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St. John's Law Review

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Recommended Citation

St. John's Law Review (1973) "Disclosure of Grand Jury Testimony (In re Biaggi)," *St. John's Law Review*: Vol. 48 : No. 2 , Article 25.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss2/25>

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to circumvent the three-judge court statutes by accepting a district court decision which precluded direct review. In contrast, the *Nieves* court followed the statute closely and ordered the special district court convened even though an appeal from the three-judge court would lie directly, as of right, to the Supreme Court.⁴³ The distinction lies in the inviolability of jurisdiction; in *Thoms*, the *district court* was permitted to influence the path of the litigation by the manner in which relief was fashioned, while in *Nieves*, a *party* was not permitted to do so. The lesson is clear: jurisdiction is a prerogative of courts, not litigants.

DISCLOSURE OF GRAND JURY TESTIMONY

In re Biaggi

The role of the grand jury in Anglo-American jurisprudence has been the subject of recent controversy.¹ The secrecy of grand jury testimony has presented the courts with the complex choice of disclosing the minutes or adhering to the long established policy of keeping grand jury testimony secret.² Disclosure of grand jury minutes

⁴³ 477 F.2d 1109. Judge Feinberg stated:

Nevertheless, though adherence to the letter of section 2281 (and judicial gloss thereon) may appear unduly formalized, and though it regrettably adds to the growing Supreme Court caseload, it may also forestall further delay that results from ultimately meaningless efforts, following disposition by a court of appeals, to obtain Supreme Court review. . . .

Id. at 1115.

¹ *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Arrington v. United States*, 350 F. Supp. 710 (E.D. Pa. 1972); *People v. Talham*, 41 App. Div. 2d 354, 342 N.Y.S.2d 921 (3d Dep't 1973).

² The custom of grand jury secrecy became fixed as a legal principle in England in 1681 in the Earl of Shaftesbury's Trial, 8 How. St. Tr. (33 Chars. 2) 759 (1681), when jurors refused to indict the Earl for "High Treason" although the charges had been asserted by the King's Counsel. The jurors demanded, and obtained, the right to interview witnesses in private, and, when they failed to indict, cited only their consciences as their reason for declining to do so. For a historical perspective of grand jury secrecy see Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 JOHN MAR. J. PRAC. & PROC. 18 (1967); Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962).

Even the Supreme Court has stated that the rule of secrecy is "indispensable." *United States v. Johnson*, 319 U.S. 503, 513 (1943). Courts consistently have stated the reasons for which, in their opinion, secrecy exists. Although the attitudes and reasons behind the cloak of secrecy are numerous and diverse, see *Comment, The Discovery and Production of Grand Jury Proceedings*, 19 MD. L. REV. 326 (1959), the following reasons most often have been quoted:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before 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 free disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931). The same reasons for secrecy have been reiterated in cases such as United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958), and United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954).

In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), the Supreme Court stated that "there are occasions when the trial judge may in the exercise of his discretion order the minutes of a grand jury witness produced for use on his cross-examination at trial. . . . [D]isclosure is wholly proper where the ends of justice require it." *Id.* at 400, quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

