

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN RE:) GJ 18-41
Grand Jury Subpoena 7049)
)
Interested Parties,) March 27, 2019
CORPORATION,) 11:28 a.m.
GOVERNMENT,) Washington, D.C.
MOVANT,)

* * * * *

**TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE**

APPEARANCES:

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P R O C E E D I N G S

1
2 THE DEPUTY: Matter before the Court, grand jury
3 matter 18-41 in regards to grand jury subpoena No. 7049,
4 Counsel for the interested party, corporation; Government;
5 movant, Reporters Committee For Freedom of the Press.

6 Please come forward and identify yourselves for
7 the record.

8 MR. BOUTROUS: Good morning, Your Honor.
9 Theodore Boutrous for the Reporters Committee For Freedom of
10 the Press. I am joined by my colleagues Lee Crain and Katie
11 Townsend from the Reporters Committee.

12 We are pleased to be here. Thank you, Your Honor.

13 THE COURT: Yes. Good morning.

14 The Government -- well, Mr. Boone.

15 MR. BOONE: Brian Boone from Alston & Bird for the
16 corporation. With me today are Karl Geercken, Ted Kang, and
17 Lee Deneen, also from Alston & Bird.

18 THE COURT: Yes. Thank you.

19 MR. GOODHAND: Good morning, Your Honor.
20 David Goodhand for the United States. With me at counsel's
21 table is Zia Faruqui and Peter Lallas.

22 THE COURT: All right. Well, welcome, everybody.

23 Let me just begin by reviewing where we are in the
24 case because the Reporters Committee has before me a motion
25 to unseal redacted versions, by my count, of the briefs, the

1 record, transcripts and orders in this action, as well as
2 the identity of the corporation, that is, the contemnor.

3 And let me just start by making clear or
4 summarizing what's already been made public in this case at
5 multiple levels of the federal judiciary.

6 In the District Court, I have already released a
7 redacted copy of the docket sheet as of January 31, 2019;
8 redacted copies of six memoranda, including the contempt
9 order in this case, which is docketed at ECF 30. The D.C.
10 Circuit has made the docket public, as well as redacted
11 forms of its opinion, the parties' briefs regarding
12 unsealing.

13 And my understanding is that the parties before
14 the D.C. Circuit are in the midst right now of an ongoing
15 effort to redact the parties' substantive briefs so that
16 redacted versions of those briefs can be made public.

17 The Supreme Court has made the docket itself
18 public, as well as redacted versions of the parties' briefs
19 regarding the stay of the contempt order in this case;
20 redacted versions of the parties' briefs regarding the
21 petition for certiori; and unredacted versions of the
22 parties' briefing regarding the Reporters Committee's motion
23 to unseal before the Supreme Court. Neither the D.C.
24 Circuit nor the Supreme Court has revealed the identity of
25 the contemnor.

1 So part -- from where I sit, part of the Reporters
2 Committee motion seeking redacted versions of the briefing
3 is, in some ways, just to have this Court catch up with the
4 redacted versions of briefing that is already available on
5 the Supreme Court docket, and I think is going to be made
6 available on the D.C. Circuit's docket.

7 Mr. Goodhand, is that a fairly accurate summary?

8 MR. GOODHAND: Yes, that's my understanding, Your
9 Honor.

10 THE COURT: Okay. Do you know when, before the
11 D.C. Circuit, all of those redacted versions of briefs will
12 be made available?

13 MR. GOODHAND: Your Honor, actually -- I'm sorry.

14 I communicated this morning with the assistant to
15 handle this matter in the D.C. Circuit. And I actually
16 asked if the redactions had been completed of both briefs,
17 and the transcripts of the oral argument. He emailed those
18 to me. And I actually didn't follow up -- I didn't have
19 time, actually, to follow up and see whether they had been
20 filed. That suggests to me, however, if they haven't
21 already been filed, it is very soon.

22 THE COURT: All right. Well, I think, from my
23 review of the docket there, the corporation doesn't have to
24 respond until March 27th. So I don't think that any of them
25 have been actually filed yet. You are just still in the

1 process of going back with redactions.

