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Civil Procedure - Disclosure of Minutes When Grand Jury was Used for Purpose of Preparing for Civil Action

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RECENT DECISIONS

CIVIL PROCEDURE — DISCLOSURE OF MINUTES WHEN GRAND JURY WAS USED FOR PURPOSE OF PREPARING FOR CIVIL ACTION — Three weeks after the close of a grand jury investigation of charges of criminal antitrust violations, the Government filed a civil complaint against defendants based upon materials accumulated by the grand jury. Defendants obtained discovery of the grand jury transcript,[1] but the United States Supreme Court overruled,[2] holding that defendants, by merely showing that the Government had not requested an indictment, had not shown "good cause" for discovery under rule 34 of the Federal Rules of Civil Procedure.[3] The Court did indicate that a use by the Government of the grand jury for the sole purpose of preparing for a civil action would result in a subversion of the grand jury process and wholesale discovery of the transcript would be allowed. Defendants then filed interrogatories to determine at what point the Government decided to abandon the criminal action. On defendant's motion for discovery, *held,* motion granted. If the Government decided at some time during the grand jury hearings that it would not seek an indictment and nevertheless continued the proceedings, there was a subversion of the grand jury as the Supreme Court defined it, and the minutes of the proceedings after the Government abandoned the criminal action should be made available for defendant's inspection. *United States v. Proctor & Gamble,* 174 F. Supp. 233 (D.C.N.J. 1959).

The policy of affording utmost secrecy to the hearings and deliberations of the grand jury has long been recognized.[4] One principal exception has allowed the prosecuting government to be present at the hearings and to retain a copy of the documents and the minutes of the proceedings.[5] A defendant in a criminal case, however, has been denied access to grand jury minutes except in those cases where the courts have determined that justice

[1] United States v. Proctor & Gamble, 19 F.R.D. 122 (D.C. N.J. 1956).

[2] United States v. Proctor & Gamble, 356 U.S. 677 (1958).

[3] FED. R. CIV. P. 34: "Upon motion of any party showing good cause therefor . . . the court in which an action is pending may (1) order any party to produce . . . any designated documents, papers, books, . . . or tangible things, not privileged, which constitute or contain evidence relating to any matters within the scope of the examination . . . and which are in his possession, custody, or control. . . ."

[4] See, *e.g.,* Collins v. State, 200 Ark. 1027, 1042, 143 S.W.2d 1, 8 (1940); Coblentz v. State, 164 Md. 558, 566, 166 Atl. 45, 49 (1933); United States v. Garrson, 291 Fed. 646 (S.D. N.Y. 1923); FED. R. CRIM. P. 6(e); Annot., 127 A.L.R. 272 (1940). For a discussion of the historical development of the rule of secrecy of grand jury proceedings, see WIGMORE, EVIDENCE §2360 (3d ed. 1940).

[5] United States v. United States District Court, 238 F.2d 713 (4th Cir. 1956), *cert. denied,* 352 U.S. 981 (1957). See State v. Kemp, 126 Conn. 60, 68, 9 A.2d 63, 68 (1939). This exception is written into FED. R. CRIM. P. 6(e): "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys of the government for use in the performance of their duties."

requires disclosure.[6] Usually the defendant's request has been denied.[7] As a result, the general thrust of criminal procedure has kept defendants from receiving a pre-trial view of evidence to be used against them.[8] This attitude is based upon a fear that the accused will explore the Government's evidence and attempt to fabricate testimony, suborn perjury, and tamper with witnesses.[9] On the other hand, the Federal Rules of Civil Procedure do not reflect this fear of defendants' subterfuge, but rather encourage the exchange of information between parties.[10] Indeed, in civil antitrust actions, deposition hearings must be open to the public.[11] The Supreme Court's earlier ruling in the controversy involved in the principal case gave priority to the policy of secrecy over the more liberal attitude of the Federal Rules of Civil Procedure as expressed in the discovery device of rule 34.[12] That holding is open to criticism, since the policy supporting secrecy loses much of its meaning after the grand jury has terminated its hearings and disposed of the case.[13] Basically, the secrecy of the grand jury was designed to protect defendants, witnesses, jurors,[14] and the scheme of the adminis-

6 See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940). The Supreme Court has refused to extend the rationale of Jencks v. United States, 353 U.S. 657 (1957), to the disclosure of grand jury minutes. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959). See *The Supreme Court, 1958 Term,* 73 HARV. L. REV. 84, 183 (1959); 13 VAND. L. REV. 404 (1959).

7 *E.g.,* United States v. Rosenberg, 245 F.2d 870 (3d Cir. 1957) *aff'd,* 360 U.S. 367 (1959); see Orfield, *The Federal Grand Jury,* 22 F.R.D. 343, 454 (1958), and cases collected therein. Two principal areas where defendants have been allowed access to the grand jury minutes are where minutes are sought to be used (1) for impeachment of a government witness during the trial, United States v. Alper, 156 F.2d 222, 226 (2d Cir. 1946); and (2) for examination of defendant's own testimony before the grand jury when he is accused of making perjurious statements at that time, United States v. Rose, 215 F.2d 617 (3d Cir. 1954).

