In re GRAND JURY INVESTIGATION OF CUISINARTS, INC.: BLENDING TRADITIONAL GRAND JURY POLICY AND EFFECTIVE ANTITRUST ENFORCEMENT

Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act[1] (the Act) as an effort to bring renewed vigor to state enforcement of antitrust laws.[2] Title III of the Act, containing the *parens patriae*[3] provisions, has proven to be a controversial and only partially effective attempt to make the state attorney general a powerful advocate of the consumer, who is most vulnerable to antitrust violations.[4]

Title III has had only limited success due substantially to the unresolved controversy surrounding the meaning of section 4F of the

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[1] Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in scattered sections of 15, 18, 28 U.S.C. (1976 & Supp. I 1977)).

[2] *In re* Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 35 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595); *see* Kinter, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1 (1977).

[3] Pub. L. No. 94-435, §§ 4C-4H, 90 Stat. 1383, 1394-96 (codified at 15 U.S.C. §§ 15c-15h (1976)). *Parens patriae*, meaning literally, "father of his country," represents the well established common-law notion that a state should be able to sue on behalf of those citizens who would otherwise be unable to seek relief. In the United States this concept developed to include "interference with the flow of goods" or "to prevent acts of pollution." Kinter, Griffin & Goldston, *supra* note 2, at 18-19. *Parens patriae* actions are the natural vehicle to advance the cause of private consumers whose individual injuries are too small to warrant the expense of litigation, but whose collective injuries are too difficult to ascertain for purposes of satisfying rule 23 of the Federal Rules of Civil Procedure. Two decisions, however, limited the ability of the states to bring these actions. *Id.* at 19; *see* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (state cannot recover damages for injury to its general economy); California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973). The *Frito-Lay* court fully recognized the desirability of allowing states to use *parens patriae* to champion the causes of their injured consumers but refused to act before the legislature had acted. *Id.* at 777.

In direct response to this call for action, Congress enacted Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. *See* H.R. REP. No. 499, 94th Cong., 2d Sess. 1 (1975), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2572 [hereinafter cited as HOUSE REPORT]. Title III grants to states the authority to bring *parens patriae* suits on behalf of their citizens. It creates an exemption for *parens partiae* suits to the class action requirements of rule 23 of the Federal Rules of Civil Procedure. It provides for damages in *parens patriae* suits to be computed and distributed through aggregation techniques. Finally, Title III instructs the United States Attorney General to provide state antitrust divisions with notice of possible causes of action and to grant these divisions access to "investigative files or other material" deemed relevant to a possible state *parens* action. Hart-Scott-Rodino Antitrust Improvements Act, §§ 4C-4E, 90 Stat. 1383, 1394-96.

[4] *See* HOUSE REPORT, *supra* note 3, at 3-4, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2572-73. The report provides:

> This lack of an effective consumer remedy sometimes results in the unjust enrichment of antitrust violators and undermines the deterrent effect of the treble damage

Act.[5] This section instructs the Attorney General of the United States to inform a state attorney general of any suspected antitrust violations in his jurisdiction[6] and to make available to the state attorney general "to the extent permitted by law, any investigative files or other materials" which could aid the state attorney general in his investigation.[7] These two short clauses, together with the scant legislative history of the Act[8] have been dissected by courts[9] and commentators[10] alike, to determine what operative position 4F(b) occupies in relation to the ancient common law policy revering grand jury secrecy.[11]

> action. [Title III] fills this gap by providing the consumer an advocate in the enforcement process—his State attorney general.
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> . . . .
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> A State attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens.

Id. at 4-5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2573-75; *see also infra* note 122.

[5] While the 4F(b) controversy has undoubtedly hampered state attorneys general's efforts to make effective use of Title III, the United States Supreme Court's holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), has had an even more immediate and chilling affect on *parens* actions. *See* Hill, *The Present and Future Status of* Parens Patriae *Litigations from the Plaintiff's Viewpoint*, 47 ANTITRUST L.J. 1375, 1377 (1979). In *Illinois Brick*, the Court held that indirect purchasers may not sue for treble damages under the Clayton Act. 431 U.S. at 730-31. Since the retail consumer is almost always the last in a chain of purchasers, this decision automatically thwarted initiation of many contemplated *parens* suits. Just what the ultimate effect, if any, *Illinois Brick* will have on future *parens* litigation will not be known for certain until the courts and the legislatures elaborate on the subject. *See* Hill, *supra*, at 1380.

[6] 15 U.S.C. § 15f(a) (1976) provides:

> Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

Id.

[7] 15 U.S.C. § 15f(b) (1976) provides:

> To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

Id.

[8] Since the Act passed without a Senate-House conference there is no conference report. Consequently, it is necessary to rely on the committee reports and various floor statements which are sufficiently contradictory thus cultivating opposing viewpoints. Kinter, Griffin & Goldston, *supra* note 2, at 2-3, 22.

[9] *See infra* note 17.

[10] *See infra* note 21.

[11] Section 4F(b) is analyzed in the context of the grand jury because most antitrust investigations are conducted through the use of the grand jury. *See infra* note 49 and accompanying text. The revered position which the grand jury holds is illustrated by the Supreme Court's pronouncement in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1958). The Court stated: "[The] 'long established policy' of [grand jury] secrecy [is] older than our Nation itself. . . . Its

The issue arises whenever the United States Attorney General has in his possession grand jury materials[12] relating to an investigation of a possible antitrust violation. Under what circumstances can he make these available to the state attorney general? Opponents of liberal disclosure point to rules 6(e)(2) and (3) of the Federal Rules of Criminal Procedure which expressly forbid a government attorney from disclosing grand jury materials absent a court order.[13] They would

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establishment in the Constitution 'as the sole method for preferring charges in serious criminal cases' indeed 'shows the high place it [holds] as an instrument of justice.' " *Id.* at 399 (citations omitted). Although grand jury secrecy is a policy which developed at common law and whose parameters continue to be shaped by common law, it is now codified in FED. R. CRIM. P. 6(e). *See* Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MAR. J. PRAC. & PROC. 18 (1967).

[12] At issue are all materials used or generated by the grand jury. This includes transcripts of the testimony of grand jury witnesses and documents and exhibits gathered or generated pursuant to the federal grand jury's investigation.

[13] FED. R. CRIM. P. 6(e)(2) provides in pertinent part:

> (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.

Id.

