NO. 10M38

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE GRAND JURY PROCEEDINGS (SIOBHAN REYNOLDS AND PAIN RELIEF NETWORK ALLIANCE, INC.)

MOVANT THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS' MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF SEEKING PUBLIC ACCESS TO THE SUPREME COURT RECORD

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MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF SEEKING PUBLIC ACCESS TO THE SUPREME COURT RECORD

The Reporters Committee for Freedom of the Press (Movant) moves to intervene in these proceedings for the limited purpose of opposing the sealing of any filings and opinions in this Court. At present, the documents publicly available[1] in this Court do not demonstrate that the public and press' First Amendment and common law rights to monitor and report on the administration of justice in the federal court system are represented.

Petitioners have stated that their Motion for Leave to File Petition for Certiorari Under Seal with a Redacted Version for the Public ("Motion to Seal") was filed "out of an abundance of caution" only – in light of the sealing orders issued by the Tenth Circuit and the District Court for the District of Kansas – and that they intend to also file a motion to unseal the Petition as well. (Mot. to Seal at 2.) To date, however, neither a motion to unseal nor the government's response is publicly available. Nor is the proposed "Redacted Version" of the Petition publicly available, leaving Movant with no ability to judge whether the proposed redacted version sufficiently addresses

[1] To date, the only publicly-docketed entries related to this case are (1) an Application For Extension Of Time Within Which To File A Petition For Writ Of Certiorari (No. 10A25), (2) the Order granting the extension (No. 10A25), (3) Petitioners' Motion for Leave to File Petition for Certiorari Under Seal with a Redacted Version for the Public (No. 10M38), and (4) a notation that the motion has been distributed to conference.

Movant's interest in protecting the press and public's right of access to judicial proceedings.

Accordingly, based on the limited public docket currently available, the Reporters Committee requests leave to intervene. If granted limited Intervenor status, Movant shall oppose the sealing or unnecessary redacting of any filings or opinions in this case, for the reasons stated more fully in Part II below.

Movant recognizes, however, that its interests may very well prove to overlap with those of petitioners. To the extent that proves to be the case, Movant has no separate need to intervene. It is for this reason that Movant alternatively requests, should this Court deny the Motion to Intervene, that this Court take the legal arguments made herein under advisement in determining whether to seal any further proceedings or filings in this case.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act ("FOIA" or "the Act") litigation since 1970.

The Reporters Committee, and the journalists that it serves, has an interest in protecting the public and press' right to monitor and report on the

administration of justice in the federal court system. The concerning use of secret dockets by federal courts in a wide variety of cases deters the press from performing its recognized role as the "handmaiden of effective judicial administration," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559-60 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)), and undermines the public's confidence in its own government institutions. The Reporters Committee submits this motion as a means of defending the press' role in ensuring that the federal court system is administered in an open and fair manner.

I. MOVANT'S REQUEST TO INTERVENE FOR A LIMITED PURPOSE IS PROPER

A. This Court has authority to grant intervention to a private party.

Although intervention by a party (other than the United States)[2] in Supreme Court proceedings is uncommon, it is not unprecedented. This Court has exercised its authority to grant motions by parties to intervene in proceedings in the past. *See, e.g., Vos v. Barg*, 129 S. Ct. 1540 (2009) (granting motion by state of Minnesota to intervene at certiorari stage); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 389 U.S. 813 (1967) (granting motion by petitioner for leave to intervene); *NLRB v. Acme Industrial Co.*, 384 U.S. 925 (1966) (granting union organizations' motion to intervene).

[2] Intervention by the United States appears to be more common. *See, e.g., Haas v. Quest Recovery Svcs., Inc.*, 549 U.S. 1163 (2007); *Jinks v. Richland County*, 537 U.S. 1017 (2002); *Medical Bd. Of California v. Hason*, 537 U.S. 1028 (2002).

Unlike in the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 24, there is no express discussion of non-party intervention in the Supreme Court Rules, the Federal Rules of Appellate Procedure (other than agency appeals), or the Federal Rules of Criminal Procedure. But this Court's exercise of such authority is consistent with a "deeply rooted understanding of appellate power," *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989), which provides that appellate courts have the inherent authority necessary to grant similar types of amendments to add or dismiss parties. *See, e.g., id.* at 837 (holding that appellate courts have authority to drop a dispensable party); *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (allowing a motion to add plaintiffs in order to "remove the matter [of original plaintiffs' standing] from controversy").

B. Movant's motion to intervene is justified and timely.

Movant's motion to intervene is timely and is based on a strong interest in the immediately-pending aspect of this case: public access to court records. The press' (and public's) interest in intervening for the limited purpose of ensuring public access to court proceedings is well recognized. *See, e.g., In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998). As the Second Circuit recently explained in *United States v. Aref*, 533 F.3d 72 (2008):

> Federal courts have authority to "formulate procedural rules not specifically required by the Constitution or the Congress" to "implement a remedy for violation of recognized rights." *United States*

v. Hasting, 461 U.S. 499, 505 (1983). Because "vindication of [the] right [of public access] requires some meaningful opportunity for protest by persons other than the initial litigants," *In re Herald Co.*, 734 F.2d [93, 102 (2d Cir. 1984)], we now invoke this authority to hold that a motion to intervene to assert the public's First Amendment right of access to criminal proceedings is proper.

