

St. John's University School of Law

St. John's Law Scholarship Repository

Faculty Publications

1999

The Leak and the Craft: A Hard Line Proposal to Stop Unaccountable Disclosures of Law Enforcement Information

John Q. Barrett

St. John's University School of Law

Follow this and additional works at: https://scholarship.law.stjohns.edu/faculty_publications



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

This Article is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE LEAK AND THE CRAFT: A HARD LINE PROPOSAL TO STOP UNACCOUNTABLE DISCLOSURES OF LAW ENFORCEMENT INFORMATION

*John Q. Barrett**

INTRODUCTION

THE critics of Kenneth W. Starr accused him, in the five-plus years that he served as the multi-tasked Independent Counsel,¹ of many

* Associate Professor, St. John's University School of Law. A.B., Georgetown University, 1983; J.D., Harvard University, 1986. E-mail: jbarrett@sjulawfac.stjohns.edu. This Article expands upon my presentation as part of a June 5, 1999, panel entitled "After Starr Wars, Part I: The Role and Responsibilities of the Public Prosecutor," at the American Bar Association's Center for Professional Responsibility 25th National Conference. I am grateful to Mary Daly, Art Garwin, and Bruce Green for their planning efforts and invitation, to Michael Simons, Brian Tamanaha, and Sarah Walzer for very helpful comments, and to Karen R. Kowalski and Jean M. Lucido for excellent research assistance.

1. "Whitewater" grossly understated the scope of Starr's jurisdiction, which was regularly expanded during his years as Independent Counsel. In August 1994, Starr was appointed to investigate the "Whitewater" real estate deal and related matters: "whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association [or] Whitewater Development Corporation . . ." *In re Madison Guar. Sav. & Loan Ass'n* at 2 (D.C. Cir. Spec. Div. Aug. 5, 1994) (order appointing Independent Counsel Kenneth W. Starr). Starr also, at that time, "inherited the wide-ranging work of [Department of Justice Special Prosecutor] Robert B. Fiske, Jr., whose Little Rock-based investigation included, among various other matters, the tax and bankruptcy fraud case involving then-Governor Jim Guy Tucker and others." Office of the Independent Counsel Kenneth W. Starr, Press Release, August 18, 1999 (visited Oct. 20, 1999), available on <<http://www.oicstarr.com>>. On subsequent occasions, the panel of judges that had appointed Starr granted Attorney General Reno's serial requests to expand Starr's jurisdiction by assigning him to undertake the following additional criminal investigations and, in his discretion, prosecutions:

- (1) whether former Associate Attorney General Webster L. Hubbell violated federal criminal law in his billing and expense practices while he was a member of Arkansas' Rose Law Firm, as well as all other matters arising from that investigation, see *In re Madison Guar. Sav. & Loan Ass'n* at 2 (D.C. Cir. Spec. Div. Sept. 1, 1994) (order expanding the jurisdiction of Independent Counsel Kenneth W. Starr);
- (2) whether William David Watkins, a former Assistant to the President for Management and Administration, violated federal criminal law in connection with his December 1993 General Accounting Office interview concern-

failings, mistakes, and improprieties.² One of the most prevalent charges was one that has significance to lawyers and resonates with the general public's sense of bad behavior by prosecutors: the allegation that Starr and/or members of his staff "leaked" information.³

This general accusation was, of course, imprecise. It also might have been overbroad. Prosecutorial "leaks" include such plain illegalities as disclosing grand jury information to the media or other unauthorized persons,⁴ and also the much less regulated practice of re-

ing the firing of White House Travel Office employees, as well as any other false statements, obstructions of justice, or other crimes by other persons or entities in matters related to or arising out of that investigation, *see In re Madison Guar. Sav. & Loan Ass'n* at 1-2 (D.C. Cir. Spec. Div. Mar. 22, 1996) (order expanding the jurisdiction of Independent Counsel Kenneth W. Starr);

(3) whether Anthony Marceca, a detailee to the White House Office of Personnel Security, or any other person or entity violated federal criminal law in connection with White House requests to the Federal Bureau of Investigation for background investigation reports and materials, as well as all other matters arising from that investigation, *see In re Madison Guar. Sav. & Loan Ass'n* at 1-2 (D.C. Cir. Spec. Div. June 21, 1996) (order expanding the jurisdiction of Independent Counsel Kenneth W. Starr);

(4) whether former White House Counsel Bernard Nussbaum committed perjury or violated any other federal criminal law in, and whether any other person or entity engaged in an unlawful conspiracy or aided or abetted any federal offense in connection with, his testimony before a House committee on June 26, 1995, as well as all other matters arising from that investigation, *see In re Madison Guar. Sav. & Loan Ass'n* at 1-2 (D.C. Cir. Spec. Div. Oct. 25, 1996) (order expanding the jurisdiction of Independent Counsel Kenneth W. Starr);

(5) whether Mr. Hubbell or any other person violated federal criminal law in connection with his income since January 1, 1994, or his tax and other debts to various levels of government or his former law firm, and whether Hubbell or any other person or entity violated any federal criminal law in connection with payments he received since that date, *see In re Madison Guar. Sav. & Loan Ass'n* at 1 (D.C. Cir. Spec. Div. Jan. 6, 1998) (order expanding the jurisdiction of Independent Counsel Kenneth W. Starr); and

(6) whether former White House intern Monica Lewinsky or other persons violated federal criminal law in dealing with "witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*," *In re Madison Guar. Sav. & Loan Ass'n* at 1-2 (D.C. Cir. Spec. Div. Jan. 16, 1998) (order expanding the jurisdiction of Independent Counsel Kenneth W. Starr).

These orders, which were unsealed by the appointing court at various times, are available on Starr's office web site, Office of the Independent Counsel (visited Oct. 20, 1999) <<http://www.oicstarr.com>>. It also is possible that Starr was assigned to conduct additional investigations that remain under court seal and have not, to date, been publicized. On October 18, 1999, Starr tendered his resignation to the special court that had appointed him in 1994. The court accepted Starr's resignation and simultaneously appointed one of his deputies, Robert W. Ray, to succeed Starr as independent counsel.

2. The mere existence of this Symposium, not to mention everything contained therein, is authority for this proposition.

3. For the most savage and entertaining, but perhaps not the most plausible, version of this criticism of Starr, see James Carville, . . . And The Horse He Rode In On: The People v. Kenneth Starr 86-109 (1998).

4. *See infra* Part I.A.

leasing non-public law enforcement information.⁵ Although it may turn out that Starr and/or members of his staff illegally disclosed grand jury information, we already know—because we in the public learned only much later, and through lawful processes that made the information public, of grand jury secrets that Starr and his staff knew at much earlier points in time but did not “leak”⁶—that they did not do so systematically. Indeed, Starr’s Office of Independent Counsel was one of technical—indeed, perhaps overly technical—and very competent legality.⁷

On the precise topic of prosecutors and other office employees talking about their work to outsiders, such as the media, Starr’s office often stated its commitment to adhere to all of the laws and general policies against grand jury leaks and other undesirable information disclosures that can be found in prosecutors’ offices at every level of government. For example, in an early press release, Starr emphatically announced that he would tolerate no improper disclosures of information by any member of his office staff:

A hallmark of this investigation from its inception has been that there have been no unauthorized or improper disclosures of information. When I was appointed Independent Counsel, I adopted and implemented a policy centralizing our contact with the press to assure that there would not be even inadvertent disclosures of information. I also received the assurance of each member of my staff that he or she understands and will abide by this policy. I am certain that these steps have worked and that they effectively have guarded against the dissemination of information to people outside of the investigation

When I took my oath of office I pledged to conduct this investi-

5. See *infra* Part I.B.

6. One example of grand jury information that did not leak is the substance of Hillary Clinton’s January 1996 testimony before a Whitewater grand jury sitting in Washington, D.C. Although we now know that Starr’s deputy, Hickman Ewing, Jr., found Mrs. Clinton’s testimony to be so incredible that he drafted a proposed indictment of her later in 1996, this information did not become public until Ewing was subpoenaed to testify about perspectives and deliberations within Starr’s office by defendant Susan McDougal during her criminal contempt trial—which was her second prosecution by Starr’s office—almost three years later. See, e.g., Pete Yost, *Starr Aide Tells of Questioning Clintons’ Credibility*, Wash. Post, Mar. 19, 1999, at A10.

7. Apart from the leak allegations, Starr’s legal adversaries and other less-invested critics said that he was obsessed with legal technicalities and lacked the judgment and broader sense of perspective that a better prosecutor would have brought to his work. See, e.g., Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 Fordham Urb. L.J. 553, 559 (1999) (describing Starr’s September 1998 referral to the House of Representatives of potential impeachment information regarding President Clinton as “an example of a prosecutorial approach that mechanically applies the facts of a case to possible charges, rather than screening those charges through the use of prosecutorial discretion”). See generally Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 Fordham L. Rev. 723 (1999) (finding that Starr acted within the legal boundaries during his investigation).

gation with objectivity, integrity and with due respect to the rights and reputations of the individuals involved in, or affected by, the investigation. We have and will abide by all of the obligations imposed upon us to protect the integrity of the grand jury process and our ethical obligations as professionals, including those requiring the secrecy of our proceedings.⁸

Mr. Starr repeated this position in various ways over his years of service.⁹

8. Office of the Independent Counsel Kenneth W. Starr, Press Release, Oct. 20, 1994 (visited Oct. 20, 1999), *available on* <<http://www.oicstarr.com>> (denying that his office was among the "federal law enforcement sources" cited in an October 19, 1994, Washington Times article concerning matters that Starr's office allegedly was investigating).