FED. R. CRIM. P. 6(e)(3) provides in pertinent part:

> (3) Exceptions.
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> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
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> (i) an attorney for the government for use in the performance of such attorney's duty; and
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> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
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> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.
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> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
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> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
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> (ii) When permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

Id.

have anyone seeking such a court order, demonstrate with particularity a "compelling necessity" for breaking the "indispensable secrecy of grand jury proceedings."[14] This interpretation of the "particularized need" standard was actually enunciated by the Supreme Court of the United States in *United States v. Proctor & Gamble Co.*,[15] and, contrary to claims by those favoring liberal discovery is not met by a mere showing that disclosure would expedite the litigation.[16]

The states seeking disclosure conceded that a court order is necessary,[17] but averred that the congressional intent embodied in the *parens patriae* provisions of the Act would be frustrated if the states were denied grand jury materials.[18] They maintained that states deserve different treatment than the private litigants of *Proctor & Gamble*.[19] Accordingly, the states proposed that in situations in which a state is either investigating or actually bringing a civil antitrust action, Congress intended section 4F(b) to annul or at least modify the particularized need standard to the extent that obtaining the requisite court order would be a simple turn-key procedure.[20]

The split of scholarly[21] and judicial opinion[22] is evidence of the compelling arguments both sides have advanced. At the United States Circuit Court of Appeals level, (the highest court yet to decide the issue), two circuits favor disclosure and two circuits oppose it. The Fourth Circuit, in *United States v. Colonial Chevrolet Corp.*,[23] and

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[14] United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958); *accord* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959).

[15] 356 U.S. 677 (1958).

[16] *Id.* at 682.

[17] *See In re* Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 31 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595); *In re* Illinois Petition To Inspect And Copy Grand Jury Materials, 659 F.2d 800, 802 (7th Cir. 1981), *cert. granted sub nom.* Illinois v. Abbott & Assocs. 102 S. Ct. 1708 (1982); United States v. Colonial Chevrolet Corp., 629 F.2d 943, 947 (4th Cir. 1980), *cert. denied sub nom.* Certain Unindicted Individuals & Corps. v. United States, 450 U.S. 913 (1981); United States v. B.F. Goodrich Co., 619 F.2d 798, 800 (9th Cir. 1980).

[18] *See infra* notes 76-78 & 101-03 and accompanying text.

[19] *See infra* notes 104-12 and accompanying text.

[20] *See supra* note 18.

[21] *See* Maximov, *Access by State Attorneys General to Federal Grand Jury Antitrust Investigative Materials*, 69 CALIF. L. REV. 821 (1981); Unikel, *Discovery of Grand Jury Transcripts in Civil Antitrust Cases in the Seventh Circuit: Fair Use or Abuse?*, 66 ILL. B.J. 706 (1978); Note, *Disclosure of Grand Jury Materials in* Parens Patriae *Actions*, 81 COLUM. L. REV. 410 (1981) [hereinafter cited as Note, *Disclosure of Grand Jury Materials*]; Note, *Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b)*, 79 MICH. L. REV. 1234 (1981) [hereinafter cited as Note, *Clayton Act Disclosure*]; Note, *The Use of Grand Jury Transcripts in Private Antitrust Litigation: An Argument for Automatic Access*, 58 TEX L. REV. 647 (1980).

[22] *See infra* cases cited notes 23, 24, 26 & 28.

[23] 629 F.2d 943 (4th Cir. 1980), *cert. denied sub nom.* Certain Unindicted Individuals & Corps. v. United States, 450 U.S. 913 (1981).

the Ninth Circuit, in *United States v. B.F. Goodrich Co.*,[24] allowed disclosure of the requested materials without a showing of particularized need,[25] while the Seventh Circuit, in *In re Illinois Petition To Inspect and Copy Grand Jury Materials*,[26] and the Second Circuit, in *In re Grand Jury Investigation of Cuisinarts, Inc.*,[27] the most recent consideration of the issue, held that disclosure was unavailable without the traditional showing of particularized need.[28] This Comment will analyze that decision within the perspective of the previous three circuit court determinations.

The facts of *Cuisinarts* mirror, for the most part, the pattern which typically gives rise to a 4F(b) issue. A special grand jury was convened in the District of Connecticut in June, 1980 as a result of an investigation by the Department of Justice into Cuisinarts' practices in marketing its brand name food processors.[29] The Department of Justice then notified the state attorneys general that on September 17, 1980 it had returned a one-count indictment against Cuisinarts charging it with conspiracy to unreasonably restrain interstate commerce in violation of section one of the Sherman Act.[30]

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[24] 619 F.2d 798 (9th Cir. 1980).

[25] 629 F.2d at 950; 619 F.2d at 800-01.

[26] 659 F.2d 800 (7th Cir. 1981), *cert. granted sub nom.* Illinois v. Abbott & Assocs., 102 S. Ct. 1708 (1982).

[27] 665 F.2d 24 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595).

[28] 665 F.2d at 36; 659 F.2d at 808.

[29] 665 F.2d at 29. The grand jury received some of the documents and testimony which the previous investigation had gathered through use of civil investigative demands. In addition over 50,000 documents from relevant corporations and individuals were subpoenaed and testimony was taken from 23 witnesses. *Id.* It is significant that all those Cuisinarts' employees who testified before the grand jury were specifically informed that their statements might be made public. Brief in Support of Petition for Certiorari at 8, Connecticut v. Cuisinarts, Inc., *petition for cert. filed*, 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595) [hereinafter cited as Petition for Certiorari].

[30] 665 F.2d at 29. Section one of the Sherman Act provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. . . ." 15 U.S.C. § 1 (1976).

This was the first criminal prosecution of this type (vertical price fixing) since the crime was made a felony in 1974. *In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1011 (D. Conn.), *aff'd*, 665 F.2d 24 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595). Simultaneously, the United States filed a civil companion suit praying for equitable relief. *Id.* at 1009. Both these actions were, for all practical purposes, settled by December 19, 1980. *Id.* Cuisinarts' plea of *nolo contendre* was accepted and a $250,000 fine was levied and paid within one week. *Id.* Counsel for both sides stipulated to the submission of a proposed final judgment in the civil action which the court approved. *Id.* The terms of the final judgment enjoined Cuisinarts from fixing the resale pricing of its food processors or from selectively denying its products to retailers. *Id.* at 1011.

Within six months of the Cuisinarts indictment, thirteen civil actions had been filed and ordered consolidated in the District of Connecticut by the Judicial Panel on Multidistrict Litigation.[31] Of these, two were *parens patriae* actions.[32] Subsequent to the initiation of these *parens* actions, other states, contemplating initiation of *parens* actions requested that the investigative files of the Department of Justice be turned over to them pursuant to section 4F(b).[33] The files were delivered, purged of the grand jury materials, which, the states were informed, would only be released in compliance with rule 6(e).[34] Accordingly, the states filed motions seeking the court order required by rule 6(e).[35]

In denying the state's motions, Judge Cabranes of the United States District Court for the District of Connecticut examined the scant legislative history of section 4F(b) and deemed it an inadequate basis to justify any modification of the necessity standard and the policy of grand jury secrecy.[36] Accordingly, the states were held to the traditional burden of showing a compelling and particularized need for the grand jury materials they sought.[37]

On appeal, the Court of Appeals for the Second Circuit affirmed Judge Cabranes' order, finding that the legislative intent was clear and unequivocal and in no way suggested any modification of the

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[31] *Id.* at 1011. These consolidated proceedings are captioned: *In re* Cuisinarts Food Processor Antitrust Litig., MDL Docket No. 447 (J.P.M.D.L. Jan. 16, 1981).

