

DC Court Wrong On Jan. 6 Grand Jury Evidence Sharing

By **Steven Gordon** (July 30, 2021)

The chief judge for the U.S. District Court for the District of Columbia Circuit recently ruled that the grand jury secrecy rule prohibits the government from using a private contractor, Deloitte Financial Advisory Services LLP, to help it organize and sift through the mountain of evidence accumulated during its criminal investigation of the Jan. 6 breach of the Capitol.



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The court acknowledged that the U.S. Department of Justice "has a genuine need for the highly technical expertise" of the contractor in order to process the evidence efficiently and disclose relevant portions to the defendants in timely fashion.[1] But it concluded, nonetheless, that the grand jury secrecy rule does not permit disclosure in these circumstances.

Although the court's opinion is lengthy and thoughtful, it reaches the wrong conclusion.

To date, the DOJ has charged more than 500 individuals with offenses arising from the events of Jan. 6.[2] The DOJ described its investigation as "the largest in American history, both in terms of the number of defendants prosecuted and the nature and volume of the evidence."

More than 6,000 grand jury subpoenas have been issued. The evidence the DOJ has obtained includes video footage from multiple sources, social media posts, and location history data and cell tower data for thousands of devices present inside the Capitol.

The DOJ told the court that expert assistance from the contractor was vital to its ability to prosecute cases effectively and to ensure that it is able to provide the defendants with all the evidence that is relevant to each of them and may contain exculpatory material.

Grand Jury Secrecy and Its Exceptions

Federal Rule of Criminal Procedure 6(e) governs the secrecy of grand jury proceedings and establishes a general rule prohibiting disclosure of matters occurring before a grand jury. The U.S. Supreme Court has said that the reasons for grand jury secrecy are:

- To prevent the escape of those whose indictment may be contemplated;
- 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;
- To prevent subornation of perjury or tampering with a witness who may testify before the grand jury and later appear at the trial of those indicted by it;

- To encourage free untrammelled disclosure by persons who have information with respect to the commission of crimes; and
- To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation.[3]

But Rule 6(e)(3) lists several exceptions in which disclosure of grand jury materials is permitted. The D.C. Circuit has ruled that these are the only exceptions and that they must be narrowly construed.[4]

The DOJ invoked two of the exceptions here. The first permits disclosure of grand jury materials to other government personnel, so they can assist federal prosecutors. This exception is designed to be utilized by prosecutors without need for court approval, although the prosecutor must notify the court afterward about these disclosures.

The second exception permits a court to authorize disclosure of grand jury material "preliminarily to or in connection with a judicial proceeding." This is the broadest exception to grand jury secrecy.

Parties seeking disclosure under this provision must show the court that the material for which they seek disclosure is needed to avoid a possible injustice in the judicial proceeding, that the need for disclosure is greater than the need for continued secrecy and that their request is structured to cover only the material so needed.[5] This provision requires "a strong showing of particularized need for grand jury materials before any disclosure will be permitted." [6]

This exception is most commonly invoked by lawyers for defendants or witnesses in criminal cases, and by lawyers in civil cases, all of whom may have legitimate needs for information that has been gathered by the grand jury in a criminal investigation. It is seldom used by the government.

The Justice Department's Arguments and the Court's Ruling

The DOJ initially sought authorization to disclose grand jury materials to Deloitte pursuant to the first exception, arguing that the contractor's employees could be considered government personnel when they were performing services under government control. Because the DOJ realized that this rationale was questionable, it sought court approval rather than unilaterally making disclosure to the contractor as the rule permits it to do.

Subsequently, the DOJ invoked the second exception, asking the court to order disclosure preliminarily to or in connection with a judicial proceeding.

The court rejected both arguments. It devoted most of its opinion to explaining why the contractor's employees are not government personnel covered by the first exception. The court's analysis of this issue is thorough and persuasive. But the court erred in holding that the DOJ had not demonstrated a particularized need for the disclosure under the second exception.

The court asserted that "the added inconvenience and administrative burden of the

government segregating, reviewing, and processing grand jury materials internally, without Deloitte's assistance, is not enough to support a finding of particularized need, even if these internal methods might be slower or marginally less accurate than the methods employed by Deloitte." [7]

Although this might result in delaying trials of jailed defendants, or failures to identify and disclose all relevant evidence to some defendants, the court decided that these concerns are outweighed by the need for continued grand jury secrecy.

The court emphasized that the grand jury investigation is ongoing, and that the contractor would receive access to all grand jury materials, including those relating to individuals still under investigation as well as innocent individuals who are caught up in the investigation. Thus, the contractor might discern the scope or direction of the investigation, and would learn the identities of all witnesses who testified before the grand jury.

The court acknowledged that there were safeguards built into the government's contract with the contractor but concluded that they "do not assuage the concern that bulk disclosure to this private entity will undermine the interests of grand jury secrecy, particularly in such a high-profile and historically significant investigation." [8]

The court did not identify any shortcomings in those safeguards, however. Its objection was based on the theoretical risks of disclosure, rather than any practical concerns.

Finally, the court rejected the DOJ's contention that the disclosure could not be structured more narrowly because the very point of using the contractor was to have its help in reviewing all potential discovery materials on a single platform.

The court countered that the blanket nature of the DOJ's request demonstrated the absence of a particularized need. It noted that defendants are routinely denied such broad access to grand jury materials in their own cases and, instead, are required to establish a particularized need for any materials that they seek.

The court found it incongruous that a contractor should gain greater access to grand jury materials in all the Capitol attack cases than any individual defendant would be entitled to receive in his or her own case.

The Court Reached the Wrong Conclusion

The court's analysis misses the jurisprudential forest for the trees. Although the DOJ's sweeping request for disclosure is unprecedented because of the volume of cases and evidence, the substance of the request fits comfortably within the contours of Rule 6(e).