2 Is that correct, Mr. Boone?

3 MR. BOONE: That's correct, Your Honor.

4 THE COURT: All right. Okay.

5 So I am going to -- just so everybody understands
6 the structure of how I'm going to conduct the hearing this
7 morning, I am going to start with some clarifying questions
8 to Mr. Boone on behalf of the corporation, and then I will
9 turn to the Reporters Committee.

10 So just to begin, Mr. Boone, on behalf of the
11 corporation, the corporation is aware that it had the right
12 to request that the contempt proceedings in this matter be
13 open to the public; is that correct?

14 MR. BOONE: That is correct, Your Honor.

15 THE COURT: And just to confirm, no such request
16 was ever made; is that correct?

17 MR. BOONE: That's right.

18 THE COURT: The Reporters Committee highlights the
19 fact that the corporation has taken no position on its
20 unsealing request, suggesting that the corporation has no
21 interest in preserving secrecy here. Is it correct that the
22 corporation has no interest in preserving secrecy here?

23 MR. BOONE: That's not correct.

24 My client would prefer not to have its identity
25 disclosed to the public.

1 THE COURT: Do you want to articulate any reasons
2 in a public hearing for why that is?

3 MR. BOONE: I'd prefer not to at a public hearing.

4 THE COURT: All right. Is the corporation willing
5 to participate in the task, should I order it, of -- that is
6 already being undertaken before the Circuit of redacting the
7 briefs, transcripts, and other orders for public versions to
8 be made available to the public?

9 MR. BOONE: We're happy to participate in that
10 process.

11 THE COURT: All right. Thank you. You may be
12 seated.

13 MR. BOONE: Thank you, Your Honor.

14 THE COURT: All right. Mr. Boutrous.

15 MR. BOUTROUS: Thank you very much, Your Honor.

16 Thank you, again, for hearing us today, because I
17 think these are very important issues. I know the Court has
18 been focused on transparency. We really appreciate the
19 Court issuing the redacted orders --

20 THE COURT: Just so the record is clear: The
21 corporation is excused.

22 MR. BOONE: Thank you, Your Honor.

23 (Whereupon, counsel for the corporation exit the
24 courtroom.)

25 MR. BOUTROUS: We hate to see them go. You are

1 welcome to stay, though.

2 We spent on the briefing -- I think you captured
3 it exactly right. Our first line request to the Court is
4 to, basically, catch up. A lot has been disclosed, and the
5 Court summarized it, I think, perfectly.

6 We have briefed First Amendment issues and
7 common-law issues. But I don't think the Court really needs
8 to reach those because Rule 6.1 of this court and
9 Rule 6(e)(6) regarding the unsealing of documents in the
10 D.C. Circuit's decision in *Dow Jones* and *In Re Sealed Case*,
11 this Court's decision in the *CNN* case regarding the *Starr*
12 investigation all demonstrate that just -- basically, the
13 test is whether sealing is necessary to protect --

14 THE COURT: Mr. Boutrous, are you telling me that
15 you spent so much of your brief talking about the First
16 Amendment right of access and the common-law right of
17 access; but you are telling me now that I really don't have
18 to worry my mind with those more interesting constitutional
19 issues?

20 MR. BOUTROUS: Only if you don't go with me on the
21 first part. Because I think that they do provide -- since
22 it is a contempt proceeding, the contempt proceedings which
23 are called out by both rules as potentially being open, and
24 Rule 65 says that it's subject -- closure subject to any
25 right to open this; it doesn't limit it to the witness's

1 rights. I think that adds a First Amendment dimension.

2 Again, there is a long history of contempt
3 proceedings being open, both to --

4 THE COURT: Let me just -- let me start with one
5 of the more troublesome aspects of your request and see if
6 we can just get that resolved right now.

7 One of the things that you requested is that the
8 contemnor be identified, which is why I felt it important
9 for the corporation to make clear it does not want to be
10 identified.