[32] 665 F.2d at 29. These two actions were brought before the states filed motions seeking disclosure of the grand jury materials. *See id.* at 29-30; *infra* notes 33-35 and accompanying text.

[33] 665 F.2d at 29.

[34] *Id.* The Department of Justice made available copies of the indictment and civil complaint and copies of internal memoranda totalling less than 20 pages. Petition for Certiorari, *supra* note 29, at 9.

[35] 665 F.2d at 29-30. Connecticut was the first state to file a motion seeking disclosure of the grand jury materials. Subsequent to the filing of this motion, 14 other states filed identical motions with the district court: North Carolina (Jan. 12, 1981); Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island (joint motion filed on Jan. 12, 1981); Maryland (Jan. 20, 1981); Pennsylvania (Jan. 28, 1981); Colorado (Jan. 30, 1981); Vermont (Jan. 30, 1981); Virginia (Feb. 6, 1981); Wisconsin (Feb. 13, 1981); and Texas (Mar. 31, 1981). *In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1012 & n.7 (D. Conn.), *aff'd*, 665 F.2d 24 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595).

[36] *In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1022 (D. Conn.), *aff'd*, 665 F.2d 24 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595). Judge Cabranes went to great lengths to explain that under the circumstances he was powerless to effect any change in the traditional grand jury policy. He stated: "[T]his court could not rely on a legislative history that is . . . 'equivocal' . . . to overturn a policy that is as well-settled as that of grand jury secrecy." *Id.* at 1020.

[37] *Id.* at 1021. Because they had not even made an attempt to establish this need, Judge Cabranes denied their motions without prejudice. *Id.* at 1023.

traditional policies of grand jury secrecy.[38] The court structured its analysis of the issue according to two "fundamental questions of statutory construction—whether grand jury materials fall within the 'investigative files or other materials' language of section 4F(b) and, if so, whether . . . disclosure is forbidden because section 4F(b) allows release only 'to the extent permitted by law.' "[39]

The *Cuisinarts* court's "investigative files" analysis is markedly similar, in form and substance, to the *Illinois Petition* court's discussion of the same issue.[40] The *Cuisinarts* court's analysis rested primarily on a separation of powers argument purporting to show that the grand jury has always been, and remains today an "arm of the judiciary."[41] Accepting this premise as valid, the court found it "curious logic indeed" for the states to contend that the grand jury materials were part of the investigative files of the Department of Justice.[42] The *Cuisinarts* court decided that these materials were records of the judicial branch subject to disclosure at the court's discretion.[43] The *Cuisinarts* court, after "momentary reflection," cited a litany of alternative investigative resources[44] as evidence that its narrow interpreta-

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[38] 665 F.2d at 30-36. The *Cuisinarts* court stated: "[I]t is clear that the legislative history, although spare, negates any inference that Congress intended section 4F(b) to modify the standards for disclosure of grand jury materials." *Id.* at 34.

[39] *Id.* at 30.

[40] *Compare Cuisinarts*, 665 F.2d at 31 ("The grand jury while maintaining its independence in many areas, is fundamentally an arm of the judiciary") *with Illinois Petition*, 659 F.2d at 803 ("[w]hile the grand jury has independence in many areas, it remains for certain purposes an appendage of the court").

[41] 665 F.2d at 31 (citing Levine v. United States, 362 U.S. 610 (1960)); *accord* J.R. Simplot Co. v. United States, 77-1 U.S. Tax Cas. (CCH) ¶ 9146 at 86,197 (9th Cir. 1976) ("[t]he grand jury is a constitutional entity under court supervision, not a tool available for Executive branch purposes"). *But see* United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting) (general perception of grand jury is that it is now tool of Executive); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1119 (E.D. Pa. 1976) ("[f]indings of fact fairly and substantially support the claim that the grand jury is essentially controlled by the United States Attorney and is his prosecutorial tool").

[42] 665 F.2d at 31. The states proposed that an investigative file could contain the records of many different sources. They did not argue that the grand jury materials lost their character as records of the court when physically located within the files of the Department of Justice. They merely asserted that the materials were part of the Justice Department's investigative files and because these materials were not specifically excepted by the "investigative files" language of section 4F(b), they should be subject to disclosure. *Id.* at 30-31.

[43] *Id.* at 31. The court quoted Justice Whittaker's concurring remarks in United States v. Proctor & Gamble Co., 356 U.S. 677 (1958), to support its position. It stated: "[G]rand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators . . . instead those documents are records of the court." 665 F.2d at 31 (quoting *Proctor & Gamble*, 356 U.S. at 684-85) (Whittaker, J., concurring).

[44] 665 F.2d at 31. The list included "information that the Justice Department obtained through civil discovery and through investigations by its Staff, staff memoranda, and government data and analyses," as well as independent civil discovery. *Id. But cf. Illinois Petition*, 659 F.2d at 803 (antitrust investigations are conducted almost entirely before grand jury).

tion of the "investigative files" language of 4F(b) would not be a significant impediment to antitrust enforcement.[45] The court felt that Congress, being cognizant of the age-old policy favoring grand jury secrecy, certainly would have expressly included grand jury materials in the 4F(b) language if it had so intended since such an inclusion would undoubtedly erode the policy of grand jury secrecy.[46]

A review of the legislation and its purpose, however, indicates that a somewhat tempered conclusion is warranted. Section 4F(b) was a bold attempt to strengthen antitrust enforcement at the state level, by encouraging federal-state cooperation.[47] Congress intended to bring to bear the superior investigative resources at the disposal of the federal government, for the benefit of the states, without incurring any additional expense of federal funds.[48] Congress was aware that investigations into the kind of per se antitrust violations for which *parens patriae* actions would be most effective, namely price fixing, are conducted almost exclusively through the use of the grand jury.[49] It is likely, therefore, that if Congress had intended to exclude grand jury materials from section 4F(b) investigative files it would most certainly have made specific provisions therein.[50] It would not have

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[45] 665 F.2d at 31.

[46] *See id.*

[47] HOUSE REPORT, *supra* note 3, at 17, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS. at 2586; *see also Antitrust Parens Patriae Amendments: Hearings on H.R. 12528 & H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 13-17 (1974) (opening statements of Chairman Rodino) [hereinafter cited as *House Hearings*].

[48] HOUSE REPORT, *supra* note 3, at 17, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2587.

[49] *House Hearings* at 23, 38, 43 (testimony of Thomas E. Karper, Assistant Attorney General); *see Antitrust Civil Process Act Amendment: Hearings on H.R. 39 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 36 (1975). *But cf.* S. REP. No. 354, 95th Cong., 1st Sess. 6, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 527, 530 ("Federal crimes are 'investigated' by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries").

