

ARGUED DECEMBER 8, 2004

RECEIVED
U.S. COURT OF APPEALS
FOR THE D.C. CIRCUIT

Nos. 04-3138, 04-3139, 04-3140

2007 MAR -7 PM 5:15
FILING DEPOSITORY

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

IN RE GRAND JURY SUBPOENAS TO JUDITH MILLER

IN RE GRAND JURY SUBPOENAS TO MATTHEW COOPER

IN RE GRAND JURY SUBPOENA TO TIME INC.

On Appeal From The United States District Court
For The District Of Columbia

**RENEWED MOTION OF *AMICI CURIAE* DOW JONES
AND THE ASSOCIATED PRESS TO UNSEAL**

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**RENEWED MOTION OF *AMICI CURIAE* DOW JONES
AND THE ASSOCIATED PRESS TO UNSEAL**

Amici Dow Jones & Company, Inc. (“Dow Jones”) and the Associated Press hereby renew their December 20, 2006 motion to unseal the remaining portions of the record in this case in light of yesterday’s verdict in the trial of I Lewis Libby, Jr. That verdict, and the trial that led up to it, make it all the more important that the public have the fullest possible access to all aspects of the judicial proceedings in this matter, and eliminate any possible basis for secrecy.

As this Court is well aware, this case arose as part of an investigation by Special Counsel Patrick Fitzgerald into the disclosure of the identity of CIA operative Valerie Plame. On February 15, 2005, a panel of this Court affirmed the district court’s refusal to quash subpoenas issued to *New York Times* reporter Judith Miller, *Time* magazine reporter Matthew Cooper, and Time Inc. *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). Portions of Judge Tatel’s concurring opinion were redacted in the publicly released version of the opinion; related affidavits from the Special Counsel were kept under seal. *Id.* at 1002. On February 3, 2006, this Court granted the motion of *amicus* Dow Jones to unseal portions of Judge Tatel’s opinion and the affidavits. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138 (D.C. Cir. 2006). The Court declined to unseal the remaining material but emphasized that its order was “without

prejudice to Dow Jones's right to move to unseal additional materials at a later date." *Id.* at 1141.

On December 20, 2006, *amici* Dow Jones and the Associated Press moved this Court to unseal all or some of the remaining redacted portions of Judge Tatel's opinion and the affidavits. *See Mot. of Amici Curiae Dow Jones and the Associated Press to Unseal (Dec. 20, 2006)* (attached as Exh. A). In support of their motion, *amici* highlighted several public statements that eliminated the need for continued secrecy, including: the disclosure by former Deputy Secretary of State Richard Armitage that he had leaked Plame's identity to reporters Robert Novak and Bob Woodward; the confirmation that presidential aide Karl Rove would not be charged in connection with the investigation; and the decision by Mr. Cooper and Mr. Novak to reveal the content of their own grand jury testimony, including testimony about their conversations with Mr. Rove. *See id.* at 5–6.

In a response filed on January 17, 2007, the Special Counsel's principal argument was that it would be "inefficient and imprudent" for this Court to rule on *amici's* motion given that Mr. Libby's criminal trial was then underway. *See Gov't Response*, at 6 (Jan. 17, 2007) (attached as Exh. B). The Special Counsel asked that the motion be denied "without prejudice to a renewed motion to unseal filed after the completion of the trial in the district court in *United States v. Libby*," or, alternatively, that the motion be "held in abeyance pending completion of the

Libby trial.” *Id.* at 1. The Special Counsel argued that the interest in public disclosure of the sealed materials counseled in favor of considering disclosure “after,” rather than “during,” the Libby trial. *Id.* at 6. On February 9, 2007, this Court issued an order denying *amici*’s motion “without prejudice to refiling upon completion of the proceedings in United States v. Libby.”

On March 6, 2007, a federal jury found Mr. Libby guilty of two counts of perjury, one count of obstruction of justice, and one count of making a false statement to federal investigators in connection with the Special Counsel’s investigation. *See* Carol D. Leonnig & Amy Goldstein, *Libby Found Guilty in CIA Leak Case*, Wash. Post, Mar. 7, 2007, at A1.