11 So from my reading of *Dow Jones*, the
12 D.C. Circuit's decision in 1998, it says in no uncertain
13 terms that the First Amendment does not provide a right of
14 access to the identities of witnesses or jurors in grand
15 jury proceedings. So doesn't that opinion foreclose
16 disclosure of the corporation's identity here?

17 MR. BOUTROUS: I don't think so, Your Honor,
18 because it is a contempt proceeding. I think the public has
19 a particular interest in scrutinizing a contempt proceeding.
20 And this Court's decision on the *Lewinsky, Starr* matter held
21 that there is an inherent power of the Court to release
22 grand jury information beyond the exceptions to the rule --
23 that are contained in Rule 6(e). Here we really have --

24 THE COURT: That is a matter that's not pending in
25 front of the D.C. Circuit. It's not my case, but in another

1 case -- whether I have that inherent authority.

2 MR. BOUTROUS: Correct. But I think the Court's
3 decision is absolutely correct. The Court relied on the
4 decisions from other circuits that are correct.

5 I think the key here is the unique circumstances
6 that we are in, that this is not an ordinary witness. This,
7 according to the contemnor's counsel, is a country, a
8 nation. We have foreign policy issues here where this
9 country has been taking the position in this court, to the
10 Supreme Court and back, that they're not even subject to the
11 grand jury --

12 THE COURT: No. Let me make sure you are
13 understanding correctly. The contemnor in this case is a
14 corporation that is owned by a foreign sovereign. It is not
15 the foreign sovereign itself.

16 MR. BOUTROUS: All right. That was what I
17 understood, Your Honor. But then I noticed that the briefs
18 that the contemnor filed in the Supreme Court referred to
19 itself as "Country A" as opposed to the company. I'm, of
20 course, working at a disadvantage; I'm reading between the
21 lines.

22 What I inferred from that is that they were
23 seeking to persuade this Court and other courts that they
24 really were one and the same as the country. And one of the
25 core issues for the public to be able to understand what

1 this case is all about is to know what the facts are and who
2 the company is.

3 It seems to me that here where Special Counsel
4 Mueller has submitted his report to the Attorney General,
5 the Attorney General has submitted a four-page summary -- we
6 don't really know what the conclusions really are; that this
7 is a time for this Court, consistent with the rules, its
8 inherent authority --

9 THE COURT: And that is -- just so you know, that
10 is one of the questions I will ask the Government to
11 explain, why are we still here, in terms of the fact that
12 the special counsel's report has been delivered and whether
13 this contempt proceeding continues or not.

14 MR. BOUTROUS: I was wondering what that -- what
15 was the status of that myself because it certainly seemed
16 the report is in. In reading all of the public materials,
17 including this Court's order --

18 THE COURT: And the reason that that question is
19 important, I think, is to clarify whether there is a closed
20 grand jury investigation now or whether this is a grand jury
21 investigation that is continuing. Because I think you would
22 concede, wouldn't you, Mr. Boutrous, that if it is an
23 ongoing grand jury investigation that the redactions and the
24 amount of information that can be publicly disclosed has to
25 be measured against the needs of an ongoing grand jury

1 investigation, correct?

2 MR. BOUTROUS: Yes, Your Honor. I agree with
3 that. It was interesting. On Friday we filed our reply
4 brief. And then, suddenly, your decision in the *CNN*,
5 Independent Counsel Starr decision became much more
6 relevant, because we were -- at least, from a public
7 perspective, it seems that the grand jury investigation that
8 was working with Special Counsel Mueller is done. At least
9 that's what it looks like.

10 If there are strands -- and I guess this contempt
11 proceeding would be one of them -- that needs to be wrapped
12 up, but I think that the arguments for coercing -- I don't
13 mean to make their argument for them -- but coercing the
14 witness now changes, that is something I think the public
15 should be able to scrutinize in how this all plays out with
16 Special Counsel Mueller having wrapped things up and made
17 the report.

18 So I do think that the arguments for disclosure
19 are even stronger -- much stronger for greater disclosure
20 if, in fact, the grand jury investigating the Russia matters
21 and related matters has completed.