533 F.3d at 81.

As a non-profit news media organization committed to defending and protecting the First Amendment rights of journalists, Movant has a recognized interest in observing and monitoring the proceedings and outcome in this case. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" (citation omitted)). Indeed, Movant's interest in this case is heightened by the potential free speech issues involved. Petitioners' Application to this Court for an extension of time to file for writ of certiorari, as well as the news reports of the proceedings before the district court, suggests that this case raises significant questions about the use of the grand jury subpoena power in matters affecting free speech. Such issues are of central importance to Movant and the journalists that it serves.

Movant's motion to intervene is also timely. In discussing intervention under Federal Rule of Civil Procedure 24, this Court explained that "[t]imeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). Given the sealed nature of this case before

both the district court and the court of appeals, Movant's motion to intervene at this stage is timely. *See id.* at 366 (considering whether a movant "knew or should have known of the pendency" of the action).

II. MOVANT SEEKS TO INTERVENE IN ORDER TO PROTECT PUBLIC ACCESS TO FILINGS IN THIS COURT

The Reporters Committee files this motion without the benefit of the parties' briefing or access to the court record below. But based on public accounts and the unsealed portion of the record in this Court, petitioners are presumably filing a petition for a writ of certiorari to challenge their unsuccessful attempt to quash two grand jury subpoenas and subsequent contempt adjudication for non-compliance.[3]

Movant does not contest the historically recognized need for secrecy in grand jury proceedings. But such secrecy is an exception to the general policy of open and public administration of justice, and should not be expanded unnecessarily to restrict public access to ancillary judicial proceedings. When the issues on appeal do not directly concern the actual grand jury proceedings themselves, the justification for secrecy loses all force. And, when the ancillary proceedings concern a matter of public interest that is widely reported in the media – particularly where the publicly reported facts are from the presumed target of the grand jury investigation herself – there is no

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[3] *See* Application for An Extension of Time Within Which To File a Petition For a Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit, *In Re Grand Jury Proceedings (Siobhan Reynolds and Pain Relief Network Alliance, Inc.)*, Application No. 10A25 (Docketed July 6, 2010).

cause for the blanket sealing of the appellate record. Such confidentiality, particularly in cases of significant public interest, does nothing to advance the rationale for grand jury secrecy, but can certainly affect the public's confidence in the justice system.

Accordingly, Movant seeks public access to two aspects of the proceedings in this case: first, the unredacted versions of all parties' Supreme Court filings (or, at least, versions minimally redacted only as truly required for purposes of grand jury secrecy); and second, any actual court proceedings that take place in the future, including in this Court and the courts below.

A. The facts publicly known, and the facts presumed.

News reports provide significant, if incomplete, insight into the issues in this case. Petitioners Siobhan Reynolds and her organization, the Pain Relief Network (PRN), were each issued a grand jury subpoena for materials. *See* Appendix at 1-4, 5-8.[4] Reynolds, on behalf of herself and PRN, refused to comply with the subpoenas and sought to have them quashed. Appendix at

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[4] Roxana Hegeman, Associated Press, *N.M. Patient Advocate Subject of Investigation In Kansas*, ABQJournal News (online posting date April 14, 2009), *available at* http://www.abqjournal.com/news/state/appatient04-14-09.htm (last accessed October 4, 2010); Jacob Sullum, *Drug Control Becomes Speech Control*, Reason Magazine (online posting date September 9, 2009), *available at* http://reason.com/archives/2009/09/09/drug-control-becomes-speech-co/ (last viewed October 4, 2010); *see also* American Civil Liberties Union Press Release, *Pain Relief Advocate Pays High Price for Free Speech* (September 3, 2009), *available at* http://www.aclu.org/print/free-speech/pain-relief-advocate-pays-high-price-free-speech (last accessed October 5, 2010); Harvey A. Silvergate, *Witchita Witch Hunt*, Forbes.com (online posting date September 1, 2009), *available at* http://www.forbes.com/2009/09/01/siobhan-reynolds-pain-relief-network-wichita-justice-department-opinions-contributors-harvey-a-silverglate.html (last accessed October 5, 2010).

1-2, 9-10.[5] Reynolds also confirmed that she was a subject in the grand jury investigation. Appendix at 1.[6] The Associated Press has a copy of at least one of the subpoenas. *Id.*

Reynolds spoke openly with the media about the subpoenas and her unsuccessful attempt to have the subpoenas quashed. *See* Appendix at 11, 1-2.[7] She also spoke publicly about the ensuing contempt proceedings against her and the fact that the district court fined her for failing to comply, and threatened her with jail time. Appendix at 11.[8] After incurring thousands of dollars in fines and facing the "imminent" threat of jail for contempt, Reynolds ultimately released the documents. Appendix at 11.[9]

Petitioners' Application (No. 10A25) for an extension of time to file a petition for writ of certiorari confirms the general procedural facts above: namely, that a grand jury issued subpoenas *duces tecum* to petitioners seeking, among other items, "expressive materials" that implicated petitioners' First Amendment rights; that the district court denied

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[5] Hegemen, ABQJournal News, *supra*; *see also* American Civil Liberties Union Press Release, *ACLU Asks Court to Block Government's Unconstitutional Attempt to Silence Pain Relief Advocate* (May 7, 2009), *available at* http://www.aclu.org/drug-law-reform/aclu-asks-court-block-government's-unconstitutional-attempt-silence-pain-relief-advo (last accessed October 4, 2010).

[6] Hegeman, ABQJournal News, *supra*.

[7] Roxana Hegeman, Associated Press, *Pain-relief advocate target of secret federal probe*, The Wichita Eagle (online posting date August 22, 2010), *available at* http://www.kansas.com/2010/08/22/1456739/schneider-advocate-targeted-in.html (last accessed October 4, 2010); Hegeman, ABQJournal News, *supra*.

