

SECRET INDICTMENTS: HOW TO DISCOURAGE THEM, HOW TO MAKE THEM FAIR

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I was not at all certain whether I had any advocates, I could not find out anything definite about it, every face was unfriendly, most people who came toward me and whom I kept meeting in the corridors looked like fat old women; they had huge blue-and-white striped aprons covering their entire bodies, kept stroking their stomachs and swaying awkwardly to and fro. I could not even find out whether we were in a law court. Some facts spoke for it, others against.¹

– Franz Kafka, “Advocates”

The United States should discourage secrecy in criminal prosecutions through both its legal doctrine and policy. While secrecy is necessary in some circumstances, as a general matter, it threatens constitutional rights and contravenes our fundamental notions of fairness in the criminal adjudication process. In light of this, Rule 6 of the Federal Rules of Criminal Procedure (FRCRP) and the prevailing common law of secret indictments in federal courts must be reformed.

Rule 6, which outlines criminal grand jury practice, permits a magistrate judge to seal an indictment, thus keeping it out of the public record—and from the accused person—until the court unseals it.² If a grand jury returns an indictment before the end of a statute of limitations period, the statute is “tolled,” even if the indictment is immediately sealed and kept secret for weeks, months, or even years.³

Seals are requested almost exclusively by prosecuting attorneys for the government.⁴ Since the codification of the FRCRP, cases have regularly, if not frequently, appeared where defendants challenged secret indictments, usually because they were sealed before a statute of limitations date but not un-

1. FRANZ KAFKA, *Advocates*, in THE COMPLETE STORIES (Nahum N. Glatzer ed., Shocken Books 1995).

2. FED. R. CRIM. P. 6(e)(4).

3. *United States v. Michael*, 180 F.2d 55, 56 (3d Cir. 1949); *see also United States v. Ramey*, 791 F.2d 317, 322 (4th Cir. 1986).

4. *See infra* Part I.D.

sealed until some time after,⁵ or because the delay between indictment and arrest was considerable.⁶

Rule 6 itself provides very little specific guidance on what is required to impound an indictment properly. Practice in many federal districts has become “ministerial” or “pro forma,” allowing the government to render an indictment secret merely by asking for a seal.⁷ Federal courts likewise maintain few to no controls over how long an indictment remains under wraps.⁸ Courts of appeals have developed sealing jurisprudence that nullifies all defendant challenges save those where the accused can demonstrate with affirmative evidence that he suffered substantial, concrete, and particularized prejudice from sealing and delay.⁹

Rule 6 and the common law concerning secret indictments fail to reflect the fact that sealing threatens well-established constitutional and statutory rights. The doctrines create a procedural black hole that unfairly advantages prosecutors and potentially dissolves rights to a speedy trial, due process, notice of criminal accusation, and repose from “stale” criminal charges.

This Article begins by canvassing the history of Rule 6 and sealed indictment jurisprudence, revealing a rapid and disturbing shift in federal court posture toward secrecy in the mid-1980s.¹⁰ It then details the three main areas where Rule 6 sealing threatens long-standing individual rights.¹¹ Finally, it proposes changes to Rule 6 itself and to federal common law concerning secret indictments to (1) ensure that courts grant seals only when justified and (2) safeguard individuals against abuses of the practice.¹²

5. See, e.g., *United States v. Sherwood*, 38 F.R.D. 14, 16 (D. Conn. 1964).

6. See *United States v. Rogers*, 781 F. Supp. 1181, 1190 (S.D. Miss. 1991).

7. See *United States v. Gigante*, 436 F. Supp. 2d 647, 660 (S.D.N.Y. 2006).

8. *Id.*

9. See, e.g., *United States v. Edwards*, 777 F.2d 644, 649 (11th Cir. 1985).

10. See *infra* Part I.

11. See *infra* Part II.

12. See *infra* Part III.

I. SEALING UNDER THE FEDERAL RULES

A. Adoption of Rule 6 of the FRCRP and Early Sealing Cases

In December 1944, the Supreme Court adopted the Federal Rules of Criminal Procedure,¹³ codifying the role of the grand jury in federal criminal actions.¹⁴ The original Rule 6 contained a provision permitting federal courts to seal criminal indictments returned by agreement of twelve or more grand jurors. Such sealing keeps the indictment secret and out of the public record until officially unsealed by the court. This impounding provision exists in the contemporary Rule 6 in much the same form¹⁵ it took originally:

The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.¹⁶

The committee notes to Rule 6 laconically state that “[t]he last sentence authorizing the court to seal indictments continues present practice.”¹⁷ The drafting history of the sealing

13. See Lester B. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 357 (1958). Development of the FRCRP began as the result of the Sumners Courts Act, which afforded the Court “the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, . . . or plea of guilty, in criminal cases.” Sumners Courts Act, Pub. L. No. 76–675, 54 Stat. 688, 688 (1940).

14. Interestingly, the first two drafts of the FRCRP contained no grand jury provisions, despite the Fifth Amendment requirement of one for “capital or infamous” crimes. Orfield, *supra* note 13, at 346.

15. The current provision reads as follows:

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

FED. R. CRIM. P. 6(e)(4). The current rule acknowledges that federal magistrate judges now preside over grand jury proceedings and have the duty of issuing orders and warrants connected with their work. FED. R. CRIM. P. 6(e). Section (e) of Rule 6 concerns recording and disclosure of grand jury proceedings and contains many additions and changes from the original rules. *Id.* The subsection on sealed indictments, however, has remained nearly identical to its original for more than sixty years.

16. FED. R. CRIM. P. 6(e) (1944).

17. FED. R. CRIM. P. 6(e) (1944) advisory committee's note part 3.

provision in the Rule is more complicated. The first draft of Rule 6 ordered all grand jurors and officers of the court to maintain the secrecy of the indictment until the accused was arrested.¹⁸ The next draft afforded prosecutors discretion to order an official sealing from the clerk of court until the accused was in custody—but allowed defendants to challenge that act and other aspects of grand jury proceedings during trial.¹⁹ Sealing authority was then briefly limited to the United States Attorney for the district; drafters quickly granted such power to the court alone, where it has stood from the late drafts through today.²⁰ Several rules commentators expressed concern for, or objection to, any sealing provision whatsoever, and no commentators appear to have propounded any sustained argument for maintaining sealing power in the hands of prosecuting officials.²¹ Thus, it is unclear whether the final committee note regarding “present practice” referred generally to the ability of federal courts to seal indictments or more specifically to the placement of authority for sealing in the hands of a federal judicial officer alone. It is certain that the drafting process progressed from an original expectation of broad secrecy to the final rule that indictments must be public unless an impartial decision maker impounds them with cause.

The vagueness of Rule 6(e), and its most persistent pitfall of complicating the application of statutes of limitations, came under swift challenge. In *United States v. Michael*,²² a grand jury indicted two defendants for criminal violations of the

18. Orfield, *supra* note 13, at 347. (“If the attorney for the government directs that the indictment shall be kept secret until the defendant is in custody or has given bail the clerk shall seal the indictment and no person shall disclose the finding of the indictment except to the extent that disclosure may be necessary to the issuance and execution of a warrant.”).

19. *Id.*

20. *Id.* at 349–50.

21. *Id.* at 353. One of the dissenting voices was William Scott Stewart, a Chicago criminal defense attorney, who penned the infamous article *How to Beat the Lie Detector* in *Esquire Magazine* in 1941. Not all the objectors were flashy criminal attorneys. Stuart Steinbrink was a celebrated corporate lawyer, see *PRINCETON ALUMNI WEEKLY*, Feb. 13, 2002, and Judge C.C. Wyche was a federal district court judge from South Carolina. See Orfield, *supra* note 13, at 353.

22. 180 F.2d 55 (3d Cir. 1950), *cert denied*, 339 U.S. 978 (1950). It is worth noting that an earlier iteration of the case underwent argument in the United States Court of Appeals for the Third Circuit in January 1948, *United States v. Michael*, 169 F.2d 1001 (3d Cir. 1948), and went up to the Supreme Court, *United States v. Knight*, 336 U.S. 505 (1949). Neither opinion addressed the sealing issue, though the defendants raised it. *Michael*, 180 F.2d at 56.

Bankruptcy Act four days before expiration of the statute of limitations for the offenses, and the court sealed the indictment.²³ When the indictment was unsealed fifty-four days later, the district court declared that it related back to the day it was “found” and thus properly tolled the statute of limitations.²⁴ The defendants challenged that such sealing was unlawful because it was not in service of taking them into custody, as stated in Rule 6. The Third Circuit reviewed the sealing decision for abuse of discretion and found that courts may lawfully seal indictments for reasons other than a need for secrecy to facilitate apprehending the accused person.²⁵ Curiously, the court referred directly to the single-sentence committee comment as support for its expansive reading of the Rule.²⁶ The court also found no actual prejudice to the defendants caused by the delay.

United States v. Onassis affirmed and clarified the *Michael* reading of Rule 6(e) and its interaction with criminal statutes of limitations.²⁷ The government indicted Aristotle Onassis and other foreign nationals, prior to expiration of the limitations period, for making false statements to the federal government concerning the sale of surplus military shipping vessels to private corporations.²⁸ The indictments were not unsealed, however, until after the date the statute would have expired, and the defendants argued such practice violated Rule 6(e) and granted the government dangerous power to control and manipulate criminal prosecution.²⁹ The district court acknowledged the role that statutes of limitations play in curbing prosecutorial abuses, but found that the ability to keep indictments secret was “important to criminal administration.”³⁰ The court stated that the ability to claim actual prejudice suffered during the sealing period provided ample defense against improper sealing. In reaching this conclusion,

23. *Michael*, 180 F.2d at 56. The opinion does not mention whether or not prosecutors requested the seal.

24. *Id.*

25. *Id.* at 57. Abuse of discretion, of course, is the standard of review for procedural, as opposed to legal, decisions. The Third Circuit, however, expanded the scope of Rule 6(e) as a matter of law in its decision. *Id.*

26. *Id.* at 57 n.1.

27. 125 F. Supp. 190, 213 (D.D.C. 1954).

28. *Id.* at 194.

29. *Id.* at 213.

30. *Id.*

the court stated that "[t]his is simply another circumstance in which the rights of the individual must be weighed against those of the state."³¹

Despite these two strong decisions expanding sealing power, two other opinions from linked cases in the mid-1960s circumscribed authority to render indictments secret. *United States v. Sherwood* concerned the prosecution of four individuals for fraud and conspiracy in violation of the Securities Act of 1933.³² In that case, the government affirmatively requested a seal without any explanation or reason, and the indictment remained impounded for over a year beyond the limitations dates.³³ The defendants challenged the seals on Sixth Amendment speedy trial grounds, asserting that they were subject to unreasonable delay in criminal prosecution.³⁴ Prosecutors countered that the seal was necessary because, when the indictment was submitted, some of the defendants were out of the country and likely to flee, and that once they returned, prosecutors needed more time to secure a plea deal from one individual.³⁵ The district court dismissed the indictment, holding that sealing was permitted only for (1) a legitimate prosecutorial purpose; and (2) the limited time that specific purpose required.³⁶ The court found that delay to avoid defendant flight was legitimate, but delay for prosecutorial convenience or strategy was not. The court presumed prejudice to the defendants during the latter period and stated that the "criminal statute of limitations would have little or no meaning were the law to be construed otherwise."³⁷

31. *Id.*

32. 38 F.R.D. 14, 16 (D. Conn. 1964); *see also* *United States v. Sherwood*, 38 F.R.D. 21 (D. Conn. 1964). It is worth noting, for the discussion ahead, that the latter case was appealed to the Second Circuit by its unsuccessful defendant. *See* *United States v. Doyle*, 348 F.2d 715 (2d Cir. 1965). In that opinion, Judge Friendly affirmed the lower court decision and held that the defendant waived his right to challenge the sealing of the indictment by pleading guilty. *Id.* at 718. Judge Friendly would later assert that almost no cases on sealed indictments existed. *See* *United States v. Southland Corp.*, 760 F.2d 1366, 1379 (2d Cir. 1985).

33. *Sherwood*, 38 F.R.D. at 16.

34. *Id.* at 17.

35. *Id.* at 18.

36. *Id.* at 20.

37. *Id.* The court went on to state that:

A person would never know with certainty that a sealed indictment might be lurking in undisclosed government files, held in abeyance for a year or years to satisfy the personal motives of a government official. To be a nation of law, and not subject to the whims of men, law must be administered uniformly and objectively.

B. Development of the "Two-Pronged" Approach

From the mid-1960s through 1985, secret indictment cases appeared regularly, if not frequently, and federal courts began to develop a two-part analysis for challenges to Rule 6 seals. As in the early years, most defendant objections concerned indictments brought just before the expiration of a statute of limitations and unsealed afterwards.³⁸ While the jurisprudence was not necessarily coordinated or cumulative, courts began to ask first whether the government asserted a legitimate prosecutorial need for a seal, and second, if such a viable rationale existed, whether the defendant suffered any actual prejudice during the period after the seal was granted.³⁹ Lack of a legitimate rationale for secrecy could result in dismissal in favor of a defendant,⁴⁰ as could a finding of actual prejudice. The issues of greatest contention became what constituted a prosecutorial need sufficient to warrant secrecy⁴¹ and when the period commenced wherein substantial prejudice could result in a dismissal.⁴²

The federal prosecution of the Elvis Bynum drug organization in the 1970s⁴³ resulted in a string of opinions from the Second Circuit that defined the contours of Rule 6 sealing doctrine.⁴⁴ Aaron Watson and Robert Whitley, lieutenants to By-

The United States of America has sufficient power, prestige, and facilities to openly indict a criminal and bring him to the bar of justice. It is not in keeping with our heritage, to destroy that image of America, by a policy of lying in wait with a sealed indictment, after the criminal statute of limitations has run, waiting for an individual defendant to return across its borders.