[50] It has been argued that Title I of the Hart-Scott-Rodino Antitrust Improvements Act, the antitrust Civil Process Act Amendments, Pub. L. No. 94-435, §§ 101-106, 90 Stat. 1383, 1383-90 (1976) (codified at 15 U.S.C. §§ 1311-1314 (1976)), provides by incorporation an exemption for grand jury materials from the investigative files language of section 4F(b). *See, e.g., In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1017 n.13 (D. Conn.), *aff'd*, 665 F.2d 24 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595); *see also* Note, *Clayton Act Disclosure*, *supra* note 21, at 1254-55.

Title I significantly expanded the ability of the Justice Department to conduct precomplaint civil investigations of possible antitrust violations through the use of civil investigative demands (CIDS). *See* Kinter, Griffin & Goldston, *supra* note 2, at 4. This greatly expanded civil investigative authority was intended to give the Justice Department the ability to conduct civil discovery

used such broad and inclusive language as "*any* investigative files or other materials which *are or may be* relevant or material to the *actual or potential* cause of action."[51]

Nevertheless, even if one assumes that Congress did intend for grand jury materials to be included as part of the materials covered by section 4F(b), the *Cuisinarts* court offered evidence supporting its conclusion that only by showing a particularized need would states be able to obtain release of the requested grand jury materials.[52] Assuming that the Justice Department had grand jury materials relevant to Cuisinarts' activities and these materials were part of the Department's investigative files, the court would then be required to address the second "fundamental question of statutory construction" to determine if, and under what circumstances these materials could be disclosed to the states, pursuant to the "extent permitted by law" language of section 4F(b).[53]

The *Cuisinarts* court stated that the states never contended that the Department of Justice had unlimited discretion to disclose grand

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in the same pervasive manner as a grand jury conducts criminal investigation even though the government may not be contemplating criminal charges. *See id.* In addition to equalizing the Justice Department's ability to conduct civil antitrust investigations and its ability to conduct criminal investigations, Congress also attempted to give materials gathered during civil discovery protection similar to that granted grand jury materials by restricting access to these materials to the Justice Department, the FTC, and the Congress. *See* 15 U.S.C. §§ 1313(c), 1313(d). These materials could, however, be used by the Justice Department in grand jury proceedings, in which case they, like all grand jury materials, would become records of the court and be subject to the protections of rule 6(e) of the Federal Rules of Criminal Procedure. *See* 15 U.S.C. § 1313(d)(1); *see also supra* notes 42 & 43 and accompanying text. Thus, since Title I expressly prevents state attorneys general from gaining access to these materials before they become property of the grand jury, Congress certainly could not have intended section 4F(b) to permit state attorneys general access to them once they were introduced to the grand jury. Therefore, it is argued that Title I of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 is a specific provision excepting grand jury materials from the investigative files of section 4F(b).

This analysis, however, fails to comport with the general intent behind the legislation. Title I and Title III both reflect the keen desire of Congress to stimulate antitrust enforcement at all levels. *See* HOUSE REPORT, *supra* note 3, at 3, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2572. Title I gives the Justice Department a civil investigative resource almost as powerful as a grand jury. Congress, however, was extremely careful to insure that these newly conferred powers were not abused, and consequently they limited access to these civilly discovered materials by creating a civil counterpart to rule 6(e) of the Federal Rules of Criminal Procedure. Once the material is introduced to a grand jury, however, it loses its character as material collected pursuant to a civil investigation, therefore, the rules protecting confidentiality in criminal discovery should apply. Accordingly, those seeking disclosure at this point must satisfy the rules of criminal discovery whether the materials are sought for civil or criminal proceedings.

[51] 15 U.S.C. § 15f(b) (emphasis added).

[52] 665 F.2d at 32. The fact that the *Cuisinarts* court refused to base its decision solely on its restrictive interpretation of section 4F(b)'s investigative files provision is, perhaps, indicative of the vulnerability of this part of the decision. *See supra* notes 47-51 and accompanying text; *see also Illinois Petition*, 659 F.2d at 804.

[53] 665 F.2d at 32.

jury materials simply because their investigative files contained grand jury materials.[54] Disclosure they conceded, was within the discretion of the trial judge.[55] Rather the point of contention was what the "to the extent permitted by law" language of section 4F(b) meant in this context.[56] A complete understanding of this debate is facilitated by a brief review of the law regarding disclosure of grand jury materials at the time that the Hart-Scott-Rodino Antitrust Improvements Act became law.

The grand jury has its roots in our most ancient English common-law heritage.[57] The policy of secrecy as a means of preserving the independent character of the grand jury is only slightly less venerable.[58] The grand jury formally became a part of American jurisprudence through the adoption of the Constitution and the fifth amendment in 1791.[59] As with all common law, it has continued to develop and take form according to the needs of the society at any given time. The first codification of the policy of grand jury secrecy occurred in 1945 with the passage of the original version of rule 6(e) of the Federal Rules of Criminal Procedure.[60] That rule provided:

> [d]isclosure . . . 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 grand juror, 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

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[54] *Id.* at 30-31.

[55] *Id.* at 31. The states further recognized that even if they were granted disclosure, their use of the materials would be restricted pursuant to the pertinent state regulations and subject to any protective orders accompanying an order granting access. *See* Petition for Certiorari, *supra* note 29, at 26.

[56] 665 F.2d at 30-33.

[57] Although "[t]he long shadows of history enshroud the precise moment when the first grand jury was established," *id.* at 27, most historians trace its origins to 1166 when King Henry II issued the Assize of Clarendon. *See* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312-27 (3d ed. 1922). *See generally* Calkins, *supra* note 11, at 18-20; Pickholz & Pickholz, *Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards*, 36 WASH. & LEE L. REV. 1027, 1028-30 (1979).

[58] Credit for this policy of secrecy is generally given to a group of courageous jurors who, in 1681, refused the King's demand that hearings in the Earl of Shaftesbury trial be conducted in public. Moreover, they returned no indictments, much to the King's dismay, crediting only their consciences as the basis for their decision. *See* Calkins, *supra* note 11, at 19.

[59] *See* U.S. CONST. amend. IV.

[60] See *supra* note 13 for text of the final version of rule 6(e) of the Federal Rules of Criminal Procedure as amended in 1977.

