UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR NONDISCLOSURE ORDER PURSUANT TO 18 U.S.C. § 2705(b) FOR GRAND JURY SUBPOENA # GJ2014031022709	Misc. No. 14-287 (RWR) (JMF)
IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR NONDISCLOSURE ORDER PURSUANT TO 18 U.S.C. § 2705(b) FOR GRAND JURY SUBPOENA # GJ2014031422765	Misc. No. 14-296 (RWR) (JMF)

MOTION TO UNSEAL MEMORANDUM OPINION AND ACCOMPANYING ORDERS

Pursuant to Local Criminal Rule 49.1(h) and Local Civil Rule 5.1(j), the American Civil Liberties Union and the American Civil Liberties Union of the Nation's Capital (collectively, "ACLU") move to unseal this Court's Memorandum Opinion and the accompanying orders filed in these cases on April 28, 2014. The motion should be granted for the reasons set out below.

Several weeks ago, the government submitted applications for gag orders, pursuant to 18 U.S.C. § 2705(b), to prevent Yahoo, Inc., and Twitter, Inc., from disclosing to any person the existence or content of certain grand jury subpoenas issued to those companies. In response, Magistrate Judge Facciola invited Yahoo and Twitter to intervene as respondents for the purpose of expressing their views regarding the validity of the proposed gag orders, and simultaneously barred the companies from disclosing any non-public information about the grand jury

subpoenas at issue, pending resolution of the matter. Am. Order, Misc. Case No. 14-287 (Mar. 24, 2014), ECF No. 3; Am. Order, Misc. Case No. 14-297 (Mar. 24, 2014), ECF No. 3. Judge Facciola further ordered the government to file redacted versions of its gag order applications on the public docket. Order, Misc. Case No. 14-287 (Mar. 24, 2014), ECF No. 4; Order, Misc. Case No. 14-296 (Mar. 24, 2014), ECF No. 4.

The government appealed both sets of orders and moved this Court to issue the proposed gag orders on its own authority. See Mem. Op. and Order, Misc. Case No. 14-480, ECF No. 2 (Mar. 31, 2014) (citing Government's Appeal from Magistrate Judge's Orders Regarding Government's Appl. for Order Pursuant to 18 U.S.C. § 2705(b), Misc. Case No. 14-287 (Mar. 27, 2014), ECF No. 5-1 (sealed); Government's Appeal from Magistrate Judge's Orders Regarding Appl. for Order Pursuant to 18 U.S.C. § 2705(b), Misc. Case No. 14-296 (Mar. 27, 2014), ECF No. 5-1 (sealed)). The government filed both appeals under seal, apparently "because each contains a single sentence on the second page explaining the general basis for the underlying grand jury investigation." *Id.* at 2 n.1. This Court granted the government's motions to seal the appeals and ordered Yahoo and Twitter not to file anything on the public docket during the appeal proceedings. Order, Misc. Case No. 14-287 (Mar. 27, 2014), ECF No. 7; Order, Misc. Case No. 14-296 (Mar. 27, 2014), ECF No. 7.

The ACLU moved to intervene for the purpose of asserting the public's right of access to the sealed filings in these proceedings—namely, the government's § 2705(b) applications, its appeals to this Court, and its motions to seal. The ACLU asked the Court to unseal the documents at issue, subject to appropriate redaction. In the same filing, the ACLU requested leave to participate as *amicus curiae* in support of Judge Facciola's decision to invite briefing from Twitter and Yahoo. Motion of ACLU to Intervene and for Unsealing, and for Leave to File

Mem. as *Amicus Curiae*, Misc. Case No. 14-287 (Apr. 16, 2014), ECF No. 8; Motion of ACLU to Intervene and for Unsealing, and for Leave to File Mem. as *Amicus Curiae*, Misc. Case No. 14-296 (Apr. 16, 2014), ECF No. 8 (collectively, "ACLU's Motion to Unseal").