Id.

38. See *United States v. Heckler*, 428 F. Supp. 269, 270-71 (S.D.N.Y. 1976); *United States v. Cosolito*, 488 F. Supp. 531, 536 (D. Mass. 1980); *United States v. Slochowsky*, 575 F. Supp. 1562, 1566 (E.D.N.Y. 1983).

39. *United States v. Davis*, 598 F. Supp. 453, 455-56 (S.D.N.Y. 1984).

40. *Cosolito*, 488 F. Supp. at 537 (holding that delay in unsealing an indictment is unreasonable if no legitimate prosecutorial need existed for the seal, regardless of any prejudice to the defendant).

41. *Slochowsky*, 575 F. Supp. at 1568; *Davis*, 598 F. Supp. at 455.

42. *United States v. Watson (Watson II)*, 690 F.2d 15, 19 (2d Cir. 1979) (Friendly, J., dissenting).

43. Max H. Seigel, *High Aide in a Former Drug Ring Is Convicted with Two Associates*, N.Y. TIMES, April 26, 1978, at B4. Bynum was characterized by the TIMES as "the largest black distributor of heroin in the United States in the late 1960s and early 1970s." *Id.*

44. See *United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980) (en banc); *United States v. Watson (Watson I)*, 599 F.2d 1149 (2d Cir. 1979), *reh'g granted and opinion modified*, *Watson II*, 690 F.2d 15.

num, and John Muse, a regular buyer from the two, appealed their convictions under a one-count indictment for conspiracy to distribute heroin.⁴⁵ A grand jury returned the indictment five months before the expiration of the statute of limitations, and the government asked for a seal to prevent the flight of some of the co-conspirators. The indictment was unsealed sixteen months later, following the arrest of Watson and Muse.⁴⁶ All three defendants moved to dismiss the indictment on grounds that its sealing violated their constitutional rights to due process and a speedy trial as well as their statutory right of repose under 18 U.S.C. § 3282.⁴⁷ In *United States v. Watson* (*Watson I*), the Second Circuit found that the government's desire to prevent the flight of some defendants justified the seal and delay in notice of the indictment.⁴⁸ They held that Rule 6(e) permitted tolling of the statute of limitations without notice to a defendant "only to the degree necessary to accommodate" legitimate prosecutorial interests; they went on to hold that when such a legitimate interest exists, only a showing of actual, substantial prejudice will result in dismissal of the indictment.⁴⁹ This foundational "two-pronged" doctrine was affirmed in two other opinions: *United States v. Watson* (*Watson II*) and *United States v. Muse*.⁵⁰

The contentious Rule 6 issue in the Bynum organization prosecutions was whether defendant John Muse suffered actual prejudice as the result of the delay in notice to him, since the court found that a legitimate prosecutorial rationale existed for secrecy. The majority of the Second Circuit panel in *Watson I* and *Watson II* found that he did, due to memory loss at some point between the crimes and his arrest,⁵¹ over the de-

45. *Watson I*, 599 F.2d at 1151.

46. *Muse*, 633 F.2d at 1042; *Watson I*, 599 F.2d at 1152.

47. *Muse*, 633 F.2d at 1042 & n.1; *Watson I*, 599 F.2d at 1152.

48. *Watson I*, 599 F.2d at 1155.

49. *Id.* at 1155-56.

50. *Muse*, 633 F.2d at 1044 ("Since the Government's prosecutorial interest in keeping the indictment sealed past the limitations period was substantial, and there was no resulting prejudice to the defendant, we conclude that Muse has no valid statute of limitations defense . . ."). While the only issue under review in *Muse* was whether the defendant suffered actual prejudice from the delay, the Second Circuit, sitting en banc, took frequent note of the prosecution's need to prevent the flight of some of the defendants. *Watson II*, 690 F.2d 15, 16 (2d Cir. 1979) (holding that "if the defendant does not demonstrate actual prejudice, we tolerate delay justified by a legitimate prosecutorial need in unsealing the indictment.").

51. *Watson I*, 599 F.2d at 1155; *Watson II*, 690 F.2d at 18.

tailed objections of Senior Judge Friendly.⁵² Friendly played an instrumental role in the decision to grant an en banc rehearing that resulted in affirmation of Muse's district court conviction.⁵³ In that *Muse* decision, the Second Circuit held that a defendant can only secure dismissal of an indictment when he establishes actual prejudice during the period that an indictment was sealed,⁵⁴ provided that the government evinces a legitimate rationale for secrecy.⁵⁵

During this middle phase, where the two-pronged approach predominated, many courts sought to define the boundaries of the "legitimate prosecutorial interest" that justified secrecy beyond the limitations period. A seal to prevent an accused or a co-conspirator from fleeing arrest met with universal acceptance, particularly given that Rule 6(e) expressly supports such a rationale.⁵⁶ Federal courts held or noted that prosecutors may not seek a seal merely to extend a criminal investigation.⁵⁷ Similarly, the government could never seek a seal merely to obtain some kind of prosecutorial advantage.⁵⁸ A New York federal court found that witness protection alone would not justify sealing beyond the limitations period.⁵⁹ After introduction of a balancing review by the *Muse* court,⁶⁰ some courts determined that they must weigh the interests of the government

52. *Watson I*, 599 F.2d at 1158–60 (Friendly, J., concurring in part and dissenting in part); *Watson II*, 690 F.2d at 18–21 (Friendly, J., dissenting).

53. *Muse*, 633 F.2d at 1043; see also *Watson II*, 690 F.2d at 21 (Friendly, J., dissenting) (suggesting that if the Government petitions for a rehearing, "that the case be reheard *en banc*").

54. *Muse*, 633 F.2d at 1043–44.

55. See *id.* at 1044 (finding that the Government's fear "that the indictment and arrest of Muse would cause his co-defendants to flee" constituted a justifiable delay).

56. See *United States v. Lyles*, 593 F.2d 182, 196 n.17 (2d Cir. 1979); *United States v. Smaldone*, 484 F.2d 311, 320 (10th Cir. 1973); *United States v. Davis*, 598 F. Supp. 453, 455 (S.D.N.Y. 1984).

57. See *Davis*, 598 F. Supp. at 455; *United States v. Cosolito*, 488 F. Supp. 531, 537–38 (D. Mass. 1980); *United States v. Heckler*, 428 F. Supp. 269, 272 (S.D.N.Y. 1976).

58. See *United States v. Villa*, 470 F. Supp. 315, 320 (N.D.N.Y. 1979) (requiring that the defendant show the "Government's delay was intentionally incurred to gain some tactical advantage" in order for defendant's due process claim to survive).

59. *United States v. Slochowsky*, 575 F. Supp. 1562 (E.D.N.Y. 1983). Here, the prosecution forwarded three justifications for the seal: (i) to keep cooperating defendants from fleeing arrest; (ii) to wait for one defendant to return from abroad; and (iii) to protect a cooperating witness. *Id.* at 1566. The court upheld the seal for the first two reasons, but stated that the third failed to justify a seal under Rule 6(e). *Id.* at 1568.

60. *United States v. Muse*, 633 F.2d 1041, 1043 (2d Cir. 1980) (en banc).

and accused individuals to fairly determine whether sealing was proper.⁶¹

C. The Rapid Change to "Prejudice Only" Review

The two-pronged approach reached a near-definitive point as Rule 6(e) doctrine when it was rapidly, and almost entirely, replaced by a more limited view toward sealing challenges in 1985. In *United States v. Southland Corp.*, Senior Judge Friendly delivered an opinion for the Second Circuit that effectively eliminated review of prosecutorial need and focused Rule 6 doctrine solely on whether a defendant could prove actual prejudice.⁶² Within a very brief period, a majority of federal circuits adopted an express version of this approach.⁶³

Southland concerned a bribery and tax evasion scheme between a private attorney and executives of a national retailing corporation.⁶⁴ A grand jury returned the indictment against one defendant two days prior to the expiration of the limitations period. The prosecution requested a seal in order to obtain "complete and truthful testimony" from an unindicted corporate executive regarding the scheme.⁶⁵ The indictment was unsealed six weeks later, and the federal district judge determined at trial, upon challenge by the indicted attorney, that the sealing "lasted no longer than necessary to accommodate legitimate prosecutorial interests."⁶⁶ Judge Friendly and the Second Circuit panel affirmed the district court decision and the convictions, holding that a court may seal an indictment under any circumstances which, in the exercise of sound dis-

61. See *Davis*, 598 F. Supp. at 456; *Slochowsky*, 575 F. Supp. at 1566-67.

62. See *United States v. Southland Corp.*, 760 F.2d 1366, 1380 (2d Cir. 1985) (concluding that absent a showing of prejudice by the defendant, the Government should be able to rely on the decision of the magistrate in finding that prosecutorial objectives were justified).

63. See *United States v. Bracy*, 67 F.3d 1421, 1426-27 (9th Cir. 1995); *United States v. Sharpe*, 995 F.2d 49, 52 (5th Cir. 1993); *United States v. Richard*, 943 F.2d 115, 118-19 (1st Cir. 1991); *United States v. Lakin*, 875 F.2d 168, 171-72 (8th Cir. 1989); *United States v. Ramey*, 791 F.2d 317, 321-22 (4th Cir. 1986); *United States v. Edwards*, 777 F.2d 644, 648 (11th Cir. 1985).

64. *Southland*, 760 F.2d at 1369-71.

65. *Id.* at 1378. This executive, Frank Kitchen, was granted immunity in exchange for his testimony while the proceedings were still under seal. See *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983). The government sought a contempt charge against Kitchen when he claimed lack of memory surrounding aspects of the scheme and an internal review launched by *Southland Corp.* *Id.* at 1268-71.

66. *Southland*, 760 F.2d at 1379.

cretion, it finds warrant secrecy.⁶⁷ The opinion went on to assert that “great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant.”⁶⁸ Note that this decision did not explicitly or implicitly overrule the two-pronged approach, but instead replaced the examination of the prosecution’s rationale for requesting secrecy with a strong presumption that the magistrate’s decision to impound, of itself, justified sealing.

Judge Friendly characterized the issue as one of first impression in the Second Circuit and, curiously, stated that “[t]here is a surprising dearth of authority upon the subject.”⁶⁹ By “subject,” he may have meant the specific issue of whether an indictment could be sealed for reasons other than obtaining custody over an accused person.⁷⁰ Given the scope of the *Southland* opinion, however, it is an equally fair reading to assume he meant the entire field of sealed indictments under the FRCRP.⁷¹ In arriving at his decision, Friendly harkened back to *United States v. Michael* and canvassed the drafting history of the FRCRP as well as criminal procedure manuals and symposia contemporaneous to their development.⁷² He provided the barest mention of the *Watson* opinions and *Muse*,⁷³ despite his extensive involvement in those cases, and did not reference any of the other opinions from the Second Circuit (or

67. *Id.* (citing *United States v. Michael*, 180 F.2d 55, 57 (3d Cir. 1949) (“Criminal Procedure Rule 6(e) authorizes indictments to be kept secret during the time required to take the defendant into custody.”)).

68. *Id.* at 1380. The opinion went on to state that the “[g]overnment should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently” *Id.*

69. *Id.* at 1378–79.

70. Just prior to the “dearth” sentence, the opinion reads “[the defendant] insists that no reason except the one mentioned in the Rule can justify the sealing of an indictment.” *Id.* at 1379.

71. *See id.* at 1374 (examining a separate but related statute of limitations issue); *id.* at 1379–80 (canvassing the history of the sealed indictment provision in Rule 6); *id.* at 1380–81 (discussing public policy rationales for allowing sealed indictments and limiting defendant ability to challenge them).

72. *See id.* at 1379–80.