Although this statement would appear to sanction liberal disclosure of grand jury testimony, the tendency toward the "aura of secrecy" prevailed, inasmuch as the Court also stated that the defendant who seeks disclosure must show that a "particularized need exists for the minutes which outweighs the policy of secrecy." *Id.* Moreover, it must be remembered that this discretion operates within the framework of the federal rules. See note 17 *infra*. The various circuits attempted to follow the ruling of *Pittsburgh Plate Glass*, but there certainly was no unanimity as to what the case signified. Some circuits, particularly the Second, felt that the case stood for the proposition that the testimony be disclosed, see, e.g., *DeBinder v. United States*, 292 F.2d 737 (D.C. Cir. 1961); *United States v. Giampa*, 290 F.2d 83 (2d Cir. 1961); *United States v. Hernandez*, 282 F.2d 71 (2d Cir. 1960); *United States v. McKeever*, 271 F.2d 669 (2d Cir. 1959). Other circuits determined that the case was authority for denying access to the testimony, see, e.g., *Bary v. United States*, 292 F.2d 53 (10th Cir. 1961); *United States v. Coduto*, 284 F.2d 464 (7th Cir. 1960); *Travis v. United States*, 269 F.2d 928 (10th Cir. 1959), *rev'd on other grounds*, 364 U.S. 631 (1961). There is one area pertaining to the veil of secrecy where unanimity exists among the circuits. It safely can be said that the disclosure of grand jury testimony is in the discretion of the trial court. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940); *United States v. Bryant*, 364 F.2d 598, 600 (4th Cir. 1966); *United States Indus. Inc. v. United States Dist. Ct.*, 345 F.2d 18, 19 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965); *In re Grand Jury Proceedings*, 309 F.2d 440, 444 (3d Cir. 1962). In *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E.D. Pa. 1933), the court refuted the contentions of some who felt that only after the grand jury has adjourned may the court be allowed to use its discretion in disclosure. The court stated:

The rule of secrecy, it will be noted, was designed for the protection of the witnesses who appear and for the purpose of allowing a wider and freer scope to the grand jury itself, and was never intended as a safeguard for the interests of the accused or of any third person. The fact that the grand jury has adjourned and been discharged has often been considered as one reason for abandoning secrecy as to deliberations. It is, however, not the only circumstance which may move the court, nor is it essential to the exercise of its discretion. It yields to the general consideration whether the ends of justice will be furthered by the disclosure. In every case the court is called upon to balance two policies, the one requiring secrecy, the other disclosure.

Id. at 284-85.

Only under a blatant abuse of discretion will the higher court reverse the trial court's findings. See *Gordan v. United States*, 299 F.2d 117, 119 (D.C. Cir. 1962); *DeBinder v. United States*, 292 F.2d 737, 739 (D.C. Cir. 1961). In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Court said:

Since there is no inexorable rule which under all circumstances entitles the witness and his counsel to see the prior statement made under oath, and since in this case the court itself examined and thus directly controlled the use of the grand jury testimony, we cannot say that the refusal to make it available to counsel for the defense is *per se* reversible error. . . . [T]he selective use of this testimony and the precautions taken by the trial judge make it impossible for us to say that he transcended the limits of sound discretion in permitting it to be used by the government without making it available to the defense.

Id. at 234.

Furthermore, the trial court does not have to choose between full disclosure and no disclosure at all. The court is free to delete any material that it finds irrelevant to the

in the federal courts is governed by court rules. Pursuant to the Federal Rules of Criminal Procedure, disclosure is prohibited subject to three exceptions. First, disclosure may be made to government attorneys to aid them in their duties. Second, "a juror . . . interpreter, stenographer . . . or any typist . . . may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding. . . ." Third, a defendant who shows that grounds may exist warranting a dismissal of an indictment due to events occurring before the grand jury, may request disclosure of the testimony.³

In the much publicized case of *In re Biaggi*,⁴ the Second Circuit circumvented the mandate of the Federal Rules of Criminal Procedure by finding a loosely constructed waiver to justify a district court order requiring disclosure. In the spring of 1973, Congressman Mario Biaggi was involved in a heated primary campaign for the mayoralty of New York City. On April 18, the *New York Times* published a story indicating that Mr. Biaggi had invoked the fifth amendment during questioning before a federal grand jury on October 29 and November 26, 1971.⁵ The charge was vigorously denied by Mr. Biaggi who expressed his intention to move for a three-judge district court examination of his grand jury testimony. Before Mr. Biaggi acted, the United States Attorney filed a motion seeking disclosure of the grand jury testimony of November 26th with names of third persons deleted.⁶ After due deliberation, District Judge Palmieri granted the Government's motion and denied Mr. Biaggi's, thereby requiring disclosure of the redacted testimony of November 26th. The order was stayed⁷ pending a speedy determination on appeal. Mr. Biaggi then committed what later proved to be a fatal blunder: he moved before the district judge for full disclosure of testimony given during both grand jury appearances in order to avoid speculation as to the deleted names. The Government agreed to the release of those portions of the October 29th testimony

