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The Discovery And Production Of Grand Jury Proceedings - United States v. The Proctor and Gamble Company et al.

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The Discovery And Production Of Grand Jury Proceedings

United States v. The Proctor and Gamble Company et al.[1]

The Supreme Court heard the instant case on appeal by the United States from a ruling of the District Court of New Jersey, dismissing a civil suit by the government under Section 4 of the Sherman Act. In preparing its case, the government had used minutes of a previous grand jury proceeding in which the government had failed in its attempt to secure an indictment against the same defendants for possible violation of anti-trust laws.

Defendants' request for discovery and production of these minutes, on the grounds that they would be prejudiced in the preparation of their defense without them, was granted by the lower Court under the Federal Rules of Civil Procedure.[2] The government had argued for the

[1] 356 U.S. 677 (1958).

[2] 28 U.S.C.A. (1958). Rule 34 provides in part:
"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the Court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control . . . ."

traditional policy of secrecy over grand jury proceedings. The District Court, however, held that defendants had met the requirement of "good cause" and that the "ends of justice" required breaking this seal of secrecy.[3] The District Court, therefore, ordered the government to turn over the minutes in question. The government was adamant in its refusal to obey and filed a motion in the District Court to the effect that if the Court's orders were not obeyed, the case should be dismissed.[4] The District Court entered judgment of dismissal.

On the main issue, the Supreme Court reversed the lower Court, and held that Proctor and Gamble had failed to establish "good cause" as required by Rule 34 and was not entitled to discovery and production of the grand jury minutes.[5] The Court then expounded the broad doctrine that:

> ". . . 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. This 'indispensable secrecy of grand jury proceedings' . . . must not be broken except where there is compelling necessity . . . shown with *particularity.*"[6]

The Court found no such showing in this case.[7] In a separate concurring opinion, Justice Whittaker proposed that grand jury minutes be impounded by the Court when no indictment was voted so that the rule of secrecy would be invoked against the government as well as against the defendant in any subsequent civil proceeding.

Justices Harlan, Frankfurter and Burton dissented, arguing that the real issue was not whether "good cause" under Rule 34 was shown, but rather whether the District Court had abused its discretion in ordering the government

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[3] U. S. v. Proctor and Gamble Company, 19 F.R.D. 122, 125 (1956).

[4] It is noted that the court could dismiss the action on the grounds that its orders were not obeyed under Rule 37 (b) (2) (iv) of the Federal Rules of Civil Procedure, 28 U.S.C.A. (1958).

[5] The Supreme Court had first disposed of Proctor's argument that the appeal could not be maintained because it was solicited by the government. The Court held that when the government proposed dismissal for failure to obey the District Court's order, it had lost the case on its merits and was only seeking expeditious review.

[6] *Supra*, n. 1, 986.

[7] *Supra*, n. 1, 987. The Supreme Court went on to point out that only where it is proven that the grand jury procedure was subverted would there be grounds for wholesale discovery and production of the transcript and in the absence of this, only a limited and discreet lifting of the secrecy would be warranted.

to furnish a transcript of the minutes. The dissent was unwilling to hold that there had been any abuse of discretion.

Historically speaking, secrecy was not a requirement or even a right of the grand jury until late in the 17th Century when in the famous *Lord Shaftesbury* case this ancient English body insisted on hearing witnesses in private in proceedings leading to a refusal to indict the Earl for high treason.[8] From that time on secrecy became established as an important characteristic of the grand jury proceeding, along with the other elements deemed so necessary to the fulfillment of its important role: ". . . freedom from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."[9] This grand jury system was created in the United States Constitution by substantially similar language.[10]

It is plain that this tradition of secrecy became firmly fixed in the developmental years of the grand jury in this country, as shown by the oft-quoted statement of Judge Learned Hand in his reply to a defendant's request for access to grand jury minutes:

> "I am no more disposed to grant it than I was in 1909. U. S. v. Violin, 173 F. 501. It is said to lie in discretion and perhaps it does, but no judge of this court has granted it and I hope none ever will."[11]

Despite this long and strongly supported tradition of secrecy, it became apparent that situations might arise which would necessitate modifying this stand. Hence, under the Federal Rules of Civil Procedure,[12] a party in a civil proceeding may be entitled to discovery and production of the grand jury proceedings upon a showing of "good cause". The Federal Rules of Criminal Procedure[13] con-

[8] Daniel, *Secrecy and the Grand Jury in South Carolina*, 7 S.C.L.Q. 455 (1945).

