemplated only criminal contempt and did not include any form of civil contempt or injunctive relief.\textsuperscript{181}

The Fourth Circuit affirmed the court’s dismissal of Finn’s civil action, concluding that Rule 6(e) did not provide a private cause of action for relief.\textsuperscript{182} The court found, however, that the Rule necessarily provided

\begin{itemize}
  \item \textsuperscript{172} See id.
  \item \textsuperscript{173} See id.
  \item \textsuperscript{174} See id.
  \item \textsuperscript{175} See id. Although Finn had not been charged with any crime, the statement expressly referenced Finn more than 370 times. See id. Indeed, the Fourth Circuit acknowledged that it was reasonable to conclude that the statement was filed “to pressure [Finn] into a plea agreement.” \textit{Id.} at 1187 n.5.
  \item \textsuperscript{176} See id. at 1185-86. Other newspaper articles referencing or quoting Schiller’s statement appeared for most of October 1994. See id. at 1186. In addition, a magazine article incorrectly stated that Finn pled guilty to felony mail fraud in connection with the stock acquisition. See id.
  \item \textsuperscript{177} See id. at 1185.
  \item \textsuperscript{178} See id. at 1186. A preliminary injunction is an injunction granted by the court to give temporary emergency relief to a petitioner. See \textsc{Dobbs, Handbook on Remedies}, supra note 34, § 2.10, at 106. A permanent injunction is granted to provide a final solution to the violation of a right. See id. An analysis of the specific requirements necessary to obtain each type of injunction is outside the scope of this Note. See supra note 34 (providing a general discussion of the nature and scope of injunctive relief).
  \item \textsuperscript{179} See Finn, 72 F.3d at 1186.
  \item \textsuperscript{180} See id.
  \item \textsuperscript{181} See id.
  \item \textsuperscript{182} See id. at 1191.
\end{itemize}
for civil and criminal contempt remedies and injunctive relief at the court's discretion in response to a Rule 6(e) violation in order to preserve grand jury secrecy. Unlike the Fifth, Eleventh, and D.C. Circuits, the Fourth Circuit refused to recognize that a private cause of action could be implied from Rule 6(e).

In refusing to recognize a private cause of action, the court relied on *Cort v. Ash,* in which the Supreme Court established four factors for determining whether to imply a private remedy where a statute does not expressly provide one. First, the *Cort* test requires that the statute es-

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183. Cf. id. at 1188-89 (noting that contempt and injunctive remedies “may be required to afford complete relief” to the target and society because “compromising grand jury secrecy is a serious matter”). The Fourth Circuit stated that, in certain circumstances, both civil and criminal contempt may be needed to provide relief for the alleged wrongful disclosure of grand jury materials. See id. Criminal contempt may be required to punish past Rule 6(e) violations and to vindicate the court's authority. See id. Civil contempt may be necessary to prevent future disclosures. See id.; see also Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441-42 (1911) (stating that “[c]ontempts are neither wholly civil nor altogether criminal” and both may be appropriate to provide a target with relief from wrongful disclosure).

The *Finn* court also stated that an injunctive order may be required to prevent further disclosure of this information. See 72 F.3d at 1188. The court implied that the Rule, while not granting a private cause of action, does allow for injunctive relief enforcible by civil contempt. Cf. id. at 1189-90 (holding that a court has an affirmative duty to “take appropriate action to prevent further violations and to sanction the violator as provided by the Rule” (emphasis added)); infra note 199 (quoting the Fourth Circuit’s specific language in defining the scope of relief under Rule 6(e)).

184. See *Finn,* 72 F.3d at 1188. The court determined that a person may request that the court investigate an alleged Rule 6(e) violation, but he may not bring a private suit against an alleged offender. See id. The court further stated that the “clear language” of the Rule does not provide for a private cause of action, and one cannot be implied. See id. In support of this conclusion, the Fourth Circuit stated that if Congress did not intend to provide a remedy, federal courts should not unilaterally engraft one onto the statute. See id. (quoting California v. Sierra Club, 451 U.S. 287, 297 (1981)); see also Federal Savings & Loan Ins. Corp. v. Reeves, 816 F.2d 130, 138 (4th Cir. 1987) (stating that Congress must have indicated explicitly that it wanted to provide a private remedy in order to justify incorporating a cause of action into the statute).