9. *See, e.g.*, Office of the Independent Counsel Kenneth W. Starr, Press Release, Nov. 25, 1994 (visited Oct. 20, 1999), *available on* <<http://www.oicstarr.com>> ("Secrecy has been and will continue to be a hallmark of this investigation. However, we have no control over what may appear in the media based upon information obtained from sources outside of the investigation and, consequently, we must not and will not comment on the reports that have appeared this week."); Office of the Independent Counsel Kenneth W. Starr, Press Release, May 19, 1995 (visited Oct. 20, 1999), *available on* <<http://www.oicstarr.com>> ("We have no control over what may appear in the media based upon information obtained from sources outside of the investigation. As we have stated previously, we have been and will continue to be bound by strict standards of secrecy."); Office of the Independent Counsel Kenneth W. Starr, Press Release, Aug. 28, 1995 (visited Oct. 20, 1999), *available on* <<http://www.oicstarr.com>> ("It is the normal practice of the Office of the Independent Counsel not to comment on any aspect of our investigation, including any reports which may appear in the media. A statement of 'no comment' neither affirms nor denies the substance of the question posed. That will continue to be this Office's practice to ensure the integrity and confidentiality of the investigation. Confidentiality has been and will continue to be a hallmark of this investigation. However, we have no control over what may appear in the media based upon information obtained from sources outside of the investigation and, consequently, we must not and will not comment on those reports."); Office of the Independent Counsel Kenneth W. Starr, Press Release, Feb. 29, 1996 (visited Oct. 20, 1999), *available on* <<http://www.oicstarr.com>> ("This Office has adopted the professional practices of accountability of the United States Department of Justice, which are consistent with the highest standards of professional conduct. Our responsibility as prosecutors, and as representatives of the United States, strongly discourages us from commenting on matters of substance regarding th[e] then-ongoing trial [of James McDougal, Susan McDougal and then Arkansas Governor Jim Guy Tucker]. It is important for advocates to confine their legal arguments to the judge and jury, in accordance with the law."); Office of the Independent Counsel Kenneth W. Starr, Press Release, Feb. 18, 1997 (visited Oct. 20, 1999), *available on* <<http://www.oicstarr.com>> ("We reaffirm that it is the normal practice of the Office of the Independent Counsel not to comment on any aspect of our investigation, including reports which may appear in the media. A statement of 'no comment' neither affirms nor denies the substance of the question posed. That will continue to be this Office's general practice to ensure the integrity and confidentiality of the investigation."); Office of the Independent Counsel Kenneth W. Starr, Press Release, June 25, 1997 (visited Oct. 20, 1999), *available on* <<http://www.oicstarr.com>> ("Federal law and traditional practice dictate that this process [of investigation] occur in secret, except that witnesses are themselves free to speak out publicly. This Office thus has no control over what witnesses might say to the media, nor over any publicity that might result."); Office of the Independent Counsel Kenneth W. Starr, Press Release, Jan. 21, 1998 (visited Oct. 20, 1999), *available on* <<http://www.oicstarr.com>> ("Because of con-

What the “leak” allegations were suggesting in their vague generalities was something more basic about Mr. Starr’s personal conduct and his supervision of the numerous, very serious federal criminal investigations that his office conducted. Starr and members of his office staff plainly did, on numerous occasions over the years, talk to reporters in detail about the thinking, the ongoing investigative work, the preliminary findings, the past and pending cases, and the possible next steps of the Office of Independent Counsel. Some of this speech occurred “on the record,” which meant that the speakers were on broadcast media or authorized print reporters to publish these statements as verbatim quotations attributed to named persons.¹⁰ Such statements

fideliety requirements, we are unable to comment on any aspect of our work.”); Office of the Independent Counsel Kenneth W. Starr, Press Release, June 13, 1998 (visited Oct. 20, 1999), available on <<http://www.oicstarr.com>> (“Steven Brill has recklessly and irresponsibly charged the Office of Independent Counsel with improper contacts with the media. These charges are false. . . . The contacts between the Office of the Independent Counsel and journalists have been legal, appropriate and consistent with Department of Justice policy . . .”); see also Office of the Independent Counsel Kenneth W. Starr, Press Release, July 18, 1995 (visited Oct. 20, 1999), available on <<http://www.oicstarr.com>> (“The Office of the Independent Counsel has not and will not disclose matters occurring before the grand jury to anyone.”); Office of the Independent Counsel Kenneth W. Starr, Press Release, Sept. 7, 1996 (visited Oct. 20, 1999), available on <<http://www.oicstarr.com>> (“As officers of the Court pledged to preserve the secrecy of the grand jury proceedings and of matters currently under investigation, we are unable to fully respond to the comments made by Susan H. McDougal and one of her attorneys, Bobby McDaniel, on national television.”); Office of the Independent Counsel Kenneth W. Starr, Press Release, Jan. 24, 1998 (visited Oct. 20, 1999), available on <<http://www.oicstarr.com>> (“[A]ny information about grand jury subpoenas has been disclosed by the persons under subpoena, their attorneys, or others outside the Office of the Independent Counsel. No such information has been disclosed by anyone from this Office.”); cf. Office of the Independent Counsel Kenneth W. Starr, Press Release, Sept. 13, 1999 (visited Oct. 20, 1999), available on <<http://www.oicstarr.com>> (“We are also gratified that the Court of Appeals’ unanimous decision provided the Chief Judge of the District Court [for the District of Columbia] with necessary guidance in addressing challenges to grand jury proceedings. Noting the important role of prosecutors providing public information regarding criminal investigations, the Court of Appeals [for the District of Columbia Circuit today] found that prosecutors’ statements about their investigations are prohibited from disclosure only ‘when they directly reveal grand jury matters.’ . . . This Office has abided, and will continue to abide, by the rules regarding grand jury secrecy.”).

10. See, e.g., Kenneth W. Starr, *Truth and Truth-Telling*, 30 Tex. Tech L. Rev. 901-07 (1999) (publishing Starr’s May 10, 1998 speech at the Texas Tech University School of Law in Lubbock, Texas); Ann W. O’Neill, *Starr Admits Blunders in Clinton-Lewinsky Inquiry*, L.A. Times, Sept. 16, 1999, at A1 (describing Starr’s September 15, 1999 speech to 500 civic and business leaders at a lunch hosted by Town Hall Los Angeles, and his remarks later that day at a meeting with senior Los Angeles Times editors); Kenneth W. Starr, *What We’ve Accomplished*, Wall St. J., Oct. 20, 1999, at A26; Mitch Webber, *Starr Discusses Independent Counsel Statute at YPU*, Yale Daily News, Sept. 10, 1999 (visited Sept. 22, 1999), available on <<http://www.yaledailynews.com/news/ArchivedArticle.asp?type=live&AID=1865>> (describing Starr’s September 9, 1999 address to the Yale Political Union); *Fox News Sunday* (Fox television broadcast, June 13, 1999) (transcript available in LEXIS) (interviewing Starr); *Nightline* (ABC television broadcast, Apr. 24, 1996) (transcript available in LEXIS) (reporting

helped to advance public understanding of Starr's work, or at least his and his staff's views of it. These statements and interviews also were available in the sunlight to be evaluated as prosecutors' statements about ongoing investigative and prosecutorial activity.¹¹

But not all of the statements and pieces of investigative information that emanated from Starr's office were on the record and attributed to named persons. At various times, Mr. Starr himself spoke,¹² and other members of his staff seem to have spoken,¹³ to reporters about their work "on background" or "off the record."¹⁴ This conduct put infor-

Starr's answers to questions about his decision to continue representing private law clients while also serving as independent counsel, and including an appearance by Starr's former deputy, Mark Tuohey, who defended Starr and his office against various charges by another guest, James Carville); Independent Counsel Kenneth W. Starr, Remarks at the University of Minnesota School of Law's United States v. Nixon Symposium (Oct. 24, 1998) (transcript available in the Federal Document Clearing House ("FDCH") Political Transcripts); Independent Counsel Kenneth W. Starr, Remarks at the Mecklenberg Bar Foundation, Charlotte, North Carolina (June 1, 1998) (transcript available in the Federal News Service); Independent Counsel Kenneth W. Starr, Address Before the San Antonio Bar Association Meeting (May 1, 1998) (transcript available in the Federal News Service) (reporting Starr's speech on executive privilege); *Susan McDougal Sentenced to Two Years by Federal Trial* (CNN television broadcast, Aug. 20, 1996) (transcript available in LEXIS) (broadcasting Starr's press conference outside the federal courthouse in Little Rock, Arkansas); *Text of Whitewater Special Counsel's News Conference* (CNN television broadcast, June 22, 1995) (transcript available in LEXIS) (broadcasting Starr's press conference following the arraignment of then Arkansas Governor Jim Guy Tucker); *Today Show: Part I: Ken Starr Discusses Investigation of President Bill Clinton* (NBC television broadcast, Aug. 9, 1999) (transcript available in LEXIS); *Today Show: Part II: Ken Starr Discusses Investigation of President Clinton and First Lady* (NBC television broadcast, Aug. 10, 1999) (transcript available in LEXIS).

