

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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ARGUED DECEMBER 8, 2004

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

**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

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

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INTRODUCTION

This Court should reject the Special Counsel's bid to keep secret certain remaining sealed portions of the record in this appeal. It would be ironic indeed if—after having prevailed in a constitutional confrontation that forced reporters to disclose their confidential sources and sent one reporter to jail for nearly three months—the Special Counsel were able to persuade this Court to keep confidential critical parts of his own presentation to this Court and the Court's reaction. The facts of this case, which involved officials from the highest ranks of the federal government, have now been publicly revealed through a full-blown criminal trial, the grand jury witnesses' own trial testimony and public statements, and “media accounts, . . . which probably number alongside ‘cross ties on a railroad or stars in the sky.’” *In re North*, 16 F.3d 1234, 1240 (D.C. Cir. 1994) (quoting *On Top Of Old Smokey* (American Folk Song)). At this stage, there is no basis for keeping any part of the record secret, and there are compelling grounds for full disclosure.

I. THERE ARE COMPELLING REASONS FOR THIS COURT TO UNSEAL THE RECORD IN ITS ENTIRETY.

There is an undeniable and overwhelming public interest in full public disclosure of the Special Counsel's factual representations and arguments to this Court. The Special Counsel argued that it was necessary and appropriate, in the exercise of his prosecutorial discretion, to compel testimony from journalists Judith Miller and Matthew Cooper about their confidential sources. We now know that

he knew—even before he served a single subpoena on a journalist—that Richard Armitage was the source of the leak to columnist Robert Novak, who first disclosed Valerie Plame’s identity as a CIA official. When this matter was being briefed and argued in this Court, neither the subpoenaed journalists, nor the public, had any inkling that the Special Counsel already knew the solution to the mystery that had provoked the investigation in the first place. Had this crucial fact been public, it no doubt would have changed the journalists’ arguments before this Court and the entire tenor of the public debate regarding this controversial case.

Now that the case is finally over, the public should be given the chance to scrutinize fully the Special Counsel’s *ex parte* statements to this Court. In particular, the Court should open the door to full public scrutiny of how— notwithstanding Mr. Armitage’s confession—the Special Counsel determined that the evidence, and the Department of Justice guidelines restricting issuance of subpoenas to reporters, *see* 28 C.F.R. § 50.10, justified contempt proceedings against these journalists to compel them to testify.

The Special Counsel thus mischaracterizes the basis for this motion. *Amici* do not seek to unseal Judge Tatel’s opinion and the record supporting it because “the pursuit of such testimony may have gone beyond the Special Counsel’s fulfillment of his ‘investigatory mandate.’” *Resp.* at 5. Rather, by way of this motion, *amici* seek to unseal the rest of the record to allow the public to gain a

better understanding of the Special Counsel's rationale for seeking to compel the testimony of these journalists, to evaluate how he explained this rationale to the Court in his *ex parte* filing, and to analyze the extent to which this Court relied upon those arguments. In short, this motion seeks to find out what the Special Counsel knew, when he knew it, and how he disclosed it to this Court.¹

The Supreme Court has repeatedly emphasized that openness of judicial proceedings “guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (plurality opinion) (citation omitted). It also “enhances . . . the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984). As the Court has observed: “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448

¹ *Amici* are well aware that the Special Counsel's investigative mandate went beyond “the leak to Novak” and also encompassed ancillary crimes such as perjury and obstruction of justice. Resp. at 5. But whether and to what extent the Special Counsel (a) discussed in his affidavits that he already knew that Mr. Armitage was Mr. Novak's original source and that he knew that before seeking expansion of his mandate, and (b) explained why in the exercise of his discretion it was nonetheless necessary to compel reporters to testify, are issues of significant public interest.

U.S. 555, 572 (1980) (plurality opinion)); *see also ABC, Inc. v. Stewart*, 360 F.3d 90, 105–06 (2d Cir. 2004) (“Our national experience instructs us that except in rare circumstances openness preserves, indeed, is essential to, . . . public confidence in the administration of justice. The burden is heavy on those who seek to restrict access to the media, a vital means to open justice.”).