On April 28, 2014, the Court issued a sealed memorandum opinion and two sealed orders, granting the government's applications for the gag orders and sealing the documents in the case.[1]

The ACLU now moves the Court to unseal these recently issued judicial documents, pursuant to the public's constitutional and common law rights of access. The decision to seal these documents in their entirety was error. The documents embody the Court's opinion on a matter of significant public interest and, we believe, touch only tangentially on the underlying grand jury subpoenas. To the extent, if any, that the Court's opinion and orders contain sensitive grand jury information, the appropriate course under Federal Rule of Criminal Procedure 6(e)(6), Local Criminal Rule 6.1, and the public's right of access, is to release the documents with the sensitive information redacted.

[redacted]

[1] Mem. Op., Misc. Case No. 14-287, ECF No. 11 (sealed); Order, Misc. Case No. 14-287, ECF No. 12 (sealed); Order, Misc. Case No. 14-287, ECF No. 13 (sealed); Mem. Op., Misc. Case No. 14-296, ECF No. 10 (sealed); Order, Misc. Case No. 14-296, ECF No. 11 (sealed); Order, Misc. Case No. 14-287, ECF No. 12 (sealed).

The fact that the Court granted the government's application for the gag orders and sealed the documents in the case are noted in the titles of the Court's orders on the public docket.

ARGUMENT

I. The Sealing of the Court's Opinion and Orders Violates the Public's Right of Access.

In its previous brief, the ACLU argued that the public has First Amendment and common law rights of access to the gag order applications and other documents filed by the government in these proceedings. ACLU's Motion to Unseal at 8. As the ACLU explained, the public's First Amendment right of access to those documents derives both from the long tradition of access to documents filed in connection with prior restraint proceedings, *see, e.g.*, *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000), and from the public's acute interest in transparency regarding "a matter of statutory interpretation which does not hinge on the particulars of the underlying investigation" and poses "serious implications for the balance between privacy and law enforcement," *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d 747, 748–49 (S.D. Tex. 2005). The public's common law right of access to the documents, on the other hand, derives simply from their status as "judicial records." *See In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 290–91 (4th Cir. 2013); *United States v. El-Sayegh*, 131 F.3d 158, 161, 163 (D.C. Cir. 1997).

Those same arguments apply with even greater force to the opinion and orders issued by this Court. "The political branches of government claim legitimacy by election, judges by reason." *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). Because the judiciary's very legitimacy stems from its issuance of reasoned decisions, documents authored or generated by a court, such as court orders, have long been considered core judicial records subject to the most stringent requirements of public access. As explained by the Third Circuit:

> [O]urs is a common-law system based on the "directive force" of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions. . . . Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes. Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions.

Lowenschuss v. West Publ'g Co., 542 F.2d 180, 185 (3d Cir. 1976) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 20, 21–22 (1963)); *see, e.g.*, *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal "because the decisions of the court are a matter of public record"); *BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC*, 303 F.3d 1332, 1335 n.1 (Fed. Cir. 2002) (rejecting request to file decision under seal); *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 891 (S.D. Tex. 2008) (rejecting permanent sealing of § 2703(d) orders, because "documents authored or generated by the court itself" are in the "top drawer of judicial records," a drawer that is "hardly ever closed to the public"). That tradition extends to public court opinions filed in prior restraint proceedings of the sort at issue here. *See In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2705(b)*, 866 F. Supp. 2d 1172, 1173 (C.D. Cal. 2011) (holding, in a public opinion, that 18 U.S.C. § 2705(b) does not authorize the government to obtain an order prohibiting disclosure of requests for "subscriber information"); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005) (holding, in a public opinion, that a non-disclosure order issued pursuant to 18 U.S.C. § 2709(c) failed strict scrutiny), *appeal dismissed*, 449 F.3d 415 (2d Cir. 2006).

Just as fundamentally, the "significant positive role" of *public* judicial decision-making in a democracy is so essential that it is hardly ever questioned. Courts have repeatedly recognized that public access to judicial opinions serves a vital function. *See, e.g.*, *United States v. Rosen*, 487 F. Supp. 2d 703, 715–16 (E.D. Va. 2007) ("[R]equiring a judge's rulings to be made in

public deters partiality and bias. . . . In short, justice must not only be done, it must be seen to be done."); *Scheiner v. Wallace*, No. 93 Civ. 0062 (RWS), 1996 WL 633226, at *1 (S.D.N.Y. Oct. 31, 1996) ("The public interest in an accountable judiciary generally demands that the reasons for a judgment be exposed to public scrutiny.").