11. See, e.g., Neil A. Lewis, *Justice Dept. Nominee Faces Questions But No Strong Opposition*, N.Y. Times, June 14, 1997, at 22 (quoting then-United States Attorney and Deputy Attorney General-designate Eric H. Holder, Jr.'s testimony before the Senate Judiciary Committee: "I don't personally have any problem with the [public] pronouncements that Judge Starr has made.").

12. See, e.g., Jeffrey Rosen, *Kenneth Starr, Trapped*, N.Y. Times, June 1, 1997, § 6 (Magazine), at 42 (reporting that "Starr provided background assistance for the article [about him] but declined to be quoted directly").

13. See Steven Brill, *Pressgate*, Brill's Content, Aug. 1998, at 122, 131-32. Brill noted:

As a general matter, in response to an opening "Have you ever . . . ?" question, Starr hesitates, then acknowledges that he has often talked to various reporters without allowing his name to be used and that his prime deputy, Jackie Bennett, Jr., has been actively involved in 'briefing' reporters, especially after the Lewinsky story broke. "I have talked with reporters on background on some occasions," he says, "but Jackie has been the primary person involved in that. He has spent much of his time talking to individual reporters."

Id.

14. According to one study of journalistic ethics, written by a former reporter who had become a journalism professor, "off the record" does not even have a single meaning in the world of journalism. "Depending on the customs of the city and the reporter's previous dealings with a particular source, it [speaking 'off the record'] may mean promising not to use the information obtained at all, or to use the information only indirectly, or not to attribute the information to the source." Bruce M. Swain,

mation into the public domain without the accountability that comes from seeing, reading, or at least knowing who deployed it.

Starr's decision to speak, and apparently to authorize his subordinates to speak, other than on the record was a choice. It was a policy decision by the person who was, within his areas of jurisdiction, the senior law enforcement official in the United States government.¹⁵ In the future, Starr's successor senior federal prosecutors should reconsider that decision and, in my view, decide to take a very different course.

This Article explores what that course should look like. Part I defines and analyzes the two types of information—grand jury secrets and law enforcement information—that Independent Counsel Starr “leaked” according to the allegations that plagued his investigation. Part II examines the various restrictions on a prosecutor's ability to disclose law enforcement information. Finally, Part III sets out strict guidelines, characterized by accountability, professionalism, and uniformity, for the disclosure of law enforcement information by the government.

I. THE “LEAK” ALLEGATIONS AGAINST INDEPENDENT COUNSEL STARR

From 1994 through 1999, Independent Counsel Starr and his staff were accused of two very different kinds of leaking. One species of leak, plainly illegal, is disclosing grand jury information to anyone

Reporters' Ethics 47 (1978). Indeed, Washington, D.C., the site of much of Starr's investigative activity and much of his office's alleged leaking, has been described as “a city with whole hierarchies of terminology for off-the-record material: background, deep background, and deep deep background, government sources, high official sources, and White House sources.” *Id.* at 48-49.

How do I know that people in Starr's office gave information to reporters on background or off-the-record? As a general matter, it was obvious in the press coverage of Starr's investigation. Press reports at various points contained unattributed information about evidence, strategy, or “thinking” inside Starr's office that, if reporters were not simply making it up (and I do not believe that many reporters make things up wholesale), could have come only from someone with inside knowledge of the Office of Independent Counsel. More directly, as I received telephone calls from reporters seeking my comments during 1998 and 1999 about the Independent Counsel Law and various developments in Starr's investigations of President Clinton, Monica Lewinsky, and others, some reporters would flat out tell me—perhaps in violation of their own professional ethics, but that is beyond the scope of what I am addressing in this Article—that they were receiving lots of inside information from Starr's office. My general impression is that this happened five to ten times. In some of these instances, later public disclosures, including on-the-record statements by Starr and his associates, confirmed the accuracy of what the reporters had told me earlier that they had learned in some kind of confidence from Starr's office.

15. See 28 U.S.C. § 594(a) (1994). See generally John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 Mercer L. Rev. 519, 524-27 (1998) (describing how the independent counsel law reallocated powers from the Department of Justice (“DOJ”) to any independent counsel appointed under its provisions).

who is not authorized by law to receive it.¹⁶ The other species of “leak,” proscribed by no federal statute or regulation and generally permitted by the customs of federal law enforcement, is sharing non-public, but non-grand jury, information with friends, political supporters, and selected reporters.¹⁷

A. *Leak Type 1: Grand Jury Secrets*

Federal Rule of Criminal Procedure 6(e), a procedural rule that has the force of any substantive federal statute,¹⁸ protects the secrecy of “matters occurring before” federal grand juries.¹⁹ Although there is significant definitional dispute and divided case law on the question of what constitutes a “matter” occurring before a federal grand jury,²⁰ the protection defined by Rule 6(e) certainly includes, at its core, verbatim accounts of witness testimony to federal grand juries.²¹ Rule 6(e) makes it a crime, subject to prosecution for criminal contempt and other charges, for any federal prosecutor, or for any prosecutor’s non-lawyer colleague who is authorized under Rule 6(e) to receive grand jury information, to reveal any grand jury secrets to any unauthorized person.²²

In the case of Independent Counsel Starr, much of what we know about his grand jury investigations comes from disclosures that plainly were not violations of Rule 6(e) by him or his staff. Some of the leading sources of public information about what transpired before Starr’s grand juries were, on the record or indirectly, talkative grand jury witnesses themselves, along with their friends, attorneys, spokespersons, and political supporters. Each of these persons is, of course, not restricted by the prohibitions of Rule 6(e). Other disclosures of

16. *See infra* Part I.A.

17. *See infra* Part I.B.

18. *See* 1 Charles Alan Wright, Federal Practice & Procedure § 21 (2d ed. 1999); 3A Charles Allen Wright, Federal Practice & Procedure §§ 871-74 (2d ed. 1982 & Supp. 1999).

19. Fed. R. Crim. P. 6(e).

20. *See generally* Sara Sun Beale et al., Grand Jury Law & Practice § 5.06 (2d ed. 1998) (citing numerous decisions and other authorities); Howard W. Goldstein, Grand Jury Practice § 3.04[2], at 3-44 to 3-49 & nn.84-100 (1998) (same); Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 Am. Crim. L. Rev. 339, 340-41 (1999) (same). In the District of Columbia Circuit, however, the federal Court of Appeals recently clarified—in its decision exonerating the Office of Independent Counsel Starr on a particular charge that it had leaked grand jury information—that Rule 6(e)’s secrecy rule regarding “matters occurring before the grand jury” refers literally and narrowly only to those matters, and not to prosecutors’ non-grand jury investigations or their personal thought processes. *See In re Sealed Case No. 99-3091* (Office of Independent Counsel Contempt Proceeding), 1999 WL 709977, at *5-*9 (D.C. Cir. Sept. 7, 1999) (per curiam).

21. *See* Goldstein, *supra* note 20, § 3.04[2], at 3-42 & n.76 (citing decisions).

22. *See* Fed. R. Crim. P. 6(e)(2). Rule 6(e) also itemizes specific circumstances in which a person who otherwise would be subject to this prohibition may disclose matters occurring before a federal grand jury. *See id.* Rule 6(e)(3).

grand jury information came directly from Starr himself, but through processes that conformed to Rule 6(e). The most notable example of these disclosures is Starr's statutorily-required²³ and court-authorized²⁴ 1998 transmissions to the House of Representatives of grand jury and other information that led to the impeachment of President Clinton.²⁵ Other scraps of grand jury-related information reached the public domain through processes that cannot fairly be blamed on Starr or his staff.²⁶

None of these disclosures negates the possibility that Starr or some other person on his staff—an attorney, a law enforcement agent, a consultant, or a worker in a support position—violated the Rule 6(e) prohibition. In early 1998, the private attorneys who were representing President Clinton, Mrs. Clinton, and other White House aides to the President filed complaints to that effect in the United States Dis-

23. See 28 U.S.C. § 595(c) (1994).

24. See *In re* Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (per curiam) (filed under seal) (order authorizing Independent Counsel Kenneth W. Starr to deliver to the House of Representatives materials, including disclosures before the grand jury, constituting information of the type described in 28 U.S.C. § 595(c)), reprinted in Office of the Independent Counsel, Referral to the United States House of Representatives Pursuant to 28 U.S.C. § 595(c), H.R. Doc. No. 105-310, app., pt. 1, tab B, at 10 (2d Sess. 1998) [hereinafter Starr Report].

25. See Starr Report, *supra* note 24. It was the House, not Starr, that summarily released this information in toto to the public—to Starr's great surprise and enduring consternation. See Testimony of Kenneth W. Starr before the House Judiciary Committee, Nov. 19, 1998, at 14, available in the FDCH Congressional Testimony on LEXIS (testifying that "the public disclosure or nondisclosure of the referral and the backup materials was a decision our office did not make—and lawfully could not make"); *Today Show: Part I: Ken Starr Discusses His Interview of President Bill Clinton* (NBC television broadcast, Aug. 9, 1999) (transcript available in LEXIS) (broadcasting Starr's explanation a year after the event that "[w]e made nothing public. We sent the information [contained in his impeachment referral] to the Congress of the United States, and the Congress, for better or worse, chose to make this public in an extraordinary way, including putting it on the Internet and the like, without any screening. . . . I was horrified. . . . I genuinely did [expect them to read it first]. It never occurred to me that—that they wouldn't."). *But cf.* Michael Isikoff, *Uncovering Clinton: A Reporter's Story* 353 (1999) (describing Starr's decision, after he learned that the House of Representatives planned to release publicly his impeachment referral, not to send Speaker of the House Newt Gingrich a staff-drafted letter warning that the referral "included 'highly explicit' material that is 'almost certainly inappropriate for wide public dissemination'").