8 See generally Comment, 60 YALE L.J. 626 (1951). Attempts by the defendant to obtain the grand jury minutes through discovery devices available in the Federal Rules of Criminal Procedure have been likewise unsuccessful, United States v. Mesarosh, 13 F.R.D. 180 (W.D. Pa. 1952); United States v. Stein, 18 F.R.D. 17 (S.D.N.Y. 1955).

9 See United States v. Ben Grunstein and Sons, 137 F. Supp. 197, 201 (D.C. N.J. 1955).

10 See note 3 *supra.* "The various instruments of discovery now serve . . . as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. . . . The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." Hickman v. Taylor, 329 U.S. 495, 501 (1947); see generally Pike & Willis, *The New Federal Deposition-Discovery Procedure,* 38 COLUM. L. REV. 1179, 1436 (1938).

11 37 Stat. 731 (1913), 15 U.S.C. §30 (1958).

12 For a criticism of this holding, see Note, 34 N.Y.U.L. REV. 606, 614 (1959).

13 The traditional policy reasons for the rule of secrecy of the grand jury are listed in United States v. Rose, *supra* note 7, at 628: "(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 grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there is no probability of guilt."

14 See WIGMORE, EVIDENCE §2360 (3d ed. 1940).

tration of justice.[15] Certainly defendants did not need protection in the principal case, for they were requesting disclosure. Witnesses cannot expect protection from the disclosure of their testimony since they might have been forced to reveal the same information in a criminal trial if the grand jury had returned an indictment.[16] The protection needed for the jurors at this point is limited to a freedom from disclosure of their votes and expressions of opinions, but these votes and opinions were not the subject of discovery in the principal case.[17] And, as noted earlier, liberal discovery is consistent with the prevailing notions concerning the administration of justice in civil cases in the federal courts.[18] Where the traditional reasons for grand jury secrecy are not applicable, it is difficult to justify the tactical advantage received by the Government when such secrecy is, nevertheless, afforded. The Government receives the benefits of the broad investigative powers of the grand jury without having to make known the weaknesses uncovered.[19] A more objectionable extension of the rationale of the Supreme Court may exist where administrative agencies are allowed access to grand jury minutes.[20] It would be unfair to deny respondents the right to examine the minutes in such cases. Since the agency is usually entrusted with the adjudication as well as the prosecution of a case, it could be considering evidence that respondent could not combat.[21]

Although the same policy considerations which were presented to the Supreme Court were presented in the present motion,[22] the holding and dictum of the Supreme Court require a distinction to be made between information obtained through the grand jury by intentional subversion and that received pursuant to an honest attempt to seek an indictment.[23] Therefore, the court in the principal case was required to make a somewhat artificial distinction. It is clear that if the Government calls a grand jury for the sole purpose of gathering evidence for a civil case, the secrecy of

15 "If defendants were entitled to inspection of grand jury minutes in all cases without regard to the merit of their requests the resulting delay in disposing of cases would add appreciably to the burden of administering criminal justice in the Federal Courts," United States v. Geller, 154 F. Supp. 727, 729 n.1 (S.D.N.Y. 1957). See also Judge Learned Hand's discussion in United States v. Garrson, *supra* note 4.

16 See WIGMORE, EVIDENCE §2362 (3d ed. 1940); *but see* Note, 59 COLUM. L. REV. 1089, 1092 (1959).

17 See WIGMORE, EVIDENCE §2361 (3d ed. 1940).

18 See note 10 *supra*.

19 For a description of the investigative powers of the grand jury, see generally Dession & Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1932). The Government's use is inhibited by the defendant's right to use grand jury transcript for impeachment purposes. See note 7 *supra*.

20 *Compare In re* Bullock, 103 F. Supp. 639 (D. D.C. 1952), *and* Application of Scro, 108 N.Y.S.2d 305 (Kings County Ct. 1951), *with* Application of Bar Ass'n of Erie County, 47 N.Y.S.2d 213 (Erie County Ct. 1944).

21 The legality of such procedure is questionable, but it is very difficult to restrain an agency from such activity. See COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 169 (1951).

22 See PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 122 (1953); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 168 (1947).

23 United States v. Proctor & Gamble, *supra* note 3.

the grand jury should be discarded; otherwise the grand jury could become a part of the structure of our civil procedure through the tactics of the Department of Justice.[24] But regardless of the Government's motives in using a grand jury, the effect on the litigation is the same.[25] Since the court in the principal case was limited by the holding of the Supreme Court, the result is desirable in that it attempts to restore some of the liberality of the Civil Rules. But so long as the rule of secrecy is followed in civil cases in which the Government is a litigant, a portion of the philosophy of the Federal Rules of Civil Procedure will be impaired.[26]

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[24] These tactics were approved by Honorable Stanley N. Barnes, then Assistant Attorney General of the United States in charge of the antitrust division, before the Special Antitrust Subcommittee of the House Judiciary Committee, May 12, 1955, BUREAU OF NATIONAL AFFAIRS, REPORT 350.

[25] See Mr. Justice Harlan's dissent in United States v. Proctor & Gamble, *supra* note 2, at 689.

[26] Congress has been considering new procedure which will allow the government pre-complaint discovery in civil antitrust actions. Such a solution should alleviate the problem of the principal case. For a discussion of the competing alternatives, see Perry & Simon, *The Civil Investigative Demand: New Fact-Finding Powers for the Antitrust Division,* 58 MICH. L. REV. 855 (1960).