> the Court at the request of the defendant. No obligation of secrecy may be imposed upon any person except in accordance with this rule . . . .[61]

The policy of grand jury secrecy has been further refined by the United States Supreme Court. In *United States v. Proctor & Gamble Co.*,[62] the defendants in a civil antitrust action were denied access to grand jury materials because they were unable to meet the "good cause" requirement of rule 34 of the Federal Rules of Civil Procedure.[63] The Court held that this burden could only be met if one showed a "compelling" and "particularized" need for the materials which outweighed the "strong public policies against disclosure."[64] This interpretation of the "good cause" requirement of rule 34 of the Federal Rules of Civil Procedure was subsequently incorporated into rule 6(e) of the Federal Rules of Criminal Procedure by the Supreme Court in *Pittsburgh Plate Glass Co. v. United States.*[65] In *Dennis v. United States*,[66] the Supreme Court cited an ever-expanding body of judicial, statutory, and scholarly authority[67] as evidence of "the growing realization that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice."[68] Without abrogating the "particularized need" standard,[69]

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[61] FED. R. CRIM. P. 6(e) (original version), *reprinted in* Pickholz & Pickholz, *supra* note 57, at 1032.

[62] 356 U.S. 677 (1958).

[63] *Id.* at 681-84. FED. R. CIV. P. 34 provides in part:

> Upon motion of any party showing good cause therefore and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, ... not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control . . . .

Id.

[64] 356 U.S. at 682-83. The Court found that if the grand jury transcript were used at the trial to impeach a witness, test his credibility, or refresh his memory, a compelling need would be present. *Id.* at 683.

[65] 360 U.S. 395 (1958). Justice Brennan was joined by Chief Justice Warren, Justice Black, and Justice Douglas in a dissenting opinion which would have accepted a less rigid showing to satisfy the particularized need standard. Justice Brennan maintained:

> Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice.

Id. at 403 (Brennan, J., dissenting).

[66] 384 U.S. 855 (1966).

[67] *See id.* at 870-71 & nn. 14-17.

[68] *Id.* at 870.

[69] *See id.* at 871-72 & n.18.

the *Dennis* Court proceeded to hold that the petitioners should have been granted access to the grand jury materials they had requested.[70] In *Douglas Oil Co. v. Petrol Stops Northwest*,[71] the United States Supreme Court acknowledged the need for maintaining grand jury secrecy, however, it also recognized the need for compelling disclosure of grand jury materials in the interest of justice.[72] The Supreme Court enunciated a three part test which represents the correct analysis to be applied when one seeks disclosure of grand jury materials.[73] The Court stated that those seeking grand jury materials must show that "the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only the material needed."[74] Essentially, the Court reaffirmed the *Proctor & Gamble* and *Dennis* balancing tests in which the need for the materials is weighed against the need for continued grand jury secrecy.[75]

It is against this background that the section 4F(b) "to the extent permitted by law" issue must be analyzed. In interpreting this language, the *Cuisinarts* court declared that any implication that Congress did not intend to include the standard of particularized need, as well as the codified law, would be a denigration of that body's legal knowledge.[76] The court noted that the common sense connotation of the phrase itself hardly seems to indicate an intent to modify the law, much less create some important new law.[77] Yet that is exactly what the states proposed. They argued that in enacting section 4F(b), Congress weighed the competing interests involved and resolved the matter in favor of disclosure of grand jury materials to a state attorney general without a prerequisite showing of particularized need.[78] Such an expansive interpretation of the plain language of 4F(b), however, should have been supported by compelling evidence of an intent to have the language so read.[79] This intent would best be illustrated by

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[70] *Id.* at 874-75. The grand jury minutes were needed in relation to the trial testimony of the government's witnesses. *Id.* at 872-73.

[71] 441 U.S. 211 (1979).

[72] *See id.* at 217-22.

[73] *See id.* at 222.

[74] *Id.*

[75] *See id.* at 222-23.

[76] 665 F.2d at 33.

[77] *Id.* at 33-34.

[78] *Id.* at 33; *see Colonial Chevrolet*, 629 F.2d at 950.

[79] *See Cuisinarts*, 665 F.2d at 34; *accord* Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive").

legislative history confirming this construction, however, legislative history of this kind is notably absent from the states' arguments. Indeed, there is no definitive legislative history to buttress the arguments of either side.[80]

One of the only references to grand jury materials in the legislative history of section 4F(b) are the comments of Senator Abourezk, the Senate Floor Manager for the Hart-Scott-Rodino Antitrust Improvements Act.[81] He stated: "[4F(b)] specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law he cannot turn over materials given in response to a grand jury demand or to a civil investigative demand."[82] To the states, the Senator's comments merely meant that the Attorney General could not voluntarily release the materials without first getting a court order.[83] This position was rejected by the *Cuisinarts* court,[84] however, it had been adopted by the *Colonial Chevrolet* court[85] which cited numerous instances of past disclosure of grand jury materials under one of the exceptions to rule 6(e).[86] The *Cuisinarts* court noted that "[o]nly one other portion of the legislative history sheds light upon Congress's understanding of the appropriate standard for disclosure."[87] The court observed that the House Report provided that "the [investigative] files are to be made available except where specifically prohibited."[88] Accordingly, "[t]he question thus becomes whether disclosure of grand jury proceedings is 'specifically prohibited' by Rule 6(e), Fed. R. Crim. P."[89] While this question has been answered differently by the various circuit courts,[90] the correct

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[80] *See* Kinter, Griffin & Goldston, *supra* note 2, at 1-3. It is, perhaps, not irresponsible to speculate that the meager legislative history available to the reader is not entirely accidental. The less than conclusive language of section 4F(b) is an example of legislation with wording that the legislators are well aware will need judicial interpretation. This generally occurs as a compromise measure when lobbying by competing interests (e.g., probusiness v. proconsumer) fails to produce a clear victory for either side.

[81] *See Cuisinarts*, 665 F.2d at 34.

[82] *Id.* (quoting 122 CONG. REC. 29,160 (1976)). These remarks came in response to voiced concerns that the Justice Department might be turned into a " 'massive document distribution center.' " *Id.* (quoting 122 CONG. REC. 29,144 (1976)).

[83] *See id.* at 33.

[84] *Id.* at 33-34; *see supra* notes 76-80 and accompanying text.

[85] 629 F.2d at 947.

[86] *See id.* & n.9.

[87] 665 F.2d at 34-35.

[88] *Id.* at 35 (quoting HOUSE REPORT, *supra* note 3, at 17, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2586).

[89] 629 F.2d at 948.

[90] *Compare Cuisinarts*, 665 F.2d at 35 (disclosure specifically prohibited by common law) *and Illinois Petition*, 659 F.2d at 804 (disclosure specifically prohibited by common law) *with Colonial Chevrolet*, 629 F.2d at 947 (disclosure permitted pursuant to issuance of requisite court

answer may lie in the history of rule 6(e). On April 26, 1976 the Supreme Court proposed an amendment to rule 6(e). The amendment was a response to the dramatically expanding use by the Justice Department of regulatory agency personnel as experts in grand jury investigations.[91] Immediately before that amendment was recommended, court decisions had severely restricted the use of rule 6(e) by requiring the government to "show the necessity for each particular person's aid rather than showing merely a general necessity for assistance" before the grand jury material could be released to agency personnel.[92] The Senate, finding these court rulings to be overly restrictive,[93] approved the Supreme Court's recommendations and passed the amended rule 6(e) on July 30, 1977.[94] The rule codified the traditional law honoring grand jury secrecy including certain exceptions to this policy of secrecy.[95] Thus, the states adopted the position that since Congress was careful to outline exceptions to the general rule, rule 6(e) was not intended to prohibit disclosure categorically.[96] Since disclosure was not specifically prohibited, the Department of Justice was required to make its complete investigative files available to the state attorneys general, pursuant to section 4F(b).[97] This logic is strained at best, and fails for at least two reasons.

