UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CASE NO. 3:15-cr-00047-RJC-DCK-1

UNITED STATES OF AMERICA

v.

DAVID HOWELL PETRAEUS,

Defendant.

FURTHER MOTION OF THE NEWS MEDIA INTERVENORS TO UNSEAL STATEMENT OF REASONS (ECF NO. 25)

On April 27, 2015, the Reporters Committee for Freedom of the Press, The Associated Press, Bloomberg, L.P., The Charlotte Observer Publishing Company, Dow Jones & Company, Inc., First Look Media, Inc., National Public Radio, Inc., The New York Times Company, and The Washington Post (collectively, the "News Media Intervenors") moved to intervene in this action for the limited purpose of unsealing certain sealed court documents concerning the sentencing of defendant David H. Petraeus ("Petraeus"). ECF No. 21. Specifically, the News Media Intervenors have requested that the Sentencing Memorandum filed by Petraeus, ECF No. 17, as well as the sentencing letters submitted to the Court in support of him, be unsealed. Subsequent to the filing of the Motion to Intervene and Unseal, on April 29, the Court entered judgment against Petraeus and, on April 30, that judgment and a sealed Statement of Reasons in support of it were placed on the docket. ECF Nos. 24–25. For the reasons set forth in the Memorandum in Support of the Motion to Intervene and Unseal, ECF No. 22, and herein, News Media Intervenors hereby further request that the Statement of Reasons be unsealed.

I. The press and the public have a constitutional and common law right of access to a court's statement of reasons for entering a particular sentence.

As set forth in detail in the Memorandum in Support of the Motion to Intervene and Unseal, ECF No. 22, the press and public enjoy both a First Amendment and common law right of access to criminal sentencing proceedings and court documents relating thereto.[1] The Fourth Circuit, like other federal courts of appeal, have expressly recognized that the public's right of access to "sentencing hearings and to documents filed in connection with such hearings" is of a constitutional nature. *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999) (citing *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986)); *see also In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 176 (5th Cir. 2011) (stating that "courts of appeals have also recognized a First Amendment right of access to documents filed for use in sentencing proceedings," and citing cases from the Second, Ninth, Eleventh, and D.C. Circuits).[2]

The First Amendment right of the press and the public to access sentencing proceedings and related court documents may be overcome "*only* by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*") (emphasis

[1] For the convenience of the Court and the parties, the News Media Intervenors hereby incorporate by reference the arguments set forth in their Motion to Intervene and Unseal and supporting memorandum.

[2] In determining whether a First Amendment right of access attaches, courts consider "whether the place and process" at issue "have historically been open to the press and general public," as well as "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). As set forth in the Memorandum in Support of the Motion to Intervene and Unseal, both "experience and logic" dictate that there is a constitutional right of access to a criminal defendant's sentencing and court documents related thereto. *See In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *see also U.S. v. Alcantara*, 396 F.3d 189, 197–98 (2d Cir. 2005) (explaining that "historically, sentences have been imposed in open court," and noting "[n]umerous cases from over a century ago [that] describe sentencing proceedings held in open court").

added); *see also In re Charlotte Observer*, 882 F.2d 850, 853 (4th Cir. 1989). And the presumption of access afforded to such proceedings and documents under common law may be overcome only where the court finds "a 'significant countervailing interest' in support of sealing that outweighs the public's interest in openness." *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.2d 283, 293 (4th Cir. 2013) (quoting *Under Seal v. Under Seal*, 326 F.3d 479, 486 (4th Cir. 2003)).

Both the constitutional and common law rights of access apply fully to the Statement of Reasons filed by the Court in connection with Defendant's sentencing. Indeed, given the vital role that public oversight of the judicial decision-making process plays in ensuring the proper functioning of the justice system, there can be little doubt that the press and the public have a First Amendment right to access the "grounds supporting" a district court's particular sentencing "decision" in a criminal case. *Company Doe v. Pub. Citizen*, 749 F.3d 246, 267–68 (4th Cir. 2014) (holding that the First Amendment right of access extended to a judicial opinion ruling on a summary judgment motion in a civil case, and explaining that "[w]ithout access to judicial opinions, public oversight of the courts, including the processes and outcomes they produce, would be impossible"); *see also Union Oil. Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("[I]t should go without saying that the judge's opinions and orders belong in the public domain."); *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (stating that public monitoring of the courts "is not possible without access to . . . documents that are used in the performance of Article III functions").

Public oversight of the decision-making process is no less critical where the court's decision to impose a particular sentence involves application and discussion of federal Sentencing Guidelines. *See Alcantara*, 396 F.3d at 199 (stating that "the ability to see the

application of sentencing laws in person is important to an informed public debate over these laws" and that "[o]bserving the effect of laws that expand or contract the discretion of judges in imposing sentences in individual cases may provide a valuable perspective"). In fact, the Sentencing Guidelines are a recognition of the public's interest in ensuring the integrity of the sentencing process for criminal defendants. One of the goals of Congress in enacting the Sentencing Guidelines was to standardize sentences so that both criminal defendants and the public could be "certain about the sentence and the reasons for it." S. Rep. No. 98-225, at 39 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3222; *see also* U.S. Sentencing Guidelines Manual § 1A2, at 13 (2014) ("An advisory guideline system continues to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review."). And, as the Senate Report makes clear, Congress expressly contemplated public access to a court's "statement of reasons" for imposing a particular sentence for this very reason; it recognized that the "statement of reasons" would "inform[] the defendant *and the public* of the reasons for the sentence." *Id.* at 80, *reprinted in* 1984 U.S.C.C.A.N. at 3263 (emphasis added); *see also Rita v. United States* 551 U.S. 338, 357 (2007) ("By articulating reasons" for imposing a particular sentence on a defendant "the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve.").

