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GRAND JURY SECRECY: WAIVER AND THE PUBLIC INTEREST

In re Biaggi, 478 F.2d 489 (2d Cir. 1973)

A New York Times article reported that Mario Biaggi had refused to answer questions concerning his finances in a grand jury investigation conducted seventeen months earlier. Biaggi, a New York City mayoral candidate, moved in federal district court for an order directing a panel of federal district court judges to examine the grand jury minutes and publicly report whether he had claimed any constitutional privilege about his personal finances or assets. The court denied Biaggi's motion, but granted the United States Attorney's motion, submitted earlier, for disclosure of Biaggi's grand jury testimony, redacted to eliminate the names of other persons mentioned in that testimony.

On appeal, the Second Circuit Court of Appeals affirmed and held: A federal district court may order disclosure of a grand jury witness' testimony if the public interest requires disclosure and if the witness, with the consent of the Government, waives his right to have the minutes remain secret.

The tradition of secret grand jury proceedings originated during the seventeenth century in England as a method of preventing abuses by the Crown in obtaining indictments. The United States initially

2. Judge Friendly felt that the precise question of whether Biaggi “took the Fifth Amendment privilege or any other privilege on [his] personal finances or assets” was misleading to the public, in that it technically required a negative answer. See In re Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (supplemental opinion).
3. Biaggi then moved for full, unredacted disclosure of his testimony. The district court denied that motion, and ordered redacted disclosure. Biaggi appealed the disclosure order and the denial of his motions. Biaggi moved for full unredacted disclosure because he feared that release of the redacted testimony would lead to speculation about the deleted names, and might involve him in libel suits if he released the names himself. Id. at 491.
4. Id. at 489. The court also held that a grand jury witness cannot condition a motion for disclosure of his testimony upon unredacted disclosure. Id.
5. Sec Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 457 (1964); Comment, Secrecy in Grand Jury Proceedings: A Proposal for a New Federal Rule of Criminal Procedure 6(e), 38 FORDHAM L. REV. 307, 308 (1969). Earl of Shaftesbury Trial, 8 How. St. Tr. 759 (1681), gave impetus to the rule of secrecy by granting a grand jury the right to privately examine witnesses and to engage in secret deliberations. At early common law, a violation of the secrecy requirement in a felony case constitu-
adopted the rule of secrecy to prevent governmental oppression, and additional justifications for the rule soon developed. One court rejected claims that the rule violated the first, fifth, and sixth amend-
ments. In applying the secrecy rule, the courts admitted stenographers and prosecutors into the grand jury room, but held that a defendant seeking discovery of grand jury transcripts had no right of access to these confidential documents. Nor did a defendant have any right to require the court to review the evidence before the grand jury to determine its sufficiency, except in extreme cases. The courts possessed the discretionary power to impose oaths of secrecy upon both grand jurors and witnesses, and to hold violators in contempt of court. The court could relax the secrecy requirement only in ex-

8. Goodman v. United States, 108 F.2d 516 (9th Cir. 1939), held oaths of secrecy not violative of first or fifth amendment rights. Construing the oath so as "not to disable a person who takes it from exercising in a proper situation his right" to counsel, the court also held secrecy oaths valid under the sixth amendment. Id. at 521.

9. Early cases tended to deny stenographers admittance to the grand jury room. E.g., Latham v. United States, 226 F. 420 (5th Cir. 1915) (presence of stenographer at grand jury proceedings held substantial violation of defendant's rights and ground for quashing indictment although no prejudice alleged or shown); United States v. Philadelphia & R. Ry., 221 F. 683 (E.D. Pa. 1915); United States v. Rubin, 218 F. 245 (D. Conn. 1914). Some courts, however, recognized compelling reasons for permitting stenographers to be present at grand jury proceedings. In United States v. Rockefeller, 221 F. 462, 466 (S.D.N.Y. 1914), the court stated:

[If] the testimony given before the grand jury may not, under any circumstances or conditions, be made a matter of record and reference, we are opening the doors very wide, and inviting not only perjured and incompetent testimony, but even gossip and conjecture, before the grand jury.

Modern courts before the promulgation of the Federal Rules permitted stenographers to record grand jury proceedings. E.g., United States v. Amazon Indus. Chem. Corp., 55 F.2d 254 (D. Md. 1931) (comparing the need for stenographer at grand jury proceedings to the requirement of transcripts at trial); Wilkes v. United States, 291 F. 988 (6th Cir. 1923), cert. denied, 263 U.S. 719 (1924) (stenographer who was also assistant district attorney, but took no part in proceedings, held not unauthorized person in grand jury room).