26. In March 1999, for example, Ms. Freda Alexander, the foreperson of the Washington, D.C. grand jury to which Starr's office had presented evidence in its investigation of President Clinton, Monica Lewinsky, and others in 1998, spoke on the record to reporters about that work, apparently because she misunderstood private legal advice she received about suing a former employer who had, she claimed, discharged her for missing work while she was serving as a grand juror. See Susan B. Glasser, *Forewoman Would Have Voted To Indict Clinton: Grand Jury Leader in Lewinsky Probe Breaks Secrecy, Says President Lied*, Wash. Post, Mar. 26, 1999, at A1; see also *Grand Jury Forewoman Now Silent*, Wash. Post, Mar. 27, 1999, at A3 (reporting a meeting between Starr and Chief Judge Norma Holloway Johnson of the United States District Court for the District of Columbia about this matter).

trict Court for the District of Columbia, a venue where Starr's office presented evidence to some of the federal grand juries that played roles in his investigations.²⁷ Chief Judge Norma Holloway Johnson subsequently determined that these litigants had identified at least twenty-four media reports in 1998 that were prima facie evidence of Rule 6(e) violations by Starr's office²⁸ and appointed a Special Master to investigate.²⁹ This "leaks" investigation reportedly has exonerated Starr and his staff,³⁰ but it appears that the court has not formally concluded its investigation as of fall 1999.

Although outsiders know little about the Special Master's investigation, it will not be surprising if this investigation concludes that Starr and his staff committed no clear violation of Rule 6(e). At the level of

27. See Dan Balz, *White House Advisers Agree: Attack Starr*, Wash. Post, Feb. 7, 1998, at A1 (reporting that Kendall made his statement at a televised press conference); Kendall, "A Deluge of Illegal Leaks," Wash. Post, Feb. 7, 1998, at A13 (quoting Kendall's public statement about "a deluge of illegal leaks from [Starr's] office of false and misleading information" and announcing his intention "to seek . . . court appropriate remedies including contempt sanctions"); *Portions of a Letter from Clinton Lawyer to Independent Counsel*, Boston Globe, Feb. 7, 1998, at A6 (quoting "a major portion" of a letter from David E. Kendall, President Clinton's personal attorney, to Independent Counsel Starr, which complained that "[t]he covert dissemination of both accurate and inaccurate information by [his] staff violates Rule 6(e) of the Federal Rules of Criminal Procedure, case law, Department of Justice Guidelines, rules of court and well-established ethical prohibitions" and listed dozens of specific examples of press reporting that allegedly reflected these leaks).

28. Contrary to much of the contemporaneous press reporting, which asserted that there had been some kind of judicial finding that Starr had violated Rule 6(e), this decision meant only that President Clinton's counsel had filed discrete and intelligible allegations to this effect that were sufficient to shift the burden of proving non-violation to Starr. See *Barry v. United States*, 865 F.2d 1317, 1321 (D.C. Cir. 1989). See generally Judge Patricia M. Wald, *A Whitewater Legacy: Running the Rapids of Constitutional Law*, The Leslie H. Arps Memorial Lecture, Association of the Bar of the City of New York (Oct. 26, 1999) (stating that this decision was "widely but wrongly hailed" as proving the truth of allegations that Starr had leaked grand jury information).

29. See *In re Grand Jury Proceedings*, No. 98-228, 1998 U.S. Dist. LEXIS 17290, at *12 (D.D.C. Sept. 24, 1998) (Johnson, C.J.) (redacted version of opinion); see also Bill Miller, *Starr Tried to Limit Leak Probe, Keep It Secret*, Wash. Post, Jan. 7, 1999, at A26 (identifying District of Columbia Court of Appeals Senior Judge John W. Kern, III, as the Special Master who Chief Judge Johnson appointed on September 25, 1998, to determine whether personnel in Starr's office were the sources for 24 media reports that constituted prima facie violations of Rule 6(e)). See generally Fed. R. Civ. P. 53 (authorizing court appointments of special masters).

30. See Jerry Seper, *Secret Report to Court Clears Starr, Staff of Illegal Leaking*, Wash. Times, Sept. 16, 1999, at A3 (quoting as the source for this report "a lawyer" who is "not a current or former member of the independent counsel's office" and "who has not read the document [Special Master Kern's report] but is familiar with its contents"); see also *Clearing Ken Starr*, Editorial, Wash. Times, Sept. 17, 1999, at A18 (editorializing that "sources familiar with Judge Kern's secret report told this newspaper's Jerry Seper that the charges against Mr. Starr were found to be entirely without merit"). Interestingly, as of early November 1999, no newspaper other than The Washington Times has reported on whether Special Master Kern has submitted to Chief Judge Johnson a report concerning the alleged leaks of grand jury information by Starr and/or his staff.

office policy and group knowledge, I have a hard time believing that so many responsible and well-regarded persons would have stooped to such obvious and serious law breaking, or that not even one whistleblower would have come forward at some point if they had. I suspect that what may have happened, instead, is that one Starr staff member at a time—acting individually, in private, without seeking anyone’s authorization, and under great stress (some of it caused by the unfair and inaccurate media criticism that the office was receiving)—spoke in confidence to one reporter at a time about selected aspects of the Office’s investigative work and did not pause to consider whether they were revealing Rule 6(e) grand jury secrets.³¹ I am guessing, in other words, that any leakers in Starr’s office were solo operators whose colleagues did not really witness their misconduct.

If my supposition is correct that “Starr’s” leaks of grand jury information actually were isolated instances of misconduct by separate individuals not acting in concert, it will be very unusual if the Special Master or any leaks investigator succeeds in proving that such misconduct occurred. Leaks investigations generally seem not to succeed, even when someone is in fact culpable for making a prohibited disclosure of information.³² First of all, the reporters who receive leaks al-

31. Cf. David Grann, *Background Noise*, New Republic, June 28, 1999, at 18, 22 (reporting that when three of Starr’s senior staff prosecutors found evidence that a colleague had misrepresented to their own internal leaks investigation his contacts with a reporter in connection with a particular story that did not disclose matters occurring before a grand jury, they drove to the colleague’s home and confronted him).

32. See, e.g., Lou Cannon, *Justice Probe Fails to Disclose Source of Leaks on Mideast*, Wash. Post, Dec. 16, 1983, at A1 (reporting the closure, without success in determining the source or the damage to national security, of “[a]n extensive Department of Justice investigation” that President Reagan had ordered “into purported unauthorized disclosures of U.S. military and diplomatic strategy in Lebanon . . . ‘There is no evidence that reporters were told anything we didn’t want them to know,’ one official said.”); Jay Croft, *2 Reporters Jailed in Jewell Suit*, Alt.-J. Const., June 4, 1999, at D1 (noting that the reporters involved in Richard Jewell’s defamation suit refuse to reveal their sources for their story despite a judge’s order); Helen Dewar, *Senate Probe Fails to Identify Leakers: Sources in Hill-Thomas, “Keating Five” Cases Elude Special Counsel*, Wash. Post, May 6, 1992, at A3 [hereinafter Dewar, *Senate Probe*] (reporting United States Senate Special Counsel Peter E. Fleming, Jr.’s final report that he was unable to identify the sources who provided to reporters either Professor Anita Hill’s October 1991 written statement regarding then Supreme Court nominee Judge Clarence Thomas or various pieces of information concerning the Senate Ethics Committee investigation of five Senators’ dealings with former savings and loan executive Charles Keating); Ronald K. Noble, *How Not to Investigate a Leak*, N.Y. Times, Feb. 11, 1998, at A29 (stating that the Department of Justice, after a comprehensive investigative effort, “failed to identify the source of the leak” that led to a 1989 CBS television report that then Representative William H. Gray III was the focus of a criminal investigation); cf. Roberto Suro, *Judges Get Involved in Probe of Starr: Reno Investigation Could Be Halted*, Wash. Post, Feb. 24, 1999, at A1 (reporting that, according to Department of Justice officials, Attorney General Reno authorized an unusually aggressive internal inquiry to find and punish the sources of news stories about her handling of [misconduct] allegations against Starr”). See generally Timothy J. Burger, *Public Integrity Chief Under Fire*, Legal Times, Dec. 15, 1997, at 4 (reporting statement by Jane Kirtley, executive director of the Reporters’ Com-

most never give up their sources.³³ Leak investigators know this and, if they also understand the value of free and aggressive reporting in a constitutional democracy,³⁴ they tend not even to ask reporters, much less seek to enforce subpoenas that might compel them to describe, who told them what and when.³⁵ This reliable silence by reporters must in turn give government leakers great confidence that their contacts will not give them up. Thus, the leakers also seem generally to tough it out by offering false denials. Finally, leak investigators shy away from polygraph examinations and other investigative methods that might identify leakers or move them to admit their misconduct.³⁶

There is a further problem in leak investigations that is particular to leaks of grand jury information. As noted above, Rule 6(e) and the case law interpreting it are quite unclear about exactly what kinds of disclosures it prohibits.³⁷ A disclosure of actual grand jury testimony would clearly be illegal, but in Starr's case, no such information from any of his grand jury investigations has appeared in media in a form that suggests it came from such a blatantly illegal disclosure.³⁸ Beyond

mittee for Freedom of the Press, that President Clinton or other top officials of his administration "have criticized or called for probes of various leaks, and not[ing] that these generally produced nothing," and quoting Federal Bureau of Investigation Director Louis Freeh's remark that, although leak probes are conducted "by the dozens . . . [u]nfortunately, few of them are resolved"); Richard Harwood, *Washington's Way With a Leak*, Wash. Post, Feb. 16, 1998, at A27 (noting that Starr responded to Clinton attorney David Kendall's February 1998 call for a "grand jury leaks" investigation by echoing that call, and by dispatching FBI agents to investigate, but commenting that "whether he [Starr] can direct or supervise an investigation of his own operation that would be seen to be credible is doubtful. If history is any guide, it also will be fruitless, and the leakers will never be found.").