73. *See id.* at 1380.

district courts within it) on Rule 6 issues, including what constitutes a legitimate reason for secrecy.⁷⁴

Friendly was a jurist of considerable renown.⁷⁵ *Southland* was one of his final opinions.⁷⁶ While secret indictment issues arise somewhat rarely, *Southland* may be one of his most successful criminal law decisions, as federal courts of appeals nationwide adopted and expanded its Rule 6 formulation and rationale rapidly.⁷⁷ Before the end of 1985, the Eleventh Circuit implemented its version of the *Southland* doctrine, and quoted Judge Friendly's opinion extensively, in *United States v. Edwards*, a drug case where the original indictment was found and sealed four days before the end of the limitations period.⁷⁸ The Eleventh Circuit held that a magistrate's decision to seal an indictment should be afforded the highest deference and that defendants must prove actual prejudice to dismiss an indictment, regardless of how long past the limitations period

74. Apart from *Watson I*, *Watson II*, and *Muse*, the circuit and district court opinions included *United States v. Lyles*, 593 F.2d 182 (2d Cir. 1979); *United States v. Doyle*, 348 F.2d 715 (2d Cir. 1965); *United States v. Davis*, 598 F. Supp. 453 (S.D.N.Y. 1984); *United States v. Slochowsky*, 575 F. Supp. 1562 (E.D.N.Y. 1983); *United States v. Villa*, 470 F. Supp. 315 (N.D.N.Y. 1979); *United States v. Heckler*, 428 F. Supp. 269 (S.D.N.Y. 1976); *United States v. Sherwood (Sherwood II)*, 38 F.R.D. 21 (D. Conn. 1964); *United States v. Sherwood (Sherwood I)*, 38 F.R.D. 14 (D. Conn. 1964). Of these opinions, *Sherwood I & II*, *Heckler*, *Slochowsky*, and *Davis* directly addressed the issue of "legitimate prosecutorial need." *Sherwood I*, 38 F.R.D. at 20 (stating that the discretionary authority of Rule 6 "must be exercised only to accomplish the limited purposes authorized by the criminal rule for which it was designed"); *Sherwood II*, 38 F.R.D. at 22 (finding the reasons for sealing the indictment "within the purview of Rule 6(e)"); *Heckler*, 428 F. Supp. at 272 (finding the Government's choice to delay prosecution did not outweigh prejudice to the defendant); *Slochowsky*, 575 F. Supp. at 1567; *Davis*, 598 F. Supp. at 455-56. Judge Friendly also wrote the opinion in *Doyle*, which was an appeal of *Sherwood II*. *Doyle*, 348 F.2d at 716-17.

75. See *A Lasting Verdict on Judge Friendly*, N.Y. TIMES, June 9, 1986, at A22; see also Bruce A. Ackerman et. al., In Memoriam, *Henry J. Friendly*, 99 HARV. L. REV. 1709, 1709-27 (1986) (publishing "In Memoriam" pieces for Henry Friendly from such luminaries as Bruce Ackerman and Richard Posner); Paul Gerwitz, Commentary, *A Lawyer's Death*, 100 HARV. L. REV. 2053, 2053-56 (1987) (stating that Friendly was "among the very greatest federal judges of this century").

76. Friendly committed suicide in March 1986, a year after publishing the *Southland* opinion. Friendly was fast growing blind and his wife, to whom he was particularly devoted, died in the spring of 1985. See Michael Norman, *Henry J. Friendly, Federal Judge in the Court of Appeals, Is Dead at 82*, N.Y. TIMES, March 12, 1986, at B6.

77. Frank I. Goodman, *Judge Friendly's Contributions to Securities Law and Criminal Procedure: "Moderation Is All,"* 133 U. PA. L. REV. 10, 23-25 (1984) (stating that Judge Friendly's "most notable contributions have come from the lectern rather than the bench" and outlining his critical stance against now well-established Fifth and Sixth Amendment criminal law jurisprudence).

78. *United States v. Edwards*, 777 F.2d 644, 646-47 (11th Cir. 1985).

the secrecy extends.⁷⁹ Other circuits followed in adopting much the same doctrine: that the decision of a magistrate to grant a seal justifies the secrecy and any delay or impact on the limitations period, leaving defendants to prove actual prejudice to obtain recourse for any unfair extension of a criminal investigation and prosecution.⁸⁰ Effectively, *Southland* and its progeny reduced sealing review to a single question of whether the defendant was substantially and irreparably prejudiced by the conduct of the prosecution.

The Fourth Circuit decision in *United States v. Ramey* offers a fascinating example of this change.⁸¹ *Ramey* was another drug prosecution in which the original indictment was found just prior to the expiration of limitations.⁸² In this case, however, the government expressly moved for a seal with three strong rationales.⁸³ Prior to the trial, the defendants challenged the secrecy and extension of limitations, and a judge reviewed the record and the evidence underlying the government's motion to seal—finding the rationales legitimate and the evidence supportive, as well as finding a lack of actual prejudice to the defendants.⁸⁴ In short, the district court conducted the full two-pronged analysis. The Fourth Circuit, however, ignored the thorough process of the district court in its holding. The court adopted the *Southland* perspective into Fourth Circuit doctrine, simply holding that, absent proof of actual prejudice, a magistrate's decision to seal should be afforded great deference.⁸⁵ *Ramey* was a case where all the players in the district court followed the rules of *Muse* and *Watson*, but rather than adopting the two-pronged approach of those cases, the Fourth Circuit wrote a rule concerned only with actual prejudice.

Federal courts of appeals solidified prejudice-only review into an ironclad doctrine in the years that followed. They also

79. *Id.* at 648–49.

80. *See, e.g., United States v. Richard*, 943 F.2d 115, 118–19 (1st Cir. 1991) (finding that secrecy is proper for any legitimate prosecutorial reason or any reason of public policy, and that once an indictment is sealed, the prosecution need not “refresh” its reasons because the defendant is protected by the actual prejudice standard).

81. *United States v. Ramey*, 791 F.2d 317 (4th Cir. 1986).

82. *Id.* at 318–19.

83. In addition to concerns that the defendants might flee, the government stated that it needed to arrange protection for one of the cooperating witnesses and wanted to safeguard the others from undue influence. *Id.*

84. *See id.* at 319.

85. *See id.* at 321–23.

loosened the expectations placed on prosecutors who seek to have indictments impounded. The Second Circuit deemed sealing “but a ministerial act” and stated that prosecutors need not even justify their request for secrecy to the magistrate judge.⁸⁶ The court allowed that prosecutors could provide a rationale later if challenged by a defendant who could establish actual prejudice.⁸⁷ The Ninth Circuit conducts appellate review of sealing under an “abuse of discretion” standard, but sets no guidelines for what comprises a proper exercise of discretion; this similarly suggests that granting seals is ministerial rather than a decision affecting substantive legal rights.⁸⁸ Accordingly, for twenty years, federal courts have tended to view Rule 6 seals under a strong presumption of legitimacy based on the decision of the magistrate to grant one; they thus require a challenging defendant to prove actual prejudice even when an indictment, and those that might have superseded it, remained secret for a long time beyond the original limitations period.⁸⁹

D. District Court Disagreement with Prevailing Doctrine

Despite the primacy of the post-*Southland* formulation, some federal district courts have returned to the two-pronged approach to secret indictments in the face of unattractive empirical realities. These courts acknowledge that a decision to seal implicates constitutional and statutory rights. They challenge the clashing doctrines that (1) sealing is merely a “ministerial act” and (2) the magistrate’s decision to seal immediately legitimates any encroachment on individual rights.

District courts have identified that the decision to seal implicates important rights. The Sixth Amendment right to a speedy and public trial can be compromised by delay and secrecy. In *United States v. Rogers*, a federal district court in Mississippi dismissed a criminal indictment because the delay caused by

86. *United States v. Srulowitz*, 819 F.2d 37, 41 (2d Cir. 1987).

87. *See id.* The Eighth Circuit adopted this “post hoc” justification doctrine in *United States v. Lakin*, 875 F.2d 168, 171–72 (8th Cir. 1989). Other federal courts have employed it as well. *See, e.g., United States v. Sharpe*, 995 F.2d 49, 52 (5th Cir. 1993). One is left to wonder what information the magistrate judge employs to make a sound decision whether to grant a seal if the United States Attorney is not required to furnish a rationale or any evidence of need.

88. *United States v. Bracy*, 67 F.3d 1421, 1427 (9th Cir. 1995).

89. *See, e.g., United States v. Maling*, 737 F. Supp. 684, 695 (D. Mass. 1990).

sealing denied the defendant his speedy trial right.⁹⁰ In *Rogers*, the prosecution brought a three-count indictment just before the end of the limitations period, then kept it sealed for nearly two years while investigating possible tax charges.⁹¹ The right of repose granted by a criminal statute of limitations like 18 U.S.C. § 3282 also can be compromised by secrecy. In *United States v. Deglomini*, a federal court in New York dismissed an indictment as untimely, noting that “[t]o allow delay in unsealing the indictment to toll the limitations period indefinitely, regardless of the reason for the delay, would . . . [create] a major loophole in the statute”⁹² In that case, the government brought charges of tax conspiracy just under the limitations wire, then failed to move forward with prosecution for fourteen months, later explaining that “lack of expediency” caused the delay.⁹³

District courts have also noted that *Southland* and like opinions contain troublesome contradictions. *Southland* and its progeny suggest that sealing is a “ministerial act” and also that the decision of a magistrate to grant a seal should be afforded great deference on later challenge by a criminal defendant.⁹⁴ In *United States v. Laliberte*,⁹⁵ Magistrate Judge Robert Collings of the District of Massachusetts pointed out the danger in these contradictory views of sealing practice:

I always thought that a “ministerial act” was, by definition, one in which the officer had no discretion. . . .

90. 781 F. Supp. 1181, 1190 (S.D. Miss. 1991). Judge Lee also ruled that the sealing failed to toll the statute of limitations because it lacked a reasonable basis. *See id.* at 1191. Judge Lee examined *Southland* and other like opinions, applying some of their rules and narrowly construing others. *See id.* at 1190–91. The Fifth Circuit later adopted the *Southland* formulation wholeheartedly in *United States v. Sharpe*, 995 F.2d 49, 52 (5th Cir. 1993), without mentioning or abrogating *Rogers*.

91. 781 F. Supp. at 1183.

92. 111 F. Supp. 2d 198, 203 (E.D.N.Y. 2000). The statute of limitations for tax crimes like those involved in *Deglomini* is six years from the commission of the acts. *See* 26 U.S.C. § 6531 (2006); *Deglomini*, 111 F. Supp. 2d at 199.

93. *Deglomini*, 111 F. Supp. 2d at 199.

94. *See, e.g., United States v. Srulowitz*, 819 F.2d 37, 41 (2d Cir. 1987); *United States v. Southland Corp.*, 760 F.2d 1366, 1380 (2d Cir. 1985).

95. 131 F.R.D. 20 (D. Mass. 1990). Magistrate Judge Collings also canvassed *Southland* and the major court of appeals opinions that followed it. *See id.* at 20. Like in *Rogers*, however, the controlling circuit had not yet spoken on the issue. *Compare* 781 F. Supp. at 1190–91, *with Laliberte*, 131 F.R.D. at 20. The First Circuit adopted the *Southland* formation a year later in *United States v. Richard*, 943 F.2d 115, 118–19 (1st Cir. 1991). The First Circuit did not specifically mention the “great deference” viewpoint, however.

[I]t is somewhat strange to rely on a Magistrate's discretion when the Government merely asks and gives no reason for sealing or provides a very general reason⁹⁶

Magistrate Judge Collings received a motion to seal that clearly would have kept the indictment secret beyond the limitations period, and the motion contained no rationale whatsoever for the request.⁹⁷ In *United States v. Gigante*,⁹⁸ Judge Chin revealed that sealing practice in the Southern District of New York had reached a very treacherous point:

Apparently, the practice in this District is for the Government not to explain its request for the sealing of an indictment, and for the magistrate judges to routinely grant these requests without asking for an explanation. The practice is troubling. While magistrate judges have broad discretion in this respect, they still must exercise that discretion to determine that indeed a legitimate prosecutorial purpose exists for sealing an indictment⁹⁹

Gigante offers a shocking case of sealing practice gone awry. The government investigated Louis Gigante, a suspected tax cheat, for years.¹⁰⁰ He was first indicted in 2003, one day before the statute of limitations would have expired, on one count of making false statements in a bankruptcy proceeding.¹⁰¹ The indictment was sealed and four superseding indictments followed, each containing charges of bankruptcy fraud and tax evasion, brought days or weeks before their expiration.¹⁰² The government brought each motion to seal before a different magistrate and offered no rationale for requesting secrecy.¹⁰³ Throughout the pre-indictment and secret indictment periods, Gigante's attorney spoke numerous times

96. *Laliberte*, 131 F.R.D. at 20.

97. *See id.*

98. 436 F. Supp. 2d 647 (S.D.N.Y. 2006).

99. *Id.* at 660 (citation omitted).

100. *See id.* at 650.

101. *See id.*

102. *See id.* at 650-51.