First, the legislative history of rule 6(e) makes clear that while the amended version of the rule was not intended to add any restrictions to the proper use of grand jury materials, neither did it intend to relieve any party seeking such disclosure from the particularized need standards.[98] The Senate Report on the amended rule made it plain that:

> There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the

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order) *and B.F. Goodrich*, 619 F.2d at 800 (assumption that disclosure is not specifically prohibited).

[91] Pickholz & Pickholz, *supra* note 57, at 1041.

[92] J.R. Simplot Co. v. United States, 77-1 U.S. Tax Cas. (CCH) ¶ 9146 at 86,198 (9th Cir. 1976); *see also* Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976).

[93] Pickholz & Pickholz, *supra* note 57, at 1040-41.

[94] Act of July 30, 1977, Pub. L. No. 95-78, § 2, 91 Stat. 319. Congress passed this law despite fears in the House that the amended 6(e) would allow grand jury materials to be used by government agency personnel in subsequent, unrelated criminal or civil actions. *See* S. REP. No. 354, 95th Cong., 1st Sess. 5, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 527, 529 [hereinafter cited as SENATE REPORT].

[95] See *supra* note 13.

[96] *See Cuisinarts*, 665 F.2d at 33.

[97] *Id.*

[98] *See supra* notes 76-95 and accompanying text.

> contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a Court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no *more restrictive than is the case today under prevailing court decisions.*[99]

The states' argument also fails because the section 4F(b) language is directed towards the Attorney General rather than the district courts in which the authority to disclose is solely vested.[100] Any assertion that section 4F(b) impliedly instructs the Attorney General to disclose the materials in question without any showing of need is unfounded.[101] Even the states conceded that there can be no disclosure without court approval.[102] Moreover, if Congress had intended 4F(b) to modify or annul the compelling and particularized need requirement of 6(e) it would have more clearly informed the courts of its intent since Congress recognized that it is the courts' function to evaluate the need required to satisfy disclosure under 6(e).[103]

The states proposed a second major argument in favor of disclosure under 6(e), maintaining that Title III created a special status for state attorneys general which made them in effect, extensions of the Justice Department for purposes of antitrust enforcement.[104] This "different footing" argument, however, is not persuasive.

There can be no doubt that Title III placed state attorneys general in a preferred position to that of the private litigant.[105] Section 4F(b) was intended to bring renewed impetus to state antitrust en-

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[99] SENATE REPORT, *supra* note 94, at 8, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS at 532 (footnotes omitted) (emphasis added).

[100] *See Cuisinarts*, 665 F.2d at 34.

[101] *But cf. B.F. Goodrich*, 619 F.2d at 801 (need is automatically met by enactment of 4F(b)).

[102] *See supra* note 17 and accompanying text.

[103] *Cf.* S. REP. No. 803, 94th Cong., 2d Sess. 110 (1976) (statement of Sen. Hart). It is clear that the Senate was aware of the particularized need standard and the court's role as evaluator of it. This awareness is illustrated by the debate on the rejected section 202(1) of the Senate version of 4F(b). Under the Senate's section 202 (1), any civil litigant pursuant to the Hart-Scott-Rodino Antitrust Improvements Act could gain virtually automatic access to all relevant materials gathered by the Justice Department, including grand jury materials. In attacking the expansive breadth of this proposed provision Senator Hart made the following observations: "Under existing law a private plaintiff must file a motion to inspect the transcripts of grand jury testimony and the documents in the district court where the investigation took place. The judge has the discretion to grant access upon a showing of 'particularized and compelling need.' " *Id.*

[104] *See Cuisinarts*, 665 F.2d at 35; *Illinois Petition*, 652 F.2d at 806; *Colonial Chevrolet*, 629 F.2d at 950; *B.F. Goodrich*, 619 F.2d at 800-01.

[105] *See Cuisinarts*, 665 F.2d at 35; *Illinois Petition*, 652 F.2d at 806; *Colonial Chevrolet*, 629 F.2d at 950; *B.F. Goodrich*, 619 F.2d at 800-01.

forcement by relieving the states of the often oppressive investigatory burden associated with antitrust actions, whenever possible.[106] Nevertheless, acceptance of these propositions still leaves the states far short of showing a congressional intent to alter the long standing policy of grand jury secrecy.[107] The only way that the states' argument could be deemed persuasive is if the statute swept so broadly as to place state attorneys general within the exception of rule 6(e)(3)(i) which provides for disclosure to "an attorney for the government for use in the performance of the attorney's duty."[108] Rule 54(c) of the Federal Rules of Criminal Procedure, however, restrictively defines "[a]ttorney for the government"[109] and has been consistently interpreted as being exclusive of nonfederal government attorneys.[110] The states, therefore, while on a different footing than private litigants are not, by definition, on the same footing as attorneys with the Department of Justice. [111] As the *Cuisinarts* court noted, both governmental entities and

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[106] *See* HOUSE REPORT, *supra* note 3, at 17, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2586-87; Maximov, *supra* note 21, at 832. *But see In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1015 (D. Conn.), *aff'd*, 665 F.2d 24 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595) ("Discovery problems were not of apparent concern to the draftsmen of the *parens patriae* provisions").

[107] *See* Maximov, *supra* note 21, at 832.

[108] *See supra* note 13.

[109] FED. R. CRIM. P. 54(c) defines attorney for the government as: "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and [in certain instances, the Attorney General of Guam or his agent]."

[110] *See, e.g., In re* Special Feb. 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896 (7th Cir. 1973); *In re* Miami Fed. Grand Jury No. 79-8, 478 F. Supp. 490, 492 (S.D. Fla. 1979). This rule has been construed narrowly even when disclosure to federal attorneys has been at issue. *See* Capitol Indem. Co. v. First Minn. Constr. Co., 405 F. Supp. 929, 933-34 (D. Mass. 1975) ("civil" Assistant United States Attorney cannot be beneficiary of "criminal" counterpart's grand jury investigation).