33. See Swain, *supra* note 14, at 52 (declaring that, as a matter of reporters' ethics, "[o]nce [they] have taken information off the record, they are obligated—by personal honor, the traditions of their craft, and a pragmatic desire to preserve reputations of trustworthiness, but certainly not by law—never to reveal the identity of the source").

34. See, e.g., Noble, *supra* note 32 (stating that "the Justice Department has long recognized the nexus between a news reporter's ability to protect [a] confidential source and our country's ability to maintain a free press"). See generally United States Dep't of Justice, United States Attorney's Manual § 1-7.112 ("Need for Free Press and Public Trial").

35. See, e.g., Noble, *supra* note 32 (describing the DOJ decision, in its 1989 investigation that sought to determine whether any Department employee was responsible for a press report regarding then-Representative William H. Gray III, not to subpoena CBS reporter Rita Braver); cf. Helen Dewar, *Leak Investigator Backs Down on Phone Subpoenas*, Wash. Post, Mar. 18, 1992, at A4 (describing Fleming's decision to permit reporters, through counsel, to object to the Senate Rules and Administration Committee regarding Fleming's subpoenas seeking telephone company records of certain calls by the reporters); Dewar, *Senate Probe*, *supra* note 32 (describing the Senate sustaining reporters' objections to subpoenas they received from Senate Special Counsel Peter Fleming during his leaks investigation).

36. But see Noble, *supra* note 32 (describing the polygraph examinations, sworn statements, and other investigative methods that the DOJ employed in its 1989 leaks investigation concerning the CBS story about then-Representative Gray).

37. See *supra* notes 18-22 and accompanying text.

38. None of the media reports that Chief Judge Johnson found to be *prima facie*

the fairly narrow category of grand jury testimony leaking, it is unclear what Rule 6(e) encompasses. In his well-noted April 15, 1998, interview with Steven Brill,³⁹ Starr voiced the narrow interpretation that Rule 6(e) does not encompass the pre-grand jury statements of witnesses who later may testify before a grand jury.⁴⁰ This view may not be commendable, but it is not inconsistent with the statements and conduct of numerous Department of Justice ("DOJ") prosecutors.⁴¹ It will be surprising if a federal appellate court, at the end of the substantive litigation over grand jury secrecy in the context of Starr's investigations, holds plainly and directly that Starr's reading of Rule 6(e) is incorrect and illegal.

B. *Leak Type 2: Law Enforcement Information*

Leaks of grand jury testimony itself are, of course, the easiest leaks to identify. If an investigator with the powers of federal law enforcement is determined to interrogate the prosecutors and other persons who had access to grand jury testimony that leaked, such leaks also should be the easiest ones to trace back to a limited number of possible sources.

Beyond the core area that is defined by the rules of grand jury secrecy, however, there is a wealth of non-grand jury information that law enforcement personnel possess and, when it suits some purpose to do so, share with the media.⁴² In Starr's case, without belaboring the

evidence that someone in Starr's office violated Rule 6(e) is a quotation from or a description of actual grand jury testimony. See *In re Grand Jury Proceedings*, No. 98-228, 1998 U.S. Dist. LEXIS 17290, at *10-*33 (D.D.C. Sept. 24, 1998) (order to show cause) (Johnson, C.J.) (redacted version of opinion) (listing the 24 media reports that, in the Court's view, are prima facie evidence that someone in Starr's office violated Rule 6(e)).

39. See Brill, *supra* note 13, at 122.

40. See *id.* at 132 ("Well, it is definitely not grand jury information, if you are talking about what witnesses tell FBI agents or us *before* they testify before the grand jury or about related matters," he [Starr] replies. "So, it's not 6-E.") (emphasis in original).

41. See *In re Sealed Case*, No. 99-3091 (Office of Independent Counsel Contempt Proceeding), 1999 WL 709977 at *5 (D.C. Cir. Sept. 7, 1999) (stating that the DOJ had, as amicus curiae in this litigation, "generally support[ed]" Independent Counsel Starr's position, which the Court upheld, regarding the "coverage" of Rule 6(e)).

42. See Robert Reno, *Starr's Loose Lips Don't Sink Ships, Just Our Confidence*, *Newsday*, June 17, 1998, at A51 (according to syndicated columnist who is the brother of Attorney General Janet Reno: "Basically, here's how it works, folks. There are more than 3,000 state and federal prosecutors in America . . . [Q]uite a number of them are gushing faucets who know exactly how to play selective footsie with the media in ways that make each of their jobs easier."); see, e.g., Robert E. Precht, *We Have Seen The Enemy: Scenes From A Trial*, 26 *Fordham Urb. L.J.* 539, 545 & nn.42-43 (1999) (describing how press reports prior to trial in the World Trade Center bombing trial said that the government had located a gas station attendant who recalled pumping gas into a yellow Ryder van driven by defendant Mohammed Salameh after he had reported it stolen and a few hours before the explosion) (citing Mary B.W. Tabor, *Witnesses Report Seeing Suspects on Eve of Blast*, *N.Y. Times*, Mar. 22, 1993,

details here, there consistently were abundant disclosures to media, regarding “Whitewater” and all the other matters within Starr’s constellation of jurisdiction, by sources who obviously were members of federal law enforcement. These disclosures began in 1993—when Mr. Starr was still in private practice and well-regarded by persons who spanned the political spectrum—as the DOJ was considering criminal referrals from the Resolution Trust Corporation (“RTC”) regarding James McDougal, Madison Guaranty Savings & Loan, and James and Susan McDougal’s real estate and other dealings through the years with Bill and Hillary Clinton.⁴³ These disclosures continued in 1994 after Attorney General Reno had appointed Robert B. Fiske, Jr. to investigate Whitewater matters as a special and independent prosecu-

at B4 (attributing the report to unnamed “Federal officials” and “Federal investigators”) and Peg Tyre, *Feds: Salameh Drove Bomb Van*, *Newsday*, Mar. 24, 1993, at 3 (quoting “New Jersey FBI Director James Esposito” in the story but attributing only to “[s]ources” the information about what “a witness told federal agents”); Jerry Capeci & Gene Mustain, *Jailed Gotti Isn’t Crying ‘Uncle,’* *N.Y. Daily News*, Aug. 4, 1999, at 3 (reporting allegations by John J. Gotti’s attorney that the federal government leaked videotapes of Gotti’s conversations with visitors at the federal prison in Marion, Illinois, to embarrass him); Warren Wilson, *Microsoft’s Gates Hissed, But Herbold Whistles Back*, *Seattle Post-Intelligencer*, Oct. 15, 1998, at C1 (reporting statement by Microsoft Executive Vice President Bob Herbold that, as its antitrust suit against Microsoft was about to commence, the federal government leaked “damaging but one-sided ‘snippets’ of information” about Microsoft to generate negative publicity about the company). See generally Eric H. Holder, Jr. & Kevin A. Ohlson, *Dealing with the Media in High-Profile White Collar Crime Cases: The Prosecutor’s Dilemma*, in *White Collar Crime*, at B-1 (1995) (discussing prosecutor cooperation with media and the guidance provided to prosecutors by DOJ media policy); Doyle McManus et al., *Learning Curve Hits Independent Counsel*, *L.A. Times*, June 17, 1998, at A1 (quoting former Carter Administration DOJ official Terrence B. Adamson: “Providing background [briefings] is something that prosecutors have done for a long time.”). But see Frank A. Aukofer, *Babbitt Likely Will Be Cleared: Report Says Interior Secretary’s Role in Casino Issue is Being Investigated by Counsel*, *Milwaukee J.-Sentinel*, Aug. 12, 1999, at 3 (quoting Michael Gaudin, spokesman for Secretary of the Interior Bruce Babbitt, regarding Independent Counsel Carol Elder Bruce’s 1998-1999 investigation of Mr. Babbitt: “She conducted a very thorough and professional investigation without a lot of the confrontationalism and leaking that have been the hallmark of other independent counsels.”).

43. For example, Susan Schmidt and Michael Isikoff reported:

The RTC, according to documents and interviews with sources familiar with the probe, told federal prosecutors more than a year ago that Bill and Hillary Clinton and other principals in a dozen corporations doing business with Madison Guaranty Savings & Loan during the mid-1980s could possibly have benefited from [an] alleged [check-kiting] scheme [to drain funds from the thrift], though there is no evidence they had direct knowledge of it.