103. *See id.* at 652. In all, indictments against Gigante were returned and then sealed five times by five different magistrates. *See id.* The government asserted that this was not intentional and pointed out that it merely requested secrecy from the "on duty" magistrate judge each day. *Id.* at 652 n.1.

with government investigators and indicated that his client would prefer to surrender voluntarily to authorities if they decided to indict.¹⁰⁴ Though not required to, Gigante's counsel also informed federal investigators each time Gigante traveled outside the jurisdiction.¹⁰⁵ After nearly two years, the indictment was unsealed and the government commenced prosecuting Gigante on the charges.¹⁰⁶ When challenged on the secrecy, the government argued that the defendant was a flight risk.¹⁰⁷

Given the potential for encroachment on rights and the troubling sealing practices that have developed, these federal courts returned to the pre-*Southland*, dual-pronged formulation to assess whether sealing was proper and delay was reasonable. In *Laliberte*, the court ruled that the government cannot obtain a seal on a criminal indictment, for reasons other than arrest of the accused, without giving the magistrate judge a legitimate basis for secrecy and the essential facts that form that basis.¹⁰⁸ The *Deglomini* court and others have held that if sealing is not properly justified, the expiration of the statute of limitations period prior to unsealing will result in dismissal of the indictment.¹⁰⁹ Courts have also asserted that the government is required to unseal an indictment as soon as the legitimate need for delay or secrecy has been satisfied.¹¹⁰ Finally, these courts have held that if an indictment remains secret beyond the limitations period and the government is found to lack a legitimate basis for sealing—or if that basis disappears or becomes unreasonable—then the indictment will be dismissed without a showing of actual prejudice by the defendant.¹¹¹

None of these decisions, or the rules that they adopted from the “two-pronged” phase of sealing jurisprudence, contravenes the “great deference” model. Furthermore, a decision like *Gigante* from within the Second Circuit can rely on *Watson*

104. See *id.* at 651.

105. See *id.*

106. See *id.*

107. See *id.* at 653.

108. 131 F.R.D. 20, 21 (D. Mass. 1990).

109. 111 F. Supp. 2d 198, 200 (E.D.N.Y. 2000); see also *Gigante*, 436 F. Supp. 2d at 654–55.

110. See, e.g., *Gigante*, 436 F. Supp. 2d at 655, 660; *United States v. Upton*, 339 F. Supp. 2d 190, 195–96 (D. Mass. 2004).

111. See *Gigante*, 436 F. Supp. 2d at 660; *Upton*, 339 F. Supp. 2d at 196; *Deglomini*, 111 F. Supp. 2d at 200, 203.

and *Muse* as viable precedent. These decisions were not overruled by *Southland*, but merely displaced by it in the main. What is worrisome is that the logic of this minority of contemporary opinions calls into serious question the prevailing doctrine applied most often to secret indictments.

E. Current Practice: Secret Indictments in the District of Maryland

Cases like *United States v. Gigante* raise legitimate concerns about what kind of process exists during the ex parte hearing where indictments are impounded and kept from the public record. Judge Chin indicated that magistrate judges in the Southern District of New York grant seals as a matter of course without demanding an up-front explanation from prosecutors for the need for secrecy.¹¹² I conducted a written poll of magistrate judges in the District of Maryland to determine what process existed in federal courts in my home state at roughly the same time.¹¹³

All nine federal magistrate judges responded, but two indicated that their dockets rarely, if ever, included felony cases that might lead to sealing requests. Of the answers from the seven remaining judges, some were consistent while others showed significant variation. Five of seven indicated that they receive fifteen to twenty-five requests for seals a year, or an average of approximately two a month. The other two indicated ten to fifteen requests annually. All of the judges stated that requests to seal come exclusively from prosecutors, never *sua sponte* or from another requesting party. Only two of the magistrate judges indicated that prosecutors “always” provide explanations for sealing requests; four of seven indicated “usually” and one “sometimes.” That spread changed in the next question of how often the magistrate judge asks for an explanation if the prosecution does not forward one: four said “always,” two said “usually,” and one responded “some-

112. See *Gigante*, 436 F. Supp. 2d at 660.

113. John Stinson, Federal Magistrate Judges Survey (2007) (unpublished survey, on file with author). I developed a very short and informal survey instrument, a page and a half long, that I emailed and sent in paper form to all nine federal magistrate judges in the District of Maryland in early 2007. The survey contained five questions with five or more “check box” selections and room for written comments. The purpose of the survey was to determine how often magistrate judges granted seals, what process they used, and whether they considered the rules and case law on sealing practice to be clear or not. For a copy of the survey instrument or the results, please contact the author.

times.” While these results are not particularly consistent, they seem to suggest that the magistrate judges in the District of Maryland are undertaking some process in the course of exercising their discretion to grant seals.

Responses regarding the clarity of current doctrine and open comments by the magistrate judges are less encouraging. Four of seven judges responded that current doctrine was “very clear” or “clear,” while one indicated that it was “unclear,” and the remainder indicated that they were “unsure” or had “no opinion.” In open comments, some judges indicated that sealing process was “pro forma and done without much discussion on the merits” and “routine procedure.” This contrasts with another judge who stated twice “I won’t seal unless I’m given a good reason.” One judge stated that “it is important to have a definite cutoff for the seal” but did not discuss how federal judges establish and enforce such process. These responses all suggest differing views of Rule 6 doctrine and its limits.¹¹⁴

Lastly, these results appear somewhat at odds with the view of sealing practice described recently by the United States Attorney’s Office for the District of Maryland. In responding to a defendant’s challenge of a secret indictment, the government stated that:

It has long been a common practice in this district, as in the Southern District of New York and apparently in many if not most other federal judicial districts around the country, that the government does not set forth its reasons for requesting that the indictment be sealed in the sealing motion. . . .

. . . .

. . . [T]he past practice in this district has typically been that the government does not provide its reasons for requesting a sealing order in the motion it submits to the Court. The Magistrate-Judges have always retained the discretion to require a contemporaneous oral explanation of the government’s reasons for requesting the sealing order, but—perhaps because of the well-established line of authority from the

114. *Id.* Open comments are available from the author in anonymous form upon request.

Srulowitz-Lakin-Sharpe line of cases—most have not done so.¹¹⁵

This description, even viewed as a persuasive pleading, tells a very different story of secret indictments in federal courts in Maryland. Compared against the survey results, it suggests that sealing practice in the district is far from uniform, with some magistrate judges always requiring explanations for seals and others granting them with little to no formal discussion of the request. This is not a failing of the magistrate judges or of federal prosecutors. Instead, this represents a clash of conflicting and unclear guidance from Rule 6 and the post-*Southland* jurisprudence on secret indictments.

II. INTERESTS AT STAKE

Despite its frequent label as a mere “ministerial act,”¹¹⁶ current Rule 6 sealing practice implicates a number of criminal law doctrines and individual rights. Most defendant challenges to seals involve situations where the indictment remained secret beyond a federal statute of limitations, raising the issue of whether the procedure creates an “end run” around legislatively granted rights to notice and repose.¹¹⁷ Sealed indictments present speedy trial concerns because, in many cases, they appear to grant prosecutors nearly unlimited time to delay progress to trial, and they eliminate a defendant’s ability, through notice, to press for swift adjudication.¹¹⁸ Moreover, secrecy, delay, and other effects of Rule 6 seals evoke serious criminal due process concerns because they can destroy individual rights through ex parte orders that often derive entirely from prosecutorial decision making.¹¹⁹ In addition, the fact that two different procedures for sealing still exist side-by-side in federal courts offers a chance to compare them

115. The Government’s Opposition to Defendant’s Motion to Dismiss Counts 1–3 and 6–7 of the Second Superseding Indictment as Barred by the Statute of Limitations at 15, 17–18, *United States v. Lawbaugh*, No. RWT-05-0402 (D. Md. Mar. 20, 2007) (citation omitted) [hereinafter Government’s Opposition to Defendant’s Motion to Dismiss].

116. *United States v. Srulowitz*, 819 F.2d 37, 41 (2d Cir. 1987).

117. See, e.g., *United States v. Michael*, 180 F.2d 55, 56–57 (3d Cir. 1949); *Gigante*, 436 F. Supp. 2d at 657–58.

118. See *United States v. Rogers*, 781 F. Supp. 1181, 1185–86 (S.D. Miss. 1991).

119. See *Gigante*, 436 F. Supp. 2d at 660; Government’s Opposition to Defendant’s Motion to Dismiss, *supra* note 115, at 15–16.

under the civil standard for due process,¹²⁰ a review that strongly urges more protection for accused individuals.

A. Statutes of Limitations

With a few exceptions, most federal crimes are subject to statutes of limitations.¹²¹ The First Congress enacted federal statutes of limitations, and they have existed uninterrupted since.¹²² These laws restrict how long the government can wait before losing the authority to indict a person for particular conduct. Conversely, they also provide an affirmative “right to repose” to individuals.¹²³ Current doctrine regarding secret indictments conflicts with both the restriction on government power and the individual right to repose created by these statutes.

The foundational doctrine of statutes of limitations is well settled. The first provision of 18 U.S.C. § 3282, which is the most frequently applicable limitation, states: “[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”¹²⁴ The Supreme Court has stated that “criminal limitations statutes are to be liberally interpreted in favor of re-

120. See *supra* Part I.B–C. It is important to keep in mind that *Southland* did not overrule or abrogate the two-pronged approach of *Muse* that looked first for a legitimate prosecutorial objective justifying secrecy, then determined whether a defendant was prejudiced, if such an objective existed. Rather, *Southland* strongly suggested that absent a showing of prejudice by a defendant, a challenge to a seal likely should fail because a multiplicity of reasons would justify secrecy and delay. The circuit court decisions that followed tended to solidify this perspective into firm law and to extend it in ways that permitted things like ex post facto rationales for secrecy and sealing merely to toll a statute of limitations.

121. Criminal statutes of limitations are found primarily in Chapter 213 of Title 18 of the United States Code. See 18 U.S.C. §§ 3281–3299 (2006). Capital offenses have no limitations period. 18 U.S.C. § 3281 (2006). Limitations periods for tax crimes, at issue in *Southland* and other sealing cases, are located in Title 26, the Internal Revenue Code. See 26 U.S.C. § 6531 (2006).

122. See Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 252 (1995); J. Anthony Chavez, *Statutes of Limitation and the Right to a Fair Trial*, 10 CRIM. JUST. 2, 3 (Summer 1995) (“The pertinent provisions of § 3282 derive from section 32 of the Act of Congress of April 30, 1790, chapter 9.”).

123. Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 99 (2002).

124. 18 U.S.C. § 3282(a) (2006).

pose,"¹²⁵ and explained that "[t]hese statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to fair trial would be prejudiced."¹²⁶ The Court acknowledged that statutes of limitations may, in some cases, allow wrongdoers to escape punishment, but when it is clear that a prosecution fails the limitation requirements, courts are obligated to follow the will of Congress and dismiss.¹²⁷

The policy behind application and liberal construction of statutes of limitations, though debated by scholars,¹²⁸ is likewise clear in federal courts. Limitations periods protect accused persons from facing "stale" charges and having to defend themselves after a period of time which may have negatively affected the defendant's ability to recall details, reach witnesses, and obtain exculpatory evidence.¹²⁹ In this way, statutes of limitations *presume* prejudice instead of requiring a defendant to prove it with substantive evidence.¹³⁰ They also compel law enforcement to act with expediency to investigate and prosecute crimes.¹³¹ Lastly, fairness dictates that individuals not have to face official punishment for acts that are long past,¹³² unless the act is of such seriousness that no limit will attach.¹³³

The law of criminal indictments involves similar, well-settled practices and policies. Doctrine concerning criminal indictments affects application of statutes of limitations because limitations periods are "tolled" by the proper return of a legally sufficient indictment.¹³⁴ Proper return must include the

125. *Toussie v. United States*, 397 U.S. 112, 115 (1970) (quoting *United States v. Habig*, 390 U.S. 222, 227 (1968)).

126. *United States v. Marion*, 404 U.S. 307, 322 (1971).

127. *Toussie*, 397 U.S. at 123-24.

128. Compare Chavez, *supra* note 122, at 2-3 (urging federal courts to liberally apply statutes of limitation and Congress to cease "carve outs" for crimes with lengthier limits), with Walter Olson, *Stale Claims: How Long Should the Law Nurse Old Grievances?*, REASON, Nov. 2000, at 40, available at <http://www.reason.com/news/show/27839.html> (outlining the rationales of long or non-existent criminal limitations periods).

129. *Toussie*, 397 U.S. at 114-15; *United States v. Ewell*, 383 U.S. 116, 122 (1966).

130. *Marion*, 404 U.S. at 322 ("The law has provided . . . mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest . . .").

131. *Toussie*, 397 U.S. at 115.

132. *Id.* at 114-15.

133. Murder is a crime for which no time bar will attach. See 18 U.S.C. § 3281 (2006).

134. See *id.* § 3282(a).

formal requirements set out by the Federal Rules of Criminal Procedure.¹³⁵ More importantly, though, a sufficient indictment must provide notice to the accused of the charges against which he must defend.¹³⁶ This notice requirement stems from the Fifth and Sixth Amendments.¹³⁷ The return of a sufficient indictment in a public forum by a grand jury is considered, under the Sixth Amendment, constructive notice to an individual that he now stands accused and should prepare his defense.¹³⁸

Thus, the laws of limitations and indictments both define rights as much as they proscribe the conduct of law enforcement. A statute of limitations creates an affirmative right to repose for persons under criminal investigation. The Fifth and Sixth Amendments, the federal rules, and federal common law create affirmative rights to notice of a criminal indictment. Together, these doctrines raise a presumption that an individual must be indicted and informed, at least constructively, of the charges before the expiration of the limitations period—unless the government has a viable interest to offset those requirements.

