ORAL ARGUMENT HELD ON DECEMBER 8, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In Re Grand Jury Subpoenas, Judith Miller	**:**	**Case Nos. 04-3138, 04-3139 and**
In Re Grand Jury Subpoenas, Matthew Cooper	**:**	**04-3140**
In Re Grand Jury Subpoenas, Time Inc.	**:**	

GOVERNMENT'S RESPONSE TO MOTION OF DOW JONES & CO. TO UNSEAL REDACTED PORTION OF THE COURT'S OPINION

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, Special Counsel, respectfully submits this response to the motion of Dow Jones & Company, Inc., *Amicus Curiae*, to unseal all or part of the redacted portion of the Court's opinion issued on February 15, 2005. As set forth below, while the Special Counsel does not object to the unsealing of specified portions of the redacted opinion for which continued secrecy does not appear necessary, the Special Counsel has concluded that the remainder of the redacted pages should not be disclosed.

BACKGROUND

The consolidated appeals in this case arose from civil contempt proceedings conducted during an ongoing federal grand jury investigation concerning alleged leaks to reporters of purportedly classified information by one or more government officials. New York Times reporter Judith Miller, Time Magazine reporter Matthew Cooper, and Cooper's employer, Time Inc., challenged grand jury subpoenas issued to them, claiming that a reporter's privilege relieved them of their obligation to provide testimony or documents in

response to the subpoenas. The district court rejected the reporters' claims and, when the reporters refused to testify despite the court's unfavorable rulings, held them in civil contempt of court.

Although the government took the position in the district court that it was not legally required to make any factual showing prior to demanding compliance with the subpoenas, in order to assure the court that the subpoenas were appropriate, the government submitted, *ex parte* and under seal, detailed descriptions of the progress of the investigation which included specific references to grand jury witness testimony and materials identified as "classified," and an extensive description of the strategy and direction of the investigation. Likewise, on appeal, in order to maintain the confidentiality of the sealed materials and the integrity of the investigation, which was then, and remains, ongoing, the government provided its *ex parte* submissions to this Court *ex parte* and under seal.

On February 15, 2005, a panel of this Court affirmed the judgments of the district court, with all three members of the panel voting to affirm. *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). Judge Tatel wrote a separate opinion in which he set forth a detailed analysis of the evidence contained in the Special Counsel's *ex parte* submissions to explain his conclusion that the information sought by the subpoenas was "both critical and unobtainable from any other source," and that, thus, any conceivable privilege was overcome. *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d at 989-91 (Tatel, J., concurring). The other two members of the panel concurred in this portion of

Judge Tatel's opinion. *Id.* at 973 (Sentelle, J., Opinion for the Court)(stating that "[a]ll further believe, for the reasons set forth in the separate opinion by Judge Tatel, that if such a privilege applies here, it has been overcome.") The Court redacted those portions of Judge Tatel's opinion that referred to classified and grand jury information, and the publicly-available opinion notes these redactions. *Id.* at 1002. The redacted portions of Judge Tatel's separate opinion (the "redacted pages") were filed under seal. This procedure facilitated review by the Supreme Court without compromising classified information or grand jury material.

This Court denied the reporters' petitions for rehearing on April 19, 2005. The reporters' petitions for *certiorari* were denied on June 27, 2005.

On October 28, 2005, the grand jury returned a five-count indictment charging I. Lewis "Scooter" Libby with obstruction of justice, perjury, and making false statements to federal investigators, in violation of 18 U.S.C. §§ 1503, 1623 and 1001. Beginning before the return of the indictment and continuing through the present, the Special Counsel has arranged to have documents obtained and generated during the course of the investigation, including grand jury transcripts, reviewed by the appropriate agencies for the purpose of identifying classified information and of assessing whether relevant documents may be declassified, with a view toward making such documents available to defendant in discovery, and to facilitating the use of such documents in public filings and proceedings.

After being served with the instant motion, the Special Counsel arranged for the

classification review of the redacted portions of this Court's February 15, 2005 opinion by the relevant agency. Based on that review, it has been determined that the redacted pages contain no references to information that is classified as of November 30, 2005. Thus, the presence of classified information no longer provides a reason for maintaining the secrecy of the redacted pages.