10. Metzler v. United States, 64 F.2d 203 (9th Cir. 1933); May v. United States, 236 F. 495 (8th Cir. 1916); see Wilkes v. United States, 291 F. 988 (6th Cir. 1923), cert. denied, 263 U.S. 719 (1924).

11. Metzler v. United States, 64 F.2d 203, 206 (9th Cir. 1933); see Goodman v. United States, 108 F.2d 516, 519 (9th Cir. 1939).

12. See McKinney v. United States, 199 F. 25 (8th Cir. 1912) (to prevent clear injustices or abuse of judicial process); United States v. Farrington, 5 F. 343 (N.D.N.Y. 1881) (if grand jury finding based on utterly insufficient or palpably incompetent evidence).

13. Goodman v. United States, 108 F.2d 516 (9th Cir. 1939); see Charge To Grand Jury, 30 F. Cas. 992, 995 (No. 18,255) (D. Cal. 1872); Annot., 127 A.L.R. 265 (1940).


15. Goodman v. United States, 108 F.2d 516 (9th Cir. 1939). All violators of
tremely limited circumstances.16

Promulgated in 1944, Federal Rule of Criminal Procedure 6(e) absolutely prohibits disclosure of grand jury deliberations or the votes of grand jurors,17 thus maintaining the "veil of secrecy"18 that

Rule 6(e), however, not merely grand jurors and witnesses, are rendered liable to contempt proceedings. See Fed. R. Crim. P., Note to Rule 6(e) (Prelim. Draft, 1943).

16. Schmidt v. United States, 115 F.2d 394, 397 (6th Cir. 1940); United States v. AMA, 26 F. Supp. 429, 430 (D.D.C. 1939). In McKinney v. United States, 199 F. 25 (8th Cir. 1912), the court stated that in extreme instances the court may do what is necessary to prevent a clear injustice or abuse of judicial process. McKinney denied disclosure to a defendant attempting to require the court to review the evidence before the grand jury to determine its sufficiency because it was not an extreme instance as defined by that court. Judge Learned Hand, in refusing to grant a defendant's motion to inspect grand jury minutes, stated the following reasons for limiting exceptions to the rule of secrecy:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). This was the dominant theory justifying non-disclosure before the promulgation of the Federal Rules. See Comment, supra note 5, at 309.

17. Fed. R. Crim. P. 6(e) provides:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter . . . or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

Thus grand jurors are free from the apprehension that their opinions and votes may be disclosed by compulsion. See Calkins, supra note 5, at 458. By 1944, when Congress promulgated the Federal Rules of Criminal Procedure, the parameters of the rule of secrecy had been largely defined. See notes 8-16 supra and accompanying text. A split of authority, however, still existed as to the duration of the secrecy requirement. Some courts held that the policy of the law required no secrecy after the presentment and indictment are found and made public, the accused taken into custody, and the grand jury finally discharged. See, e.g., Metzler v. United States, 64 F.2d 203 (9th Cir. 1933); Atwell v. United States, 162 F. 97 (4th Cir. 1908). Contra, Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940); United States v. AMA, 26 F. Supp. 429, 430 (D.D.C. 1939) (holding a secrecy oath unlimited by time or circumstance). The Supreme Court, in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940) (dictum), stated: "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

18. This term is traditionally used to describe the effect of the rule of secrecy. See
surrounds grand jury proceedings. There are, however, three exceptions to the rule which permit disclosure: 

1. upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury...

2. to the attorneys for the government in the performance of their duties...


If a fact is sought for itself and not because it was stated before a grand jury, there is no bar of secrecy. In re Hearings Before the Comm. on Banking and Currency, United States Senate, 19 F.R.D. 410, 412 (N.D. Ill. 1956), aff'd on other grounds, 245 F.2d 667 (7th Cir. 1957); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 211 F. Supp. 729, 734 (N.D. Ill. 1962).


21. Fed. R. Crim. P. 6(e). A motion to dismiss on its face must raise a constitutional question requiring dismissal of the indictment if proved. Calkins, supra note 5, at 471; see Note, Disclosure of Grand Jury Minutes to Challenge Indictment and Impeach Witnesses in Federal Criminal Cases, 111 U. Pa. L. Rev. 1154, 1157-58 (1963). Constitutional challenges may be valid if an indictment is based upon incompetent or insufficient evidence, or is returned by a biased grand jury. Challenges will be sustained if an indictment is based upon no legal evidence at all, or upon coerced confessions or illegally seized evidence, or if an indictment is returned against a person granted immunity from prosecution. For a full discussion of the constitutional implications of a motion to quash indictment, see Calkins, supra note 5, at 471-76; Note, supra at 1157-58 (and cases cited therein). In addition, a motion to dismiss must be made in good faith. See Calkins, supra note 5, at 471. Evidence supporting a motion to dismiss the indictment also must overcome the strong presumption of regularity accorded grand jury findings. Beatrice Foods Co. v. United States, 312 F.2d 29, 39 (8th Cir.), cert. denied, 373 U.S. 904 (1963).

and [3] when so directed by the court preliminarily to or in connection with a judicial proceeding.”