Current sealing doctrine confounds the well-settled law of limitations and indictments. Federal courts have consistently ruled that an indictment found by a grand jury prior to the end of the limitations period tolls the statute, even if it is promptly impounded and never placed on the public record.¹³⁹ One could argue, based on the opening phrase of 18 U.S.C. § 3282,¹⁴⁰ that federal court decisions like *Southland*, as common law, can simply override a criminal limitations period. Both conclusions, however, give short shrift to Supreme Court admonitions that statutes of limitations should be liberally construed in favor of repose¹⁴¹ as well as to the policy that time bars ensure that accused persons can properly prepare a de-

135. FED. R. CRIM. P. 7.

136. *Schmuck v. United States*, 489 U.S. 705, 718 (1989); *Hamling v. United States*, 418 U.S. 87, 117 (1974).

137. *Ring v. Arizona*, 536 U.S. 584, 600 (2002); *In re Gault*, 387 U.S. 1, 59 n.1 (1967) (Black, J., concurring); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963).

138. See *Apprendi v. New Jersey*, 530 U.S. 466, 510–11 (2000) (Thomas, J., concurring).

139. *United States v. Michael*, 180 F.2d 55, 56 (3d Cir. 1949).

140. See 18 U.S.C. § 3282(a) (2006) (stating that the limitations period applies “[e]xcept as otherwise expressly provided by law”).

141. *Toussie v. United States*, 397 U.S. 112, 115 (1970).

fense.¹⁴² Such loose evaluations of the law of limitations similarly overlook the constitutional right to prompt and public notice of criminal charges.¹⁴³ Statutes of limitations set a legal limit, after which prejudice is presumed, unless the defendant has been afforded the chance to begin to prepare his defense. The current doctrine of decisions like *Lakin* and *Ramey* places the onus of proving prejudice back on a criminal defendant for a potentially unlimited time.¹⁴⁴

Secret indictments also fail the empirical "smell test" because they follow the letter of the law (that a grand jury must find an indictment within a certain period) while flouting the real substance of those laws (that time bars protect persons from indefinite investigation and compel prosecutors to be timely, accurate, and efficient). In practical terms, impounding an indictment extends the limitations period because the accused individual believes that he stands in exactly the same position both before and after indictment. He is unaware, and has no way of knowing, that he has transformed into a criminal defendant. Sealing practice also extends the statute of limitations because it permits almost unbounded time to the prosecution to continue its investigation and prepare for trial.

The dangers posed by sealed indictments demand that the government justify any request for secrecy. There are many good reasons to seal indictments, even beyond the end of a limitations period.¹⁴⁵ Such reasons raise public and prosecutorial interests that can override the individual's immediate rights to repose and notice of an indictment. The prosecutorial interest must be substantial, however, because the rights at issue are likewise substantial. The difficulty with the *Southland* formulation, by contrast, is that it asserts that a limitless range

142. *United States v. Marion*, 404 U.S. 307, 322 (1971).

143. See U.S. CONST. amends. V, VI.

144. See, e.g., *United States v. Ramey*, 791 F.2d 317, 322 (4th Cir. 1986) ("An indictment returned in open court before the statute of limitations has run is valid even though it is then sealed and kept secret until after the period of limitations has expired. Only if a defendant can show substantial actual prejudice in the period between the sealing of the indictment and its unsealing is dismissal of the indictment recognized on this ground." (quoting 1 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE & PROCEDURE* § 110, at 306-07)).

145. See, e.g., *United States v. Smaldone*, 484 F.2d 311, 320 (10th Cir. 1973) (secrecy required to prevent flight of accused); *United States v. Slochowsky*, 575 F. Supp. 1562, 1568 (E.D.N.Y. 1983) (secrecy required to obtain cooperation from a key co-conspirator).

of reasons will justify secrecy and permit the attendant encroachment on individual rights.¹⁴⁶

Justification should take place up front, prior to impounding the indictment, because the rights at issue disappear upon the grant of the seal—or shortly thereafter if a seal is granted just before the end of a limitations period. In this way, sealing doctrine should track warrant requirements or the prophylactic measures of a Miranda warning.¹⁴⁷ If the need for secrecy exists at the time the government seeks to indict, prosecutors should be compelled to state their reasons for a seal as part of the process of obtaining one, thus permitting magistrate judges to conduct a full and thorough process of deciding whether to grant it.

B. Sixth Amendment Right to Speedy Trial

The Constitution expressly protects the right to a speedy trial.¹⁴⁸ The right derives from ancient Anglo Saxon law, appearing first in the Magna Carta.¹⁴⁹ The right benefits both accused individuals and society at large, as well as serving as a check on government power.¹⁵⁰ Current sealing doctrine threatens Sixth Amendment protections by permitting delay in prosecution while denying an accused individual the option of pressing for swift adjudication of criminal charges.

The first clause of the Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”¹⁵¹ The Supreme Court has held

146. Compare *United States v. Southland Corp.*, 760 F.2d 1366, 1380 (2d Cir. 1985) (suggesting that a wide range of prosecutorial objectives will justify sealing beyond a statute of limitations), with *United States v. Edwards*, 777 F.2d 644, 648–49 (11th Cir. 1985) (holding that a prosecutorial desire to toll the statute of limitations without alerting the accused was a legitimate prosecutorial reason for a seal). See also *United States v. Srulowitz*, 819 F.2d 37, 41 (2d Cir. 1987) (holding that the prosecution need not present a justification for a sealing request unless later challenged by a defendant).

147. See FED. R. CRIM. P. 41(d); *Miranda v. Arizona*, 384 U.S. 436, 444–45, 467–69 (1966).

148. U.S. CONST. amend. VI.

149. See *Klopper v. North Carolina*, 386 U.S. 213, 223–24 (1967) (outlining the history of the speedy trial right, including its first appearance on paper in 1215 CE).

150. See *Barker v. Wingo*, 407 U.S. 514, 519–22 (1972). See generally ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (E.A. Shils trans., The Lawbook Exch., Ltd. 2006) (1941) (providing a historical account and analysis of two types of government in Nazi Germany, each with different levels of individual legal rights); FRANZ KAFKA, *THE TRIAL* (Willa Muir & Edwin Muir trans., Schocken Books 1995) (1925) (narrating a fictional case in which a charge is never provided).

151. U.S. CONST. amend. VI.

repeatedly that the right to a speedy trial is fundamental.¹⁵² The right arises as soon as an individual becomes an “accused” person through indictment, information, arrest, or other restraint by law enforcement.¹⁵³ Once a person becomes an accused, the government has a constitutional obligation to quickly and properly move toward disposition of the charges.¹⁵⁴ The right is considered important enough that Congress passed the Speedy Trial Act of 1974, which defined exact time limits for many phases of criminal prosecution.¹⁵⁵ The provisions of the Act, found primarily at 18 U.S.C. § 3161, do not reach sealed indictments because the Act’s protections do not tend to trigger until an individual has been arrested.¹⁵⁶

Sixth Amendment guarantees exist for three primary reasons. They prevent oppressive incarceration prior to trial, minimize the anxiety and social obloquy that accompany public accusation, and ensure that delay will not impair the ability of the accused to mount an effective defense.¹⁵⁷ Defendants have “no duty to bring [themselves] to trial”; the state bears the responsibility of swiftly disposing of criminal charges out of fairness to the accused.¹⁵⁸ In addition, the effects of time can negatively influence the government’s case, and the interests

152. See, e.g., *United States v. Loud Hawk*, 474 U.S. 302, 312 (1986) (“[T]he Sixth Amendment’s guarantee of a speedy trial ‘is an important safeguard . . .’” (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966))); *Klopfer*, 386 U.S. at 223.

153. *Dillingham v. United States*, 423 U.S. 64, 65 (1975).

154. *United States v. Marion*, 404 U.S. 307, 313 (1971).

155. Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. §§ 3161-3174 (2006)).

156. See 18 U.S.C. §§ 3161-74 (2006). Subsection (a) of § 3161 does provide a general provision for speedy trial: “In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.” § 3161(a). Successful challenges under the Speedy Trial Act, however, almost entirely rely on other provisions that set specific time limits. See, e.g., § 3161(b) (stating that government must bring information or indictment within 30 days of arrest of defendant); § 3161(e) (indicating that new trial must commence within 70 days of official declaration of mistrial or order for new trial).

157. *Marion*, 404 U.S. at 320 (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)). The Supreme Court has, at times, asserted that speedy trial rights only protect defendants from unnecessary incarceration or heavy bail. See *United States v. MacDonald*, 456 U.S. 1, 8 (1982). More recently, the Court asserted that the most serious negative result from delay is its harm to the accused person’s ability to defend himself. See *Doggett v. United States*, 505 U.S. 647, 654 (1992) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).

158. *Barker*, 407 U.S. at 527.

of public safety demand efficient prosecution.¹⁵⁹ Empirically, democratic societies usually disfavor lingering criminal charges because such circumstances reek of overly powerful and bureaucratized law enforcement and invoke rightful fears about totalitarianism.¹⁶⁰ They also suggest unchecked ineptitude.¹⁶¹

Violations of the Sixth Amendment right to speedy trial are not discerned with ease, however, the way a Confrontation Clause violation might be. Recognizing that speedy trial claims are highly fact specific, the Supreme Court established in *Barker v. Wingo* a balancing test of four factors to determine whether the government unreasonably delayed prosecution: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right [to speedy trial], and prejudice to the defendant.”¹⁶² Length of delay is a preliminary inquiry, as the Court has determined that the time involved must be “presumptively prejudicial” to continue a *Barker* review.¹⁶³ The *Barker* court went on to assert that “[c]losely related to length of delay is the reason the government assigns to justify the delay” and to make clear that deliberate delay to gain tactical

159. *Id.* at 519–21. Speaking of a years-long delay in prosecuting a murder defendant, the Supreme Court said, “[i]t must be of little comfort to the residents of Christian County, Kentucky, to know that [the defendant] was at large on bail for over four years while accused of a vicious and brutal murder of which he was ultimately convicted.” *Id.* at 519–20.

160. See, e.g., Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 829–31 (2007) (surveying the dangers posed by secret investigations); WILLIAM BLACKSTONE, 4 COMMENTARIES *336, *343–44 (asserting that proper process and trial by jury prevent abuse by the crown and development of criminal process that, while potentially convenient, sacrifice individual liberty and threaten “the constitution” of the nation).

161. William P. Quigley, *Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again*, 81 TUL. L. REV. 955, 966–71 (2007) (outlining failures in the criminal justice system in New Orleans and concluding that systemic ineptitude was as responsible as the devastation of the storm, which ruined the city, for delays and severe encroachments on individual liberties).

162. 407 U.S. 514, 530 (1972).

163. *Id.* The delay in *Barker* was five years. *Id.* at 533. Federal circuit courts of appeals tend to follow the loose guideline, stated in *United States v. Ward*, that delays approaching one year are presumptively prejudicial. 211 F.3d 356, 361 (7th Cir. 2000). The Ninth Circuit, however, has held that a six-month delay constitutes a “borderline case.” *United States v. Valentine*, 783 F.2d 1413, 1417 (9th Cir. 1986) (quoting *United States v. Simmons*, 536 F.2d 827, 831 (9th Cir. 1976)). These lengths seem somewhat at odds with Congress’s view as expressed in the Speedy Trial Act of 1974. See 18 U.S.C. §§ 3161–74 (2006). That law tends to limit delays to periods such as thirty days, seventy days, and six months depending on the particular circumstances. See *id.*

advantage would weigh "heavily against the government."¹⁶⁴ Concerning prejudice, the Court has stated at times that an affirmative showing is required by the defendant to prevail on a speedy trial challenge.¹⁶⁵ When specifically addressing the issue of what suffices as prejudice under Sixth Amendment review, however, the Court has stated that it "is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim."¹⁶⁶ "[E]xcessive delay presumptively compromises the reliability of a trial" and should be given weight in Sixth Amendment review.¹⁶⁷ A defendant's assertion of his right has played an important role in speedy trial review.¹⁶⁸ The Court has been clear, in this regard, that when an accused individual is unaware of criminal charges against him, he will not be faulted during Sixth Amendment review for failing to assert his speedy trial right.¹⁶⁹

Given that speedy trial review is ad hoc and fact driven,¹⁷⁰ it is difficult to assess more generally whether current sealing practice per se violates Sixth Amendment rights. In reviewing the practice against the four *Barker* factors, however, it becomes clear how much secret indictments implicate Sixth Amendment issues. One also cannot help but notice how closely linked the *Barker* factors become when a prosecution involves a secret indictment.

The threshold issue of length of delay is empirical and highly practical. The common sense view applied in standard

164. *Barker*, 407 U.S. at 531. The admonition against deliberate delay for tactical advantage appears in many Supreme Court decisions, and the Court has suggested that it would also represent a violation of due process rights. See, e.g., *Doggett v. United States*, 505 U.S. 647, 656 (1992); *United States v. Marion*, 404 U.S. 307, 324 (1971).

165. See *Reed v. Farley*, 512 U.S. 339, 353 (1994).

166. *Doggett*, 505 U.S. at 655. In *Doggett*, the Court thoroughly examined the negative impact that time can have on an effective defense. *Id.* at 654-58. While again finding that any prejudice determination is highly fact specific, the Court asserted that, under Sixth Amendment review, prejudice could be assumed in some circumstances, particularly if evidence suggests that the government was negligent or deliberate, or if the length of time was particularly long. See *id.* at 656-57.