22 THE COURT: But if, in fact -- and we'll hear from
23 the Government -- the grand jury matter is continuing
24 robustly, then that is a significant consideration in terms
25 of the response that may be available to your motion,

1 correct?

2 MR. BOUTROUS: I agree with that, Your Honor.

3 I think it would -- nonetheless, disclosure -- at
4 least to the extent that has already occurred in the Supreme
5 Court, the D.C. Circuit, this Court's prior orders -- would
6 still then be appropriate because the local rule and
7 Rule 6(e)(6) contemplate disclosure during ongoing grand
8 jury investigations, but the considerations -- the balance
9 would be different; I agree with that, Your Honor.

10 THE COURT: All right. So is there anything else
11 that you would like to add to your papers?

12 MR. BOUTROUS: If I could, Your Honor, on the
13 witness issue. I do want to -- I think it really is a
14 special situation because we have the public scrutiny and
15 the public attention to this matter which the Court noted in
16 one of its orders.

17 We have the fact that we have a company owned by a
18 foreign nation litigating in our courts all the way to the
19 Supreme Court, briefing things fully. And the core issue --
20 in order for the public to understand this Court's ruling,
21 that's the one thing we don't know. We don't know what the
22 facts are regarding this company, who is this company.

23 We know so much about the Mueller investigation.
24 Even without seeing the report, we know a lot. We know what
25 the focus was. We know many, many things about it.

1 So it seems that if ever there were a strong
2 public interest for exercising the Court's discretion for
3 considering First Amendment considerations about disclosing
4 the witness's identity -- and I know Mr. Boone said that
5 they would rather their identity remain secret, but it
6 wasn't like they were fighting tooth and nail. They asked
7 in the D.C. Circuit for permission to file their response to
8 our motion on the record, and then their response was: We
9 take no position, which I took to mean they weren't exactly
10 viewing this as a crucial thing to keep secret. They didn't
11 argue there was a reason --

12 THE COURT: And that's why I had the corporation
13 clarify --

14 MR. BOUTROUS: Yes.

15 THE COURT: -- what you thought was being
16 suggested by their notice of no position I thought was not
17 an unreasonable perception of that position; but I knew it
18 was incorrect, which is why the corporation clarified and
19 corrected the impression that you thought had been suggested
20 by their no position on your motion.

21 MR. BOUTROUS: And I appreciate that, Your Honor.

22 But I would say that even now that I understand
23 their position, it's a farer cry from any sort of compelling
24 reason, any sort of, you know, need to keep it secret.

25 Now, the United States, in their briefs, they --

1 this is the other point I wanted to make, Your Honor.

2 In the D.C. Circuit and the Supreme Court, I
3 argue, yes, we agree; redacted materials can be released in
4 a way that protects grand jury secrecy. We really
5 appreciate that the transcripts and the briefs in the D.C.
6 Circuit, as you know, are on the verge of coming out.

7 And they told the D.C. Circuit that as to this
8 Court's records, this Court's past position -- now, in their
9 briefs, they seem to be taking the position nothing else
10 should come out because all of this other information has
11 come out; that's, of course, not the standard. The more
12 that's made public, the less reason there is for secrecy.

13 So we would ask the Court to release as much as
14 possible the entire record in this case. We know it's all a
15 big task for everyone, but the D.C. Circuit has said that as
16 important as that is --

17 THE COURT: And you appreciate, as the D.C.
18 Circuit certainly does, and has talked about in *Dow Jones*
19 and in the sequel to *Dow Jones*, proceedings before the
20 Circuit can be far more controlled and measured and
21 certainly take more time than proceedings in front of the
22 District Court in grand jury proceedings. And,
23 consequently, redactions of transcripts, let's say, or
24 briefing submitted in the course of ancillary grand jury
25 proceedings like contempt proceedings, which are fast

1 moving, have to get a lot of detailed facts in front of the
2 Court and the witness, and vice versa to the Government, on
3 a prompt basis and fulsome basis in order for the Court to
4 make a fair evaluation of the parties' arguments. But
5 because of all of those circumstances, which are
6 characteristic of the nature of grand jury proceedings,
7 including ancillary proceedings like contempt proceedings
8 before the District Court, makes redactions a lot more
9 complicated to make.