Susan Schmidt & Michael Isikoff, *Dealings of Clinton Partners Were Referred to Justice Dept. in 1992*, *Wash. Post*, Nov. 11, 1993, at A3. Although sources for this reporting were of course not identified, the tenor of the story suggested that they were employees of the Resolution Trust Corporation, not the Department of Justice. But see Susan Schmidt & Michael Isikoff, *Arkansas Probe Sensitive From Start: Investigation of Collapsed S&L Affected by Links With the Clintons*, *Wash. Post*, Jan. 5, 1994, at A1 (chronicling “[t]he history of the Madison investigation, pieced together from interviews with Justice Department and RTC officials along with documents from the case”).

tor within the DOJ.⁴⁴ Disclosures continued after the independent counsel law was enacted later that year and Reno triggered it in the Whitewater, Vincent Foster, and Webster Hubbell matters, resulting in the appointment of Independent Counsel Starr.⁴⁵ These disclosures continued from 1994 to 1998 as Starr was assigned to investigate numerous other matters.⁴⁶

II. PROSECUTORS' ABILITY TO DISCLOSE LAW ENFORCEMENT INFORMATION

The disclosures of non-grand jury law enforcement information that flowed from Starr's office are typical of what federal law enforcement sources give to the media in criminal investigations, and certainly in criminal investigations that involve public officials or other persons and events of notoriety, throughout the country.⁴⁷ In this part, I will describe how this is possible by considering the relative absence of restrictions on the government's ability to engage in this kind of talking and revealing about people and matters it is investigating by methods other than the grand jury.

A. Rule 6(e)

The rule of grand jury secrecy is a limited restriction on the ability of law enforcement personnel to disclose information. Rule 6(e) is, as described earlier, not a broad prohibition and it is not easy to en-

44. See, e.g., Susan Schmidt, '84 Clinton Panel Names as a Suspect: RTC Asks Fiske to Probe Whether \$60,500 in S&L Funds Was Diverted, Wash. Post, Apr. 2, 1994, at A1 (reporting that RTC investigators in 1993 named the 1984 Clinton gubernatorial campaign as a suspect in their criminal investigation of Madison Guaranty Savings & Loan, and that 10 of RTC's criminal referrals to the DOJ regarding Madison were forwarded to special prosecutor Fiske). Although this reporting also did not identify its sources, the tenor of the story again suggested that they were RTC, and not DOJ (including Mr. Fiske's office), employees.

45. See, e.g., Ellen Joan Pollock, *Starr Takes Over Whitewater Probe as Decisions Must Be Reached on Batch of Possible Indictments*, Wall St. J., Aug. 31, 1994, at A14 (reporting, according to unnamed "lawyers involved in the investigation," that Starr had "substantial documentary evidence" showing that Webster Hubbell had billed personal expenses to his former law firm and soon could seek his indictment on mail fraud and other charges, and that Hubbell's "attorney declined to comment").

46. See, e.g., Bob Woodward, *Shadow: Five Presidents and the Legacy of Watergate 398* (1999) ("The media stories about the Lewinsky matter were obviously coming, at least in part, from Starr's office."). But see William Raspberry, *Just Two Questions*, Wash. Post, Nov. 21, 1998, at A21 (quoting a letter from Starr to Kendall: "When you look at the information that we had in our office, and [at] the FBI, as opposed to information that you had access to, it [the former] never entered the public domain." He [Starr] mentioned specifically the celebrated blue dress with its DNA secrets. "Those were never in the public domain because you did not have a witness in your joint defense arrangements whom you could debrief.") (first two sets alterations in original) (emphasis in original).

47. See *supra* note 42 and accompanying text.

force.⁴⁸ Although it does apply more directly to investigations, such as public corruption investigations, that are conducted more before grand juries and through their compulsory processes than drug and other street crime investigations, which law enforcement agents tend to develop outside the grand jury context,⁴⁹ Rule 6(e) simply is not the all-encompassing limit on government disclosures of information that criminal defense attorneys claim it to be.⁵⁰

B. *Department of Justice Regulations*

Beyond Rule 6(e), the policies of the DOJ also are not, as restrictions on information dissemination go, very restrictive or demanding. The DOJ's formal regulations in this area, which generally apply to court-appointed independent counsel who were or are in operation under the independent counsel law,⁵¹ are filled with generalities. In the context of indicted criminal cases and filed civil proceedings, the DOJ recognizes both the patent impropriety of releasing information "for the purpose of influencing a trial"⁵² and the existence of "valid reasons for making available to the public information about the administration of the law."⁵³

How should one, in the words of the regulations themselves, "stri[k]e a fair balance" between these competing values?⁵⁴ The DOJ candidly admits that finding this balance "depends largely on the exercise of sound judgment" by DOJ personnel and by representatives of the media.⁵⁵ The regulations do not presume to coach the media on how to behave. For DOJ personnel, however, the regulations contain "Guidelines" that apply to releases of information from the time a person becomes the subject of a criminal investigation until any resulting proceeding is terminated by trial or otherwise.⁵⁶ These guidelines define safe harbors (types of information that DOJ personnel generally may disseminate)⁵⁷ and rocky shoals (types of information

48. See *supra* notes 18-22 and accompanying text.

49. See Richman, *supra* note 20, at 342-45.

50. Professor Richman exaggerated only a little when he described the focus on grand jury secrecy as a project in "Plugging the Leaks in an Empty Bucket." *Id.* at 339.

51. See 28 U.S.C. § 594(f)(1) (1994).

52. 28 C.F.R. § 50.2(a)(2) (1998).

53. *Id.*

54. *Id.*

55. *Id.*

56. See *id.* § 50.2(b).

57. See *id.* § 50.2(b)(3)(i)-(iv) (authorizing DOJ personnel, subject to "specific limitations imposed by law or court rule or order," to "make public" a "defendant's name, age, residence, employment, marital status, and similar background information," "[t]he substance or text of the charge," "[t]he identity of the investigating and/or arresting agency and the length or scope of an investigation," and "circumstances immediately surrounding an arrest"). The regulation also directs, however, that where releasing such information would be "highly prejudicial" or "serve no law

that they should not release).⁵⁸ The regulations also plainly state that senior officials can and will, in specific circumstances, make ad hoc decisions about what information to release.⁵⁹

The DOJ's internal rulebook for prosecutors, The United States Attorney's Manual, contains further policy guidance in this area. While potentially criminal matters are under investigation but have not yet been indicted, the Manual flatly prohibits "components and personnel of the Department" from "respond[ing] to questions about the existence of an ongoing investigation or comment[ing] on its nature or progress, including such things as the issuance or serving of a subpoena, prior to the public filing of the document."⁶⁰ The very next subsection of the Manual, however, defines the following exceptions to this duty:

In matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare, comments about or confirmation of an ongoing investigation may need to be made. In these unusual circumstances, the involved investigative agency will consult and obtain approval from the United States Attorney or Department Division handling the matter prior to disseminating any information to the media.⁶¹

These statements encompass the substance of the policy guidance and constitute the only formally codified restraints on federal law enforcement personnel within the DOJ today. Thus, at least as a floor, they are the policy within any DOJ component or any office of independent counsel. It amounts to a system where, in dealing with media and responding to inquiries, each United States Attorney, the Assis-

enforcement function," it "should not be made public." *Id.* § 50.2(b)(3)(iv).

58. *See id.* § 50.2(b)(6)(i)-(vi) (specifying "[o]bservations about a defendant's character;" "[s]tatements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement;" references to "investigative procedures . . . or to the refusal by the defendant to submit to such tests or examinations;" "[s]tatements concerning the identity, testimony, or credibility of prospective witnesses;" "[s]tatements concerning evidence or argument in the case;" and "[a]ny opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged [or] . . . a lesser offense").

59. *See id.* § 50.2(b)(9) The Code states:

Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. If a representative of the DOJ believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

Id.

60. U. S. Dep't of Justice, United States Attorney's Manual § 1.7-530(a).

61. *Id.* § 1-7.530(b).

tant Attorney General who heads the Criminal Division (along with the Main Justice officials above them, up to and including the Attorney General herself), and each Independent Counsel has blanket permission to determine that "the public interest, safety or welfare" requires the release of non-grand jury information.⁶²

In some instances, the determination whether to release investigative information has been made, formally or informally, as the DOJ's regulations and The United States Attorney's Manual envision: with permission from an official at the United States Attorney level or higher, and in unusual circumstances for specific (and generally valid) reasons, such as reassuring the public about aggressive efforts that federal law enforcement is devoting to a known situation, or about the public's own safety.⁶³ But the DOJ also has experienced the release of information that is contrary to its general policies: individual prosecutors, or agents working under their supervision, deciding on their own to provide information to individual reporters on terms that allow them to use the information while protecting the sources' identities.

C. *Legal Ethics Rules*

State court ethics rules, which are made applicable to federal attorneys by a new federal statute that took effect in 1999,⁶⁴ seem not to impose much additional constraint on prosecutors releasing non-public investigative information. American Bar Association Model Rule of Professional Conduct ("Model Rule") 3.6, which is the basis for most of the particular state court ethics rules that pertain to lawyer

62. See Levenson, *supra* note 7, at 564. Under the now-expired independent counsel law, each independent counsel had full legal authority to determine on his own that "public safety, interest or welfare" required him to disclose certain law enforcement information. The statute did not require an independent counsel to consult with the Attorney General or even with a career official in the DOJ before making this kind of determination. In addition, even after an independent counsel followed through on his determination to disclose law enforcement information, the statute gave the attorney general no remedy short of her ultimate, never-exercised power to dismiss the independent counsel for cause. See generally Barrett, *supra* note 15, at 547 (discussing 28 U.S.C. § 596(a)(1) (1994), which authorized the attorney general personally to dismiss an independent counsel "for cause").