[8] Hegeman, Witchita Eagle, *supra*.

[9] Hegeman, Witchita Eagle, *supra*.

petitioners' motion to quash the subpoenas and held petitioners in contempt; and that the Tenth Circuit affirmed the district court's holding.

B. The legal and policy grounds for grand jury secrecy do not support the sealing of filings in this Court.

Neither the Federal Rules of Criminal Procedure nor the underlying rationale for grand jury secrecy support the sealing of such a certiorari petition or other related court filings in an appeal pertaining to a challenge to grand jury subpoenas and subsequent contempt proceedings – particularly where the facts of those ancillary court proceedings are already public knowledge. The decision to seal or redact a portion of any filing should differentiate between secret material concerning the actual grand jury proceedings and ancillary courtroom matters.

a. The recognized need for secrecy in grand jury proceedings.

This Court has consistently "recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops NW*, 441 U.S. 211, 218 (1979). Such secrecy is intended to serve a "number of distinct interests," *id.*, which this Court summarized in *Douglas Oil*:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be

> indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

441 U.S. at 219 (footnote omitted).

Federal Rule of Criminal Procedure 6 contains the current codification of the historical rule of secrecy in grand jury proceedings. *See Douglas Oil*, 441 U.S. at 218 n.9. The secrecy provisions[10] contained in Rule 6 prohibit the disclosure – by certain individuals only (notably not witnesses) – of "a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2). Additionally, the Rule generally requires courts to close hearings "to the extent necessary," and to seal records and documents "to the extent and as long as necessary," to prevent disclosure of matters occurring before the grand jury. Fed. R. Crim. P. 6(e)(5), 6(e)(6).[11]

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[10] Fed. R. Crim. Proc. 6(e)(2) provides:

(2) Secrecy.

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

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

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

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

Section 6(e)(3)(A)(ii) and (iii) refer to certain government personnel.

[11] Fed. R. Crim. Proc. 6(e)(5) and 6(e)(6) provide:

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

b. Neither federal rule of criminal procedure 6 nor the underlying rationale for grand jury secrecy justifies sealing all appellate filings in ancillary court proceedings.

The secrecy provisions in Federal Rule of Criminal Procedure 6(e) have only a limited applicability to ancillary court proceedings on appeal. Although some specific evidence or arguments presented in court proceedings ancillary to a grand jury investigation may warrant confidentiality, blanket secrecy over the entire court matter conflicts with the text of the rule as well as this Court's practice.

Rule 6(e)(5) instructs courts to close hearings to the "extent necessary to prevent disclosure of a matter occurring before a grand jury." If a court hearing itself was considered to be a "matter occurring before a grand jury," logically no court proceeding touching on grand jury matters could ever be open because the hearing itself would necessarily disclose a grand jury matter. Such a reading would render superfluous Rule 6(e)(5)'s command to close hearings "to the extent necessary." Similarly, Rule 6(e)(6)'s instruction for courts to seal records, orders and subpoenas "to the extent and as long as necessary" to prevent the unauthorized disclosure of grand jury matters would also have no purpose if all such court documents themselves were considered to be secret grand jury materials.

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

The better reading of these provisions is that Rule 6(e)(5) and 6(e)(6) merely restrict the public disclosure of certain information in court hearings – in other words, the rule requires sealing, redacting and closing only those portions of court documents (and hearings) that directly address secret information actually presented in or to a grand jury. *See, e.g., In re: Sealed Case No. 99-3091(Office of Independent Counsel Contempt Proceeding)*, 192 F.3d 995, 1002 (D.C. Cir. 1999)("Information actually presented to the grand jury is core Rule 6(e) material that is afforded the broadest protection from disclosure.")

This reading is consistent with this Court's published opinions in similar types of cases in which specific details about the grand jury proceedings may be kept secret, but facts about the ancillary courtroom proceedings themselves are not. *Levine v. United States*, 362 U.S. 610 (1960), is instructive. The petitioner in *Levine* challenged the district court's finding of criminal contempt after Levine declined to answer grand jury questions. This Court summarized the proceedings below, explaining that the district court began the proceedings by clearing the courtroom in order to review the grand jury record. The district court then asked the witness the same questions posed by the grand jury, in the grand jury's presence. When the witness confirmed that he would not answer the questions, the district court summarily initiated contempt proceedings and held Levine in criminal contempt. *Id.* at 612-15.

This Court upheld the contempt finding on appeal, concluding that Levine had failed to timely raise a due process challenge to the fact that the contempt proceedings were held in a closed courtroom. *Id.* at 618-19. Of note, however, the Court acknowledged that grand jury secrecy did not justify closing of the contempt proceeding itself:

> Petitioner had no right to have the general public present while the grand jury's questions were being read. However, after the record of the morning's grand jury proceedings had been read, and the six questions put to petitioner with a direction that he answer them in the court's presence, ***there was no further cause for enforcing secrecy in the sense of excluding the general public.*** Having refused to answer each question in turn, and having resolved not to answer at all, petitioner then might well have insisted that, as summary punishment was to be imposed, the courtroom be opened so that the act of contempt, that is, his definitive refusal to comply with the court's direction to answer the previously propounded questions, and the consequent adjudication and sentence might occur in public.

Levine, 362 U.S. at 618 (emphasis added).