The grand jury investigation that led to the indictment of Mr. Libby is ongoing.[1]

ARGUMENT

I. Applicable Law

The Supreme Court consistently has recognized that "the proper functioning of our grand jury system *depends* upon the secrecy of the grand jury proceedings." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)(emphasis added). In its decision in this case, this Court noted the reasons for grand jury secrecy catalogued by the Supreme Court in *Douglas Oil* :

> (1) disclosure of pre-indictment proceedings would make many prospective witnesses "hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony"; (2) witnesses who did appear "would be less likely to testify fully and frankly as they would be open to retribution as well as inducements"; and (3) there "would be the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment."

In re Grand Jury Subpoena, Judith Miller, 397 F.3d at 973 (quoting *In re North (Omnibus Order)*, 16 F.3d 1234, 1242 (D.C. Cir., Spec. Div., 1994 and *Douglas Oil Co. of California*

[1] The investigation is continuing before a new grand jury, because the grand jury that returned the indictment against Mr. Libby expired by statute, and could not be extended.

v. Petrol Stops Northwest, 441 U.S. 211, 218 n. 9 (1979))(quotation marks omitted). As Judge Tatel put it in his concurrence to the denial of rehearing:

> Telling one grand jury witness what another has said not only risks tainting the later testimony (not to mention enabling perjury or collusion), but may also embarrass or even endanger witnesses, as well as tarnish the reputations of suspects whom the grand jury ultimately declines to indict. Strong guarantees of secrecy are therefore critical if grand juries are to obtain the candid testimony essential to ferreting out the truth.

See generally In re Grand Jury Subpoena, Judith Miller, 405 F.3d 17, 18 (D.C. Cir. 2005)(Tatel, J., concurring)(citation omitted). For these reasons, it is well settled that, "[u]nlike typical judicial proceedings, grand jury proceedings and related matters operate under a strong presumption of secrecy." *In re Sealed Case,* 151 F.3d 1085, 1069-71 (D.C. Cir. 1998). *See also United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991)(suggesting that courts require *in camera* disclosure of the subject of investigation in order to discourage routine use of motions to quash as a form of discovery); *In re Sealed Case*, 199 F.3d 2000 (D.C. Cir. 2000)(stating that in the grand jury context "privacy and secrecy are the norm"); *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1070 (D.C. Cir. 1998)(approving *ex parte* review in applying the crime-fraud exception to the attorney-client privilege). While secrecy remains an issue even after a grand jury has been discharged, the need to preserve the confidentiality of grand jury proceedings is most acute where the grand jury's investigation is ongoing. *See, e.g.*, *Butterworth v. Smith*, 494 U.S. 624, 632 (1990)(noting that some interests served by grand jury are less significant after grand jury has been discharged).

The Federal Rules of Criminal Procedure protect grand jury secrecy by prohibiting grand jurors, attorneys for the government, and others serving in official capacities from disclosing matters occurring before the grand jury. Fed. R. Crim. P. 6(e)(2)(B). In addition, the Rules require that judicial proceedings ancillary to the grand jury must be closed to the extent necessary to prevent such disclosure, and requires that "records, orders and subpoenas relating to the grand jury's proceedings shall remain under seal to the extent and for such time as necessary" to prevent such disclosure. Fed. R. Crim. P. 6(e)(5) and 6(e)(6). Local Criminal Rule 6.1 of the district court for the District of Columbia provides that documents related to the grand jury may be made public only upon "a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." L. CR. R. 6.1. The term "matters occurring before the grand jury" includes "the identities of the witnesses, the substance of testimony, and the "strategy or direction of the investigation, the deliberations or questions of grand jurors and the like." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499-500 (D.C. Cir. 1998). As this Court has noted, matters occurring before the grand jury include "not only what has occurred and what is occurring, but also what is likely to occur" before the grand jury. *Id.*

Consistent with Fed. R. Crim. P. 6(e) and the interests that underlie grand jury secrecy, this Court has recognized that there is no First Amendment right to access to grand jury proceedings. *E.g., In re Motions of Dow Jones & Co*. 142 F.3d at 499.