185. 422 U.S. 66 (1975). The Fourth Circuit stated that the measure of Congress's intent to provide a private cause of action under Rule 6(e) does not stem from the nature of the contempt. Cf. *Finn,* 72 F.3d at 1187-88 (stating that the nature of the contempt provided in Rule 6(e) is not determinative of whether a private right of action is contemplated thereunder). Where a statute does not provide an express private remedy, a court may imply such a remedy if the *Cort* factors are met. See id. at 1188-89.

186. See *Finn,* 72 F.3d at 1188-89. Some post-*Cort* cases have noted that the primary factor is whether the statute or legislative history indicates congressional intent to establish a private right of action. See id. at 1189 (citing Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 771-72 (1981)). However, the preferred test for uncovering congressional intent still comprises all four *Cort* factors. See id. (citing Davis v. Passman, 442 U.S. 228, 241 (1979)).
tablish a "federal right" in the plaintiff's favor. Second, a court must find an express or implied legislative intent to establish a private remedy. Third, a court must determine whether implying a private remedy is consistent with the nature of the statute and the legislative purposes for enacting the statute. Finally, a court must decide whether the issue falls within an area of traditional state regulation.

Applying the first Cort factor, the Fourth Circuit found that Rule 6(e) did not create a federal right in favor of an unindicted target. The court did acknowledge, however, that even though the grand jury secrecy rule exists to protect the grand jury process, part of that secrecy requirement includes insulating the grand jury target from adverse publicity and damage to his reputation. As to the second Cort factor, the court found nothing to support the argument that Congress intended a private remedy to arise from Rule 6(e). Because the Fourth Circuit found that Finn's claim failed to meet two of the four factors of the Cort test, the court concluded that no private remedy could be implied from the Rule 6(e) contempt remedy.

The Finn court stated, however, that "compromising grand jury secrecy is a serious matter" and that Rule 6(e) was enacted to achieve one of the purposes underlying grand jury secrecy—to protect an unindicted target from overzealous prosecution and adverse publicity stemming from such conduct. Having rejected the concept of a private cause of action, the Fourth Circuit nonetheless concluded that a target could seek relief from a district court in connection with unlawful Rule 6(e) disclosures. The Fourth Circuit held that once a target established a Rule 6(e) prima facie violation by showing that the alleged offender know-

187. See id. at 1189 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).
188. See id. (quoting Cort, 422 U.S. at 78).
189. See id. (quoting Cort, 422 U.S. at 78).
190. See id. (quoting Cort, 422 U.S. at 78). If the issue concerns an area that is traditionally the concern of the states, inferring a remedy based on federal law would be inappropriate. See id.
191. See id.
192. See id. (citing Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979)).
193. See id. The court stated that neither the Rule's language nor other evidence supports the contention that a right of private enforcement under Rule 6(e) may be implied. See id. at 1188-89.
194. See id. at 1189 (quoting California v. Sierra Club, 451 U.S. 287, 298 (1981)) (stating that because the first two Cort factors did not establish congressional intent to create a private remedy, it was not necessary to do any further analysis under the test).
195. See id.
196. See id.
ingly disclosed grand jury materials and that such person was subject to Rule 6(e), the court "must take appropriate steps to determine whether a violation has occurred." If a violation has occurred, a court has an affirmative duty to stop future Rule 6(e) violations and/or to sanction the offender. Although the Finn court concluded that the district court properly dismissed Finn's complaint, it remanded the case, directing the district court to investigate whether the contents of the statement violated Rule 6(e) and, if so, to impose the appropriate equitable relief and/or contempt sanctions.