[9] Costello v. United States, 350 U.S. 359, 362 (1956).

[10] U. S. CONSTITUTION, AMENDMENT 5.

[11] United States v. Garsson, et al., 291 F. 646, 649 (S.D.N.Y. 1923).

[12] *Supra*, n. 2.

[13] 18 U.S.C.A. (1958) Rule 6 (e) provides in part:
"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, interpretor, 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."

tain a similar provision but one which requires a showing that grounds exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

The instances where courts have been called upon in civil proceedings to rule upon the merits of defendant's request for discovery and production of grand jury minutes are rare.[14] However, it has often been ruled upon in criminal proceedings.[15]

In the instant case, the Supreme Court referred to several criminal cases to support its position.[16] In view of this it would seem that, though the fact situations differ and the rules are distinct, the application of these rules for disclosure in civil and criminal cases call forth the same broad requirement of "good cause". And more important, they call forth the same principles and reasons for non-disclosure which must be overcome.[17] Thus, while Judge Leahy feels that reasons for production of the secret jury matter are less cogent in civil proceedings,[18] Judge Hand feels there could not be less reason for their production in criminal cases.[19]

What then can we look for the courts to say about this "good cause", which alone will open the door to grand jury records?

Three general attitudes seem discernible from the cases and opinions surveyed: (1) that the records of grand jury proceedings should never be invaded; (2) that a limited and discreet production is permissible in cases which successfully meet objective standards of "good cause"; (3) that the rules for discovery and production should be more flexibly applied and left wholly to the discretion of the trial judge.

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[14] United States v. General Motors Corporation, 15 F.R.D. 486 (1954) where defendant's request was denied; United States v. Morgan Stanley and Company, 76 F. Supp. 621 (S.D.N.Y. 1948) where Judge Medina in a verbal ruling from the bench also denied defendant's request.

[15] *Ibid.*, 487. Judge Leahy gives a collection of criminal cases in point.

[16] United States v. Johnson, 319 U.S. 503 (1943); Costello v. United States, 350 U.S. 359 (1956). The latter case presents a brief history of the grand jury system.

[17] The reasons behind the tradition of non-disclosure, to be referred to later, are well described in Goodman v. United States, 108 F. 2d 516, 519 (9th Cir. 1939).

[18] *Supra*, n. 4, 488.

[19] *Supra*, n. 11, 649, in which Judge Hand stated:

"While the prosecution is held rigidly to the charge, he (the defendant) need not disclose the barest outline of his defense. He is immune from question or comment on his silence. . . . 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."

The stalwart of the inflexible stand is, as one would expect, Judge Hand, but this same attitude can be fairly detected (though not so boldly stated) as late as 1954, when in *U. S. v. General Motors Corporation*,[20] Judge Leahy stated:

> "Disclosure could seriously impair the grand jury system, the freedom and effectiveness of its inquiry and deliberation. Any precedent that evidence before a grand jury may at some future time be disclosed to probable examination of civil litigants in preparation of the trial of their cause . . . would tend to restrict free function of the grand jury."

The second attitude seems to represent the majority view[21] and is the stand taken by the Supreme Court in the subject case. The only "good cause" for which wholesale discovery and production of grand jury minutes would be warranted, is proof that the criminal procedure was subverted. And for any "discrete and limited" disclosure there must be a compelling necessity shown with particularity.[22] Examples which the Court gives are "to impeach a witness, to refresh his recollection, to test his credibility and the like".[23] Thus, this Court felt that defendant had not shown a particularized need in regard to the grand jury testimony of any one witness. Therefore, the wholesale delivery of the entire transcript ordered by the lower Court without any evidence of subversion was totally unjustified.[24]

In other cases which fall into the group following the view of this case, various phrases have been used to describe what they would accept as "good cause." Thus we find courts using such phrases as "a positive showing or allegation of facts"; [25] and "sufficient reason".[26] In cases where wholesale discovery and production were requested, the courts were precise in calling for clear proof of a subverted proceeding, showing that the jury was improperly constituted, or that there was fraud, misconduct or cor-

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[20] *Supra*, n. 14, 488.