II. The Propriety of Unsealing the Redacted Pages

The redacted pages of Judge Tatel's separate opinion contain a detailed analysis of evidence collected by the grand jury with respect to the grand jury's need for the information sought by the challenged subpoenas to reporters, the existence of alternative sources of that information, and the public interest in enforcing the subpoenas. The redacted pages make extensive reference to the identity of grand jury witnesses, the substance of their testimony, and the strategy and direction of the investigation. Because the redacted pages are replete with references to matters occurring before the grand jury, the redacted pages clearly are covered by Fed. R. Crim. P. 6(e), as this Court previously determined.

Movant Dow Jones does not contest this Court's determination that redaction of portions of Judge Tatel's concurrence was necessary to protect grand jury secrecy at the time the Court's decision was rendered. Rather, movant asserts that it is no longer necessary to maintain the secrecy of all or part of the information discussed in the redacted portion of Judge Tatel's separate opinion, because that information has become publicly known as a result of the indictment of I. Lewis Libby, public statements concerning the indictment, and certain reporters' reports of their own testimony before the grand jury. As discussed below, after a careful review of the redacted pages and consideration of the principles underlying Fed. R. Crim. P. 6(e), the Special Counsel has concluded that continued secrecy is not necessary with respect to certain portions of the redacted pages that directly relate to Mr. Libby, whose status as a subject of the grand jury investigation became publicly known

through the return of the indictment subsequent to the issuance of the Court's February 15, 2005 opinion, and that do not relate to other persons whose status as a witness or subject has not been publicly disclosed. However, the Special Counsel has concluded that secrecy continues to be necessary with respect to the remainder of the redacted pages, in order to protect from public embarrassment or ridicule individuals whose status as grand jury witnesses or subjects has not been publicly disclosed, as well as to protect the integrity of the ongoing investigation. Together with this Response, the Special Counsel is submitting as "Exhibit 1," *ex parte* and under seal pending the Court's resolution of the instant motion, a copy of the redacted pages of Judge Tatel's concurrence, in which the Special Counsel has redacted the portions which the Special Counsel believes must remain under seal.[2] Also, for the Court's convenience, the Special Counsel is submitting as "Exhibit 2, " *ex parte* and under seal, a complete copy of the redacted portion of Judge Tatel's separate opinion.

Since the Court's opinion was issued on February 15, 2005, certain information referred to in the redacted pages has become publicly known through the return of the indictment against Mr. Libby.[3] As a result of the indictment, Mr. Libby's status as a subject and target of the investigation was revealed. Second, witnesses who gave testimony that directly contradicted Mr. Libby's testimony were identified in the indictment. Third, the

---

[2] Should this Court require a detailed description of the Special Counsel's analysis, it will be provided in a sealed, *ex parte* affidavit.

[3] The Special Counsel strongly disagrees that any comments made during the press conference concerning the indictment provide an independent basis for unsealing all or part of the redacted pages.

substance of the witnesses' testimony described in the redacted pages was revealed as a result of being quoted or summarized in the indictment, although the redacted pages do contain very limited details that go beyond those included in the indictment.[4] In addition, all but one of the witnesses discussed in this portion of the redacted pages have publicly disclosed the substance of their own testimony before the grand jury. Finally, the part of the investigation that specifically focused on Mr. Libby's conduct has largely been concluded.