purpose for which the party seeking disclosure would put the testimony to use, and which can possibly cause harm to another. *United States Indus. Inc. v. United States Dist. Ct.*, 345 F.2d 18, 22 (9th Cir.), cert. denied, 382 U.S. 814 (1965) (to protect the anonymity of witnesses); *United States v. Scott Paper Co.*, 254 F. Supp. 759, 765 (W.D. Mich. 1966) (to protect the jurors from embarrassment); *United States v. Gruenwald*, 162 F. Supp. 621, 622 (S.D.N.Y. 1958) (where excised portions had no testimonial value).

Recent cases dealing with the problem of disclosure or secrecy include *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1972); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Flanders v. Schoville*, 350 F. Supp. 371 (N.D. Iowa 1972).

³ FED. R. CRIM. P. 6(e).

⁴ 478 F.2d 489 (2d Cir. 1973).

⁵ N.Y. Times, Apr. 18, 1973 at 1, col. 1.

⁶ 478 F.2d at 491.

⁷ *Id.*

necessary to define the context in which the relevant statements were made provided that third parties remain anonymous. When Mr. Biaggi refused to accede to this condition, Judge Palmieri denied his motion.

The jockeying for position having been completed, *In re Biaggi* reached the Second Circuit. In a masterful example of judicial legerdemain, Judge Friendly, writing for the majority, affirmed the district court decision. The majority opinion began by noting that the secrecy of grand jury proceedings "is older than our nation itself."⁸ According to Chief Judge Friendly, the policy of secrecy was justified by the need to protect the interests of the Government,⁹ the witness before the grand jury,¹⁰ parties unfavorably mentioned,¹¹ and the grand jurors.¹²

Despite the importance of these interests, secrecy of grand jury minutes is not absolute. Disclosure of grand jury testimony is governed by rule 6(e) of the Federal Rules of Criminal Procedure.¹³ Judge Friendly discounted the first and third exceptions enunciated therein as manifestly inapplicable¹⁴ and focused on the second which permits disclosure "by the court preliminarily to or in connection with a judicial proceeding."¹⁵ This exception balances the interests of secrecy against those of fairness in judicial proceedings. However, it was concluded that since no judicial proceeding was involved this exception was also inapplicable.¹⁶

⁸ *Id.*, quoting *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959).

⁹ The interest of the government sought to be safeguarded is that of preventing "disclosure of its investigation of crime which may forewarn the intended objects of its inquiry or inhibit future witnesses from speaking freely. . . ." 478 F.2d at 491.

¹⁰ "The interest of a witness [is] 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 browbeating without the protection of counsel. . . ." *Id.* Cf. Jencks Act, 18 U.S.C. § 3500 (1948), which has been amended to include statements made by Government witnesses before a grand jury in a criminal prosecution.

¹¹ The interest of those unfavorably mentioned is similar to the interest of witnesses. See note 10 *supra*.

¹² 478 F.2d at 492. See note 2 *supra*.

¹³ Rule 6(e) reads as follows:

Secrecy of Proceedings and Disclosure. 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 the use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before a 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. . . .

¹⁴ 478 F.2d at 492.

¹⁵ FED. R. CRIM. P. 6(e).

¹⁶ [O]bviously the permission to disclose for use in connection with 'a judicial proceeding' does not encompass a proceeding instituted solely for the purpose of accomplishing disclosure.