The reasoning in *Levine* is consistent with the approach taken by this Court in the many other opinions that commonly discuss procedural and factual matters of cases arising from court proceedings ancillary to the underlying grand jury proceedings. For example, *United States v. R. Enterprises, Inc.* concerned an attempt by three businesses to "avoid compliance with a subpoena *duces tecum* issued in connection with a grand jury investigation." 498 U.S. 292, 294 (1991). This Court's opinion names the businesses that were issued the subpoenas, describes the general subject of the grand jury investigation and information sought through the subpoenas,

details the ancillary proceedings related to business's attempts to quash the subpoenas as well as the subsequent contempt adjudications, and summarizes the issues on appeal. *Id.* at 294-98. Notably, the Court's discussion of the "strict secrecy requirements" of grand jury proceedings required by Rule 6 addressed only the amount of detail that the government needed to disclose in response to a subpoena challenge, not the fact of the subpoena challenge itself. *Id.* at 299. Likewise, this Court's opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972), discussed in depth the challenges to grand jury subpoenas in multiple cases, providing significant details about their facts and procedural histories despite the highly charged nature of those cases. *See id.* at 667-679.

The present case is no different in principle. Regardless of whether the issue is contempt (either criminal, as in *Levine*, or civil, as in *R. Enterprises*) or a motion to quash, particularly at this late appellate stage, there is "no further cause for enforcing secrecy" with respect to those parts of the court proceedings that do not necessarily disclose actual grand jury deliberations or secrets.

Additionally, the justification for sealing appellate filings in ancillary proceedings is even less compelling in this case, because significant facts about the grand jury proceedings are already publicly known. The existence of a grand jury investigation seeking information from petitioners is a

commonly known fact; indeed, petitioner Reynolds herself has publicized that fact. *See supra at* 8-9.

Accordingly, none of the "distinct interests" to be protected by grand jury secrecy, *see Douglas Oil,* 441 U.S. at 218-19, are served by sealing or unnecessarily redacting the filings made in this Court. There can be no concern of maintaining witness confidentiality in an appeal brought by the subject witness who has publicly disclosed her challenge to a grand jury subpoena. For the same reason, the traditional concern that disclosure will inhibit full and frank testimony cannot be at issue in ancillary proceedings regarding the subject witness's compliance with a subpoena. Nor can there be any concern of a flight risk, juror intimidation or public ridicule through publicity surrounding a court challenge to a witness subpoena, particularly where the witness herself has already publicly disclosed that she is both a subject of the grand jury investigation and her position on the subpoenas.

A number of circuit court decisions recognize this general proposition: that the public disclosure of facts related to a grand jury proceeding warrants reexamining the need for continued secrecy. *See, e.g., In re: Sealed Case No. 99-3091*, 192 F.3d at 1004-05 (prosecutor's disclosure of the fact that President Clinton was under grand jury investigation was not a violation of Rule 6(e) because it was "common knowledge" already); *id.* at 1004 ("The purpose in Rule 6(e) is to preserve secrecy. Information widely known is not secret" (quoting *In Re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994))). Details

about the grand jury investigation here are already public – a fact that is "clearly relevant because even partial previous disclosure often undercuts many of the reasons for secrecy." *In re Petition of Craig*, 131 F.3d 99, 107 (2d Cir. 1997).

C. Sealing appellate records is inconsistent with the open administration of justice, lessens accountability and public oversight in the judicial system, and affects public confidence in its government institutions.

The sealing of this case throughout the legal process has effectively prevented the press and public from evaluating the merit of the serious First Amendment claims made by petitioners here. This Court has recognized that open criminal courts help to foster confidence in the judicial system as well as the responsible administration of justice by "subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard*, 384 U.S. at 350.

The need for public scrutiny is particularly acute in appeals like the one at issue here. As reported in the press, the subpoenas at issue raise serious First Amendment concerns over the manner in which the government has used the grand jury process. Yet the press and public have access to only an incomplete picture, one that lacks even an official record of the ancillary proceedings that led to contempt findings, fines and the threat of jail. The need to keep secret certain details that may touch on the inner workings of

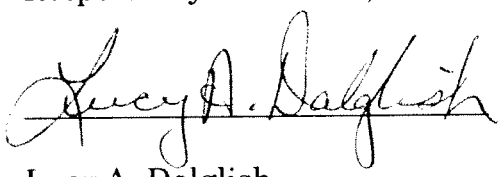
the actual grand jury investigation does not justify the wholesale sealing of the appellate record.

III. CONCLUSION

The Reporters Committee respectfully requests that this Court grant it leave to intervene for the limited purpose of opposing the sealing of any subsequent filings and opinions in this Court, for the reasons addressed above. In the alternative, the Reporters Committee requests that this Court take this motion under advisement in determining whether to seal any further proceedings or filings in this case.

Dated: October 7, 2010

Respectfully submitted,



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APPENDIX

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Tuesday, April 14, 2009

N.M. Patient Advocate Subject of Investigation in Kansas

By Roxana Hegeman
Associated Press

WICHITA, Kan. — A federal grand jury is investigating the head of the Pain Relief Network for her role in the case of a Kansas doctor whose clinic prosecutors have linked to 59 overdose deaths.

Siobhan Reynolds, president of the Santa Fe, N.M.-based group, is a subject in the grand jury investigation of possible obstruction of justice in the case of Dr. Stephen Schneider and his wife, Linda, according to court documents. A subject is a person of interest the prosecution may be considering charging.