III. THE SCOPE OF THE RULE 6(E) CONTEMPT REMEDY

A. Solely Criminal Contempt?

The Blalock special concurrence and the Barry dissent (Dissenters) offered several arguments to support the contention that the Rule 6(e) contempt remedy is exclusively criminal. They asserted that the Rule's plain meaning and legislative history belied any finding that Congress intended to provide for either civil contempt or a private right of action. The Dissenters also asserted that civil contempt sanctions were ineffective remedies for Rule 6(e) violations and, thus, Congress could not have intended to provide for such relief under the Rule. The Dissenters' arguments adopt an unnecessarily narrow view of the purpose and func-

197. See id. at 1189 n.7. The prima facie showing established by the Fourth Circuit in Finn appears to be easier to meet than the prima facie requirements established by Lance and Blalock. See supra text accompanying notes 79-84 (discussing the prima facie factors established in Lance); Blalock v. United States, 844 F.2d 1546, 1551 (11th Cir. 1988) (quoting Lance v. United States Dep't of Justice, 610 F.2d 202, 216 (5th Cir. 1980)).
198. See Finn, 72 F.3d at 1189 (emphasis added).
199. See id. at 1189-90. A district court also has a duty to preserve the integrity of the grand jury process. See id. at 1191. The Fourth Circuit stated that the court has the authority to "impose such sanctions as it may find appropriate," and that it may also invoke its inherent civil and criminal contempt powers "if it finds that sanctions under Rule 6(e)(2) are not appropriate." Id. at 1191; see also supra note 34 (discussing the nature and scope of equitable relief, including injunctions and civil contempt sanctions).
200. See Finn, 72 F.3d at 1191. In October 1995, three months before the Fourth Circuit decided the Finn case, the federal government closed its investigation of the VRS and cleared Finn and two other senior VRS officials of wrongdoing. See Spencer S. Hsu, Investigation of Va. Pension Fund Collapses; U.S. Studied Takeover of Real Estate Firm, WASHT. POST, Oct. 6, 1995, at D3.
201. See Barry v. United States, 865 F.2d 1317, 1326-28 (D.C. Cir. 1989) (Sentelle, J., dissenting); Blalock, 844 F.2d at 1555-60 (Tjoflat & Roettger, JJ., specially concurring).
202. See Barry, 865 F.2d at 1328 (Sentelle, J., dissenting); Blalock, 844 F.2d at 1555-60 (Tjoflat & Roettger, JJ., specially concurring).
203. See Barry, 865 F.2d at 1326-28 (Sentelle, J., dissenting); Blalock, 844 F.2d at 1559-60 (Tjoflat & Roettger, JJ., specially concurring).
tion of the Rule 6(e) contempt remedy. The Fourth Circuit in Finn, like the federal circuit courts of appeal in Eisenberg, Blalock, and Barry, concluded that the language of Rule 6(e) supports a broader interpretation of the contempt remedy—namely that it contemplates both criminal and civil contempt sanctions as well as equitable relief to provide the necessary remedies for violations of the Rule.204

1. The Plain Language of Rule 6(e)

The Dissenters argued that the requirement of a “knowing” violation and the use of the term “punished” in the Rule indicated that Congress intended only a criminal contempt remedy.205 However, the requirement of intent, while a necessary element of a criminal contempt conviction, does not by itself control whether the contempt remedy is civil or criminal.206 Although criminal intent is not required for a finding of civil contempt, civil contempt may nonetheless be based on criminal intent.207 Thus, criminal conduct may result in either criminal or civil contempt sanctions.208 Because either civil or criminal contempt may be based on “knowing” conduct, Rule 6(e) does not necessarily envision solely criminal contempt.209

The Dissenters also argued that the use of the term “punished” weighs in favor of criminal contempt as the exclusive remedy for Rule 6(e) violations.210 According to the Dissenters, the term “punished” implied a punitive sanction and, therefore, the contempt remedy must be criminal.211 The Supreme Court, however, continued to struggle with the dis-

204. See Finn, 72 F.3d at 1188; accord Barry, 865 F.2d at 1321-22; Blalock, 844 F.2d at 1550-51; cf. United States v. Eisenberg, 711 F.2d 959, 964 (11th Cir. 1983) (noting that upon a prima facie showing of a Rule 6(e) violation, a court should “order the government to take steps to stop any [future violations]”).

205. See Barry, 865 F.2d at 1327-28; Blalock, 844 F.2d at 1558.

206. See United States v. Laurins, 857 F.2d 529, 534 (9th Cir. 1988) (quoting United States v. Rose, 806 F.2d 931, 933 (9th Cir. 1986) (per curiam) (asserting that willful conduct is not a prerequisite for establishing civil contempt, but civil contempt could be based on willful conduct).