478 F.2d at 492.

At this point, the inquiry should have terminated.¹⁷ However, undaunted by the mandate of the Federal Rules of Criminal Procedure, the Second Circuit embarked on an expedition in search of an excuse for the limited disclosure approved by the court below. After careful scrutiny of the interests to which the secrecy rule was directed, Judge Friendly concluded that each of the parties affected had waived its protection or would not be prejudiced by the district court's order. Notwithstanding his former motion for a review of the minutes by a three-judge panel,¹⁸ appellant Biaggi, as a result of his subsequent request for full disclosure, was deemed to have waived his right to protest publication of the grand jury minutes. The Government also had waived the protection of rule 6(e) "in the clearest terms"¹⁹ when on April 26th the United States Attorney moved for disclosure. Insofar as the rights of the grand jurors to secrecy were concerned, the court concluded that they would not be affected.²⁰ The final interest confronting the court at this point was that of those unfavorably mentioned in grand jury proceedings. The Second Circuit relied on the district judge's order which required that the names of third parties be deleted and its own reading of the minutes in reaching the conclusion that "there is little chance that the questions asked and answers given will provide a context for meaningful inference about the identities of the deleted names."²¹ Having gone beyond the perim-

¹⁷ In stating the scope of the Federal Rules of Criminal Procedure, rule 1 provides that they shall "govern the procedure in the courts of the United States . . . in all criminal proceedings. . . ."

In *United States v. Crolich*, 101 F. Supp. 782 (S.D. Ala. 1952), a case very similar to *Biaggi*, the district court in Alabama denied the motion to release grand jury testimony. In that case, the Government had moved for testimony before the grand jury as to illegal activities and corruption on the part of election officials to be made known to county board officials charged with the duty of appointing election officers in the future. There, just as in *Biaggi*, the public's right to know was balanced against the right of keeping secret a witness' statements. The court said:

Referring to Rule 6(e) . . . it will be seen that the court has no authority to permit or require disclosure of matters occurring before the grand jury except (1) to attorneys for the government; (2) 'preliminarily to or in connection with a judicial proceeding;' or (3) at the request of the defendant upon proper showing.

Id. at 784. Thus, the court found that none of the exceptions of rule 6(e) could be applied and therefore denied the motion for release of the testimony.

Other federal cases have also stood for the proposition that the Federal Rules set the measure of access to grand jury minutes, and, if an exception does not apply, then there may be no disclosure. *See, e.g., In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962); *United States v. Scott Paper Co.*, 254 F. Supp. 759, 763 (W.D. Mich. 1966). *But cf. Doe v. Rosenberry*, 255 F.2d 118, 119 (2d Cir. 1958), where Judge Hand suggested that there may be common law exceptions in addition to those found in rule 6(e).

¹⁸ 478 F.2d at 493.

¹⁹ *Id.*

²⁰ The interests of grand jurors were not affected because "they asked no questions and their names could be redacted if they had." *Id.*

²¹ *Id.*

eter of rule 6(e), and having reconciled the various interests involved, the Second Circuit affirmed the district court and ordered the release of Mr. Biaggi's grand jury testimony "with all names and personal references redacted."²²

The original *Biaggi* decision was somewhat strained because the court stayed the execution of its order pending Mr. Biaggi's application to the Supreme Court. Following the Second Circuit's decision in *Biaggi*, a supplemental opinion was handed down by Judge Friendly. In its supplemental opinion, the court admonished that its decision should "not be taken as demanding, or even authorizing, public disclosure of a witness' grand jury testimony in every case where he seeks this and the Government consents. It rests on *the exercise of a sound discretion under the special circumstances of this case.*"²³

Judge Hays dissented, feeling the court ought not add another exception to the rule of secrecy on its own, that such action amounted to judicial legislation. Because none of the rule 6(e) exceptions to the requirement for secrecy were applicable, Judge Hays contended that there should be no disclosure at all.