Reynolds' group has supported the Schneiders, who were indicted in December 2007 on 34 counts alleging they unlawfully prescribed painkillers and overbilled for services at their Haysville clinic. The Schneiders maintain that they are innocent.

Reynolds confirmed that she is the subject of an investigation and said a grand jury in Topeka has ordered her to provide documents related to the Schneiders' case by Wednesday.

Reynolds has filed a motion asking a federal judge to throw out the grand jury's subpoena and told The Associated Press that she would go to jail rather than turn over the documents.

"I am going to fight it as far as I need to," she said. "If I were to give in here, lawful advocacy against the United States in court will effectively be brought to an end. So ... a lot is at stake here."

The U.S. attorney's office declined to comment.

However, in court documents filed last year in the Schneiders' case, prosecutors portrayed Reynolds as having a "sycophantic or parasitic relationship" with the couple. Prosecutors alleged she was using the case to further her group's political agenda and her personal interests.

The group supports physicians charged with violations of the Controlled Substances Act, Reynolds said, and has become involved in about 15 such cases nationwide. The group filed a short-lived lawsuit against the Justice Department after the Schneiders' indictment, but withdrew it a month later.

The Topeka grand jury's subpoena, of which the AP obtained a copy, ordered Reynolds to provide all correspondence with attorneys, patients, Schneider family members, doctors and others related to the criminal case and malpractice lawsuits against the Schneiders.

In her motion, Reynolds argued that turning over such documents would destroy her work as a political activist and that it violates her First Amendment rights of speech and association.

"This is a direct attempt to intimidate me and silence me," Reynolds said.

The subpoena also demanded bank and credit card statements showing payments to and from clinic employees, patients, potential witnesses and others.

Former Schneider patient Marti Beatty said a government investigator recently interviewed him about his conversations with the group, which he called "innocent and unexciting."

"He was trying to get me to say we as a group — or she really, in particular — had ulterior motives," Beatty said of the investigator.

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http://reason.com/archives/2009/09/09/drug-control-becomes-speech-co

Drug Control Becomes Speech Control

A federal prosecutor tries to silence a pain treatment activist.

Jacob Sullum | September 9, 2009

When the government accuses a doctor of running a "pill mill," prosecutors portray every aspect of his practice in a sinister light. Prescribing painkillers becomes drug trafficking, applying for insurance reimbursement becomes fraud, making bank deposits becomes money laundering, and working with people at the office becomes conspiracy.

When Siobhan Reynolds thinks a doctor has been unfairly targeted for such a prosecution, she tries to counter the official narrative by highlighting the patients he has helped and dramatizing the conflict between drug control and pain control. But now the government has turned its reinterpretive powers on Reynolds, portraying the pain treatment activist's advocacy as obstruction of justice and thereby threatening the freedom of anyone who dares to suggest there is more than one side to a criminal case.

In December 2007, the U.S. Attorney's Office in Wichita unveiled a 34-count indictment against Haysville, Kansas, physician Stephen Schneider and his wife, Linda, a nurse who worked in his clinic. It charged Schneider with "illegally distributing prescription drugs to his patients, directly causing the deaths of at least four of them."

Convinced the Schneiders were innocent, Reynolds and her group, the Pain Relief Network (PRN), publicly disputed the charges. In January 2008, PRN announced a lawsuit challenging the constitutionality of using the federal Controlled Substances Act to regulate the practice of medicine, traditionally a state function. PRN also tried to stop the state medical board from suspending Schneider's license, arguing that doing so would harm his patients.

Although neither of those efforts succeeded in a court of law, they began to have an impact in the court of public opinion. Press coverage of the case went beyond perfunctory quotes from defense attorneys to include the perspectives of chronic pain patients who were grateful to Schneider for making their lives livable and anxious about their prospects of obtaining adequate treatment from doctors wary of legal trouble.

"He fought for me, and it is time now that I fight for him," a woman suffering from spinal deterioration told the Associated Press. "He doesn't deserve this. This is like a nightmare for me." Hundreds of patients signed a petition supporting Schneider, an effort launched under

a hand-lettered sign reading "Don't Tread on Me Tanya."

The Tanya in question, Assistant U.S. Attorney Tanya Treadway, evidently was annoyed by the unusually balanced press coverage Reynolds helped arrange. In April 2008, Treadway took the extraordinary step of seeking a court order prohibiting Reynolds, who was neither a defendant nor a lawyer in the Schneiders' case, from talking about it. The prosecutor claimed Reynolds had "a sycophantic or parasitic relationship with the defendants," whom she was using "to further her own personal interests."

Nine months after a federal judge rejected Treadway's attempt to gag Reynolds, the activist learned she was the subject of a grand jury investigation into possible obstruction of justice. Reynolds and PRN received subpoenas demanding their communications with dozens of people, including relatives of the Schneiders and members of their defense team. Tellingly, the material sought includes correspondence related to a PRN-commissioned billboard in Wichita proclaiming "Dr. Schneider never killed anyone."

Scott Michelman, an attorney with the American Civil Liberties Union who is representing Reynolds, says the interest in the billboard "confirms that this so-called investigation is about Siobhan Reynolds' speech....The most plausible explanation here is that the prosecutor is trying to shut Siobhan up."

Last week a federal judge rejected Reynolds' motion to quash the subpoenas on First Amendment grounds and imposed $200-a-day fines on her and PRN for refusing to comply. Reynolds plans to appeal. "This is a direct attempt to intimidate me and silence me," she told A.P.