Accordingly, pursuant to Federal Rule of Appellate Procedure 27 and D.C. Circuit Rules 27 and 47.1, *amici* respectfully renew their motion and the arguments contained therein and in the related reply brief (attached as Exh. C), and move this Court to unseal the remaining redacted portions of Judge Tatel’s opinion and the sealed affidavits.¹

¹ Dow Jones and the Associated Press filed their corporate disclosure statements in their *amicus* brief submitted October 25, 2004.

ARGUMENT

This Court has made clear in this case that the secrecy of grand jury proceedings is not “unyielding,” and “[j]udicial materials describing grand jury information must remain secret only ‘*to the extent and as long as necessary*’ to prevent the unauthorized disclosure of a matter occurring before a grand jury.” 438 F.3d at 1140 (quoting Fed. R. Crim. P. 6(e)(6)) (emphasis added by the Court). Importantly, “secrecy is no longer ‘necessary’ when the contents of grand jury matters have become public.” 438 F.3d at 1140. Indeed, “[t]here must come a time . . . when information is sufficiently widely known that it has lost its character as Rule 6(e) material.” *Id.* (quoting *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994)).

As the Special Counsel predicted in his opposition to *amici*’s original motion, “information pertinent to the necessity of compelling the testimony of [the] two reporters will be disclosed at trial.” Exh. B. at 10; *see also id.* at 5–6 (agreeing that “disclosures necessitated by the Libby trial may justify disclosure of some materials”). Indeed, testimony taken in open court through the course of Mr. Libby’s trial has removed any remaining need for secrecy. Mr. Woodward and Mr. Novak testified that Mr. Armitage, not Mr. Libby, disclosed Ms. Plame’s identity to them. *See* Richard B. Schmitt & Greg Miller, *Journalists Take Stand in Libby’s Defense*, L.A. Times, Feb. 13, 2007, at A13. The court also heard an audio

recording of Mr. Woodward's interview of Mr. Armitage in which he revealed Ms. Plame's identity. *Id.* *Washington Post* reporter Walter Pincus testified that then-White House Press Secretary Ari Fleischer was his source for Ms. Plame's identity. *Id.* Mr. Fleischer, testifying with immunity, stated that he had heard Ms. Plame's name from Mr. Libby, and that he had disclosed Ms. Plame's identity to reporters. *See* Amy Goldstein & Carol D. Leonnig, *Former Press Secretary Says Libby Told Him of Plame*, *Wash. Post*, Jan. 30, 2007, at A3.

Not only has the need for secrecy evaporated in light of this and other testimony at Mr. Libby's trial, but the Special Counsel has now indicated that his investigation is complete. *See* Carol D. Leonnig & Amy Goldstein, *Libby Found Guilty in CIA Leak Case*, *Wash. Post*, Mar. 7, 2007, at A1 ("Fitzgerald said he does not expect to bring any more charges unless new information comes to light."). This Court in its prior order noted that the fact that "the special counsel's investigation is ongoing only heightens the need for maintaining grand jury secrecy." 438 F.3d at 1141. But in light of the end of Mr. Fitzgerald's inquiry, it is essential that Judge Tatel's opinion and the Special Counsel's affidavits be unsealed.

As *amici* maintained in their original motion, public access to grand jury materials is critical so that the public can understand the Special Counsel's use of his investigatory authority and thereby serve as a check on the criminal justice

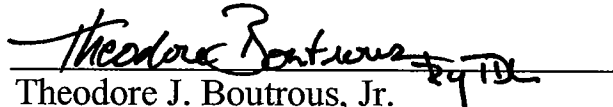
system. *See, e.g., Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (noting “the critical importance of *contemporaneous* access” to grand jury materials (emphasis in original)). Now that Mr. Libby’s trial is complete and a verdict has been rendered, it is even more imperative that this Court grant access to these materials. Unsealing these documents will help the public understand not only the proceedings in this Court, but the proceedings in the district court that have just concluded. The Special Counsel has indicated that his investigation is complete, and the public deserves an opportunity to scrutinize the basis for his appointment and his conduct of an investigation that forced the imprisonment of a journalist and resulted in the criminal conviction of an official from the highest levels of the United States government in connection with that official’s conversations with the press.

CONCLUSION

For all the reasons set forth above and in *amici*'s original motion, this Court should now unseal the remaining portions of Judge Tatel's opinion and the Special Counsel's affidavits.

Dated: March 7, 2006

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2007, I caused a true and correct copy of the foregoing to be served on the following via overnight delivery:

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