[111] In *Illinois Petition*, the states made the additional assertion that if section 4F(b) did not relieve state attorneys general of the particularized need requirement, then all it really did was codify an already existing standard procedure. 659 F.2d at 808. As a matter of informal practice, the United States Attorney General will very often make his files available, upon request, to the state attorney general who is contemplating a criminal action. This practice creates an interesting situation as illustrated by State v. Lawn King, Inc., 84 N.J. 179, 417 A.2d 1025 (1980). In *Lawn King* the New Jersey Supreme Court intimated that because of the "enormous difficulties" involved in criminal antitrust prosecutions, the state attorney general should, in all but the most extreme cases, seek a civil rather than criminal remedy. *See id.* at 216, 417 A.2d at 1045. State attorneys general are therefore placed in an unenviable situation. What might otherwise be a worthwhile civil suit under Title III could instantly become less attractive as a productive civil suit if the state is denied access to grand jury materials without showing a particularized need. The costs of uncovering information that already lies discovered in the Justice Department's files may not be worth the eventual civil remedy. As a practical matter they could get the grand jury materials by initiating a criminal antitrust prosecution. But then, states are faced with the enormous difficulties inherent in a criminal antitrust prosecution. Therefore, state attorneys general interested in promoting antitrust enforcement are placed in an untenable position.

other entities which perform valuable public services are still held to the particularized need standard.[112]

If state attorneys general are still required to show particularized need, is section 4F(b) nothing more than a "redundant and totally unnecessary" piece of legislation?[113] Initially, since *Douglas Oil*, the term "compelling and particularized need" no longer carries the rigid, quantitative meaning assigned to it by earlier case law.[114] Today, to satisfy "the extent permitted by law" language, a movant seeking disclosure need only show that his need for the relevant grand jury materials is more compelling than the need for continued grand jury secrecy.[115] Therefore, the legislation and the common law operate to lessen the showing one must make to obtain disclosure.

The compelling need the states have for disclosure under section 4F(b) is founded on the principle that competition is the fundamental economic policy of this nation.[116] As the United States Supreme Court has pointed out: "The unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions."[117] Based on the premise that our antitrust laws were designed to be "a comprehensive charter of economic liberty, aimed at preserving free and unfettered competition as the rule of trade,"[118] section 4F(b) is a small, yet critical component of a much larger scheme designed and implemented in response to a grave and urgent need for adequate antitrust enforcement. This need is even more pressing today than in 1976 when the Hart-Scott-Rodino Antitrust Improvements Act was enacted. In 1974, the Assistant Attorney General in charge of the Antitrust Division noted that our nation annually pays an estimated eighty billion dollars for ineffective competition in the economy.[119] Only four years later, Representative John Coyners, Jr., Chairman of the Sub-

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[112] 665 F.2d at 36; *see* Note, *Disclosure of Grand Jury Materials*, *supra* note 21, at 417-19.

[113] Petition for Certiorari, *supra* note 29, at 29.

[114] *See supra* notes 63-75 and accompanying text. *cf. In re* Grand Jury Proceedings, Nos. 81-2077, 81-2115, 81-2407, slip op. at 17 (7th Cir. Sept. 3, 1982) ("As a practical matter . . . it may be easier at times for the government, rather than a private party, to meet the [particularized need] standard").

[115] *Douglas Oil*, 441 U.S. at 223; *see also supra* notes 71-75 and accompanying text.

[116] *See* United States v. Topco Assocs., 405 U.S. 596 (1972); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[117] Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

[118] *Id.*

[119] HOUSE REPORT, *supra* note 3, at 22, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2591. He also noted that $10,000,000,000 of this $80,000,000,000 loss is attributable to price fixing violations alone. *See id.*

committee on Crime of the Committee on the Judiciary, "conservatively" assayed the nation's bill for corporate antitrust violations at approximately two hundred billion dollars.[120]

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, the most significant piece of antitrust legislation in decades,[121] in many respects reflects the compelling need for antitrust enforcement as perceived by Congress. Title III, the *parens patriae* provision, illustrates a particular aspect of the general need for vigorous antitrust enforcement. That is, the specific need for a realistic remedy for the consumer injured by antitrust violations.[122] The states are motivated to pursue this remedy because section 4F(b) ensures them of the cooperation of the Federal Government to the fullest extent permitted by law.[123]

At the trial level of *In re Grand Jury Investigation of Cuisinarts, Inc.*,[124] the states sought to be relieved entirely of the particularized need requirement of rule 6(e).[125] This was impossible.[126] Moreover, it was a tactical blunder by the states. Judge Cabranes, the district court judge, refused to relieve the states entirely from the burden of showing need.[127] He was, however, quite willing to weigh whatever need the states could establish against the need for continued grand jury secrecy pursuant to the balancing test enunciated by the Supreme Court in *Douglas Oil*.[128] The states, however, having made no effort to establish need, were without a case for all practical purposes.[129] Accord-

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[120] *Hearings Before the House Subcomm. on Crime of the Comm. on the Judiciary*, 95th Cong., 2d Sess. 1 (1978) (statement of Rep. John Coyners, Jr.). At a time when an estimated national budget of half that amount is creating profound political upheaval, the ramifications of efficient antitrust enforcement are obvious. *See* Kinter, Griffin & Goldston, *supra* note 2, at 31.

[121] Kinter, Griffin & Goldston, *supra* note 2, at 31.

[122] HOUSE REPORT, *supra* note 3, at 4, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2573-74. Without this remedy the desired deterrent effect of the treble damages action is often not realized since a consumer is often unable to pursue an individual antitrust suit. *See* Hill, *supra* note 5 at 1377 ("The *parens* statute was founded on a legislative belief that consumers bear a significant portion, if not the bulk of the injury of antitrust violations").

[123] *See* HOUSE REPORT, *supra* note 3, at 17, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 2587; *see also* 122 CONG. REC. S12357 (daily ed. July 23, 1976) (statement of Sen. Morgan) ("[t]he States are ideally situated to protect the rights of the consumer, the small businessman, and the honest businessman of any size"); *cf.* Crime Control Act of 1976, 42 U.S.C. § 3739 (1976) (federal appropriations to states to aid state antitrust enforcement thus promoting rights of consumers).

[124] 516 F. Supp. 1008 (D. Conn.), *aff'd*, 665 F.2d 24 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595).

[125] *Id.* at 1016.

[126] *See supra* notes 76-80 and accompanying text.

[127] *See Cuisinarts*, 516 F. Supp. at 1020.

[128] *See id.* at 1021.

[129] *See id.*

ingly, the issue on appeal remained an all-or-nothing proposition, and once again the states were, inevitably, frustrated.[130] Had the states attempted to establish need from the outset, then hypothetically, Judge Cabranes would have had to consider additional factors in his analysis.