These considerations carry special force here, where the Special Counsel operated wholly outside the Justice Department’s usual system of checks and balances. In his words, the Special Counsel “serve[d] as the functional equivalent of the Attorney General,” with broad authority to conduct the matter without “seek[ing] approvals prior to significant investigative or prosecutorial steps.” Affidavit of Aug. 27, 2004, ¶ 6 & n.1. “After all, special prosecutors, immune to political control and lacking a docket of other cases, face pressure to justify their appointments by bagging their prey.” *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1176 (D.C. Cir. 2006) (Tatel, J., concurring). The public must be allowed to examine the full record of the Special Counsel’s representations to this Court in order to conduct an informed evaluation and debate concerning his performance. That is especially true because, unlike under the now-defunct Independent Counsel statute, there is no requirement that the Special Counsel issue a final report, and he has indicated that he will not do so. *See CQ Transcriptions, Special Counsel Holds Media Availability*, via LEXIS (Mar. 6, 2007)

(“QUESTION: Will you make public the complete account of your investigation . . . ? FITZGERALD: Well, my short answer is no.”). As this Court has recognized, the final report requirement was intended to “ensure the accountability of the Independent Counsel to the government of the United States and the public.” *North*, 16 F.3d at 1238 (internal quotation marks omitted). In this case, as in *North*, “[t]he American public is particularly entitled to this accountability where the subject of the investigation and the investigation itself have been widely publicized, of long duration, and of great expense.” *Id.*²

Moreover, there are “especially strong” reasons favoring public disclosure of judicial orders and opinions because they are “the quintessential business of the public’s institutions.” *E.E.O.C. v. Nat’l Children’s Center*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). And the public interest in the full text of the Special Counsel’s

² This Court in *North* released an Independent Counsel’s report in light of four factors outlined in a Senate report accompanying the reauthorization of the Independent Counsel Act. 16 F.3d at 1237. The court considered: “[1] whether the subjects of the investigations have already been disclosed to the public; [2] whether the subjects do not object to the filings being released to the public; [3] whether the filings contain information which is already publicly known; and [4] whether the court filings consist of legal or factual rulings in a case which should be publicly available to understand the court’s rules and precedents or to follow the developments in a particular matter.” *Id.* (internal quotation marks omitted). Although the factors were not binding, the Court relied on them in making the report public, determining that Americans deserved an opportunity to judge the Independent Counsel’s investigation based on the whole record. By analogy, those factors militate strongly toward releasing the full record before this Court.

affidavits is heightened by the fact that this Court expressly relied upon and analyzed them in reaching its decision. *See id.* at 1410–11; *cf. Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006) (discussing common law and First Amendment presumption of public access to documents submitted to courts for purposes of obtaining a judicial ruling); *Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252–53 (4th Cir. 1988) (noting that sealed discovery documents “stand[] on a wholly different footing” than documents actually “filed by a party seeking action by the court”). Given the precedent established by this case, the press, the public and the Department of Justice itself have a significant interest in knowing what information the Special Counsel and the Court found compelling enough to require such a showdown. Such guidance is needed to steer clear, if possible, of similar confrontations in the future.

II. RULE 6(e) EMPOWERS THIS COURT TO UNSEAL JUDGE TATEL’S OPINION AND THE SPECIAL COUNSEL’S AFFIDAVITS.

The Special Counsel nonetheless maintains that certain grand jury matters are “still secret” and must not be disclosed even though they have “*become publicly known* as a result of public statements made by grand jury witnesses.” Resp. at 10 (emphasis added). Although he never mentions Mr. Armitage by name, the Special Counsel’s response suggests that he is asking this Court to keep under seal, among other things, material regarding Mr. Armitage. But Mr. Armitage’s role has been publicly disclosed on numerous occasions—including in

a tape recording of an interview with reporter Bob Woodward that was played at trial, in testimony by Mr. Novak, and by Mr. Armitage himself in numerous interviews and public statements. *See, e.g.,* Neil A. Lewis, *First Source of C.I.A. Leak Admits Role, Lawyer Says*, N.Y. TIMES, Aug. 30, 2006, at A12. Likewise, as *amici* have already shown, *see* Renewed Mot. at 2, the world is well aware that presidential advisor Karl Rove was a subject of the Special Counsel’s investigation and a source of Ms. Plame’s identity for both Mr. Novak and Mr. Cooper, both of whom testified during the *Libby* trial and wrote articles on this topic. No legitimate purpose would be served, and the public interest would be damaged, by keeping judicial records discussing these facts secret—in fact, doing so after all that has been disclosed would border on the farcical.