Moreover, the Federal Rules of Criminal Procedure themselves say that they "are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." [9]

The rationales for grand jury secrecy are to protect the efficacy of the grand jury process as a tool for gathering evidence, and to protect the reputations of individuals who are investigated but not charged. It is prosecutors who ordinarily have the most direct stake in preserving grand jury secrecy.

In almost all cases where a court is asked to order disclosure of grand jury materials

"preliminarily to or in connection with a judicial proceeding," another person is seeking the disclosure and the prosecutor is opposing it. It is highly significant that here the request for disclosure is being made by the prosecutors, themselves. Prior decisions involving requests for disclosure made by other parties provide a poor guide in this case.

Disclosure of grand jury materials to a criminal defendant, a witness or a party in another proceeding creates a direct risk to the continued secrecy of those materials because those recipients are not under the control of prosecutors and potentially have an interest in publicly disclosing the materials to further their own interests.

Here, in contrast, the DOJ proposes to make disclosure to its own agent, who is under its control and who shares its interest in preserving grand jury secrecy.

Rule 6(e) explicitly permits the disclosure of grand jury materials to persons who can assist federal prosecutors in performing their duties. It gives prosecutors a blank check to make disclosures, without the need for court approval, to any government personnel — including those of a state, state subdivision, Indian tribe or foreign government — whose assistance they consider necessary.

While the rule requires court approval for disclosures to private persons, a prosecutor's need for assistance remains a strong basis for authorizing such disclosure. Prosecutors would not go to the trouble of seeking court authorization if they could obtain needed assistance from government personnel.

The court here erred in assessing the factors that determine whether a particularized need for disclosure has been established.

First, it incorrectly found that the DOJ's need for disclosure was undercut because the DOJ could use alternative means to comply with its discovery obligations, although they might be slower or less accurate. The court drew a mistaken analogy to decisions denying disclosure of grand jury materials being sought for use in civil cases when the parties have alternative means of obtaining the same information.

Those decisions reflect a justified reluctance by Congress and the courts to permit the investigative powers of federal grand juries to become the handmaiden for discovery in other cases.[10] This concern is inapplicable to situations where federal prosecutors seek disclosure in order to receive assistance in discharging their duties in the very criminal cases that are the subject of the grand jury's investigation.

The court also missed the mark in assessing the risks posed by the requested disclosure. It did not give sufficient weight to the facts that (1) disclosure was being sought by the party with the most direct stake in preserving the efficacy of the ongoing grand jury investigations, and (2) the disclosure would be made to an agent of that party.

As the U.S. District Court for the District of Hawaii pointed out in its 2011 decision in *In re Disclosure of Matters Occurring Before a Grand Jury to the Litigation Technology Service Center*:

Disclosure to [an entity] which merely processes the documents and data and follows all government protocols for security, should not affect witnesses' willingness to come forward to testify, increase the risk of flight by grand jury targets, damage the reputations of those accused, or inject outside interference into the grand jury.[11]

Finally, the court erred in concluding that the blanket nature of the DOJ's request contradicts a particularized need for disclosure. A need for disclosure can be particular even if the proposed disclosure, itself, is broad. It is the need that must be particular, not the amount of grand jury materials at issue or the number of cases.

Here the DOJ clearly has a particular need to comply with its discovery obligations in all the charged cases. The DOJ needs to efficiently, accurately and promptly organize the evidence in the Capitol attack investigation, an enormous undertaking. This need, by its very nature, applies to all the evidence and all the cases.

Nor is it incongruous that a contractor should gain greater access to grand jury materials in these cases than any individual defendant is entitled to receive in his own case. The contractor is not the party seeking disclosure here, nor is it seeking to further its own legal interests. Rather, the DOJ, which already has access to all the grand jury materials, seeks to disclose those materials to its agent so that the agent can assist the DOJ in fulfilling its prosecutorial duties.

Grand jury secrecy is an important but practical doctrine fueled by practical concerns. Unfortunately, the court's construction of Rule 6(e) turns it into a straitjacket that needlessly constrains the ability of the DOJ to process the Capitol attack evidence efficiently and accurately, and to disclose relevant portions to defendants in timely fashion.

This result — which is not compelled by Rule 6(e) — is not in the best interests of either the prosecution or the defendants in these cases. The court's ruling does not secure simplicity in procedure and fairness in administration, nor does it eliminate unjustifiable expense and delay.

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[1] *In re Capitol Breach Grand Jury Investigations Within the District of Columbia*, --- F.R.D. ----, 2021 WL 3021465, at *2 (D.D.C. July 16, 2021).

[2] <https://www.justice.gov/usao-dc/capitol-breach-cases>.

[3] *U.S. v. Proctor & Gamble*, 356 U.S. 677, 681 n.6 (1958).

[4] *McKeever v. Barr*, 920 F.3d 842, 846-47 (D.C. Cir. 2019).

[5] *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

[6] *U.S. v. Sells Eng'g Inc.*, 463 U.S. 418, 443 (1983).

[7] *In re Capitol Breach Grand Jury Investigations Within the District of Columbia*, --- F.R.D. ----, 2021 WL 3021465, at *22.

[8] *Id.* at *24.

[9] Fed.R.Crim.P. 2.

[10] See *Sells Eng'g*, 463 U.S. at 431-35.

[11] *In re Disclosure of Matters Occurring Before a Grand Jury to the Litigation Technology Service Center*, No. 11-00163 JMS/RLP, 2011 U.S. Dist. LEXIS 96369 (D. Haw. Aug. 25, 2011), 2011 WL 3837277, at *4 (D. Haw. 2011).