As this Court has noted, while "[i]t is true that 'Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs,' . . . it is also true that 'when information is sufficiently widely known ... it has lost its character as Rule 6(e) material.' ." *In re Motions of Dow Jones & Co.*, 142 F.3d at 505 (quotation marks and citations omitted). *See also In re Sealed Case No. 99-3091*, 192 F.3d 995, 1004 (D.C. Cir. 1999)(noting that where the general public has already become aware of matters occurring before the grand jury, there is no additional harm in disclosure); *In Re North*, 16 F.3d 1234, 1245 (D.C. Cir.1994) (stating, "There must come a time . . . when information is sufficiently widely known that it has lost its character as Rule 6(e) material. The purpose in Rule 6(e) is to preserve secrecy. Information widely known is not secret."); *In re Petition of Craig*, 131 F.3d 99, 107 (2d Cir.1997) ("[T]he extent to which the grand jury material in a particular case has been made public is clearly relevant because even partial previous disclosure often undercuts many of the reasons for secrecy."). Thus, while public disclosure of certain grand

[4] The additional details include quotations from testimony summarized in the indictment, and the identities of certain persons who were identified in the indictment solely by job title.

jury information does not automatically warrant disclosure of matters occurring before the grand jury, such disclosure is relevant tot he question of whether continued secrecy is necessary.

Given that the information contained in the portion of the redacted pages that relates directly to Mr. Libby (and not to the conduct of other persons) has become publicly known through the indictment, and also through the public statements of grand jury witnesses, and that the investigation concerning the conduct of Mr. Libby is largely concluded, the principles underlying Rule 6(e) do not require maintaining this portion of the redacted pages under seal. Under these circumstances, the need to encourage voluntary participation, and full and frank testimony, of witnesses in the grand jury, or to protect witnesses from retribution and inducements, in connection with this aspect of the investigation is minimized. *See In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1070 (D.C. Cir. 1998)(*quoting Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979)). Moreover, the release of these portions of the redacted pages will not result in "persons who are accused but exonerated by the grand jury [being] held up to public ridicule." *Id.* In the Special Counsel's view, the fact that the redacted pages contain references to a limited number of discrete details that have not been made public does not alter the analysis. Accordingly, the Special Counsel has no objection to the release of the portions of the redacted pages that relate directly to Mr. Libby, and not to others, which are identified in Exhibit 1.

The remainder of the redacted pages discuss grand jury testimony related to persons

who have not been, and may never be, charged with a criminal offense, and persons who have not been publicly identified as witnesses or subjects of the investigation. Continued secrecy with respect to these portions of the redacted pages is vital "'to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation.'" *See In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001)(quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n. 6 (1958)(internal quotation marks omitted). Moreover, because the investigation concerning these matters is ongoing, continued secrecy is needed to assure that prospective witness will come forward voluntarily, and will testify fully and frankly, and to prevent any efforts to obstruct the investigation. *See Douglas Oil*, 441 U.S. at 219. While some of the testimony discussed in these portions of the redacted pages has become publicly known as a result of public statements made by witnesses, this fact does not reduce the need for continued secrecy. Even if a witness's public statements about his own testimony standing alone were sufficient to justify the disclosure of such testimony in connection with an ongoing grand jury investigation, in this case, the references to such testimony contained in the redacted pages is so tightly interwoven with non-public grand jury matters that it would be impossible to disclose such testimony without revealing other details concerning the subjects and witnesses, as well as the strategy and direction, of the grand jury's ongoing investigation. *See In re Motions of Dow Jones & Co.*, 142 F.3d at 505 (citing *In Re North*, 16 F.3d at 1242). Thus, it is necessary that the portions of the redacted pages that do not refer specifically to the charged conduct of Mr. Libby, and do refer to individuals

who have not been charged with crimes, remain under seal, and the Special Counsel objects to their release.

CONCLUSION

For all of the foregoing reasons, the Special Counsel respectfully requests that the motion of Dow Jones & Company, Inc. be granted only with respect to those portions of the redacted pages of Judge Tatel's separate opinion that specifically relate to the charged conduct of I. Lewis Libby as identified in Exhibit 1 to this Response, and that the motion be denied with respect to the remaining portions of the redacted pages.

Respectfully submitted,

PATRICK J. FITZGERALD

By: _____
PETER R. ZEIDENBERG
Deputy Special Counsel

PATRICK J. FITZGERALD
Special Counsel
JAMES P. FLEISSNER
DEBRA RIGGS BONAMICI
KATHLEEN M. KEDIAN
Deputy Special Counsels

Office of the United States Attorney
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5300