207. See id.

208. See id. (quoting United States v. Rose, 806 F.2d 931, 933 (9th Cir. 1986)).

209. Cf. id. (holding that while “willfulness” is an element of criminal contempt, willful conduct may be addressed by both civil and criminal contempt; therefore, the court may use both types of sanctions under 18 U.S.C. § 401(3)).

210. See Barry, 865 F.2d at 1328 (Sentelle, J., dissenting); Blalock, 844 F.2d at 1558-59 (Tjoflat & Roettger, JJ., specially concurring).

211. See Blalock, 844 F.2d at 1558-59 (Tjoflat & Roettger, JJ., specially concurring) (stating that the purpose of criminal contempt is to punish misconduct, while the purpose of civil contempt is to coerce compliance with an equitable order, not to punish prior wrongful behavior); see also Barry, 865 F.2d at 1327 (Sentelle, J., dissenting).
tinction between criminal and civil contempt, concluding that distin-
guishing between the two types is often difficult.²¹² Civil contempt sanc-
tions may contain aspects that are punitive in nature, while, at times,
criminal contempt sanctions may be remedial.²¹³ Given this uncertainty,
Congress's use of the term "punished" in Rule 6(e) does not establish
conclusively that the Rule 6(e) contempt remedy is criminal.²¹⁴

Consistent with the Fifth, Eleventh, and D.C. Circuits, the Fourth Cir-
cuit in Finn determined that the Rule 6(e) contempt remedy encom-
passed both civil and criminal contempt, as well as injunctive relief en-
forceable by civil contempt.²¹⁵ The Fourth Circuit reasoned that because
the language of the Rule does not differentiate between the two forms of
contempt remedies,²¹⁶ both forms, along with injunctive relief, may be
necessary to provide the appropriate remedy, and, therefore, Rule 6(e)
authorizes substantially more than criminal contempt to punish and/or
remedy violations of the Rule.²¹⁷

(stating that there is no bright-line test in distinguishing between civil and criminal con-
tempt); see also Earl C. Dudley, Jr., Getting Beyond the Civil/Criminal Distinction: A
(noting that the civil versus criminal contempt distinction is confusing).

²¹³ See Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 635 (1988) (stating that both civil
and criminal contempt cases have characteristics that are "remedial or punitive or both").

²¹⁴ Cf. United States v. Powers, 629 F.2d 619, 627 (9th Cir. 1980) (stating that
"punishment for civil contempt is usually considered to be remedial," thus supporting
the argument that a statute's or a court's language should not always be interpreted liter-
ally (emphasis added)).

The Blalock special concurrence also argued that Rule 6(e) is simply an affirmation
that the court's statutory criminal contempt authority under 18 U.S.C. § 401 applies to
violations of the grand jury secrecy rule. See Blalock, 844 F.2d at 1553 (Tjoflat & Roett-
ger, JJ., specially concurring). The Blalock special concurrence argued that § 401 explic-
tly provides for criminal sanctions for misconduct in judicial proceedings. See id. Courts,
however, have used this provision routinely as a basis for issuing criminal as well as civil
contempt sanctions. See, e.g., Downey v. Clauder, 30 F.3d 681, 685 (6th Cir. 1994) (stating
that 18 U.S.C. § 401 is the general statutory authority for civil and criminal contempt san-
cctions); United States v. Horn, 29 F.3d 754, 765 n.13 (1st Cir. 1994) (noting the avail-
ability of civil contempt sanctions under 18 U.S.C. § 401); Coleman v. Espy, 986 F.2d
1184, 1190 (8th Cir. 1993) (stating that 18 U.S.C. § 401 allows the court to impose either
criminal or civil contempt sanctions); Ahmed v. Reiss Steamship Co., 761 F.2d 302, 305
(6th Cir. 1985) (stating that 18 U.S.C. § 401 contemplates both civil and criminal con-
tempt sanctions).

²¹⁵ See Finn, 72 F.3d 1182, 1188 (4th Cir. 1996).

²¹⁶ See id. The Fourth Circuit found that because Rule 6 does not "modify or qualify
in any way the phrase 'contempt of court,'" both civil and criminal contempt remedies
were available. Id.