167. *Id.* at 655-56.

168. See *United States v. Loud Hawk*, 474 U.S. 302, 314-15 (1986) (describing defendants' speedy trial claims as "reminiscent of Penelope's tapestry" because the defendants asserted the right, then slowed down the process with frivolous motions); *Barker*, 407 U.S. at 534-35 (finding that the defendant was betting on delay as much as the prosecution).

169. See *Doggett*, 505 U.S. at 653-54.

170. See *Barker*, 407 U.S. at 530.

speedy trial claims likely parallels well to a sealed indictment situation. Sixty days of delay or sealing probably causes little concern in either situation as a general matter.¹⁷¹ Many months of delay, however, raise significant Sixth Amendment concerns and should be considered presumptively prejudicial in a standard speedy trial or secret indictment context.¹⁷² Length of delay in the sealing context, however, is factually different from standard speedy trial challenges because the accused is unaware that he faces criminal charges and likely will not use the time of delay to prepare his defense. This connects length of delay to another element of *Barker* review: assertion of the right to speedy trial.

Federal courts correctly expect defendants to assert a speedy trial right throughout any delay. Delay and postponement can often benefit a defendant, so failure to object to delay followed by a speedy trial claim on appeal appears disingenuous.¹⁷³ Individuals transformed into accused persons by secret indictment, however, have no ability to object to delay.¹⁷⁴ In fact, whether intentional or not, impounding an indictment both specifically prevents a defendant from seeking speedy adjudication and avoids the requirements of the Speedy Trial Act by holding notice and arrest in abeyance.¹⁷⁵ In much the same way that sealing creates an “end run” around an individual’s right to repose, it likewise short circuits a person’s right to demand swift disposition of criminal charges. This lack of notice along with the dissolution of the right to object to delay should, at a baseline, weigh this balancing factor in favor of an accused unless circumstances clearly indicate otherwise. In

171. Cf. 18 U.S.C. § 3161(c)(1) (2006) (permitting a delay of up to seventy days for a defendant who has pled not guilty to charges); *United States v. Michael*, 180 F.2d 55, 57 (3d Cir. 1949) (asserting that a fifty-four-day seal likely did not prejudice the defendant).

172. Cf. *United States v. Ward*, 211 F.3d 356, 361 (7th Cir. 2000) (delay approaching one year is presumptively prejudicial); *United States v. Rogers*, 781 F. Supp. 1181, 1185–86 (S.D. Miss. 1991) (finding two year delay presumptively prejudicial and finding that thirteen months of delay were unexcused).

173. See, e.g., *Loud Hawk*, 474 U.S. at 314–15; *Barker*, 407 U.S. at 534–35.

174. Cf. *Doggett*, 505 U.S. at 653–54 (finding that an individual who is legitimately unaware of criminal charges against him cannot be faulted for failing to assert his right to speedy trial).

175. It is possible that a defendant who is aware of an ongoing investigation, and who predicts that indictment is likely, could assert a desire for swift adjudication or make like requests. The defendants in *Gigante* and *Rogers* did as much. See *United States v. Gigante*, 436 F. Supp. 2d 647, 651 (S.D.N.Y. 2006) (stating that the defendant, through his attorney, expressed a desire to surrender voluntarily if indicted, not knowing that the government had already indicted him and had the charges impounded); *Rogers*, 781 F. Supp. at 1188–89.

addition, these two results of sealing should be considered examples of prejudice to a defendant, which connects this factor to another *Barker* factor.

When weighing the factors in a speedy trial determination, courts must look to facts and circumstances that caused prejudice to the defendant. Prejudice can be the kind of concrete "actual" prejudice of lost evidence or witnesses,¹⁷⁶ and it can encompass a broader view of the deterioration of (1) acknowledged rights, or (2) the full ability to defend against charges.¹⁷⁷ Delay and secrecy create both concrete and "deteriorative" prejudice.¹⁷⁸ The inability to promptly prepare a defense, though accused, is a form of prejudice, and the longer the delay continues, the heavier the impact.¹⁷⁹ In addition, the inability to object to delay is a form of prejudice. The loss of the right of repose under the statute of limitations, if circumstances involve sealing beyond that period, is a form of prejudice. Though in the vast majority of cases it would not be intentional, secrecy and delay almost certainly provide the "tactical advantage" that the Supreme Court has admonished against in a number of speedy trial cases.¹⁸⁰ The prosecution can take its time, prepare, gather evidence, and interview witnesses while a defendant continues about his business, unaware that he will one day face arrest and trial. Because all may be unknown to the accused, the potential for harm from sealed indictments is greater than the former state court practice of issuing "*nolle prosequi* with leave" orders,¹⁸¹ which was vigorously struck down in *Klopfer v. North Carolina*.¹⁸² This disposition stalled charges and gave prosecutors the ability to reopen cases at will and not subject to statutes of limitations or speedy trial guarantees.¹⁸³ All the potential harm inherent to sealing urges the conclusion that defendants facing impounded indictments are prejudiced by the practice for purposes of speedy trial review, whether they evince concrete evi-

176. See *Reed v. Farley*, 512 U.S. 339, 353 (1994).

177. See *Doggett*, 505 U.S. at 654-56.

178. See, e.g., *United States v. Heckler*, 428 F. Supp. 269, 272 (S.D.N.Y. 1976).

179. *United States v. Taylor*, 487 U.S. 326, 340 (1988); see also *Doggett*, 505 U.S. at 654.

180. See *Doggett*, 505 U.S. at 656; *Barker v. Wingo*, 407 U.S. 514, 531 (1972); *United States v. Marion*, 404 U.S. 307, 324 (1971).

181. *Klopfer v. North Carolina*, 386 U.S. 213, 214 (1967).

182. *Id.* at 226.

183. *Id.* at 214.

dence of “actual prejudice” or not. It also urges courts to closely scrutinize another factor in *Barker* balancing: the government’s reason for delay.

If the government elects not to swiftly prosecute criminal charges against an individual, it needs a viable explanation for burdening society and the accused.¹⁸⁴ As stated above, many valid reasons for secrecy and delay exist.¹⁸⁵ The rights at stake when the government seeks to impound an indictment are substantial, however, and should be offset only by substantial government interest or some other form of proof that prosecution will be as timely as possible.¹⁸⁶ Without some viable reason or a court-imposed limit on the seal, post-indictment, pre-arrest delay could be indefinite and effectively immune from challenge. This would raise all the concerns behind imposing speedy trial requirements in all other contexts: fairness, public safety, individual liberty, and restraint on law enforcement power. In addition, requiring that the government supply its rationale for secrecy before obtaining a seal ensures preservation of that information for any viable defendant challenge. It also could deter abuse of sealing practice.¹⁸⁷

Secret indictments raise significant Sixth Amendment concerns, not just because of the delay they can cause, but also because they deny accused persons the ability to press for swift adjudication of the charges against them. Sealed indictments raise many of the same concerns under the speedy trial clause that they do under other areas of law: lack of notice, over-advantaging law enforcement, and dissolution of rights usually afforded to individuals facing investigation and arrest. Sealed indictments play a similarly disturbing game of “hide the ball” with Sixth Amendment rights as they do the requirements of statutes of limitations. For these reasons, prosecutors who seek seals should be expected to forward viable reasons for secrecy and delay. Courts should consider first

184. See *Barker*, 407 U.S. at 527.

185. See *supra* note 145 and accompanying text.

186. Cf. *Marion*, 404 U.S. at 333 (Douglas, J., concurring) (urging that, in light of the rights at stake, the Court should hold that the speedy trial right is violated by “years of unexplained and inexcusable preindictment delay”); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (establishing rules to protect individuals when “a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”).

187. Cf. *United States v. Hasting*, 461 U.S. 499, 505 (1983) (outlining supervisory powers of courts to deter abuses by law enforcement).

whether the reasons offset the dissolution of rights involved, then should consider “capping” the length of time that indictments can be hidden from the individuals they accuse of crimes.

C. Due Process

Current sealing practice implicates Fifth Amendment due process protections because the inherent fairness of impounded indictments remains in doubt. Due process is a difficult and fluid concept. It is used differently in civil and criminal contexts and is extremely difficult to apply to generalized circumstances as opposed to the specific facts of a live controversy. Even so, as a general matter, secret indictments raise legitimate due process concerns that urge change to the current doctrine.

The right to due process under the exercise of federal authority stems from the Fifth Amendment. “No person shall be . . . deprived of life, liberty, or property, without due process of law.”¹⁸⁸ For well over a century and a half, the Supreme Court has asserted that procedural due process resists exact definition.¹⁸⁹ In the criminal context, the Court has presented two foundational principles: that due process protections stem

188. U.S. CONST. amend. V.

189. See, e.g., *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276–77 (1856). The Court in *Den*, after tracing the origins of due process back to the Magna Carta, offered this attempt at a definition:

But is it “due process of law”? The constitution [sic] contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process “due process of law,” by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

Id. See also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28–37 (1991) (Scalia, J., concurring) (providing an extended discussion of the history of the doctrine of due process and its meaning in terms of proper procedural protections for individuals).

from our traditional notions of fairness and justice¹⁹⁰ and that due process requires that “defendants be afforded a meaningful opportunity to present a complete defense.”¹⁹¹ In the civil context, the Court has repeatedly asserted that due process requires both proper notice to the person facing a deprivation and a meaningful opportunity to be heard.¹⁹² I mention the civil context because precedent and a viable rationale exist for applying a portion of civil due process doctrine to sealing practice for reasons outlined below.¹⁹³

1. Introduction on criminal and civil due process doctrines applicable to sealing

Defendants who challenge law enforcement or prosecutorial conduct on due process grounds must either point to an established practice that was not followed or an acknowledged right that they were denied (e.g., the right to counsel). Otherwise, they would have to make a very compelling argument—that fundamental notions of fairness and justice were denied in their case.¹⁹⁴ Usually this latter circumstance will involve the government acting in a way that afforded it a clear and unfair advantage or that created identifiable prejudice against the defendant.¹⁹⁵ While there are no “rules” or strict tests for assessing due process violations in the criminal law context, there are guiding principles that may apply to sealed indictments. First, due process requires adjudication by a neutral decision maker.¹⁹⁶ Secondly, the federal government risks a due process violation if it exercises its power in a way that

190. See, e.g., *Rochin v. California*, 342 U.S. 165, 169 (1952) (asserting that due process requires scrupulous review of all phases of a criminal prosecution “in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses” (quoting *Malinski v. New York*, 342 U.S. 401, 416–17 (1945))).

191. See, e.g., *California v. Trombetta*, 467 U.S. 479, 485 (1984).

192. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

193. See *infra* Parts II.C.1, II.C.4.

194. *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

195. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (denying a defendant access to exculpatory evidence); *Rochin*, 342 U.S. at 166 (forcing defendant to vomit up possible evidence he swallowed).

196. U.S. CONST. amend. VI; *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.) (asserting that one individual cannot serve as judge to a case and counsel to one of the opposing sides).

hampers a defendant's preparation for trial.¹⁹⁷ Additionally, if a statute creates a liberty interest, it should be upheld under due process, even if the right is not expressly demanded by the Constitution.¹⁹⁸

In the civil context, the Supreme Court developed a balancing test to determine the fairness of an existing procedure against an alternative suggested by an individual challenging a loss of liberty or property. *Mathews v. Eldridge* established that due process requires a court to balance (1) the private interest affected; (2) the risk of erroneous deprivation of such interest through current procedures; and (3) the government's interest, including the function and burdens posed by additional or substitute procedures.¹⁹⁹ The unique history of sealing jurisprudence creates an opportunity to utilize the *Mathews* test in the criminal context where, traditionally, it is not applied.²⁰⁰ Notably, the Second Circuit utilized a simple version of *Mathews* balancing in *United States v. Muse* to address the baseline issue of whether sealing was appropriate.²⁰¹ More to the point, however, two procedural practices still exist concerning secret indictments: the *Muse* process of requiring and examining prosecutorial motive for seeking a seal (most clearly outlined in *Laliberte*)²⁰² as well as looking for prejudice to the defendant from the seal and delay; and the post-*Southland* doctrine of looking only to prejudice.²⁰³ Accordingly, after examining the prevailing *Southland*-based sealing practice in "traditional" criminal due process terms, I will employ *Mathews* balancing to determine whether one of the two

197. *California v. Trombetta*, 467 U.S. 479, 486 (1984); *United States v. Marion*, 404 U.S. 307, 324 (1971); see also *Lovasco*, 431 U.S. at 790, 795.

198. *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

199. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

200. The Supreme Court applied *Mathews* to the detention of enemy combatants at Guantanamo Bay to determine what process such detainees deserved in order to contest the massive deprivation of liberty and other rights they faced in American custody. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–33 (2004) (plurality opinion). Justice Scalia, however, wrote an impassioned dissent asserting that the *Mathews* test was entirely inappropriate for criminal or quasi-criminal circumstances. *Id.* at 574–77 (asserting that criminal law in the United States operates under established due process norms and that the application of a civil balancing test, applied in precedent to the denial of welfare benefits, is at best an absurdity and at worst a severe erosion of constitutional doctrine).

