

ARGUED DECEMBER 14, 2018

FEB - 5 2019

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3071

IN RE: GRAND JURY SUBPOENA

**RESPONSE OF THE UNITED STATES
TO MOTION TO UNSEAL**

The United States of America hereby responds to the request of movant, the Reporters Committee for Freedom of the Press, for this Court to unseal the appellate briefs, oral argument transcript, and record in this matter. The government agrees that certain redacted materials can be unsealed. Accordingly, concurrently with the filing of this response, the government is moving for leave to file redacted public copies of the transcript and the government's brief. The government suggests that the witness be ordered to propose similar redactions of its briefs. Finally, the government proposes referring the request for record redactions to the district court.

1. This Court has issued publicly filed redacted opinions that identify the general nature of the underlying proceedings and the legal issues involved. *In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir. 2019). The Supreme Court has granted leave to file a petition for a writ of certiorari under seal with redacted copies for the public record. And the district court has unsealed its docket with certain redactions. The redacted materials are sealed in order to protect against disclosure of a matter occurring before a grand jury. *See* Fed. R. Crim. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”).

In light of those developments, the government believes that versions of the briefs and sealed oral argument transcript may now be made public, with appropriate redactions, without compromising grand jury secrecy. To that end, the government is simultaneously filing a motion in this Court for leave to publicly file redacted copies of its brief before the Court and of the sealed oral argument transcript. The government is further moving for the witness to propose redactions for

its opening and reply briefs, and for the government to be permitted to review those proposals and suggest additional redactions as necessary.

2. In seeking redacted materials here, the Reporters Committee invokes a presumptive right of access to certain judicial proceedings based on both the First Amendment and the common law. As discussed below, the government respectfully disagrees with the Reporters Committee's analysis. It is unnecessary, however, for the Court to address those issues. The government's approach discloses on the public record the arguments of the parties while preserving grand jury secrecy. That appears to reach the same substantive result—public filings, redacted to protect grand jury secrecy—that would occur if the Court granted the motion to direct the filing of redacted documents.¹

The government has not proposed to release or redact the *ex parte* materials in this case. This Court has already concluded that the *ex parte* (and *in camera*) submission of the information in those materials is

¹ In its supplemental statement filed on January 28, 2019, the Reporters Committee suggests that the name of the witness cannot be redacted. Supp. 4. Rule 6(e), however, protects “the identities of witnesses,” among other things. *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998) (citation omitted). As discussed below, the First Amendment does not require a different result.

“necessary to ensure the secrecy of ongoing grand jury proceedings.” *Grand Jury Subpoena*, 912 F.3d at 632 (citation omitted). Those materials are sensitive and bear on an ongoing grand jury investigation. Any attempt to redact those materials and disclose them to the public would yield little substance and risk inadvertently revealing matters that are protected by Rule 6(e). *See In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988); *see also United States v. Index Newspapers LLC*, 766 F.3d 1072, 1095 (9th Cir. 2014) (“[E]ven seemingly innocuous information can be so entangled with secrets that redaction will not be effective.”).

As for the record on appeal, the government suggests that this Court follow its ordinary practice and refer the request to unseal those documents to the district court. *See* D.C. Cir. R. 47.1(c). “Every court has supervisory power over its own records” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). Thus, it is appropriate—and more efficient—for the district court to consider whether the record items that were submitted to the district court should be unsealed, and what redactions are necessary. Given that court’s familiarity with the record and the volume of the materials, it is well positioned to consider the risks

to grand jury secrecy and the burden of further redactions. *See Index Newspapers LLC*, 766 F.3d at 1095 (“[I]f the record is sufficiently voluminous, the consequences of disclosure sufficiently grave or the risks of accidental disclosure sufficiently great, the balance may well tip in favor of keeping records sealed.”).

3. In any event, with respect to the briefs and transcript, no broader right of access exists beyond what the government is offering to release.

There is “no First Amendment right of access to grand jury proceedings.” *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499 (D.C. Cir. 1998). “[N]or do First Amendment protections extend to ancillary materials dealing with grand jury matters” *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007). The First Amendment creates a qualified right of access to judicial proceedings that “have historically been open to the press and general public,” and where “public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986); *see Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991). But grand jury proceedings and related civil contempt materials arising from grand-jury proceedings have historically been

closed to the public. See *Levine v. United States*, 362 U.S. 610, 617 (1960); see also *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979). And “the proper functioning of our grand jury system depends on the secrecy of grand jury proceedings.” *Press Enterprise*, 478 U.S. at 9 (quoting *Douglas Oil*, 441 U.S. at 218). As noted, the government has agreed to make public the briefs and oral argument transcript, subject to appropriate redactions to protect matters occurring before the grand jury. With respect to those materials, the First Amendment could provide no greater right of access.

The common law also provides no right of access to materials from proceedings ancillary to grand jury matters. Initially, the common law right of access does not extend to matters that “have traditionally been kept secret for important policy reasons,” and it has not been extended to “preindictment, pretrial proceedings involving a grand jury.” *Dow Jones*, 142 F.3d at 504 (citation omitted). But “even if there were once a common law right of access to materials of the sort at issue here, the common law has been supplanted by Rule 6(e)(5) and Rule 6(e)(6) of the Federal Rules of Criminal Procedure.” *Id.* “These Rules, not the common law, now govern.” *Id.* Rule 6(e)(6) keeps “[r]ecords, orders, and subpoenas relating

to grand-jury proceedings” under seal “to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.” The government’s proposed redactions adhere to that standard.

CONCLUSION

WHEREFORE, the government respectfully requests that the motion to unseal be granted in part to allow public filing of redacted versions of the briefs and oral argument transcript, and that the motion to unseal be referred in part to the district court to consider unsealing of the remainder of the appellate record.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 27(d)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this motion contains 1275 words, and therefore complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). This motion has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/

ERIC HANSFORD
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing motion to be served by electronic means, via email, upon counsel for movant Reporters Committee for Freedom of the Press, Theodore J. Boutrous, tboutrous@gibsondunn.com, and counsel for the witness, Brian D. Boone, brian.boone@alston.com, on this 5th day of February, 2019.

/s/

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