²¹⁷ See id.
2. The Legislative History

The Dissenters further argued that the legislative history of Rule 6(e) reflects a congressional intent to make criminal contempt the sole remedy for violations of the Rule.\(^218\) The legislative history of Rule 6(e), however, neither explicitly nor implicitly provides that criminal contempt was the exclusive remedy for violations of the Rule.\(^219\)

Adopting the 1977 amendment of Rule 6(e) involved several stages. The initial proposal contemplated expanding the scope of persons to whom grand jury materials could be disclosed, but did not provide a corresponding remedy against persons making unlawful disclosures.\(^220\) Congress subsequently rejected the initial proposal in favor of the current version of Rule 6(e), which not only expanded the scope of disclosure of grand jury materials, but also provided an express contempt remedy for violations of the Rule.\(^221\) Thus, the legislative history of Rule 6(e) suggests that Congress intended to protect persons subjected to increased risk of exposure by providing a contempt remedy that implicitly included civil remedies, such as civil contempt sanctions and injunctive relief, for violations of the Rule.\(^222\)

3. An Ill-Suited Remedy

The Dissenters also asserted that because civil contempt remedies, including injunctive relief, are designed to coerce or compel conduct, these remedies are ill suited to prohibit or restrain violations of Rule 6(e).\(^223\)

\(^{218}\) See Barry v. United States, 865 F.2d 1317, 1328 (D.C. Cir. 1989) (Sentelle, J., dissenting); Blalock, 844 F.2d at 1556-57 (Tjoflatt & Roettger, JJ., specially concurring). The Blalock special concurrence also argued that cases in the late 1800s indicated that grand jury secrecy violations were penalized as criminal contempts. See id. (citing In re Sumnerhayes, 70 F. 769, 773-74 (N.D. Cal. 1895) (other citations omitted)). The Blalock special concurrence also noted that after the common law grand jury secrecy rule was incorporated into Rule 6(e), courts continued to penalize secrecy violations as criminal contempts. See id. at 1557.


\(^{220}\) See supra notes 53-54 and accompanying text (discussing the initially proposed 1977 amendment of Rule 6(e)).

\(^{221}\) See supra notes 54-55 and accompanying text (discussing the initially proposed 1977 amendment of Rule 6(e)).

\(^{222}\) See supra note 55 (stating that the redrafted Rule is intended to provide a “clear prohibition” against prosecutorial misuse of the grand jury).

\(^{223}\) See Barry, 865 F.2d at 1328 (Sentelle, J., dissenting) (stating that civil contempt would not be useful in remedying violations of Rule 6(e)); Blalock, 844 F.2d at 1559 (Tjoflatt & Roettger, JJ., specially concurring) (stating that civil contempt would be ineffective in compelling compliance with Rule 6(e) proscriptions); see also supra note 139 (discuss-
They argued that criminal contempt sanctions are better suited because criminal sanctions are intended to prohibit conduct. Criminal contempt, however, is designed to punish or penalize past misconduct, while civil contempt is calculated to compel or coerce prescribed conduct—both being required to prohibit future misconduct. The Finn court cited an early Supreme Court case for the proposition that a district court should have the discretion to utilize either civil or criminal contempt sanctions to achieve a particular result. Moreover, Blalock, Barry, and Finn all recognized that injunctive relief may be appropriate to prevent future Rule 6(e) violations. Indeed, both types of contempt sanctions, in addition to injunctive relief, may be necessary to provide complete relief to the target. Because only one district court has found the Dissenters' reasoning persuasive, court decisions after Finn likely will conclude that Rule 6(e) contemplates both criminal and civil con-

224. See Barry, 865 F.2d at 1328 (Sentelle, J., dissenting); cf. Blalock, 844 F.2d at 1560 (Tjoflat & Roettger, JJ., specially concurring) (arguing that the imposition of civil contempt was insufficient to penalize Rule 6(e) violations and, therefore, criminal sanctions were necessary).