63. The public statements that Attorney General Reno and other Department officials made about investigative efforts and developments in the days following the bombing of the Murrah federal building in Oklahoma City are one example. See, e.g., Richard A. Serrano & James Risen, *Bombing Suspect In Custody: FBI Questions 2 Others as Death Toll Hits 65*, L.A. Times, Apr. 22, 1995, at A1 (reporting on Reno's April 21, 1995 press conference where she announced the arrest of Timothy McVeigh). Federal Bureau of Investigation official James K. Kallstrom's public briefings and statements during the early investigation of the crash of TWA flight 800 are another example of the Department deciding, at the highest levels, to release more investigative information than its ordinary policies might dictate. See generally Joe Sexton, *The Investigation: The First 36 Days: Behind a Calm Facade, Chaos, Distrust, Valor*, N.Y. Times, Aug. 23, 1996, at A1 (quoting Kallstrom and describing his close relationship with FBI Director Louis J. Freeh).

64. See 28 U.S.C. § 530B (Supp. 1999).

speech outside of court, bars lawyers from speaking about investigations or litigation only when they “reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”⁶⁵ Model Rule 3.8, which defines special responsibilities of prosecutors and thus supplements Model Rule 3.6,⁶⁶ is similarly directed to the adjudicative, not the investigative, stage of law enforcement lawyering.⁶⁷ It seems that, in the minds of prosecutors who contemplate disclosing investigative information prior to the commencement of formal proceedings, the risk of prejudice to citizens that is the focus of these rules does not rise to the level where it becomes a matter of the prosecutors’ professional responsibility as lawyers not to release the information. Indeed, one confirmation that prosecutors do not perceive these ethics rules as significant restraints is the fact that the DOJ, in its recent efforts to effect the repeal of the new statute that puts federal prosecutors under state ethics rules, has made no claim that these particular rules affect how federal attorneys must conduct themselves.⁶⁸

D. *Media and Public Culture*

The prosecutors and their supervisors who know that there are at least some policy and professional restraints on their abilities to disclose law enforcement information do so today in a public culture that strongly tempts government law enforcement personnel to talk about their work. There are, obviously, an enormous number of media outlets and reporters. These media woo prosecutors and law enforcement agents because they have the content these media need, including crime stories, information about well-known or powerful persons, and facts that can be connected to popular themes, such as negative views of the government and public officials. Reporters also can offer prosecutors and agents credible protection from identification, and thus from consequences of being caught in the act of talking without

65. Model Rules of Professional Conduct Rule 3.6(a) (1998).

66. *See, e.g., id.* Rule 3.8(e) (directing prosecutors to “exercise reasonable care to prevent investigators” and other colleagues in law enforcement “from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6”).

67. *See id.* Rule 3.8(g) (directing prosecutors, “except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [to] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused”) (emphasis added).

68. *See* Testimony of Eric H. Holder, Jr., Deputy Attorney General, Before the Senate Judiciary Committee, Mar. 24, 1999, available in the FDHC Congressional Testimony on LEXIS; *see also* Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *Fordham Urb. L.J.* 607, 631-33 (1999) (explaining that “prevailing ethical norms,” as they apply in “the investigative context,” allow “more leeway” to prosecutors than they do to other lawyers).

lawful authorization from an appropriate supervisor.⁶⁹

For these would-be media sources in law enforcement, reporters' requests for information, and the prospect of publicity about one's work, are undeniably appealing. Telling the government's side of a story, and/or rebutting the anti-government story that the government's adversaries often put out to the media without restraint or honesty, makes sense in the effort to build support in investigative, jurisdictional, bureaucratic, budgetary, public opinion, and other battles.⁷⁰ Press reports also provide pure ego gratification. Some prosecutors and agents are tempted, while working on the matter at hand, also to think about their own prospects for advancement in law enforcement. They also may start to think about developing their future job opportunities in the private sector, their political support, their prospects for election or nomination to judicial office, and/or their prospects for non-judicial elective office. As these thoughts occur, some lawyers and agents surely come to conclude that talking to the media is one way to build name-recognition and reputation and thus, perhaps, to realize these ambitions.

E. *Unaccountable Government Speech About Law Enforcement Matters Is Wrong*

Our rules, weak though they are, and the strong statements that public officials—including Attorney General Reno and then-Independent Counsel Starr⁷¹—make regularly about the need for law enforcement personnel not to speak about non-public matters, are correct. Law enforcement wields enormous power over the individual. People's lives, jobs, relationships, privacy, and happiness are at stake when the government commences an investigation, and they are not easily restored after the government has disclosed information about who it is investigating and what it is learning about them. As former Secretary of Labor Raymond J. Donovan famously asked after he was prosecuted in state court by an elected District Attorney—not in federal court by an independent counsel, as political and legal lore

69. Cf. *Independent Counsel Implosion*, Editorial, Wash. Post, Mar. 13, 1999, at A20 ("The subject of leaks is one on which we cannot comment dispassionately. Soliciting leaks, after all, is part of what a vibrant free press does. And it would be rather hypocritical for an organization that thrives on such disclosures also to denounce them.").

70. Cf. Neil A. Lewis, *A Court Becomes a Model Of Conservative Pursuits*, N.Y. Times, May 24, 1999, at A1 (noting that, during the writer's research regarding the judges of and some of the recent decisions rendered by the United States Court of Appeals for the Fourth Circuit, "[m]ore than half of the . . . active judges were interviewed . . . although most asked that they not be quoted directly or by name"). For an interesting discussion of non-government lawyers using media in efforts to influence prosecutors, see Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 Colum. L. Rev. 1811, 1837-39 (1995).

71. See *supra* note 9.

now misremembers this case⁷²—“Which office do I go to to get my reputation back?”⁷³

Government behavior—the choices we make as we exercise public power—also makes fundamental statements about our values as a general public, and about the values of the individuals who hold governmental positions of power. In criminal prosecution, the right values continue to include, in my view, what Attorney General Robert Jackson described in his famous 1940 speech to DOJ personnel as “[a] sensitiveness to fair play and sportsmanship,” as “temper[ing] zeal with human kindness,” as “approach[ing the prosecutorial] task with humility.”⁷⁴ On the specific issue of disclosing law enforcement information outside of court, Jackson recognized that law enforcement entities and personnel simply need to make their choices. The prosecutor “can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.”⁷⁵ Or law enforcement can choose, based on a principled view of its craft, to behave better than that.⁷⁶

III. A PROPOSAL FOR FEDERAL LAW ENFORCEMENT EMPLOYERS

Although leaks are difficult to locate after the fact, they can be reduced hugely, if not prevented altogether, in any law enforcement organization. It simply takes law enforcement leadership that is willing to make clear policy and then to demonstrate, by its own example in following the policy and by its determined, even-handed enforcement efforts that make examples of any violators, its seriousness in taking a hard line against unaccountable disclosures of law enforcement information.⁷⁷

72. See, e.g., Father Andrew M. Greeley, *Prosecutors in America Are Out of Control*, *The Stuart News/Port St. Lucie News*, Dec. 19, 1998, at D3 (“If a special counsel is appointed—even on the most flimsy grounds—the cost of your defense is \$2 million in addition to the harm done to your reputation and your family life. The costs go even higher when you are indicted. As former Secretary of Labor Raymond Donovan said when he was acquitted in the 1980s, “Where do I go to get my reputation back?”).

73. Selwyn Raab, *Donovan Cleared of Fraud Charges By Jury in Bronx*, *N.Y. Times*, May 26, 1987, at A1 (quoting Donovan’s remarks in a courthouse corridor following his acquittal on all ten counts after an eight-month trial: “The question is, should this indictment have ever been brought? Which office do I go to to get my reputation back? Who will reimburse my company for the economic jail it has been in for two and a half years?”).

74. Robert H. Jackson, *The Federal Prosecutor* (Address delivered at the Second Annual Conference of United States Attorneys, Apr. 1, 1940), *reprinted in* 31 *J. Am. Inst. L. & Criminology* 3, 6 (1940).

75. *Id.* at 3.

76. See generally Green, *supra* note 68, at 619 (explaining that prosecutorial conduct implicates ethics both when this conduct is subject to legal rules adopted by courts or other bodies that control lawyer conduct, and when prosecutorial conduct involves what to do “in situations where the law offers a choice”).

77. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *Harv. L.*

For an Attorney General of the United States and her subordinate officials in Main Justice, as well as for United States Attorneys and any future independent counsel or special prosecutor, the key components of a principled and fair approach are the following policy components:

(1) Decisions to disclose law enforcement information should come from the top, in response to requests for permission that have traveled up the chain of command. United States Attorneys, other law enforcement component heads, and their supervisors in Main Justice should decide, in an ascending hierarchy and, using the "public interest, safety or welfare" standard in the current Manual, when the DOJ as an entity will disseminate information about any investigation or prosecution.⁷⁸

(2) Anonymity should end and accountability should begin. Law enforcement policy should be to disseminate its information always, and only, on the record. This policy would demonstrate law enforcement's substantive commitment to fair play and restraint in using the powerful voice of the government. It also would demonstrate a justified, democratic confidence that law enforcement officials can describe their work for the public directly to the public. Finally, it would permit law enforcement officials to be held accountable both for their statements and for the substantive acts that on-the-record statements can explain, thereby eliminating the "who said what" mysteries that stem from the media protecting their sources and too often are the end of today's leaks investigations.