The definition of “judicial proceeding” enumerated in Fed. R. Crim. P. 54(c) are attorneys for the Government under Rule 6(e). Rule 54(c) provides:

Attorney for the government, means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney. . . .

The phrase “attorneys for the government,” however, does not include a state attorney general or his assistants. In re Holovachka, 317 F.2d 834 (7th Cir. 1963).


Discovery of a defendant’s grand jury testimony is governed by Fed. R. Crim. P. 16(a)(3). The Jencks Act, governing disclosure of trial witnesses’ pretrial statements to defendants, has been amended to include statements made before a grand jury. See
ing” as used in Rule 6(e) has been extended to allow disclosure of quasi-judicial proceedings.24

Ordinarily, disclosure is permitted only within one of the three exceptions.25 In *In re Bullock,*26 however, a federal district court determined that disclosure was in the public interest, and granted disclosure to a board investigating an indicted police officer, even though


the disclosure was not warranted by any of the traditional exceptions to Rule 6(e). 27

In re Biaggi created a fourth exception to Rule 6(e) by authorizing disclosure when the parties waive the secrecy requirement and the public interest requires that disclosure. 28 In creating this additional exception, the Second Circuit applied the common law doctrine of waiver to the Federal Rules of Criminal Procedure, 29 although case

27. Id. Because this disclosure does not constitute a quasi-judicial proceeding preliminary to a judicial proceeding, the Doe analysis is inapplicable. See note 24 supra. Bullock correctly stated the test for the exercise of discretion as follows:

Where public interest is superior to the purpose of the secrecy of Grand Jury testimony, the latter protection will be disregarded and the minutes divulged within limits prescribed by law.

103 F. Supp. at 643 (emphasis added). See United States v. Crolich, 101 F. Supp. 782, 783 (S.D. Ala. 1952) (emphasis added), which states:

[T]he rule of secrecy of such [grand jury] proceedings may be relaxed by permitting disclosure in accordance with Rule 6(e) . . . whenever the interest of justice requires.

In determining whether to disclose testimony within the judicial proceeding exception, courts balance the policy of secrecy against the need for disclosure. See, e.g., Dennis v. United States, 384 U.S. 855, 871-72 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399-400 (1959); United States v. Proctor & Gamble, 356 U.S. 677, 683 (1958). Bullock, in using the phrases "interests of justice" and "public interest" interchangeably, shifts the focus of the test from a proceeding's interest in justice to the general public interest and thereby facilitates the use of a public interest test removed from the judicial proceeding exception. Thus, in removing the public interest limitation from the judicial proceeding context and applying it as a grant of power, Bullock seems to lend support to Biaggi. Bullock's value as precedent is limited, however, because Biaggi itself distinguished that case as a deviation from Rule 6(e) and the case law. See 478 F.2d at 492.

28. The court in Biaggi held that a proceeding instituted solely for the purpose of accomplishing disclosure of grand jury testimony is not a judicial proceeding within the meaning of the federal rule. The court, distinguishing Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958), aff'd 152 F. Supp. 403 (S.D.N.Y. 1957), also refused to apply the quasi-judicial analysis to the Biaggi facts. 478 F.2d at 492 n.7; see notes 24 & 27 supra. Thus Biaggi does not come within the judicial proceeding exception. The permitted disclosure to "the attorneys for the government for use in performance of their duties" also is clearly inapplicable. This exception "does not confer a license to broadcast a transcript of grand jury proceedings to the world, and the United States Attorney asserted no such license here." 478 F.2d at 492. Because Biaggi was the subject of no indictment, the second exception is similarly not applicable. Id.

29. "Waiver" is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also R. Bowers, THE LAW OF WAIVER 1-2 (1914). In moving for full, unredacted disclosure, Biaggi manifested the requisite knowledge and intent for the application of waiver. Any statutory provision intended for the benefit of an individual may be waived. Brooklyn Savings
law support for doing so is tenuous. Bullock does lend some support to the doctrine’s application by assuming, without deciding, that a witness can voluntarily consent to disclosure of grand jury minutes. Nevertheless, waiver is inoperative if it transgresses public policy.
and in expressly providing for waiver of other criminal rules, but omit-
ting reference to waiver in Rule 6(e), the Federal Rules, strictly
construed, manifest a policy of grand jury secrecy limited to the three
recognized exceptions. Thus the applicability of the waiver doctrine
to Rule 6(e) may be questioned.

The effect of the principal case, if limited to its application of the
waiver doctrine and subsequent disclosure of redacted transcripts, is
minimal. The court adds waiver as a fourth exception to Rule 6(e),
but limits the application of the doctrine by requiring governmental
consent and a judicial determination that disclosure is in the public
interest, which in effect provides a court with discretion to reject any
attempted waiver. Furthermore, disclosures that are granted are sub-
ject to immediate review for abuse of discretion. Since the Biaggi
court ordered disclosure of only a redacted transcript, the rights of per-
sons mentioned in grand jury testimony remain protected. Nor will
the disclosure inhibit witnesses in future cases from speaking freely,
since disclosure of the transcript is authorized only if the witness him-
self seeks disclosure.

(1944); Coppell v. Hall, 74 U.S. (7 Wall.) 542, 558 (1868); Millmaster Int'l, Inc. v.
United States, 427 F.2d 811, 814 (C.C.P.A. 1970); In re International Match Corp.,
190 F.2d 458, 467 (2d Cir. 1951) (dissenting opinion).

and Fed. R. Crim. P. 23(a). See also Fed. R. Crim. P. 23(b) (consent to jury of
less than twelve); Fed. R. Crim. P. 42(b) (criminal contempt defendant may consent
to trial or hearing with judge he criticized); Fed. R. Crim. P. 44 (defendant may elect
to proceed without counsel); cf. Fed. R. Crim. P. 51; Fed. R. Crim. P. 43; Fed. R.
Crim. P. 52(b).

Ironically, although the Biaggi court created a fourth exception by applying
waiver, that court stated early in its opinion that "rule 6(e) provides for three, and
only three, exceptions to the rule of secrecy." 478 F.2d at 492.

Fed. R. Crim. P. 2 states that the Federal Rules "shall be construed to secure
. . . fairness in administration." Disclosure beyond the purview of Rule 6(e), in view
of the liberal construction provision of Rule 2, is justified in the Biaggi opinion by judi-
cially recognizing that public policy prevents candidates for public office from using
the judicial process to create false impressions. 478 F.2d at 494 (2d Cir. 1973) (sup-
plemental opinion).

The circuit court reviewed the district court's denial of Biaggi's motions two
days later. See 478 F.2d at 491. Expedited appeals reflect the irreparable nature of
injuries that may result from disclosure of grand jury testimony.

See note 29 supra.

The Supreme Court has stated, "The grand jury as a public institution serving
the community might suffer if those testifying today knew that the secrecy of their tes-
timony would be lifted tomorrow." United States v. Proctor & Gamble Co., 356 U.S.
Conversely, the value of *Biaggi* as precedent to other petitioners seeking disclosure of grand jury testimony is substantial, since the holding, broadly interpreted, authorizes disclosure beyond the purview of Rule 6(e). Specifically, the court removed the public interest limitation from the judicial proceeding context and applied it as a grant of power, and redefined disclosure as used in Rule 6(e) to mean disclosure to the public.

The public interest in being informed about corruption in public office is obvious. Nevertheless, it is questionable whether the Federal Rules of Criminal Procedure, promulgated to guide federal judges, should be weakened by subsequent case law. Rather, it would seem preferable to amend Rule 6(e) to permit public disclosure of grand jury investigations of alleged corruption by public officials.


39. Thus the *Biaggi* court reached much the same result as did the district court in *Bullock*, despite the *Biaggi* court's explicit rejection of the *Bullock* analysis. See note 27 supra.

40. This writer was unable to find any previous court that disclosed grand jury transcripts to the public.

41. *CaL. PEnAL CODE* § 939.1 (Deering 1971) provides:

If the court, or the judge thereof, finds that the subject matter of the investigation affects the general public welfare, involving the alleged corruption, misfeasance, of malfeasance in office or dereliction of duty of public officials or employees of any person allegedly acting in conjunction or conspiracy with such officials or employees in such alleged acts, the court or judge may make an order directing the grand jury to conduct its investigation in a session or sessions open to the public.

It is questionable, however, whether open grand jury sessions are feasible. At the federal level, for example, the alleged attempt to use federal investigative bodies, e.g., the Internal Revenue Service, against individuals on “political enemy” lists sufficiently demonstrates the potential for misuse of the grand jury by public officials. Open grand jury sessions could destroy political careers without justification upon the order of the President or any member of the Department of Justice with authority to order a grand jury investigation. Disclosure of grand jury transcripts subsequent to investigations conducted pursuant to Rule 6(e), in cases involving alleged corruption by public officials, would protect both the innocent public official and the public's right to know.