It is submitted that neither of the rationales employed withstand analysis. The original decision merits criticism in several respects. The Second Circuit never addressed itself to the fact that Mr. Biaggi's motion for full disclosure was filed only after the lower court had rendered an adverse decision on his first request for a three-judge review of the minutes and after the Second Circuit had extended the stay pending the "speedy determination" of Mr. Biaggi's appeal. Yet, the court based its waiver theory on that motion. Surely Mr. Biaggi and his lawyers could not anticipate the dreadful consequences of that motion. How then could Mr. Biaggi's waiver have been voluntary and intelligent?²⁴ Despite its failure to consider this point, the Second Circuit

²² *Id.*

²³ *Id.* at 494 (emphasis added). Judge Friendly concluded that the public interest mandated disclosure.

²⁴ Judge Friendly stated that Mr. Biaggi waived the protection that secrecy affords those witnesses who appear before a grand jury "by seeking complete disclosure in the form of a motion requesting disclosure of his own testimony for its own sake and not merely as the lesser of evils should release of the redacted minutes be upheld." 478 F.2d at 493. No treatment was given as to whether Mr. Biaggi "knowingly and intelligently waived his privilege."

The Supreme Court has consistently maintained that a waiver of rights must be voluntarily and intelligently made. The high standard of proof needed to support a waiver of rights was defined in *Johnson v. Zerbst*, 304 U.S. 458 (1938). In holding that a defendant had not waived his right to counsel, the Court established guidelines for determining waivers:

It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acqui-

concluded that Mr. Biaggi had waived the protection of federal rule 6(e). Although the supplemental opinion purports to supersede the original decision, it does not expressly vitiate the unwarranted judicial sleight of hand performed in arriving at the latter.

In the supplemental opinion, Judge Friendly failed even colorably to support his conclusion with sound legal reasoning. Instead, he merely revealed the real basis for the decision. Since Mr. Biaggi allegedly had tried to manipulate the judicial process to create a false impression which would benefit his candidacy, the public interest dictated the disclosure of the controversial minutes. In the first opinion no mention of the public interest was made. The majority, in the interim between the two opinions, apparently decided it could substitute the public interest for that of Mr. Biaggi.

Nor was the court concerned whether Mr. Biaggi intentionally had attempted to exploit the judicial process.²⁵ Even if he had sought to manipulate the judicial process, the decision of the court would not have been justified.²⁶ Although the court may have felt it was poetic justice that Mr. Biaggi "got what he asked for" in his second motion, the decision is an unwarranted application of judicial power.

Biaggi may be viewed as an admonition by the Second Circuit to those who would seek to manipulate the judicial process. However, it is also an unfortunate precedent despite Judge Friendly's attempt to limit it to "the special circumstances of this case."²⁷ In the context of a closely-contested political campaign, the potential for influential judicial intrusion is dismaying. The specter of collusion between the United States Attorney and the courts violates all notions of fair play. The *Biaggi* decision, in sanctioning judicial transgression of grand jury secrecy without authority, threatens to open a Pandora's box resulting in abuse of judicial power in the name of the nebulous public interest. The majority should have heeded the strictures of Judge Hays:

essence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of [a] right . . . must depend, in each case, upon the particular facts and circumstances surrounding that case. . . .

304 U.S. at 464, quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) and *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937) (footnotes omitted).

²⁵ After the grand jury testimony was made public, the court admitted that it was "now apparent that Mr. Biaggi's request for a review of his grand jury testimony . . . was framed, *whether wittingly or not*, in such a manner as to create a false impression in light of the publicity that had given rise to it." *Id.* at 494 (emphasis added).

²⁶ Cf. *Bronston v. United States*, 409 U.S. 352, reversing 453 F.2d 555 (2d Cir. 1973), wherein the Court held that a defendant could not be punished for half truths even where he intended the result to be misleading.

²⁷ 473 F.2d at 494 (supplemental opinion).

The law forbids the publication of these Grand Jury minutes. In my opinion the rules of law are a more reliable guide to the administration of justice than the personal views of judges as to what "the public interest" may require.²⁸

²⁸ *Id.* (Hays, J., dissenting).