10 Do you understand that?

11 MR. BOUTROUS: I do understand that. I know the
12 D.C. Circuit noted that it is a different inquiry, so we
13 appreciate that.

14 The Court, in its orders -- I think it was very
15 helpful for us to see the Court's analysis. But we
16 respectfully request -- and notwithstanding the differences
17 in the inquiry -- that the Court release as much as possible
18 in redacted form because we do know a lot about the case;
19 and it would be interesting to see how it played out with
20 Your Honor and what led the Court -- I mean, contempt is a
21 serious thing. We know the Court is careful in holding
22 someone in contempt, so we'd like to see what their
23 arguments were before this Court.

24 They seemed -- again, I'm sort of in the peanut
25 gallery here, but I'm fascinated to read how it played out.

1 It seemed like their arguments were shifting; they
2 were coming up with new arguments before the Court. Some of
3 them seemed -- for a company owned by a foreign nation --
4 kind of out there on the edge, and they're saying we don't
5 have to listen to the U.S. courts. That's something the
6 public should be able to see in an investigation like this,
7 and how it unfolded within this Court, the judge who had to
8 hold them in contempt -- I think it's even more important to
9 see what was being argued to you by both sides and what led
10 the Court to its decisions so we can understand what really
11 the Court was basing its decision on.

12 We really appreciate the Court hearing us. And we
13 hope the Court would release as much as possible, including
14 the identity of the witness. I mean, a foreign country
15 comes here, goes into contempt, goes to our Supreme Court,
16 cert is denied, the investigation is over -- we should know
17 who that country is and the company and what it's all about
18 so we can scrutinize their behavior and how our judicial
19 system and the justice department handled it.

20 THE COURT: And I appreciate the fact that the
21 Reporters Committee has taken the time and engaged quality
22 counsel to come forward and bring these issues teed up for
23 the Court's consideration. Transparency, particularly when
24 it comes to judicial proceedings, is very important. There
25 should be no secret law.

1 MR. BOUTROUS: Thank you, Your Honor.

2 THE COURT: So I appreciate your efforts here.

3 MR. BOUTROUS: Thank you very much.

4 THE COURT: Thank you.

5 Mr. Faruqui. Mr. Goodhand.

6 So let's start with the first question. Is the
7 grand jury investigation over?

8 MR. GOODHAND: No, it is continuing. I can -- in
9 the Court's words, I can say it's continuing robustly.

10 THE COURT: All right. So this is a situation
11 where the Court must evaluate the Reporters Committee
12 request for unsealing in the context of a robust and ongoing
13 grand jury investigation; is that correct?

14 MR. GOODHAND: Exactly.

15 THE COURT: All right.

16 Notwithstanding the fact there is an ongoing grand
17 jury investigation, given the fact that there are redacted
18 versions of briefs in front of the Supreme Court, redacted
19 versions of the briefs that are in the process of being done
20 for posting on the D.C. Circuit's docket -- although there
21 are a lot more briefs in front of the District Court, and
22 that makes the administrative work that much more in front
23 of the District Court, why is it that the Government is
24 taking the position of "no" as opposed to allowing for
25 redacted versions of at least the briefing and, if not, some

1 of the transcripts in this matter to be made public?

2 MR. GOODHAND: Sure.

3 We thought we saw a little bit of schizophrenia in
4 the Reporters Committee's motion, and that's why we did
5 launch an opposition. When I say that, what I mean is
6 this -- and, in particular, I'm directing the Court's
7 attention to page 13 where the Reporters Committee says:
8 The public has the right of access to contempt proceedings.
9 There can be no doubt that the public has a right of access
10 to the orders, briefs, transcripts, and underlying record in
11 the proceedings before this Court.

12 We were a little concerned that that was a
13 suggestion that -- this is a contempt proceeding, number
14 one, and that means everything gets opened; that was our
15 concern.