Another item sought by the grand jury is a PRN documentary that discusses how the war on drugs affects pain treatment, a video Michelman calls "completely innocuous from a criminal perspective" and "absolutely protected speech." Its title, especially apt in light of Treadway's vindictive campaign against Reynolds, is *The Chilling Effect.*

Jacob Sullum is a senior editor at Reason *and a nationally syndicated columnist.*

Free Speech

Pain Relief Advocate Pays High Price For Free Speech

September 3, 2009

FOR IMMEDIATE RELEASE

TOPEKA, KS – A federal court in Topeka, Kansas today imposed a $200 per day fine upon nationally renowned pain relief activist Siobhan Reynolds for her refusal to comply with a pair of subpoenas secured in an effort to chill her constitutionally protected speech, as well as an additional $200 per day fine upon her advocacy organization, the Pain Relief Network (PRN). Reynolds, who is President of PRN, has been an outspoken advocate for sufferers of chronic pain and physicians' ability to provide appropriate pain management treatment without risk of criminal prosecution. The subpoenas are part of an ongoing grand jury investigation related to the federal prosecution of Dr. Stephen Schneider and his wife, Linda, who operated a medical practice specializing in pain relief and whose prosecution Reynolds has publicly condemned. Reynolds is represented by the American Civil Liberties Union in the case.

"The constitutional rights of Ms. Reynolds, and of all Americans, must not come with a price tag. The court effectively decreed that she may remain free to exercise her First Amendment rights, but it will cost $400 a day," said Jay Rorty, an attorney with the ACLU who represented Reynolds in court today. "While Ms. Reynolds is relieved not to have to go to prison today, the government is still imposing an unreasonable choice between exercising her right to free speech and going bankrupt."

Today's court order requires that both Reynolds and PRN pay fines of $200 per day for as long as she refuses to comply with the subpoenas – a penalty that will quickly bankrupt Reynolds and PRN.

"This fine is just the latest symptom of the federal government's shameful assault on those who suffer from chronic pain and the doctors who work to bring them relief," said Reynolds. "I chose to stand up in defense of patients, doctors and the First Amendment, and now I will pay the price. But I will continue to draw attention to the under-treatment of pain in this country and to expose the federal government's callous policies that turn honest physicians

and desperate patients into criminals."

Reynolds founded PRN with her husband, since deceased, who suffered from an extremely painful congenital connective tissue disorder – a condition that their son, now 17 years old, has inherited. PRN is a national advocacy organization that offers support to chronic pain patients and opposes the criminal prosecution of physicians based on medical decisions.

On March 10, 2009, subpoenas were issued to both Reynolds and PRN ordering that Reynolds turn over all personal and organizational communications on any subject with any former employees or patients of the Schneider Medical Clinic or with any of dozens of named individuals, including members of the Schneider family and members of the Schneiders' legal and medical defense team, as well as a record of all Reynolds' phone calls for the past 17 months.

Emblematic of the subpoenas' First Amendment intrusion is the demand for correspondence with a company that Reynolds enlisted to erect a billboard in support of the Schneiders – a clear example of constitutionally protected speech, according to the ACLU. The subpoena also seeks a copy of an advocacy video Reynolds made concerning pain relief and the government's related prosecution of physicians.

The subpoenas are part of a grand jury investigation initiated by the same Assistant U.S. Attorney who is prosecuting the Schneiders, and who had previously sought, and was denied, a gag order to prevent Reynolds from speaking about the Schneiders' case. With the gag order denied, the prosecutor convened a grand jury and secured the subpoenas in an attempt to silence Reynolds by invading her privacy and by raising the specter of criminal prosecution, according to the ACLU.

The ACLU also contends that the subpoenas are an impermissible intrusion into the Schneiders' defense team – an attempt to gain confidential information not otherwise available to the prosecution. Attempts by the ACLU and the Schneiders' attorneys to quash the subpoenas have been denied by the court.

Reynolds' testimony before the House Judiciary Committee on DEA Oversight concerning under-treatment of chronic pain and related overzealous federal enforcement may be found at: http://judiciary.house.gov/hearings/July2007/Reynolds070712.pdf

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Forbes.com

Commentary

Wichita Witch Hunt

Harvey A. Silverglate, 09.01.09, 4:15 PM ET

No good deed goes unpunished when a private citizen is up against the federal drug warriors--those members of the Department of Justice who have been seeking, with increasing success in recent decades, to effectively control the practice of pain relief medicine. But a current drama being played out in federal court in Kansas portends an even darker turn in the DOJ's war--a private citizen is being threatened with prosecution for seeking to raise public and news media consciousness of the Feds' war against doctors and patients.

The current contretemps in Wichita has its roots in 2002 when Sean Greenwood, who for more than a decade suffered from a rare but debilitating connective tissue disorder, finally found a remedy. William Hurwitz, a Virginia doctor, prescribed the high doses of pain relief medicine necessary for Greenwood to be able to function day-to-day.

Yet when federal agents raided Hurwitz's clinic in 2003 and charged the pain management specialist with illegal drug trafficking, Greenwood's short-lived return to normalcy ended. He couldn't find another doctor willing to treat his pain--the chances were too good that the "narcs" and the federal prosecutors who work with them would assert impossibly vague federal criminal drug laws. Three years later, Greenwood died from a brain hemorrhage, likely brought on by the blood pressure build-up from years of untreated pain.

Greenwood's wife, Siobhan Reynolds, decided to fight back. In 2003 she founded the Pain Relief Network (PRN), a group of activists, doctors and patients who oppose the federal government's tyranny over pain relief specialists.