201. 633 F.2d 1041, 1043 (2d Cir. 1980) (en banc); see also *United States v. Onassis*, 125 F. Supp. 190, 213 (D.D.C. 1954).

202. *United States v. Laliberte*, 131 F.R.D. 20, 20–21 (D. Mass. 1990).

203. See *supra* Part I.C.

extant processes would better protect the rights of defendants without overburdening federal prosecutors.²⁰⁴

2. *Current prevailing sealing practice as a traditional threat to criminal due process*

The decision of a federal magistrate judge to grant a seal renders a criminal indictment secret, hidden from the accused and the public until such time as the prosecution elects for its disclosure. Secrecy is expressly disfavored in American criminal procedure, as established by the Constitution and decades of case law.²⁰⁵ While it hardly creates an immediate due process violation, this traditional and apt distrust of secrecy urges scrupulous procedures to fend off government abuse, even unintended or unwitting abuse, or prejudice to defendants.²⁰⁶ Current prevailing procedure, however, lacks robust judicial oversight and unfolds in ways that, in most cases, probably advantage the government to the detriment of individual rights. Prevailing practice risks significant due process prob-

204. Scholars have suggested that the strict wall of separation between criminal and civil procedure and conceptions of due process hamstrings both legal arenas. David Sklansky and Stephen Yeazell argue that codified criminal procedure evolves far more slowly and narrowly than its civil counterpart and that the great strides in limiting prosecutorial and law enforcement actions have come through constitutional litigation, which often does not speak directly to the rules of procedure. The result of these two realities is that criminal procedure requires reform and modernization. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 695 (2006). Niki Kuckes asserts that civil due process is consistent but flexible while criminal due process appears more rigid and uneven. In criminal procedure, this results in early proceedings where accused persons have very few protections and trial proceedings where they have significant protections. Her article does not examine sealed indictments, but it does raise a number of issues that overlap with the concerns of this article. See generally Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1 (2006).

205. See U.S. CONST. amends. IV (search and seizure protections), V (due process protections), VI (right to speedy and public trial); *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) ("The principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials.") (internal quotations omitted); *Spano v. New York*, 360 U.S. 315, 326 (1959) (Douglas, J., concurring).

206. Cf. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 318–21 (1972) (examining executive branch objections to thorough judicial review of secret surveillance and concluding that such oversight was necessary to protect jealously-guarded individual rights and not overly burdensome to government interests); *Miranda v. Arizona*, 384 U.S. 436, 444, 467–69 (1966) (holding that consistent protective procedures are required to assure that the Fifth Amendment rights of persons in police custody are not infringed); H.R. REP. NO. 93–1508, as reprinted in 1974 U.S.C.C.A.N. 7401, 7404–05 (asserting that development and passage of the Speedy Trial Act of 1974 arose from a need to establish clear and detailed procedures to protect Sixth Amendment rights).

lems because it affords few to no protections for the established rights of accused individuals despite our traditional wariness of secrecy.

The decision to seal is made *ex parte*, and a defendant has absolutely no opportunity to speak on his own behalf concerning any loss of rights that may result from secrecy and delay. It is well settled that American jurisprudence disfavors *ex parte* hearings, finding that adversary proceedings far better serve the ends of justice.²⁰⁷ The prosecutor who requests a seal is an interested party. The magistrate judge thereby must represent the interests of society in fair and constitutional criminal proceedings in the same fashion she would when deciding whether to grant a search warrant.²⁰⁸

As discussed above, the act of sealing dissolves acknowledged individual rights, some constitutionally-based and others derived from statute. The magistrate judge's decision does away with the right to demand a speedy trial,²⁰⁹ and if the indictment is sealed beyond the end of the statute of limitations period, the decision does away with a defendant's right to either timely notice or repose.²¹⁰ This process is unlike grand jury practice and the return of the indictment itself because all of the issues and rights therein are preserved for full adjudication at trial.²¹¹ The indictment serves as notice of the charges an accused will have to defend against and announces the possibility of a loss of rights and liberty.²¹² Thus, a decision to seal involves a finality that the indictment itself lacks because sealing may subject an accused person to a loss of rights that he can never functionally defend or ever win back.²¹³ An ac-

207. See, e.g., *Alderman v. United States*, 394 U.S. 165, 183–84 (1969).

208. See *Giordenello v. United States*, 357 U.S. 480, 485–87 (1958); *Johnson v. United States*, 333 U.S. 10, 13–15 (1948).

209. See *supra* Part II.B.

210. See *supra* Part II.A.

211. See FED. R. CRIM. P. 10 (describing the right to arraignment in open court after return of indictment and arrest); *Apprendi v. New Jersey*, 530 U.S. 466, 476–78 (2000) (asserting that Anglo-Saxon justice and American due process require “that ‘the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by’” a jury (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *336, *343)).

212. See *Apprendi*, 530 U.S. at 478.

213. While it may not rise to the same level of unconstitutionality, the effect of a sealed indictment can resemble the imposition of double jeopardy on an accused where the protected right is lost immediately upon infringement. See *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 302–03 (1984). In double jeopardy, if an accused is compelled to endure a second trial, his right is destroyed even if he is acquitted—or if an appellate court throws out a convic-

cused individual may challenge, before the district court judge, the secrecy of an indictment after the indictment is unsealed, or on appeal to a circuit court, but any delay or loss of rights already is complete. Furthermore, the fact that the only remedy for an accused is dismissal of all or part of the criminal indictment likely predisposes federal judges to condone abusive use of seals.²¹⁴

Finally, if a magistrate judge grants a seal “pro forma” or “ministerially,” without demanding a showing of need from the prosecutor, then the judgment of when and why to seal rests almost solely with the government.²¹⁵ This is a very disquieting reality given the loss of rights precipitated by a secret indictment. As established clearly in *Dr. Bonham’s Case* and upheld jealously throughout American criminal jurisprudence, due process minimally requires a disinterested decision maker when liberty, property, or enumerated rights are at stake.²¹⁶ Permitting a practice where prosecutors request seals and decide how long criminal indictments will remain under wraps, a practice where the act of the magistrate judge is merely that of a rubber stamp but carries the jurisprudential weight of a well-considered decision, facially violates this bulwark of due process and risks grave infringements of individual rights.

tion at the second trial on double jeopardy grounds. *See id.* Similarly, a person accused under a secret indictment loses forever his right to immediate notice and may lose his right to repose under a statute of limitation, his right to a speedy trial and right to object to delay, and other rights and protections that, essentially, are destroyed by the infringement.

214. The much-quoted language from *Southland* best illustrates the likelihood of a district court judge’s reluctance to grant a remedy to a defendant, even in circumstances of clear abuse:

The question remains whether the prosecutorial objectives here sought to be obtained justified the sealing of the indictment. This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant. The Government should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellant court sees things differently, after the expenditure of vast resources at a trial and at a time when reindictment is by hypothesis impossible.

United States v. *Southland Corp.*, 760 F.2d 1366, 1380 (2d Cir. 1985).

215. *See* United States v. *Gigante*, 436 F. Supp. 2d 647, 660 (S.D.N.Y. 2006); Government’s Opposition to Defendant’s Motion to Dismiss, *supra* note 115, at 15–17.

216. *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.); *see also* *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (“[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”).

From the traditional viewpoint of criminal due process, sealed indictments raise very real concerns. Sealed indictments granted with minimal judicial review of the circumstances raise even more serious concerns. Again, an actual due process *violation* demands specific facts and conduct by the government, but at a minimum, current sealing practices present a minefield of potential infringements that are not offset by procedural safeguards. Federal criminal procedure needs such safeguards to reduce the risks to individual liberties, and of improper prosecutorial conduct, whether intended or inadvertent.²¹⁷

3. *The two existing approaches to sealed indictments warrant application of Mathews v. Eldridge balancing to determine what process is constitutionally required*

A comparison of the two kinds of sealing doctrine, pre- and post-*Southland*, strongly suggests that due process requires federal courts to demand a valid reason for secrecy and to conduct a full review of the proffered rationale. Sealing practice offers a rare and fascinating opportunity to apply the civil due process balancing doctrine of *Mathews v. Eldridge*,²¹⁸ despite the fact that the Supreme Court tends to look to more “traditional” understandings of due process in the criminal realm.²¹⁹ The *Mathews* test is applicable here because two very different federal doctrines actually exist and are in concurrent use—the majority “prejudice only” standard of *Southland* and its progeny and the “two-pronged” test embodied in *Muse* and occasionally employed by district courts.²²⁰ Under the *Mathews* conception, due process requires a reviewing court to balance (1) the private interest affected; (2) the risk of erroneous deprivation of such interest through current procedure and the probable value of additional or substitute procedures; and (3) the government’s interests, including the function and bur-

217. See *supra* note 206 and accompanying text.

218. 424 U.S. 319, 334–35 (1976).

219. See *supra* notes 190–91 and accompanying text.

220. Compare *United States v. Scrushy*, 2:05CR119-F, 2006 WL 780905, at *5 (M.D. Ala. Mar. 27, 2006) (denying a challenge to a sealed indictment and upholding tolling of the statute of limitations because no prejudice existed) with *Gigante*, 436 F. Supp. 2d at 658 (holding that without a valid reason justifying secrecy and the tolling of limitations, sealing is improper and an indictment should be dismissed).

dens posed by additional or substitute procedures. Conducting the test strongly suggests that the *Muse* model better protects the due process rights of accused persons without overly burdening the government.

The private interest here is substantial. In any case involving a secret criminal indictment, the private interest comprises a suite of constitutional, common law, and statutory rights outlined along the course of this article: rights to repose, a speedy trial, notice, and the opportunity to prepare a thorough defense from the moment an individual becomes “an accused.”²²¹ These interests are particularly weighty in the criminal realm where an accused faces a massive deprivation of liberty if found guilty.²²²

The risk of erroneous deprivation through the prevailing practice (thus under the post-*Southland* formula) is high. If sealing is but a “ministerial” act,²²³ issuance of a seal will always fail to take cognizance of the individual rights at stake. Furthermore, if the field of acceptable rationales for secrecy is wide open, as suggested in *Southland*,²²⁴ and if, as described in *Gigante*, prosecutors often are not required to state a reason to impound up front anyway,²²⁵ then: (1) there is no genuine test for necessity before substantive rights are eliminated by the act of the magistrate judge; and (2) there likely are no viable grounds to challenge secrecy, delay, and the loss of enumerated rights, no matter how egregious, without demonstrable and affirmative proof of concretized prejudice.²²⁶ This is disturbing given the very real prejudice created by sealing. An accused could lose months of defense preparation time, be denied the option of pressing for a speedy trial, and lose the right to repose—all without a neutral decision maker placing these interests in balance against the needs of law enforcement. These are substantive losses without even considering the pos-

221. See *supra* Parts II.A, II.B, and II.C.1-2.

222. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (White, J., concurring).

223. Cf. *United States v. Laliberte*, 131 F.R.D. 20, 20 (D. Mass. 1990) (characterizing a “ministerial act” as, “by definition, one in which the officer has no discretion.”).

224. *United States v. Southland Corp.*, 760 F.2d 1366, 1380 (2d Cir. 1985).

225. *Gigante*, 436 F. Supp. 2d at 660.

226. But see *Doggett v. United States*, 505 U.S. 647, 655 (1992) (asserting that particularized proof is not required to establish a Sixth Amendment violation).

sibility that sealing might afford the prosecution an "unfair advantage" that infringes due process.²²⁷

The government's interests are also substantial. Broadly, these interests all encompass the need for thorough, effective investigation and prosecution of criminal wrongdoing. Whether these broad interests require secrecy is situation-dependent. The government also has a case-specific interest embedded within any rationale for secrecy: prevention of defendant flight or protection of important witnesses, for example.²²⁸ These often are important interests that can, under the right circumstances, clearly justify secrecy. None of these interests, neither the broad nor the specific, however, are impinged or overly burdened by imposing procedural requirements on sealing requests and demanding greater review by magistrate judges. If United States Attorneys had to follow the *Laliberte* process of providing a rationale for secrecy as part of a written request for a seal,²²⁹ they would merely have to extend the work of preparing an indictment by a few more hours to also prepare a legitimate motion for secrecy. If seals required a meaningful review of the government's reason for secrecy by the magistrate judge, fewer seals might issue—for the reason that the judges might find some of the rationales wanting. This is not a shortcoming or burden of the additional procedure, however. It is merely a consequence of ensuring that the system works fairly. In addition, such procedure would not risk a breach of secrecy any more than the process of bringing an indictment to a grand jury would.²³⁰

In the final *Mathews* analysis, the process of requiring a legitimate prosecutorial reason for a seal up front, as clearly reasserted in *Muse* and most thoroughly described in *Laliberte*,²³¹ better safeguards the established rights of defendants while not significantly burdening the prosecution. It also matches the legal process to its justification: that a magistrate judge has

227. Cf. *United States v. Lovasco*, 431 U.S. 783, 795 (1977) (reiterating that prosecutorial delay solely to "gain tactical advantage over the accused" likely violates due process but stressing that such purely tactical delay is "'fundamentally unlike'" constitutionally permissible investigative delay (citing and quoting *United States v. Marion*, 404 U.S. 307, 324 (1971))).