225. See DOBBS, HANDBOOK ON REMEDIES, supra note 34, § 2.9, at 97-98.


227. See id.; Barry, 865 F.2d at 1321-22; Blalock, 844 F.2d at 1550-51.

228. See In re Grand Jury Investigation (90-3-2), 748 F. Supp. 1188, 1202 (E.D. Mich. 1990) (holding that Rule 6(e) authorizes criminal contempt sanctions for Rule 6(e) violations but not civil contempt sanctions or injunctive relief). Although the Fourth Circuit, prior to its holding in Finn, had not directly addressed the scope of the Rule 6(e) contempt remedy, its prior Rule 6(e) decisions conflict with a narrow interpretation of the Rule. See In re Charlotte Observer, 921 F.2d 47, 50 (4th Cir. 1990) (recognizing that "a court might well issue curative orders protecting the business and the secrecy of the grand jury"); United States v. Coughlan, 842 F.2d 737, 740 (4th Cir. 1988) (noting that the contempt remedy is not the exclusive remedy for Rule 6(e) violations and that other remedies, such as suppressing grand jury materials, may be appropriate to effectively respond to such violations).
tempt sanctions as well as injunctive relief for grand jury secrecy violations.  

B. More Than Criminal and Civil Contempt and Injunctive Relief?

1. Congress Intended to Create a Rule 6(e) Private Right of Action

The Finn court relied on the Cort v. Ash factors to determine whether Rule 6(e) created a private cause of action, and concluded that such a remedy could not be implied. The first Cort factor is whether the plaintiff is a member of the “class for whose especial benefit the statute was enacted.” The Fourth Circuit found that Rule 6(e) was not enacted for the particular benefit of unindicted targets. Contrary to the Finn court's analysis, however, evidence suggests that the statute does create a federal right in favor of grand jury targets subjected to unlawful grand jury disclosures, and that Congress did intend a private remedy under the Rule. It has long been recognized that a primary reason for mandating secrecy in grand jury proceedings is to prohibit the disclosure of confidential information, thus protecting an unindicted target. The Supreme Court also has found that secrecy works to prevent adverse publicity against unindicted targets of grand jury investigations. Because unindicted targets, such as Finn, are directly harmed by the unlawful disclosure of grand jury materials, and because the secrecy requirement exists in large part to discourage harmful disclosures and to prevent adverse publicity, it is reasonable to conclude that grand jury secrecy

229. See supra note 228 (explaining that few courts have rejected injunctive relief as a viable Rule 6(e) remedy); see also 1 LAFAVE & ISRAEL, supra note 2, § 8.5, at 156 (Supp. 1991) (stating that where a “target... believes that there has been unauthorized disclosure of [a] grand jury matter, that person may seek injunctive relief to preclude further disclosure” or contempt sanctions).

230. Finn, 72 F.3d at 1188-89 (citing Cort v. Ash, 422 U.S. 66, 78 (1975)); see also supra notes 185-90 and accompanying text (discussing the Cort factors).

231. See Finn, 72 F.3d at 1189.

232. Id. (emphasis in original).

233. See id.

234. See supra notes 23-24 (discussing the importance of secrecy in protecting unindicted targets).

235. See Pittsburgh Paint & Glass Co. v. United States, 360 U.S. 395, 405 (1959) (Brennan, J., dissenting); see also supra text accompanying notes 23-24 (discussing the reasons for secrecy in the American grand jury process).

236. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979); see also United States v. Coughlan, 842 F.2d 737, 739 (4th Cir. 1988); United States v. Eisenberg, 711 F.2d 959, 961 (11th Cir. 1983) (explaining that an unindicted target's reputation is protected by the grand jury secrecy rule); supra, notes 23-24 and accompanying text.
targets are within the group of persons for whose "especial benefit" the Rule was enacted.\textsuperscript{237}

The second Cort factor is whether the legislative history reveals a congressional intent to create a private right of action.\textsuperscript{238} The Finn court concluded that there was no evidence of such intent to provide a private remedy to a target under Rule 6(e).\textsuperscript{239} An examination of the legislative history, however, exposes Congress's intent to give persons harmed by disclosure of grand jury materials an opportunity to object to such disclosure.\textsuperscript{240} The first draft of the 1977 amendment unilaterally expanded the scope of persons to whom grand jury materials should be disclosed, while providing no corresponding right to those who were harmed by such disclosure.\textsuperscript{241} Congress rejected this proposal and adopted the current version of Rule 6(e).\textsuperscript{242} In the 1977 amendment, Congress expanded the scope of permissible disclosure to facilitate law enforcement's contribution to grand jury proceedings and to encourage efficient investigations without judicial delay.\textsuperscript{243} Fearing that such power would lead to abuse of the grand jury process, Congress sought to balance such expansion by providing an express contempt remedy.\textsuperscript{244} The legislative history thus indicates that Congress intended that persons harmed or disadvantaged by the relaxed disclosure scheme were entitled to protection under Rule 6(e).\textsuperscript{245}

\textsuperscript{237} Cf. Finn, 72 F.3d at 1188-89 (acknowledging that the secrecy rule acts to protect unindicted targets).