II. Any sealing of the Court's Statement of Reasons—either in whole or in part—must comply with constitutional and common law requirements, and the public's right of access to the Statement of Reasons cannot be overcome in this case.

Federal law requires that a court "state in open court the reasons for its imposition of the particular sentence" at the time of sentencing. 18 U.S.C. § 3553(c). In addition, "in every criminal case," the sentencing court must submit to the United States Sentencing Commission a "written statement of reasons for the sentence imposed," which must "include the reason for any

departure from the otherwise applicable guideline range. . . ." 28 U.S.C. § 994(w)(1)(B); *see also* 18 U.S.C. § 3553(c) (stating that where a court imposes a sentence outside of the kind and range of sentence specified in the Sentencing Guidelines for the offense for which the defendant was convicted, the court must set forth the "specific reason[s]" for doing so, with "specificity," in a written "statement of reasons"). A court is required to set forth its "statement of reasons" for selecting a particular sentence on a "form" issued by the Judicial Conference of the United States and approved by the Sentencing Commission. *Id.*; 28 U.S.C. § 994(w)(1)(B). While, nothing in these statutes explicitly addresses sealing of a court's written statement of reasons, the statutory language of 18 U.S.C. § 3553(c) indicates that Congress assumed properly that—like other aspects of the sentencing process—it would be presumptively public. *See* 18 U.S.C. § 3553(c) (requiring courts to state the reasons for its imposition of a particular sentence "in open court," and requiring that "a transcription or other appropriate public record of the court's statement of reasons" be provided to the Sentencing Commission).

The News Media Intervenors are aware that the form promulgated by the Judicial Conference for a court's statement of reasons states that it is "not for public disclosure." *See* Statement of Reasons, Form AO 245B, http://1.usa.gov/1It7VN1.[3] The News Media Intervenors are also aware that, as set forth above, Congress has required that courts utilize the form

[3] According to the Judicial Conference's Policy on Privacy and Public Access to Electronic Case Files, "statements of reasons in the judgment of conviction" should not be "made available to the public." March 2008 Revised Policy, http://1.usa.gov/1jh3ghI. The apparent rationale for this restriction is that statements of reasons "may include sensitive information about whether a defendant's substantial assistance served as a basis for the sentence." *See* U.S. Judicial Conference, Report of the Proceedings, at 14 (March 13, 2007) *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings.aspx; *see also* U.S. Judicial Conference, Report of the Proceedings, at 17 (March 14, 2001) *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings.aspx (stating that "in order to protect the identity of cooperating defendants, the portion of the forms entitled 'Statement of Reasons' . . . will not be disclosed to the public"). That rationale has no application here.

approved by the Sentencing Commission for their statements of reasons. 18 U.S.C. § 3553(c)(2); *see also* 28 U.S.C. § 994(w)(1)(B). To the extent, however, that the statutory language and/or the form promulgated by the Judicial Conference are interpreted to either mandate or authorize automatic sealing of statements of reasons—including the Statement of Reasons filed in this action—without courts being required to make any specific factual findings as to the necessity of such a restriction on public access in a particular case, they violate both the First Amendment and common law access rights of the press and the public.

Sealing of court documents to which the constitutional presumption of access applies is permitted only "on the basis of specific judicial findings" that sealing is both essential and narrowly tailored. *In re Charlotte Observer*, 882 F.2d at 852. When a First Amendment right of access attaches to a document or proceeding, a district court "may restrict access *only* on the basis of a compelling governmental interest, and only if the denial [of access] is narrowly tailored to serve that interest." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (emphasis added) (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir.1988)). Because "any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like a fiat and requires rigorous justification," *Company Doe*, 749 F.3d at 266 (quotation omitted), sealing of a document that goes to a core aspect of the sentencing process, without any justification, violates the First Amendment. Accordingly, to the extent the relevant statutes and/or Judicial Conference form are read as a requirement that the Statement of Reasons in this case be sealed without first satisfying First Amendment standards, they do not pass constitutional muster; such a requirement is unconstitutional both on its face and as applied here.

Because there has been no showing, whatsoever, of a compelling interest that would necessitate the sealing of the Statement of Reasons, either in whole or in part, it should be unsealed. To the extent the Court makes specific findings that a compelling interest justifies sealing some portion of the Statement of Reasons in this case, any such sealing should be narrowly tailored to serve that interest, and the Court should make public a redacted version of the Statement of Reasons.[4]

CONCLUSION

For the foregoing reasons, and those set forth in its Motion to Intervene and Unseal and supporting memorandum, the News Media Intervenors respectfully request that the Court unseal its Statement of Reasons relating to the sentence imposed on Defendant.

This the 4th day of May, 2015.

Respectfully submitted,

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[4] Unsealing is also appropriate in light of the common law presumption of access that also applies to this document. Like the First Amendment, the common law does not permit court records to be sealed in the absence of any articulated need for secrecy. And, as set forth above and in the Memorandum in Support of the Motion to Intervene and Unseal, ECF No. 22 at 6–10, the public has a powerful interest in access to the reasons underpinning a criminal sentence, generally, and the sentence imposed on the Defendant in this case, particularly. The public's right of access to the Statement of Reasons outweighs any competing interest in secrecy. *See Va. Dep't of State Police*, 386 F.3d at 575 (requests to limit access to judicial records subject to the common law right of access should be considered "in light of the relevant facts and circumstances of the particular case") (quotation omitted).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **FURTHER MOTION OF THE NEWS MEDIA INTERVENORS TO UNSEAL STATEMENT OF REASONS (ECF NO. 25**) was filed with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing and serve counsel for all parties, as set forth below.

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This the 4th day of May, 2015.

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