The *Douglas Oil* balancing test is the operative heart of a three prong analysis which the Supreme Court noted was required in grand jury disclosure situations.[131] The first prong of the analysis requires a showing that the materials are needed so as to avoid an injustice in another proceeding.[132] That need, in the context of *Cuisinarts*, is the need for adequate representation of the consumer in a *parens* proceeding alleging antitrust violative conduct. Without the assistance of the Federal Government, the states might be unable or unwilling to champion the cause of the class of citizen which bears the bulk of antitrust violations.[133]

The second prong of the analysis is the balancing test. The need for the materials is balanced against the need for continued grand jury secrecy.[134] In *United States v. Rose*,[135] the Court of Appeals for the Third Circuit listed the reasons for maintaining grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated;
> (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
> (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
> (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;
> (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.[136]

In the context of the *Cuisinarts* case, these reasons lose much of their persuasiveness. In *Cuisinarts*, the grand jury had completed its term and all criminal and civil action by the Justice Department was

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[130] *See Cuisinarts*, 665 F.2d at 30-36.
[131] *See supra* notes 71-75 and accompanying text.
[132] *Douglas Oil*, 441 U.S. at 222.
[133] *See supra* note 122.
[134] *Douglas Oil*, 441 U.S. at 222.
[135] 215 F.2d 617 (3d Cir. 1954).
[136] *Id.* at 628-29 (footnote omitted).

terminated. Therefore, these reasons immediately dissipate.[137] The only remaining concern is the possible chilling effect disclosure might have on the future effectiveness of grand juries.[138] Grand jury effectiveness often depends on free and untrammeled testimony of witnesses.[139] Thus, it is important to protect witnesses from "future retribution or social stigma."[140] Otherwise, witnesses aware that their testimony may be disclosed in the future, would be afraid to produce this free and untrammeled testimony.[141] This concern can be lessened through the use of the approach that the Justice Department employed with the *Cuisinarts* grand jury. There, all the witnesses were told before they appeared before the grand jury that their testimony might be made public.[142] Nevertheless, the Justice Department intimated that court imposed safeguards would be issued so that the goals of grand jury secrecy would not be compromised.[143] This, they asserted would "promote state enforcement of the antitrust laws" without abrogating grand jury effectiveness.[144]

The third prong of the analysis requires movants to structure their requests so as to include only relevant materials.[145] This is a difficult if not categorically impossible task since the states have no way of determining relevancy without first getting access.[146] Requiring the district judge to conduct an *in camera* review of the massive volumes of material generated by an antitrust investigation is also impractical.[147] Therefore, the states' obligation to prove relevancy

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[137] *See* Calkins, *supra* note 11, at 20. It is well recognized that once the grand jury has completed its term much of the basis for the policy of secrecy is eroded. *See Douglas Oil*, 441 U.S. at 222; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940) ("[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it"); *cf.* Illinois v. Sarbaugh, 552 F.2d 768, 774 (7th Cir.), *cert. denied sub nom.* J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977) (following conclusion of grand jury investigation, burden of showing compelling necessity is reduced).

[138] *See Douglas Oil*, 441 U.S. at 222.

[139] *See id.* at 218-19; *Rose*, 215 F.2d at 628-29.

[140] *Douglas Oil*, 441 U.S. at 222.

[141] *See id.*; *Proctor & Gamble*, 356 U.S. at 682.

[142] *See* Petition for Certiorari, *supra* note 29, at 7-8.

[143] *See id.* at 26-27. One such court-imposed safeguard is the use of protective orders to ensure grand jury secrecy. *See* Illinois v. Sarbaugh, 552 F.2d 768, 775 (7th Cir.), *cert. denied sub nom.* J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977).

[144] *See* Petition for Certiorari, *supra* note 29, at 26-27.

[145] *Douglas Oil*, 441 U.S. at 222.

[146] *See Cuisinarts*, 516 F. Supp. at 1021.

[147] *See Dennis*, 384 U.S. at 874 ("[I]t [is not] realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate") (footnote omitted).

should be a lenient one. In addition to being practically sound, adoption of a lenient relevancy burden will also effectuate the intent of section 4F(b) which directs disclosure of any "materials which are or may be relevant." Simply requiring the states to tailor their requests according to either time or geographic location should be deemed sufficient to meet the relevancy requirement.[148]

It is undoubtedly true that the grand jury is an integral part of the antitrust enforcement effort. Nevertheless, in determining how expansive a role grand jury materials will play in antitrust enforcement, legislators and courts must remain aware of the competing concerns present. Militating against liberal disclosure is the argument that the effectiveness of the grand jury will undoubtedly be reduced if it gets a reputation as a porous conduit for the kind of sensitive commercial information and candid testimony which comes before it. However, the very fact that grand jury materials are the cornerstone of antitrust enforcement may weigh in favor of disclosure pursuant to section 4F(b).

While there is no easy way to resolve this tension, it is telling that in the majority of these situations the Federal Government has not objected to disclosure once the grand jury has been dismissed.[149] Since the Department of Justice is the primary bastion against antitrust infractions, it would suffer greatly from any erosion of grand jury effectiveness. Perhaps, therefore, once the reasons for grand jury secrecy as noted in *United States v. Rose* have been satisfied, the recommendation of the Federal Government should be given substantial weight in arriving at a decision.

Congress enacted section 4F(b) intending to promote improved enforcement of the antitrust laws through the use of a novel investigative device.[150] Absent available regulatory or administrative investigative files,[151] section 4F(b) offers the states their only other substantial investigatory resource. If grand jury materials are excluded from the Justice Department's files, then the value of section 4F(b) in antitrust enforcement will be eviscerated.[152] Therefore, the "investigative files"

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[148] *See Cuisinarts*, 516 F. Supp. at 1021.

[149] *See* Steinhouse, *The Effect of Justice Department and FTC Cases on Private Antitrust Litigation*, 34 OHIO ST. L.J. 490, 494 (1973).

[150] *See supra* notes 2-4 and accompanying text.

[151] Of course, if there is some relevant data available as a result of an independent agency proceeding, the need for disclosure would be significantly mitigated.

[152] *See* Petition for Certiorari, *supra* note 29, at 29. In *Cuisinarts*, only 17 pages out of the thousands generated by the Justice Department investigation were revealed to the states. *See id.*; *supra* note 34.

language of section 4F(b) includes any grand jury materials which may be in the Justice Department's files. Congress did not intend to annul the traditional rules of grand jury secrecy in enacting 4F(b) and, therefore, was careful to use the language, "to the extent permitted by law" in providing when disclosure would be permitted. Congress did, however, define a compelling need for invigorated antitrust enforcement, particularly by the states, when it enacted Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. When a state attorney general requests the investigative files of the Justice Department, this need must be weighed against the need for continued grand jury secrecy, according to the standards enunciated by the United States Supreme Court in *Douglas Oil*. In situations like *Cuisinarts*, if: (1) the grand jury has been dismissed; (2) all civil and criminal prosecution by the Justice Department has been finished; (3) the witnesses were made aware that their testimony might be made public and assured that safeguards would be provided to ensure secrecy if so warranted; and, (4) the Government has no objection to disclosure—disclosure should be ordered.

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