\textsuperscript{238} See id. at 1189.

\textsuperscript{239} See id.

\textsuperscript{240} See supra notes 53-58 and accompanying text (discussing congressional intent in enacting the 1977 amendment to Rule 6(e)).

\textsuperscript{241} See S. REP. NO. 95-354, at 5-7 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 528-30; see also supra note 27 (providing the original text of Rule 6(e), which limited the disclosure of grand jury materials solely to government attorneys).

\textsuperscript{242} See S. REP. NO. 95-354, at 4, 7; see also supra note 25 (providing the current version of Rule 6(e)).

\textsuperscript{243} See S. REP. NO. 95-354, at 8; see also supra note 25 (discussing the present version of Rule 6(e)).

\textsuperscript{244} See S. REP. NO. 95-354, at 8.

\textsuperscript{245} See supra notes 52-56 and accompanying text (discussing congressional intent in enacting the 1977 amendment to Rule 6(e)). In light of the federal judiciary's difficulties in determining the scope of the Rule 6(e) remedy, the existence of its non-statutory, inherent powers to punish and provide relief through the use of contempt and injunctive orders, and the effectiveness of a private remedy to preserve grand jury secrecy, Congress should consider amending the Rule. This Note suggests that such an amendment should expressly empower federal courts to regulate Rule 6(e) violations through criminal and civil contempt sanctions and injunctive relief, and allow targets to enforce their right to grand jury secrecy through a private cause of action.
After applying two of the four Cort factors and concluding that Rule 6(e) would not sustain an implied private remedy, the Finn court determined that further analysis was unnecessary. When properly analyzed, however, the first two factors indicate Congress's intent to create a private remedy under Rule 6(e), and therefore, further analysis under the Cort test is required.

The third Cort factor requires a determination of whether a private right of action is compatible with the statute's fundamental purpose, namely the preservation of grand jury secrecy. An unindicted target, like Finn, hopes to invoke Rule 6(e) protection to prevent harm to his reputation and avoid adverse publicity. The Finn decision provided that although a target may seek criminal and/or civil contempt sanctions, as well as injunctive relief for violations of Rule 6(e), he does not have a private enforcement remedy to pursue such relief under the Rule.

Given the legislative purposes underlying the Rule, however, eliminating relief in the form of a private remedy would be too restrictive. A private right of action to seek equitable relief, reinforced by the right to seek civil contempt sanctions to compel compliance with such relief, is essential to maintain grand jury secrecy. Because Rule 6(e)'s contempt provision was not intended to be the exclusive remedy for violation of the Rule, and because a private remedy would provide an additional means to preserve grand jury secrecy, an implied right of action is consistent with Rule 6(e)'s underlying purposes.

246. Finn v. Schiller, 72 F.3d 1182, 1189 (4th Cir. 1996) (citing California v. Sierra Club, 451 U.S. 287, 298 (1981), for the proposition that further examination is necessary only if analysis of the first two factors signifies that Congress intended to create a private remedy).

247. See id. (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).

248. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) (explaining that Rule 6(e) is intended to protect grand jury secrecy, and one of the primary purposes of grand jury secrecy is to protect individuals from harmful disclosure of confidential grand jury materials).

249. See supra notes 23-24 and accompanying text (discussing the target's interests in ensuring that grand jury secrecy be carefully maintained).

250. Finn, 72 F.3d at 1188-89 (stating that Rule 6(e) victims may ask the court to investigate and impose civil contempt sanctions, which may include injunctive relief, but may not bring a private suit for such relief).