228. *United States v. Muse*, 633 F.2d 1041, 1043 (2d Cir. 1980) (en banc).

229. *United States v. Laliberte*, 131 F.R.D. 20, 20 (D. Mass. 1990).

230. Cf. *United States v. U.S. Dist. Court*, 407 U.S. 297, 320-21 (1972) (dismissing arguments that requiring judicial process in domestic surveillance posed a risk of breach of secrecy).

231. *Muse*, 633 F.2d at 1043; *Laliberte*, 131 F.R.D. at 20.

the authority under Rule 6 to seal an indictment and keep it out of the public record if, in her sound judgment, secrecy is warranted.

4. *Conclusion regarding Rule 6 sealing practice and due process*

Current sealing practice raises serious due process concerns. While traditional criminal due process jurisprudence resists a conclusive evaluation of sealing practice generally, prevailing customs and the circuit court decisions justifying them suggest an enormous potential for due process infringement in secrecy and delay. In addition, because two different practices still exist in the case law simultaneously, we can apply the civil *Mathews v. Eldridge* due process test, which militates for more up-front protection of defendants' rights. Clearly, prevailing sealing practice requires remediation to protect individual rights and stave off inadvertent or deliberate prosecutorial abuses. Viable fixes fortunately exist that should add little to no complexity or burden to the process of criminal prosecution.

III. PROPOSED REMEDIES

Current sealing practice needs reform both "up front" when seals are issued and at the time of challenge by a defendant to a district or circuit court. An effective solution requires a change to Rule 6 in order to establish, unequivocally, more rigid requirements to obtain a seal on an indictment. Protection of individual rights likewise demands clear common law rules regarding what sealing rationales viably override individual rights and how long seals can stay in place once issued. Fortunately, the Federal Rules of Criminal Procedure, extant sealing case law, and analogous criminal procedures offer viable solutions that will safeguard individual rights without overburdening courts or prosecutors.

A. *Reforming Rule 6*

To create uniformity of process and to ensure that seals only issue when the government provides a rationale that properly overrides individual rights, Rule 6 must be changed. *United*

States v. Laliberte and existing criminal motions practice provide good direction for rewriting Rule 6.²³²

A decision to seal should come in the form of an official court order from the magistrate judge, one that requires a written motion and, potentially, supporting evidence. Rule 47 of the Federal Rules of Criminal Procedure provides guidelines for motions practice.²³³ Because review of a motion to seal would almost always be *ex parte*, and because seals rarely require the kind of expediency some search warrants demand,²³⁴ such a request should be in writing to ensure a full record for review by the accused individual later.

The rule should require a motion to seal to include good cause for such an order, pleaded with specificity. To ensure that issuance of a seal is never *pro forma*, the magistrate judge must have a viable rationale to review. In addition, requiring the prosecutorial reason for secrecy up front and with specificity helps to create built-in time limits for seals. If the government asserts a need for secrecy because a co-conspirator is out of the country, the need for the seal likely would come to an end upon that person's return to the United States.²³⁵

The decision to seal should remain discretionary, as it has been since the first ratification of Rule 6.²³⁶ A reformed Rule 6, however, also should direct that magistrate judges have discretion to include a firm expiration for the seal, requiring the government to re-file a motion for extension.

My suggested language for a new Rule 6(e)(4) would be:

Upon written motion by the government, the magistrate judge may issue an order that the indictment be kept secret. A motion to seal must include good cause for secrecy, pleaded with specificity or supported by evidence. An order to seal is effective until the defen-

232. FED. R. CRIM. P. 47; *Laliberte*, 131 F.R.D. at 20–21.

233. FED. R. CRIM. P. 47.

234. See FED. R. CRIM. P. 41(d)(3) (permitting the issuance of warrants by telephonic or other forms of reliable electronic communications).

235. See generally *Muse*, 633 F.2d 1041 (affirming defendant's conviction because he could not demonstrate any substantial prejudice caused by the sealing of the indictment against him); *United States v. Sherwood*, 38 F.R.D. 14 (D. Conn. 1964) (finding prejudice based on prosecutorial delay and dismissing indictments against defendants that had been sealed for more than a year while the government assessed level of cooperation by co-defendant).

236. The first version of the sealing provision of Rule 6 states, very much as it does today, that "[t]he court may direct that an indictment shall be kept secret." FED. R. CRIM. P. 6(e) (1944) (emphasis added).

dant is in custody or has been released pending trial or may be issued for a specific period of time established by the magistrate judge. The clerk must then seal the indictment, and no person may disclose the existence of the indictment except as necessary to issue or execute a warrant or summons.

B. Reforming Judicial Review of Sealing

The review of sealing requests, originally by a magistrate judge and by other federal judges upon challenge by a defendant, likewise needs greater direction through federal common law to ensure both uniformity of process and adequate protection for individual rights. There are three primary issues in these areas of sealing practice. First, what level of review should a magistrate judge give an original request for secrecy? Second, what qualifies as a legitimate prosecutorial rationale for secrecy? Last, when should properly-granted seals be deemed to have “expired”?

1. Level of review required when a seal is requested

Magistrate judges should only issue seals under a uniform standard of review. Currently, no precedent establishes how magistrate judges should review sealing requests; almost all the opinions merely say that the decision itself should be granted broad deference if challenged.²³⁷ Extant search warrant jurisprudence provides a good guideline for the standard of review for seals.²³⁸ A decision to seal implicates individual rights; in some cases, granting a seal immediately dissolves certain of these rights.²³⁹ Consequently, the decision to impound an indictment should never be made *pro forma*. Instead, review should deliberately weigh the collection of indi-

237. See, e.g., *United States v. Sharpe*, 995 F.2d 49, 52 (5th Cir. 1993); *United States v. Ramey*, 791 F.2d 317, 321 (4th Cir. 1986); *United States v. Edwards*, 777 F.2d 644, 647–48 (11th Cir. 1985).

238. See generally U.S. CONST. amend. IV (requiring probable cause to support issuance of a search or arrest warrant); FED. R. CRIM. P. 41 (establishing procedure for obtaining a warrant); *Illinois v. Gates*, 462 U.S. 213 (1983) (requiring courts to examine the totality of the circumstances when determining whether probable cause exists).

239. See *supra* Part II.A–C.

vidual rights at stake against the stated prosecutorial rationale for secrecy.

Federal courts should adopt the “substantial basis” standard from search warrant practice for sealing requests.²⁴⁰ Each procedure, search warrants and sealing, permits law enforcement to override established individual rights, so each should require the magistrate judge to find a weighty rationale to justify it. Accordingly, an order to seal should include the magistrate judge’s determination that the prosecution’s motion, and any evidence, presented a substantial basis for overriding the accused person’s rights and the prevailing inclination toward public criminal process.

2. Review of sealing orders upon challenge by a defendant

Review of challenges to secrecy and delay should continue to show deference to the decision of the magistrate judge, but must begin to examine prosecutorial rationale as well as to consider the rights at stake for accused individuals. If Rule 6 sealing is conducted under more scrupulous procedures, as opposed to pro forma, federal district court and circuit court judges certainly can rely on the decisions of magistrate judges and apply the kind of abuse of discretion standard usually employed to challenges.²⁴¹ As long as the record demonstrates that the prosecution followed the rules and that the magistrate judge found a substantial basis for secrecy, the decision should be upheld. In the absence of such process, however, post-sealing review would need to be more intensive to fully consider the circumstances and any loss of rights by, or other prejudice to, the defendant. Post-hoc rationales by the government would have to clearly outweigh the negative effects of the seal on that particular defendant.

The breadth of acceptable sealing rationales needs some prudent limiting. In *Southland*, Judge Friendly quite rightly noted that many reasons beyond apprehension of an accused

240. See *Gates*, 462 U.S. at 238.

241. See *United States v. Bracy*, 67 F.3d 1421, 1426–27 (9th Cir. 1995). The Ninth Circuit in *Bracy* formally reviewed the decision to seal as a procedural act by the magistrate judge subject to an abuse of discretion standard. *Id.* Most other circuit court decisions do not formally classify the process in this way, but instead merely state that the magistrate’s decision is due great deference. See *supra* note 7 and accompanying text. This review, however, would appear to resemble abuse of discretion, which affords significant deference to the judge making a procedural decision.

may justify secrecy.²⁴² Circuit courts, however, have expanded this practical observation into decisional law that legitimizes seals for nearly any reason whatsoever. For example, the Eleventh Circuit permits sealing merely to toll the statute of limitations without alerting the accused,²⁴³ a posture that condones an end run around all the individual rights outlined in this article. A prosecutor merely has to seek a seal and can then return to investigating and preparing a case in secret under no time pressures whatsoever—so long as the defendant suffers no substantial prejudice that is both particularized and demonstrable.

Federal courts should draw reasonable lines for prosecutorial rationales that legitimately offset the individual rights of accused persons. Apprehension of the defendant or of a co-conspirator, protection of central witnesses, or preservation of key evidence likely justifies secrecy and some delay. Merely tolling a statute of limitations in secret or extending investigation time should not because these appear only to serve prosecutorial convenience or furnish an unfair advantage to the government without additional benefit to society or the judicial process.

3. *Considering the length of delay created by sealing*

Federal common law should also clearly address acceptable time periods for sealing. Hopefully, a change to Rule 6 suggesting that magistrate judges could issue “expiration dates” for sealing orders would result in reasonable up-front controls. Defendants, however, should have recourse to challenge seals without expiration dates when they create unreasonable delay. One early sealing case, *United States v. Sherwood*, established a very workable rule that provides an excellent starting point: sealing is only proper and justified while the rationale supporting it still exists.²⁴⁴ There, the government claimed that it needed a seal because the defendants were abroad when the indictment was returned; however, the seal stayed in place for some months beyond the return of the defendants.²⁴⁵ Mini-

242. *United States v. Southland Corp.*, 760 F.2d 1366, 1379–80 (2d Cir. 1985).

243. *United States v. Edwards*, 777 F.2d 644, 648–49 (11th Cir. 1985).

244. *United States v. Sherwood*, 38 F.R.D. 14, 20 (D. Conn. 1964).

245. *Id.* at 18.

mally, seals on indictments should expire when the provided rationale ends.

Further protection is necessary, however, in situations where an indictment is sealed with a proper rationale but not unsealed in a timely manner. An example would be a situation where the government seeks a seal under a motion, with evidence, claiming that the accused poses a flight risk, but then fails to arrest him for another eleven months. Courts should look to the most generous Sixth Amendment speedy trial jurisprudence when such circumstances occur because (1) sealing dissolves an accused person's ability to press for swift adjudication, and (2) federal courts are implicated directly in the delay.

Federal courts should establish that six months of delay under seal is presumptively prejudicial under *Barker* review.²⁴⁶ For delay caused by sealing, federal courts likewise should employ the broader definition of prejudice established by *Doggett v. United States*,²⁴⁷ as opposed to demanding concrete and particularized evidence of prejudice.²⁴⁸ Because the accused has no opportunity to assert the right to speedy trial in almost all sealing situations, this will make a challenge hinge on the prosecution's rationale for secrecy.²⁴⁹ If a defendant challenges secrecy-based delay under the Sixth Amendment, the prosecution will have to further justify whether its acceptable rationale remained throughout the impound period and why the awarded seal did not facilitate arrest and commencement of adversarial proceedings within a six-month period. Presumably, most prosecutions would survive such an inquiry, and the indictment would not be dismissed, because the government would furnish proper explanations for the time taken. This safeguard, however, would penalize prosecutions that languished without justification or delays that appeared merely for tactical advantage.

246. See *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972). The six-month period comes from Ninth Circuit decisions on speedy trial challenges generally. See *United States v. Valentine*, 783 F.2d 1413, 1417 (9th Cir. 1986) (finding six-month delay long enough to trigger an evaluation of other factors bearing on defendant's Sixth Amendment claim).

247. *Doggett v. United States*, 505 U.S. 647, 654-56 (1992).

248. See, e.g., *United States v. Ramey*, 791 F.2d 317, 322 (4th Cir. 1986) ("Only if a defendant can show substantial actual prejudice in the period between the sealing of the indictment and its unsealing is dismissal of the indictment recognized . . .").

249. See *Barker*, 407 U.S. at 530-33 (outlining and describing four factor test).

IV. CONCLUSION

The sealing of indictments in federal courts is a common, if not frequent, procedure. The vagueness of Rule 6 on sealing and the decisions of federal courts of appeals since the mid-1980s, however, have created very significant concerns involving how sealing occurs and how much discretion prosecutors have over secret indictments. Sealed indictments implicate rights under statutes of limitations, Sixth Amendment speedy trial protections, and Fifth Amendment due process protections.

Fortunately, these problems could be easily remedied through creating a more deliberate process within Rule 6 and by incorporating some existing Fourth Amendment jurisprudence into sealing review. Compelling the government to justify secrecy to a magistrate judge up front and in writing likely will curtail most problems associated with current sealing practice. Acknowledging the individual rights of accused persons when reviewing sealing challenges likewise will reduce any abuses of the procedure.

Federal law should discourage secrecy in criminal prosecutions except where clearly necessary and specifically justified. Such a stance, and the rules to effectuate it, best comport with constitutional law and America's traditional and fundamental notions of fairness.