16 We certainly understand the mandate of Rule 6.1.
17 We understand the mandate of *Dow Jones*. And we are
18 perfectly willing to work within the confines of both those
19 constructs to get to roughly the same place that the D.C.
20 Circuit and the Supreme Court has reached with this massive
21 caveat. There's been a lot of discussion about the identity
22 of the witness. You know, number one, we have heard from
23 the corporation about that.

24 Number two, I think, in contrast to the Reporters
25 Committee's arguments, Rule 6.1 itself recognizes,

1 consistent with *Dow Jones*, that: All hearings on matters
2 affecting grand jury shall be closed except for contempt
3 proceedings in which the alleged contemnor requests a public
4 hearing.

5 To my mind, I understand Rule 6.1 to be this:
6 It's an embodiment of the rule -- Rule 6(e), 6(e)(5) and
7 6(e)(6) that the advisory committee has said is consistent
8 with the First Amendment.

9 So Rule 6.1 is sort of a perfect distillation of
10 the balance, on the one hand, of grand jury matters and, on
11 the other hand, the First Amendment. So we are willing to
12 work within the confines of Rule 6.1, and we will. It will
13 be a burden. We will endeavor to do that, just as things
14 have already done -- others have done that at other levels.

15 But we were concerned about, sort of, the blanket
16 suggestion that the First Amendment puts this category of
17 proceeding in a different posture than a typical ancillary
18 grand jury matter. This is an ancillary grand jury matter.
19 It is not a contempt proceeding and, thus, all bets are off.
20 I think that answers the question that has been raised with
21 respect to the identity of the contemnor.

22 So, with that said, of course -- with those
23 caveats -- again, that was the basis, essentially, for our
24 opposition here. We're willing to work with the Court and
25 the Reporters Committee.

1 THE COURT: All right. And how much time do you
2 think that the Government would need, beginning with -- I
3 think what would be easiest is the redaction of briefing in
4 the matter, in cooperation with the corporation's counsel,
5 before turning to looking at whether any transcripts can be
6 redacted in a way that leaves anything intelligible left to
7 be read.

8 MR. GOODHAND: Sure. Sure.

9 THE COURT: How much time would you need?

10 MR. GOODHAND: I would like -- I think I
11 understand the Court's general timetable to be a month. I
12 would appreciate that for a couple of reasons.

13 As the Court and indexed newspapers outlined, when
14 you have voluminous materials, there are risks attendant,
15 sort of, inadvertent disclosures; we don't want to go down
16 that road. There are great consequences attendant to
17 inadvertent disclosures. So if the Court was willing to
18 grant us the luxury of that time, we would greatly
19 appreciate it because of the volume.

20 THE COURT: All right. I am going to be issuing a
21 memorandum, an order on this matter and this particular
22 motion, to make clear what is being done and what my order
23 is; and I will take the month-long request into
24 consideration.

25 I think you are also going to have to be

1 consulting with the corporation's counsel.

2 MR. GOODHAND: Yes.

3 THE COURT: So I think a month may be even, you
4 know, too tight a time frame; but I will let you work that
5 out with the corporation. Thank you.

6 MR. GOODHAND: Okay. Thank you, Your Honor.

7 THE COURT: Mr. Boutrous.

8 MR. BOUTROUS: Yes, Your Honor.

9 THE COURT: You have won a huge chunk of your
10 motion --

11 MR. BOUTROUS: Yes, so I am going to say very
12 little.

13 THE COURT: -- with the Government; and I will
14 take under consideration your request for the additional
15 disclosure of the contemnor corporation's identity.

16 Is there anything you would like to respond to?

17 MR. BOUTROUS: Really just --

18 THE COURT: You won. You might just want to sit
19 down.

20 MR. BOUTROUS: With that, Your Honor, I would like
21 to wrap up. Thank you, Your Honor.

22 THE COURT: Thank you. You are all excused.

23 THE DEPUTY: All rise.

24 (Whereupon, the proceeding concludes.)

25 * * * * *

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 27th day of March, 2019.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter