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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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> The United States initially

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1. *N.Y. Times*, Apr. 18, 1973, at 1, col. 1.

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. See 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,<sup>6</sup> and additional justifications for the rule soon developed.<sup>7</sup> One court rejected claims that the rule violated the first, fifth, and sixth amend-

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ted a felony in itself. 4 W. BLACKSTONE, COMMENTARIES \*126; 1 J. CHITTY, THE CRIMINAL LAW 317 (5th Am. ed. 1847); 2 M. HALE, PLEAS OF THE CROWN 161 (1st Am. ed. 1847). For a concise discussion of the history of the grand jury in England, see 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 321-27 (3d ed. 1922).

6. The fifth amendment grand jury guarantee reflects this fear of oppression. See *Ex parte Bain*, 121 U.S. 1, 10-11 (1885); Burnstein, *Grand Jury Secrecy*, 22 LAW IN TRANSITION 93, 94 (1962). U.S. CONST. amend. V provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." This provision of the fifth amendment is not a limitation upon the states. *Hurtado v. California*, 110 U.S. 516 (1884); see *Lem Woon v. Oregon*, 229 U.S. 586 (1912). Nevertheless, most state constitutions provide for grand jury indictment. See, e.g., COLO. CONST. art. II, § 23; FLA. CONST. art. V, § 9. But in a majority of states indictment is an alternative to the filing of an information. See *Barber v. State*, 429 F.2d 20 (8th Cir. 1970) (upholding Arkansas practice of filing an information without preliminary hearing or grand jury indictment). State statutory safeguards of the secrecy rule vary substantially. Compare DEL. SUPER. CT. (CRIM.) R. 6(e) (identical to FED. R. CRIM. P. 6(e)), with N.H. REV. STAT. ANN. § 600:3 (1955) (requiring grand jurors to take oath of secrecy) and TENN. CODE ANN. § 40-1612 (1955) (prohibiting disclosure of grand jury proceedings except for impeachment of trial witness or upon charge of perjury against grand jury witness).

7. *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D. Md. 1931), summarized the reasons justifying the rule of secrecy as follows:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to ensure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation . . . .

See also *Schmidt v. United States*, 115 F.2d 394, 396-97 (6th Cir. 1940); *Goodman v. United States*, 108 F.2d 516, 519 (9th Cir. 1939); *In re William Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 467-68 (E.D. Pa. 1971); Burnstein, *supra* note 6, at 95. The *Biaggi* court specified the interests of a witness that may inhibit free disclosure of testimony:

[T]he interest[s] of a witness [are] against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant or where he may have been subjected to prosecutorial brow-beating without the protection of counsel; . . . protection of witnesses against reprisal . . . .

478 F.2d at 491. *Biaggi* also considers crucial "the similar interests of other persons who may have been unfavorably mentioned by grand jury witnesses or in questions of the prosecutor." *Id.* For a discussion of the historical roots and contemporary validity of these reasons, see Calkins, *supra* note 5; Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962).

ments.<sup>8</sup> In applying the secrecy rule, the courts admitted stenographers<sup>9</sup> and prosecutors<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> The courts possessed the discretionary power to impose oaths of secrecy upon both grand jurors<sup>13</sup> and witnesses,<sup>14</sup> and to hold violators in contempt of court.<sup>15</sup> The court could relax the secrecy requirement only in ex-

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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:

[I]f 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).

14. *Goodman v. United States*, 108 F.2d 516, 520 (9th Cir. 1939) (dictum). Although not required by act of Congress, in 1943 approximately thirty-three of the eighty-five federal district courts required grand jury witnesses to take oaths of secrecy. *FED. R. CRIM. P.*, Note to Rule 6(e) (Prelim. Draft, 1943).

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

tremely limited circumstances.<sup>16</sup>

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

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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* [https://openscholarship.wustl.edu/law\\_lawreview/vol1974/iss1/12](https://openscholarship.wustl.edu/law_lawreview/vol1974/iss1/12)

surrounds grand jury proceedings.<sup>19</sup> There are, however, three exceptions to the rule<sup>20</sup> 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<sup>21</sup> . . . [2] to the attorneys for the government in the performance of their duties<sup>22</sup> . . .

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National Dairy Prods. Corp. v. United States, 350 F.2d 321, 331 (8th Cir. 1965), *vacated*, 384 U.S. 883 (1966); United States v. Alper, 156 F.2d 222, 226 (2d Cir. 1946); *In re Grand Jury Investigation*, 32 F.R.D. 175, 180 (S.D.N.Y. 1963).

19. The rule itself does not, of course, prevent any witness from verbally divulging his testimony, which no doubt accounts for the appearance in the media of supposedly “secret” information. See *In re Minkoff*, 349 F. Supp. 154, 157 (D.R.I. 1972); *In re Grand Jury Summoned October 12, 1970*, 321 F. Supp. 238, 240 (N.D. Ohio 1970); *In re Russo*, 53 F.R.D. 565, 570 (C.D. Cal.), *aff’d*, 448 F.2d 369 (9th Cir. 1971). Nevertheless, a court does have the power to swear witnesses to secrecy. See notes 14-15 *supra* and accompanying text.

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).

20. See *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973). Within the confines of the rule, disclosure is left to judicial discretion. *E.g.*, *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Alper*, 156 F.2d 222, 226 (2d Cir. 1946); Note, *A Reexamination of the Rule of Secrecy of Grand Jury Minutes in the Federal Courts*, 34 N.Y.U.L. REV. 606 (1959). See note 27 *infra*.

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).

22. FED. R. CRIM. P. 6(e). Compare FED. R. CRIM. P. 7(e) (Prelim. Draft, 1943) (allowing disclosure to attorney for Government only after disclosure permitted to defendant who successfully shows that grounds may exist for motion to dismiss indictment), with FED. R. CRIM. P. 6(e) and FED. R. CRIM. P. 6(e) (2d Prelim. Draft, 1944). “Attorneys for the government,” as the phrase is used in Rule 6(e), means the Attorney General, United States Attorneys, and their authorized assistants. *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962), and *In re William Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971), assert that those persons

and [3] when so directed by the court preliminarily to or in connection with a judicial proceeding."<sup>23</sup> The definition of "judicial proceed-

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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).

The limited definition of "attorneys for the government" originally precluded disclosure to Government agencies. *See In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962) (denying disclosure to Federal Trade Commission); *United States v. General Elec. Co.*, 209 F. Supp. 197 (E.D. Pa. 1962) (denying disclosure to attorneys for Tennessee Valley Authority). The current trend, however, is to extend the exception to include Government personnel necessary to assist those enumerated in Rule 54(c). *See In re William Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971) (allowing disclosure to Internal Revenue Service agents working under aegis of United States Attorney's Office); *United States v. Zirpolo*, 288 F. Supp. 993 (D.N.J. 1968) (upholding disclosure of documents to Federal Bureau of Investigation agents by the grand jury); *Comm. on Rules of Practice and Procedure, Proposed Amendments to the Federal Rules of Criminal Procedure*, 476 F.2d No. 2, 1-2 (June 18, 1973) (advance sheet). As a limitation, a good faith requirement is imposed upon Government agencies to ensure that their assistance is not merely a subterfuge to gather otherwise unobtainable evidence. *See In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956); *United States v. Doe*, 341 F. Supp. 1350 (S.D.N.Y. 1972); *In re William Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971); *Comm. on Rules of Practice and Procedure, Proposed Amendments to the Federal Rules of Criminal Procedure*, 476 F.2d No. 2, 1-3 (June 18, 1973) (advance sheet).

23. FED. R. CRIM. P. 6(e). The "judicial proceeding" exception provides for disclosure of grand jury transcripts in criminal cases. *E.g.*, *Dennis v. United States*, 384 U.S. 855 (1966); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Generally, pretrial disclosure for purposes of trial preparation is denied. *See, e.g.*, *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958); *United States v. Brothman*, 93 F. Supp. 368 (S.D.N.Y. 1950). *But see* *United States v. Wortman*, 26 F.R.D. 183 (E.D. Ill. 1960), *rev'd on other grounds*, 326 F.2d 717 (7th Cir. 1964). A defendant indicted for making perjurious statements before a grand jury, however, has a right to inspect his own grand jury testimony. *E.g.*, *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954); *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951). For a discussion of the rule of secrecy as it relates to defending against a charge of perjury, see *Calkins, supra* note 5, at 470-71. Disclosure in some civil antitrust cases also is permitted within this exception. *E.g.*, *Allis-Chalmers Mfg. Co. v. City of Fort Pierce*, 323 F.2d 233 (5th Cir. 1963); *United States v. General Elec. Co.*, 209 F. Supp. 197 (E.D. Pa. 1962). *But see* *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958). In addition, the judicial proceeding exception allows disclosure to other plaintiffs in antitrust treble damage actions. *E.g.*, *Allis-Chalmers Mfg. Co. v. City of Fort Pierce*, 323 F.2d 233 (5th Cir. 1963); *Consolidated Edison Co. v. Allis-Chalmers Mfg. Co.*, 217 F. Supp. 36 (S.D.N.Y. 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 the jury, 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.<sup>24</sup>

Ordinarily, disclosure is permitted only within one of the three exceptions.<sup>25</sup> In *In re Bullock*,<sup>26</sup> 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

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18 U.S.C. § 3500(e)(3) (Supp. II, 1972), amending 18 U.S.C. § 3500 (1970). Case law prior to the adoption of the Jencks Act amendment reflected a liberal trend in granting access to grand jury testimony. In *Jencks v. United States*, 353 U.S. 657 (1957), the Supreme Court established that a criminal defendant as a matter of right could inspect written reports of Government trial witnesses' statements given to Government agents. The Third Circuit, in *United States v. Rosenberg*, 245 F.2d 870 (3d Cir. 1957), interpreted *Jencks* as guaranteeing a criminal defendant the right to inspect the grand jury testimony of a trial witness. In response to *Rosenberg*, Congress passed the Jencks Act, which permitted discovery of a trial witness' signed statements and recordings or transcripts of statements made to Government agents, but did not provide for discovery of the testimony of a grand jury witness. See 18 U.S.C. § 3500(e)(2) (1970, Supp. II, 1972); Comment, *The Impact of Jencks v. United States and Subsequent Legislation on the Secrecy of Grand Jury Minutes*, 27 *FORDHAM L. REV.* 244 (1958). In *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958), the Supreme Court established that the "good cause" requirement of *FED. R. CRIM. P.* 34, which is satisfied by a showing of particularized need, was the requirement for discovery of grand jury testimony under Rule 6(e). For example, the use of grand jury transcripts to impeach a witness at trial or to refresh a witness' recollection constituted particularized need. See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940). *But cf.* *Putnum v. United States*, 162 U.S. 687, 694-95 (1896). The burden of showing particularized need was on the party seeking disclosure. *Dennis v. United States*, 384 U.S. 855 (1966); *United States v. Killian*, 275 F.2d 561 (7th Cir. 1960); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 217 F. Supp. 36 (S.D.N.Y. 1963). *But cf.* *United States v. Zborowsky*, 271 F.2d 661 (2d Cir. 1959) (dictum) (burden upon Government to establish no particularized need). *Pittsburgh Plate Glass Co. v. United States*, *supra*, which held that particularized need under Civil Rule 34 governed the court's discretion under Criminal Rule 6(e) in criminal cases, significantly weakened the distinction between disclosure of grand jury testimony in criminal and civil cases. See *Sherry*, *supra* note 7, at 673-74. The Second Circuit prospectively abolished the particularized need requirement in criminal cases in *United States v. Youngblood*, 379 F.2d 365 (2d Cir. 1967). For a discussion of that case and a defense of the liberal Second Circuit position, see 81 *HARV. L. REV.* 712 (1968). This liberal trend culminated in the amendment to the Jencks Act, 18 U.S.C. § 3500(e)(3) (Supp. II, 1972), amending 18 U.S.C. § 3500 (1970). For a detailed discussion of the *Jencks* decision and its effects, see Comment, *The Jencks Legislation: Problems in Prospect*, 67 *YALE L.J.* 674 (1958).

24. *Doe v. Rosenberry*, 152 F. Supp. 403, 406 (S.D.N.Y. 1957), held the investigations of the Grievance Committee of the Association of the Bar of the City of New York to be "quasi-judicial" and preliminary to a judicial proceeding within the meaning of Rule 6(e). See *In re Grand Jury Transcripts*, 309 F. Supp. 1050 (S.D. Ohio 1970).

25. *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973).

26. *In re Bullock*, 102 F. Supp. 639 (D.D.C. 1952).

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

*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.<sup>28</sup> In creating this additional exception, the Second Circuit applied the common law doctrine of waiver to the Federal Rules of Criminal Procedure,<sup>29</sup> although case

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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'g* 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 assert[ed] 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.<sup>30</sup> *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.<sup>31</sup> Nevertheless, waiver is inoperative if it transgresses public policy,<sup>32</sup>

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Bank v. O'Neil, 324 U.S. 697, 704-05 (1944) (Fair Labor Standards Act liquidated damages provision not waivable because not solely for benefit of individual); see *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872); *Millmaster Int'l, Inc. v. United States*, 427 F.2d 811, 814 (C.C.P.A. 1970); cf. R. BOWERS, *supra* at 390. After trial, or if no indictment is returned, the secrecy requirement of Rule 6(e) is solely for the benefit of a witness. Prevention of escape, protection against subornation of perjury, and protection of the innocent accused no longer are necessary after the grand jury's final dismissal. See *Metzler v. United States*, 64 F.2d 203, 206 (9th Cir. 1933); *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284-85 (E.D. Pa. 1933); Comment, *supra* note 5, at 310. After trial, tampering with witnesses is not a valid concern. In view of the narrow disclosures by the courts, no other person need fear disclosure of the testimony of a witness. *Dennis v. United States*, 384 U.S. 855, 869 (1966), quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958), states that "when disclosure is permitted, it is to be done 'discreetly and limitedly.'" Redaction in *Biaggi* manifests adherence to this policy.

30. The dissent stated that no statutory or case law support existed for the majority position. 478 F.2d at 494. Two cases, however, seem to apply the waiver doctrine to Rule 6(e). *United States v. Carter Prods., Inc.*, 27 F.R.D. 243, 246 (S.D.N.Y. 1961), states that "Grand Jury secrecy may be waived by the Government." But *Carter*, ruling on motions for interrogatories to determine if the Government improperly used criminal procedures to elicit otherwise unobtainable evidence for a civil case, is squarely within the judicial proceeding exception. *Carter's* statement is based upon the principle that a party may not profit from his own wrongdoing. *Carter* relies upon *United States v. Byoir*, 58 F. Supp. 273 (N.D. Tex.), *aff'd*, 147 F.2d 336 (5th Cir. 1945), which held that Government disclosures of grand jury testimony in violation of the secrecy requirement precludes denial of defendant's right to determine whether the disclosure is accurate. *Carter* also cites *United States v. Proctor & Gamble Co.*, 174 F. Supp. 233 (D.N.J. 1959), *on remand from* 356 U.S. 677 (1958), and *United States v. Ben Grunstein & Sons*, 137 F. Supp. 197 (D.N.H. 1955), and asserts that the Government waives the secrecy requirement by referring to and employing grand jury testimony in subsequent proceedings. Thus, a defendant has a right to obtain copies of the grand jury testimony, to the extent that it was referred to or employed by the Government. Aware of the possibility of discrepancies between references to the transcript by the Government and statements actually made before the grand jury, the courts merely were ensuring that no wrongdoing would profit the Government. Thus *Carter*, *Byoir*, *Proctor & Gamble*, and *Ben Grunstein* are consistent with FED. R. CRIM. P. 2. See note 35 *infra*. Similarly, *United States v. Wortman*, 26 F.R.D. 183 (E.D. Ill. 1960), *rev'd on other grounds*, 326 F.2d 717 (7th Cir. 1964), denying a motion to discover grand jury testimony, does not use the term "waiver" to mean the common law doctrine of waiver, but to refer to the court's discretion to disclose under the judicial proceeding exception. Thus, neither *Carter* nor *Wortman* uses the term "waiver" in its technical legal sense.

31. *In re Bullock*, 103 F. Supp. 639, 641 (D.D.C. 1952).

32. Specifically, waiver is inoperative if it transgresses public policy as manifested in federal statutes or rules. Cf. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704-05

and in expressly providing for waiver of other criminal rules, but omitting reference to waiver in Rule 6(e),<sup>33</sup> the Federal Rules, strictly construed, manifest a policy of grand jury secrecy limited to the three recognized exceptions.<sup>34</sup> Thus the applicability of the waiver doctrine to Rule 6(e) may be questioned.<sup>35</sup>

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 subject to immediate review for abuse of discretion.<sup>36</sup> Since the *Biaggi* court ordered disclosure of only a redacted transcript, the rights of persons mentioned in grand jury testimony remain protected.<sup>37</sup> Nor will the disclosure inhibit witnesses in future cases from speaking freely, since disclosure of the transcript is authorized only if the witness himself seeks disclosure.<sup>38</sup>

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(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).

33. *Contrast* FED. R. CRIM. P. 6(e) to FED. R. CRIM. P. 5(c), FED. R. CRIM. P. 6(b)(2), FED. R. CRIM. P. 7(b), FED. R. CRIM. P. 12(b)(2), FED. R. CRIM. P. 20, 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).

34. 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.

35. 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 judicially 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) (supplemental opinion).

36. 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.

37. See note 29 *supra*.

38. 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 testimony 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,<sup>39</sup> and redefined disclosure as used in Rule 6(e) to mean disclosure to the public.<sup>40</sup>

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.<sup>41</sup>

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677, 682 (1958). See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Amazon Indus. Chem. Co.*, 55 F.2d 254, 261 (D. Md. 1931). This is not a valid reason for non-disclosure. "In revealing damaging evidence before the grand jury, the witness must expect that such evidence will be disclosed at trial." Calkins, *supra* note 5, at 461. See 8 J. WIGMORE, EVIDENCE 736 (McNaughton rev. ed. 1961); 13 VAND. L. REV. 404, 408 n.22 (1959).

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 or 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.