[21] United States v. White, 104 F. Supp. 120 (D.C. N.J. 1952); United States v. Proctor and Gamble Co., 47 F. Supp. 676 (D.C. Mass. 1942); United States v. National Wholesale Druggists' Ass'n., 61 F. Supp. 590 (D.C. N.J. 1945).

[22] *Supra*, n. 1, 684.

[23] 356 U.S. 677, 683; see also United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940).

[24] *Ibid.*, 684.

[25] United States v. Brumfield, 85 F. Supp. 696, 705 (W.D. La. 1949).

[26] United States v. Potts, 57 F. Supp. 206, 207 (M.D. Pa. 1944).

ruption present in the proceedings which violated defendant's constitutional rights.[27] Whatever descriptive words were used, the implication was that the defendant had to do more than merely challenge the legality of the indictment or, as in this case where there was no indictment, show that he needed the information for purposes of thoroughness in preparing his case. It was the belief of the above courts that the secrecy of grand jury hearings, whether viewed in historical perspective, or in the light of current judicial thought, was still fundamental to the proper functioning of that body, and only the most compelling necessity justified disclosure of its proceedings.

The dissent in the instant case (and also the lower Court's opinion) represents the third attitude in respect to the tradition of secrecy.[28] To this group the phrase "good cause" is not a rule which is applied objectively within limits of a "particularized need" and supported by positive facts. It is in the last analysis a vague sort of guide for the use of a trial judge's discretion. This exercise of discretion becomes the main issue in cases where the request for discovery and production of grand jury minutes is granted, and not whether "good cause" has been shown. And the feeling of this group is that such discretion should not be lightly disturbed.

Another proposition advanced by advocates of this more liberal position is that once the grand jury's function has ended, secrecy may be considered less vital.[29] The Court, in *U. S. v. American Medical Association*,[30] held that a jury is not released from its oath by operation of indictment, arrest of accused or expiration of the jury term, and that such release from oath may only come from the Court when justice requires it.

Perhaps the most forceful argument of this dissent was their pointing out of the fundamental unfairness and inequality in allowing the government's attorneys to possess and use the grand jury minutes while denying such use to the defendants. There is a clear implication in their opinion, moreover, that the government's motivations in prosecuting the prior criminal proceedings were not clearly

[27] United States v. Olney, 21 F. Supp. 281 (E.D. N.Y. 1937); United States v. Gouled, 253 F. 242 (S.D. N.Y. 1918).

[28] See also: DiCarlo v. United States, 6 F. 2d 364 (2nd Cir. 1925); Basselman v. United States, 239 F. 82 (2nd Cir. 1917); Felder v. United States, 9 F. 2d 872 (2nd Cir. 1925).

[29] See also: Metzler v. United States, 64 F. 2d 203 (9th Cir. 1933); Atwell v. United States, 162 F. 97 (4th Cir. 1908).

[30] United States v. American Medical Association, 26 F. Supp. 429 (D.C. D.C. 1939).

above reproach,[31] an implication which prompted the majority to state their confidence in the integrity of the prosecution.[32] In the light of these considerations Justice Whittaker's proposal in his concurring opinion would seem to merit further attention. However, such impounding of the grand jury minutes where no indictment is returned would require amending the now existing rules.

Viewing the more modern trend as a whole, it seems safe to conclude that federal courts generally will take a middle-of-the-road policy in the strictness with which they will apply the rules of discovery to the traditionally secret grand jury minutes. That wholesale discovery of the minutes should be granted only upon proof that the proceedings were subverted seems reasonable under the existing rules if the necessary secrecy is to be substantially preserved. The further view, that limited and discreet lifting of the non-disclosure rule is justified only when a showing of "good cause" has been demonstrated by proof of a particular need, is a fair attempt to apply the discovery rules objectively. While it is true that such an approach will sometimes work hardships, it is counter-balanced by the broad scope of the rules of discovery in federal procedure, which offer the defendant many other means of gaining the same information. The logic which dictated the establishment of this tradition of secrecy is based on far more substantial considerations than that of allowing a defendant greater thoroughness in preparing his civil suit.

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[31] *Supra*, n. 1, 690.
[32] *Ibid.*, 684.