(3) Top officials can and should share the responsibility for speaking publicly about enforcement matters with personnel who are most expert in the particular matters being discussed. Top officials should be encouraged, in other words, to invite other personnel to be present with them and to participate when an authorized disclosure of information is made.

(4) When law enforcement officials choose to disclose information in the public interest, they should do so generally. Information disclosures should be made through general press availabilities, not exclusive interviews. If some extraordinary circumstance requires an Attorney General or other authorized senior law enforcement official to discuss non-public law enforcement matters in an exclusive interview,

Rev. 1521, 1545 (1981) ("Self-imposed limits on discretion may have greater force than either their detractors or creators realize. As they acquire greater visibility, they may become part of the popular climate and professional culture in which prosecutors work. In the end, however, such limits are likely to be no stronger than the determination of the men and women who abide by them to limit their own discretion.").

78. See *supra* notes 60-61 and accompanying text. This standard also could be strengthened (1) by requiring affirmatively that any decision to disseminate law enforcement information must have a legitimate law enforcement purpose, and (2) by stating that merely seeking to discredit a law enforcement critic or a subject of a law enforcement investigation would not qualify as such a legitimate purpose.

she should be required to explain that circumstance on the record during the interview.

(5) Violations should have serious consequences. In this respect, Independent Counsel Starr was exactly right: an improper disclosure of law enforcement information should be, at minimum, “a firing offense.”⁷⁹

79. *Starr's Letter to the President's Personal Lawyer*, N.Y. Times, Feb. 7, 1998, at A9. In the letter, Starr states:

From the beginning, I have made the prohibition of leaks a principal priority of the Office [of Independent Counsel]. It is a firing offense, as well as one that leads to criminal prosecution. In the case of each allegation of improper disclosure, we have thoroughly investigated the facts and reminded the staff that leaks are utterly intolerable.

Id.

In rare instances, the DOJ has fired employees over unapproved information disclosures. In 1946, for example, Attorney General Tom C. Clark fired Oetje John Rogge, the former Assistant Attorney General who had headed the Criminal Division from 1939-1940, after he had returned to the Department as a Special Assistant Attorney General following World War II to investigate links between Germany's Nazi government and groups and persons in the United States. *See, e.g.*, Associated Press, *German Plot to Defeat Roosevelt in 1940 Disclosed by Justice Aide*, N.Y. Times, July 8, 1946, at 1 (summarizing Rogge's interview with imprisoned Nazi Hermann Goering and other evidence); United Press, *Nazi Links to U.S. Found*, N.Y. Times, June 2, 1946, at 5 (describing Rogge's investigations in Germany in spring 1946). In mid-1946, Rogge had delivered a detailed report on his investigation to Clark, who had declined to release it. Rogge responded by speaking publicly about his findings, which led Clark promptly to fire him. *See* Associated Press, *Clark Ousts Rogge for Speech Linking Americans with Nazis*, N.Y. Times, Oct. 26, 1946, at 1; *see also* David Bird, *O. John Rogge, 77, Anti-Nazi Activist*, N.Y. Times, Mar. 23, 1981, at B14 (reporting, as part of Rogge's obituary, that his report to Attorney General Clark said that 24 members of Congress either collaborated with or were used by a Nazi agent). *See generally* O. John Rogge, *The Official German Report: Nazi Penetration, 1924-1942; Pan-Arabism, 1939-Today* (1961) (including material from Rogge's September 1946 report to the DOJ). In 1999, a United States Attorney removed an Assistant District Attorney who had been specially detailed to her office to be the lead prosecutor in the recent federal case against John A. Gotti because the Assistant had press contacts that violated federal policy. *See* David M. Herszenhorn, *Gotti Offered Lighter Term As Setbacks Hamper U.S.*, N.Y. Times, Feb. 1, 1999, at B3 (reporting the dismissal of Assistant District Attorney Vincent Heintz from the case).

In Starr's five years as independent counsel, there apparently was only one instance of employee discipline. In March 1999, Starr announced that he was accepting the resignation of his spokesman, attorney Charles G. Bakaly, III, and that Starr was referring a matter involving Mr. Bakaly to the DOJ for criminal investigation. *See* Roberto Suro, *Starr Aide Resigns, May Face Prosecution: Justice Dept. Gets Referral in Leaks Probe*, Wash. Post, Mar. 12, 1999, at A1; *see also* Office of the Independent Counsel Kenneth W. Starr, Press Release, Mar. 11, 1999 (visited Oct. 20, 1999), available on <<http://www.oicstarr.com>> (announcing that Starr had accepted, “with regret,” Bakaly's resignation effective June 1, 1999; that Bakaly would be on paid administrative leave until that date; and that Starr's internal investigation concerning possible unauthorized disclosures to the New York Times had been referred to the DOJ). Although the facts of this ongoing and largely unpublicized matter were unclear to the public for months, it became somewhat clearer in September 1999 that Starr's action against Mr. Bakaly related to a leaks investigation that the Federal Bureau of Investigation (“FBI”) had conducted at Starr's request. *See In re Sealed Case No. 99-3091* (Office of the Independent Counsel Contempt Proceeding), 1999 WL

In tandem with this policy, which should be explained with clarity and emphasis to both law enforcement personnel and the media,⁸⁰ the DOJ, and any other special federal investigator or prosecutor who comes into existence, should begin to disseminate its public information in a more uniform and comprehensive way. Every unsealed indictment and brief should promptly be posted on the Internet. Every on-the-record media interview with a law enforcement employee should be taped and posted for public retrieval. Top officials should do more regular, appropriate, general briefing of the public and press. The growing DOJ web site⁸¹ and Attorney General Reno's weekly press availabilities⁸² are good models of ways to make the work of federal law enforcement open and accountable to the press and the public.

CONCLUSION

This proposal is idealistic.⁸³ It requires integrity and character at the highest levels of law enforcement. But we always have had that in many high-ranking Main Justice officials, as well as in many United States Attorneys and DOJ component heads.

Controlling unaccountable disclosures of information also requires

709977, at *1 (D.C. Cir. Sept. 7, 1999) (per curiam). The FBI was investigating whether any member of Starr's office had been a source for press reports during President Clinton's impeachment trial that Starr believed he was constitutionally empowered to seek the criminal indictment of a sitting President. See Don Van Natta, Jr., *Starr Is Weighing Whether To Indict Sitting President: A Constitutional Matter*, N.Y. Times, Jan. 31, 1999, at A1. There has been no report that Starr ever disciplined Mr. Bakaly before March 1999, or any other Office of Independent Counsel employee at any time, for providing information to a reporter.

80. See, e.g., Paul E. Coggins, *Keep Your Investigations To Yourself*, Legal Times, May 19, 1997, at 32 (explaining his practice, while serving as United States Attorney for the Northern District of Texas, of sponsoring an annual gathering for heads of investigative agencies and reporters to "discuss a wide range of issues . . . including the rules governing disclosure of information during an investigation").

81. See *United States Dep't of Justice* (visited Oct. 20, 1999) <<http://www.usdoj.gov>>. The web sites that were created by the Office of Independent Counsel Donald C. Smaltz, see *Office of Independent Counsel Donald C. Smaltz* (visited Oct. 20, 1999) <<http://www.oic.gov>>, and by the Office of Independent Counsel Starr, see *Office of Independent Counsel Kenneth W. Starr* (visited Oct. 20, 1999) <<http://www.oicstarr.com>>, are also excellent and appropriate methods of disseminating information to the public about important federal law enforcement efforts.

82. See *infra* note 83. Watergate Special Prosecutor Archibald Cox's news conferences during 1973 are another example of visible, and thus accountable, information releases by a senior federal prosecutor. See James S. Doyle, *Where Are the Stories Behind the Leaks?*, Nieman Reports (visited June 23, 1998), available on <<http://www.nieman.harvard.edu>>.

83. It is not, however, unrealistic. As recently as earlier this year, top DOJ officials apparently were considering policy changes in the area of contacts between Main Justice officials and reporters. See Attorney General Janet Reno's Weekly Media Availability, Apr. 8, 1999, at 10 (transcript available in FDCH Political Transcripts on LEXIS); *id.*, Apr. 1, 1999, at 11-12 (transcript available in FDCH Political Transcripts on LEXIS).

some guts at the top levels of law enforcement, and guts may be less abundant than are personal integrity and good character. My proposed hard line risks imbalanced reporting on matters of great public interest, and it trusts reporters, at least to a degree, not to be captured by the non-government sources who will continue to give them information in all of the current ways. It also would require the ugliness of firing (or at least trying to find and fire) the first violators, to teach truly the seriousness of this culture shift in federal law enforcement.

But it would be the right thing to do, which is the whole point, and the luxury, of being a federal prosecutor. Those who need to be told more than that will not understand it anyway.⁸⁴

84. Cf. Jackson, *supra* note 74, at 6 ("The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway.").

Notes & Observations