

IN THE SUPREME COURT OF THE UNITED STATES

Nos. 18A669, 18M93, 18-948

IN RE GRAND JURY SUBPOENA

ON APPLICATION FOR A STAY AND MOTION FOR LEAVE TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT UNDER SEAL

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR
LEAVE TO INTERVENE TO FILE A MOTION TO UNSEAL

The Solicitor General, on behalf of the United States of America, respectfully responds to the request of movant, the Reporters Committee for Freedom of the Press, to intervene in this case in order to file a motion requesting this Court to direct the filing of public and redacted versions of the documents filed in the above-captioned matters. In the government's view, intervention is unnecessary to achieve the unsealing objectives sought by movant, as this Court can, on motion of the parties, achieve the same result.

1. The court of appeals has issued public, redacted opinions that identify the general nature of the underlying proceedings and the legal issues involved, and petitioner has filed a petition for

a writ of certiorari under seal with redacted copies for the public record. Accordingly, a substantial amount of information about the filings in this case has already been unsealed. 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."). Although the Court has granted the application for leave to file the application for a stay, the response, and the reply under seal (No. 18A669), the government believes that redacted versions of those filings may now be made on the public record without compromising grand jury secrecy.

To that end, the government is simultaneously filing a motion in this Court for leave to file a redacted copy of its response to the application for a stay on the public record and for the applicant to file similar redacted versions of its application and reply, after the government has had the opportunity to review those proposed filings.

Although movant seeks to justify its request for unsealing based on First Amendment and common-law access principles that in the government's view do not apply to sealed grand jury proceedings, it is unnecessary for the Court to address those issues. The government's approach (which is consistent with that

taken by the court of appeals and this Court) discloses on the public record the arguments of the parties while preserving grand jury secrecy. Movant does not request that any additional information be made public. See Mot. 7 ("All of these aspects of the proceedings should be accessible to the public, subject only to redactions necessary to protect the secrecy of the grand jury."); id. at 8-9 (citing Fed. R. Crim. P. 6(e)(5) as apparently consistent with movant's approach). Accordingly, the government's approach reaches the same substantive result -- public filings, redacted to protect grand jury secrecy -- that would occur if the Court granted the motion to intervene and the accompanying motion to direct the filing of redacted documents.

2. The government suggests that the court of appeals address in the first instance movant's request for unsealing of the underlying record, pursuant to the motion that movant simultaneously filed in that court. That court -- which resolved the merits in a full opinion that was redacted to protect sealed matters -- would be better situated to address what additional documents, if any, should be unsealed and what redactions are necessary to protect against disclosure of matters occurring before a grand jury.

"Every court has supervisory power over its own records." Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). For that reason, it is appropriate for this Court to unseal the

filings made here, redacted as appropriate to protect against disclosure of a matter occurring before the grand jury. But it is equally appropriate -- and more efficient -- for this Court to allow the court of appeals to address movant's unsealing request with respect to the record. Movant has submitted a substantially similar unsealing request to that court that covers the briefs and record filed below. See Motion To Unseal, In re Grand Jury Subpoena, No. 18-3071 (filed Jan. 9, 2019). In doing so, movant has invoked D.C. Circuit Rule 47.1(c), which provides that "any * * * interested person may move at any time to unseal any portion of the record in this court, including confidential briefs or appendices filed under this rule." Ibid.

Allowing the court of appeals to address that motion is sensible because that court has gained familiarity with the record by resolving the appeal on the merits and by preparing a redacted opinion. In addition, the court of appeals' local rules specify a procedure to be followed with respect to unsealing requests. "On appeals from the district court, the motion [to unseal] will ordinarily be referred to the district court, and, if necessary, the record remanded for that purpose, but the court may, when the interests of justice require, decide that motion, and, if unsealing is ordered, remand the record for unsealing." D.C. Cir. Rule 47.1(c). This local rule may afford the court of appeals flexibility, for example, to direct the filing of redacted briefs

that were submitted on appeal, while protecting the remainder of the record from disclosure on the ground that the burden of redacting intertwined grand jury material may outweigh any incremental value of unsealing. See 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. Alternatively, if 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.”). Those matters are best left to the discretion of the court of appeals.

3. In view of those ongoing proceedings in the court of appeals, and the feasibility of unsealing redacted filings in this Court without the participation of movant (which would be unable to review the sealed material in any event), this Court need not resolve movant’s arguments for intervention or about rights of access in judicial proceedings that are related to the grand jury’s investigation. Without intervention, movant and the public can obtain access to relevant materials to the extent consistent with the protection of grand jury secrecy.

CONCLUSION

The motion to intervene should be denied.

Respectfully submitted.

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JANUARY 2019