Now, the PRN's campaign to raise public awareness of pain-doctor prosecutions has made Reynolds herself the target of drug warriors. Prosecutors in Wichita have asked a federal grand jury to decide whether Reynolds engaged in "obstruction of justice" for her role in seeking to create public awareness, and to otherwise assist the defense, in an ongoing prosecution of Kansas pain relief providers. The feds' message is clear: In the pursuit of pain doctors, private citizen-activists--not just physicians--will be targeted.

For Reynolds, the script of the Kansas prosecution has become all too familiar: The feds announced a 34-count indictment at a December 2007 press conference. Local media dutifully reported the charges with minimal scrutiny and the accused--Dr. Stephen Schneider and his wife, Linda, a nurse--were convicted in the court of public opinion before their trial even began.

In such an atmosphere, it is very difficult to make the point that physicians engaged in the good faith practice of medicine are being second-guessed--not by fellow physicians, but by the federal government--and punished under the criminal law for administering what the Drug Enforcement Agency (DEA) of the Department of Justice considers more narcotics than is necessary to alleviate a patient's pain.

When pain doctors administer too much of a controlled substance, or do so knowing that they will be diverted to narcotic addicts, they are deemed no longer engaged in the legitimate practice of medicine. But the dividing line is far from clear and not subject to universal agreement even within the profession. Any patient in need of relief can, over time, develop a chemical dependence on a lawful drug--much like a diabetic becomes dependent on insulin. And, once a treatment regimen begins, many patients' tolerance to the drug increases. Thus, to produce the same analgesic effect, doctors sometimes need to increase the prescribed amount, and that amount varies from person to person.

It is notoriously difficult even for trained physicians to distinguish an addict's abuse from a patient's dependence. Nonetheless, federal narcotics officers have increasingly terrorized physicians, wielding the criminal law and harsh prison terms to punish perceived violators. Since 2003, over 400 doctors have been criminally prosecuted by the federal government, according to the DEA. One result is that chronic pain patients in this country are routinely under-medicated.

The litany of abusive prosecutorial tactics could fill a volume. A "win-at-all-costs" mentality dominates federal prosecutors and

drug agents involved in these cases. After a Miami Beach doctor was acquitted of 141 counts of illegally prescribing pain medication in March 2009, federal district court Judge Alan Gold rebuked the prosecution for introducing government informants--former patients of the doctor who were cooperating to avoid their own prosecution--as impartial witnesses at trial.

Improprieties galore marked the prosecution of Dr. Hurwitz. Before his trial in federal court in Virginia in 2004, the DEA published a "Frequently Asked Questions" (FAQ) pamphlet for prescription pain medications. In a remarkable admission, the DEA wrote that confusion over dependence and addiction "can lead to inappropriate targeting of practitioners and patients for investigation and prosecution." Yet on the eve trial, the DEA, realizing that Hurwitz could rely on this government-published pamphlet to defend his treatment methods, withdrew the FAQ from its Web site. Winning the case proved more important than facilitating sound medical practice. Hurwitz was convicted.

In Kansas, it appears that zealous prosecutors are targeting not only the doctors, but also their public advocates. When Reynolds wrote op-eds in local newspapers and granted interviews to other media outlets, Assistant U.S. Attorney Tanya Treadway attempted to impose a gag order on her public advocacy. The district judge correctly denied this extraordinary request.

Undeterred, Treadway filed on March 27 a subpoena demanding a broad range of documents and records, obviously hoping to deter the peripatetic pain relief advocate, or even target her for a criminal trial of her own. Just what was Reynolds' suspected criminal activity?

"Obstruction of justice" is the subpoena's listed offense being investigated, but some of the requested records could, in no possible way, prove such a crime. The prosecutor has demanded copies of an ominous-sounding "movie," which, in reality, is a PRN-produced documentary showing the plight of pain physicians. Also requested were records relating to a billboard Reynolds paid to have erected over a busy Wichita highway. It read: "Dr. Schneider never killed anyone." Suddenly, a rather ordinary exercise in free speech and political activism became evidence of an obstruction of justice.

On Sept. 3, a federal judge will decide whether to enforce this subpoena, which Reynolds' lawyers have sought to invalidate on free speech and other grounds. The citizen's liberty to loudly and publicly oppose the drug warriors' long-running reign of terror on the medical profession and its patients should not be in question. Rather, the question should be how the federal government has managed to accumulate the power to punish doctors who, in good faith, are attempting to alleviate excruciating pain in their patients.

Harvey A. Silverglate, author of Three Felonies a Day: How the Feds Target the Innocent *(Encounter Books, 2009), is a criminal defense and civil liberties attorney and author in Cambridge, Mass.*

Read more Forbes Opinions here.

Drug Law Reform | Freedom of Speech and Belief

ACLU Asks Court To Block Government's Unconstitutional Attempt To Silence Pain Relief Advocate

May 7, 2009

FOR IMMEDIATE RELEASE

TOPEKA, KS – The American Civil Liberties Union today filed a motion to quash a pair of subpoenas that were issued to nationally renowned pain relief advocate Siobhan Reynolds in an effort to chill her constitutionally protected speech supporting physicians' ability to provide appropriate pain management treatment without risk of criminal prosecution. The subpoenas are part of an ongoing grand jury investigation related to the federal prosecution of Dr. Stephen Schneider and his wife Linda, who operated a medical practice specializing in pain relief, and whose prosecution Reynolds has publicly condemned.

"The government may not use the subpoena power to chill the First Amendment rights of those with opposing views," said ACLU attorney Scott Michelman, who, with the ACLU of Kansas & Western Missouri, represents Reynolds. "It is vital to the proper functioning of our democracy that advocates, like Ms. Reynolds, be free to speak out without fear of government retaliation."

Reynolds is President of the Pain Relief Network (PRN), a national advocacy organization that opposes the criminal prosecution of physicians based on medical judgment. On March 10, 2009, subpoenas were issued to both Reynolds and PRN ordering that Reynolds turn over all personal and organizational communications on any subject with any former employees or patients of the Schneider Medical Clinic or with any of dozens of named individuals, including members of the Schneider family and members of the Schneiders' legal and medical defense team, as well as a record of all Reynolds' phone calls for the past seventeen months.

Emblematic of the subpoenas' First Amendment intrusion is the request for correspondence with a company that Reynolds enlisted to erect a billboard in support of the Schneiders – a

clear example of constitutionally protected speech, according to the ACLU. The subpoena also seeks a copy of an advocacy video Reynolds made concerning pain relief and the government's related prosecution of physicians.

The subpoenas are part of a grand jury investigation initiated by Assistant U.S. Attorney Tanya Treadway, who is prosecuting the Schneiders and who had previously sought, and was denied, a gag order to prevent Reynolds from speaking about the Schneiders' case. With the gag order denied, Treadway convened a grand jury and issued the subpoenas in an attempt to silence Reynolds by invading her privacy and by raising the specter of criminal prosecution, according to the ACLU.

"The chilling effect of the subpoenas on the advocacy of Ms. Reynolds, PRN, and other potential speakers is undeniable and impermissible under the First Amendment," said Michelman.

The subpoenas are striking in their breadth, as they would force Reynolds and PRN to disclose all of their communications with a long list of individuals, whether or not the communications are in any way related to the Schneider case.

"I will not be intimidated and I will not be silenced," said Reynolds, who founded PRN with her husband, since deceased, who suffered from an extremely painful congenital connective tissue disorder – a condition that their son inherited. "As I testified before Congress, an obsession with prescription drug abuse has resulted in the gross under-treatment of pain in this country. We have turned honest physicians and desperate patients into criminals, and policymakers and the public need to hear about it."

The ACLU also contends that the subpoenas are an impermissible intrusion into the Schneiders' defense team – an attempt to gain confidential information not otherwise available to the prosecution. The Schneiders have filed their own motion to quash on the basis that this material must be requested through the ordinary legal discovery process, if at all. Both motions will be heard together.

"The First Amendment bars both direct restrictions on protected speech as well as attempts to silence speakers via indirect burdens which can be potentially just as effective," said William Raney, Board President of the ACLU of Kansas & Western Missouri. "The ACLU will investigate and oppose outright bans on speech as well as efforts to 'chill' speakers by making them so uncomfortable, via threat of criminal prosecution or otherwise, that they cease communication without a straightforward gag."

A hearing in the matter is scheduled for Tuesday, May 12, at 3:30, in federal district court in Topeka.

The Wichita Eagle
Kansas.com

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Saturday, Oct. 2, 2010

Posted on Sun, Aug. 22, 2010

Pain-relief advocate target of secret federal probe

BY ROXANA HEGEMAN
Associated Press

Siobhan Reynolds has spent years crusading on behalf of chronic pain patients — testifying before Congress, suing government drug regulators and speaking out against what she believes is a government crackdown on prescription painkillers that has left many patients needlessly suffering.

But as the case of a Kansas physician linked to 68 overdose deaths wraps up in a federal courtroom in Wichita, the fiery patient advocate has found herself in an uncomfortable new role: fighting a secret federal investigation targeting her over a possible conspiracy to obstruct justice for her involvement in that case.

Reynolds, the president of the Pain Relief Network, championed the defense of physician Stephen Schneider and his wife, Linda. The Haysville couple were convicted of unlawfully writing prescriptions leading to death, health care fraud and money laundering.

Reynolds has become a leading voice for pain-relief advocates after the 2003 arrest of William Hurwitz, whose pain management clinic in a suburb of Washington, D.C., once treated Reynolds' late husband, Sean Greenwood, who suffered from a painful connective-tissue disorder.

Her initial refusal to turn over e-mails and other subpoenaed documents related to the Kansas case has already led to a contempt citation and cost Reynolds and her nonprofit group $36,500 in fines before the money ran out. Faced with imminent jailing for contempt, Reynolds relented and turned over some 4,000 pages of subpoenaed material three weeks before the Schneiders' trial.

"I am being beaten up in the dark by the government," Reynolds said. "They have taken everything I have. They have coerced me into violating all kinds of oaths I had held firm. But when push came to shove at the very end here, I decided I would be more valuable to the Schneiders and this country out than in."

Assistant U.S. Attorney Tanya Treadway declined to discuss the grand jury investigation, which has been vaguely referenced in documents in the Schneider case.

Federal Rule of Criminal Procedure 6

(a) Summoning a Grand Jury.

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

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

(b) Objection to the Grand Jury or to a Grand Juror.

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

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

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

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

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

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But

the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

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

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

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

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

(3) Exceptions.

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

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

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

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

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

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

federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

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

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

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

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

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

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

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

(E) The court may authorize disclosure--at a time, in a manner, and subject to any other

conditions that it directs--of a grand-jury matter:

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

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

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

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

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

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

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

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

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

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

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

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

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

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury--or its foreperson or deputy foreperson--must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

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

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

(i) "Indian Tribe" Defined. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.