There is simply no basis for the Special Counsel to argue that information that has been repeatedly disclosed to the public, including by a grand jury witness, can or should be kept secret under Rule 6(e). Although incidental disclosure does not automatically erase the protections of Rule 6(e), this Court has noted that the rule does not protect information once it has been “virtually proclaimed from the rooftops” by a grand jury witness or his attorney. *In re Motion of Dow Jones*, 142 F.3d 496, 504 (D.C. Cir. 1994). Indeed, this Court has already unsealed information in this very case after it become public, observing that there is “little purpose in protecting the secrecy of grand jury proceedings that are no longer

secret.” 438 F.3d at 1140. The Special Counsel cannot explain why he *supports* the release of information that has been “made public during the course of” the Libby trial, Resp. at 9, but opposes the release of information that has been broadly disseminated to the public through other means.

The Special Counsel argues, in the alternative, that this information—which he *admits* is widely known—cannot be released because some of it is “tightly interwoven with non-public grand jury matters,” and that there is no First Amendment right of access to grand jury proceedings. Resp. at 10, 9. But as this Court has held under far more sensitive circumstances, Rule 6(e) gives it the power to release information when countervailing factors are present—regardless of whether First Amendment or common law rights of access are triggered. *North*, 16 F.3d at 1244. “[T]he Courts may loosen th[e] bonds [of secrecy] under the terms of the Rule. ‘Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . . when so directed by a court . . . in connection with a judicial proceeding.’” *Id.* (quoting Rule 6(e)(3)(C)); *see also Dow Jones*, 142 F.3d at 504–05.

In *North*, the Court rejected Rule 6(e) objections and released the Independent Counsel’s Iran-Contra investigation report, which contained not just grand jury information but also “repeatedly accuse[d] named individuals of crimes, although in many instances the individual was never indicted, if indicted was never

convicted, or if convicted the conviction was reversed.” 16 F.3d at 1237. Because “most” of the contested information already had been reported in the media or otherwise disclosed, the Court held that *all* of the information in the report had “lost its character as Rule 6(e) material.” *Id.* at 1245; *see also id.* (“Information widely known is not secret.”). More fundamentally, the Court recognized that “it is in the public interest that this matter of extended national controversy be afforded as full as conclusion as possible” by allowing the American people a right to examine every aspect of the investigation, and that keeping portions of the report a secret would only have “extend[ed] the controversy over the supposed, reported, or suspected contents of the” secret material. *Id.*

Those principles of openness and fairness apply squarely here. This case involves a matter of great public controversy extending to the highest reaches of the White House, State Department, CIA and the national media. The vast majority, if not all, of the material information already has been publicly disclosed. Under the rationale in *North*, the Court should release the entirety of Judge Tatel’s opinion and the Special Counsel’s affidavits, even to the extent that some small sliver of undisclosed grand jury information supposedly is “interwoven” with the vast array of information that is now indisputably public.

This investigation is over, the only trial resulting from it has produced a conviction, and this spectacle is the subject of ongoing and intense public debate

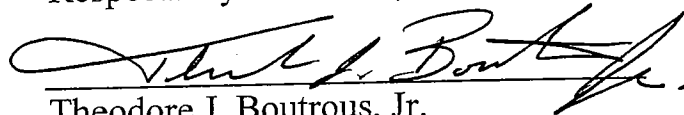
and controversy. Accordingly, it is “in the national interest that the public, its representatives in the political branches, and its surrogates in the media have as full an access to the fruits of the investigation as possible, consistent with the fairness dictates of the law.” *North*, 16 F.3d at 1241.

CONCLUSION

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

Dated: March 30, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th 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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