251. See FED. R. CRIM. P. 6(e) (providing that violations "may be punished as a contempt of court"); see also supra note 25 (providing the full text of Rule 6(e)). Prior to Finn, the Fourth Circuit had concluded that the contempt remedy was not intended to be the exclusive remedy for grand jury secrecy violations. See supra note 228 (discussing cases which support the proposition that injunctive remedies may be appropriate to respond to a Rule 6(e) contempt violation).
The final Cort factor requires the court to determine whether the cause of action is one traditionally relegated to the state's discretion. Because federal grand juries are governed exclusively by federal law, no state remedies exist for violations of Rule 6(e), and, therefore, breach of the grand jury secrecy rule is not an issue traditionally included within a state's jurisdiction. Thus, contrary to the Fourth Circuit's opinion in Finn, proper analysis of the Cort factors suggests that, in addition to civil and criminal contempt sanctions and other equitable remedies, a private right of action exists under Rule 6(e)'s contempt remedy.

2. No Private Right of Action, but an Affirmative Duty Nonetheless

Although the Finn court refused to find a private enforcement remedy under Rule 6(e), its ruling may benefit grand jury targets by providing a more practical, effective way to remedy Rule 6(e) violations. The decisions in Blalock and Barry provided that a target may seek to invoke the court's civil contempt power to coerce compliance with an injunctive order only after the target brings an action for injunctive relief. These decisions imply that prosecutors get "one free misstep" before they are subject to contempt sanctions.

The Finn procedure is arguably more straightforward, and the target's relief more instantaneous. According to the Fourth Circuit, the target cannot file a private cause of action with the court, but can notify the court of an alleged Rule 6(e) violation. The target then must make a prima facie showing of a Rule 6(e) violation. To establish such a case, the petitioner must demonstrate that grand jury information was knowingly disclosed and that the source of the disclosure was subject to the restrictions of Rule 6(e). If the petitioner is successful, the district court "must" investigate and, if it finds a Rule 6(e) violation has oc-

252. See Finn, 72 F.3d at 1189 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).
253. See supra note 1 (discussing the formation and governance of federal grand juries).
255. See Barry v. United States, 865 F.2d 1317, 1325 (D.C. Cir. 1989); Blalock v. United States, 844 F.2d 1546, 1551 (11th Cir. 1988).
256. Goldstein, supra note 254, at 6.
257. See id.
258. See Finn, 72 F.3d at 1187, 1189; see also supra note 196-99 (discussing the procedural mechanism to invoke the court's contempt powers).
259. See Finn, 72 F.3d at 1189.
260. See id. at 1189 n.7.
261. See id. at 1189.
curred, it is obligated to impose appropriate relief to remedy the violation. Such relief may consist of civil contempt sanctions and injunctive orders to “stop further or future” Rule 6(e) violations as well as criminal contempt sanctions to punish prior violations and to preserve the court’s authority over the matter.

The Finn holding nonetheless restricts an important private right in the Fourth Circuit. Even though protecting an unindicted target is one of the major justifications for the grand jury secrecy rule, the denial of a private cause of action by the Finn court removed one effective means of enforcing this policy.

IV. CONCLUSION

Ample evidence exists to support the contention that criminal and civil contempt sanctions, as well as injunctive relief, are available to remedy and punish violations of the Rule. Rule 6(e) also appears to provide a private right of action to pursue such relief in order to protect the integrity of the grand jury process. The legislative history and case law contain little to disprove such a contention. It is more reasonable to assume that Congress, recognizing the judiciary’s inherent powers and expressly providing that Rule 6(e) violations “may be punished by contempt,” left the courts free to fashion appropriate injunctive and contempt remedies and that such remedies could be pursued through a private civil action.

The Finn case underscores the appropriateness of a private remedy for violations of Rule 6(e). A civil suit creates the proper forum in which to remedy a prosecutor’s negligent disclosure of grand jury materials. Unindicted individuals are virtually bereft of any practical remedies at law, yet the threat of injury to their reputations and livelihoods is immense. Limiting the Rule 6(e) remedy to contempt and injunctive relief without a private right of action to seek such relief would be fundamentally unfair and contrary to the principal goals of Rule 6(e): namely the preservation of grand jury secrecy for the overall benefit of society and the protection of unindicted grand jury targets.

262. See id. at 1188.
263. See id.