The importance of public access to judicial opinions flows from two bedrock principles: (1) the public's right to know what the law is, as a condition of democratic governance; and (2) the founding recognition that, in our political system, it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Because courts determine what the law means—and therefore what the law is—the societal need for access to judicial decisions is paramount.

Moreover, the value in making judicial opinions public only increases where, as here, the opinions concern both the power of the executive branch and the constitutional rights of citizens. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (access to court files "accentuated" where "the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch"); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d at 748–49 (refusing government request to seal opinion, because it involved a matter of statutory interpretation that "has serious implications for the balance between privacy and law enforcement"). In this case, the government presumably relies on questionable statutory authority to justify restraining the speech of Internet companies. *See* Mem. Op. and Order at 6, Misc. Case No. 14-480 (Mar. 31, 2014), ECF No. 2 (questioning whether 18 U.S.C. § 2705(b) authorizes the government to obtain the requested gag orders (citing *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2705(b)*, 866 F. Supp. 2d at 1179–80 (C.D.

Cal. 2011))). As evinced by a flood of recent press attention, the government's ability to silence Internet service providers and other Internet companies who wish to inform their subscribers of requests for private information has become a matter of significant public interest.[2] The Court should not conceal from public scrutiny important decisions and orders touching on this issue.

The government presumably contends that this matter should be sealed because it involves certain grand jury subpoenas. *See* Mem. Op. and Order at 8, Misc. Case No. 14-480, ECF No. 2. But the mere mention of a grand jury investigation is not sufficient to defeat the public's presumptive right of access to entire judicial records, especially this Court's opinions and orders. *Cf. Butterworth v. Smith*, 494 U.S. 624, 630 (1990) ("The invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" (quoting *United States v. Dionisio*, 410 U.S. 1, 11 (1973))). Federal Rule of Criminal Procedure 6(e)(6) reflects a more limited conception of grand-jury secrecy, providing that "[r]ecords, 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" (emphases added). A document or proceeding is considered to be "related to" a grand jury subpoena or investigation only "if it would reveal matters actually or potentially occurring before the grand jury." *In re Grand Jury Subpoena*, 103 F.3d 234, 238 (2d Cir. 1996). This ancillary protection generally extends to proceedings on motions to quash grand jury subpoenas and disputes over

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[2] *See, e.g.*, Craig Timberg, *Apple, Facebook, Others Defy Authorities, Notify Users of Secret Data Demands*, Wash. Post (May 1, 2014), *available at* http://www.washingtonpost.com/business/technology/apple-facebook-others-defy-authorities-increasingly-notify-users-of-secret-data-demands-after-snowden-revelations/2014/05/01/b41539c6-cfd1-11e3-b812-0c92213941f4_story.html; Reed Albergotti, *Google, Apple, Microsoft to Notify Users About Subpoenas in Privacy Nod*, Wall St. J. (May 2, 2014), *available at* http://online.wsj.com/news/articles/SB10001424052702304677904579538320088504240.

testimonial privilege, which involve the substance of the grand jury's inquiry. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 498 (D.C. Cir. 1998).

These proceedings, by contrast, "are not really about grand jury secrecy" at all, but rather about "interdicting Twitter [and Yahoo] from advising [their] subscriber[s] [about] . . . grand jury subpoena[s]." Mem. Op. and Order at 8, Misc. Case No. 14-480, ECF No. 2. Federal Rule of Criminal Procedure Rule 6(e)(2)(B), which enumerates the seven categories of individuals who must keep grand jury matters secret, makes no reference to recipients of grand jury subpoenas. Because Rule 6(e)(2)(A) provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)," recipients of grand jury subpoenas may not be gagged under the Rules. Presumably, that is why the government here relies on extraneous statutory authority to obtain its requested non-disclosure orders. *Cf. In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2705(b)*, 866 F. Supp. 2d at 1173 ("The United States argues, however, that the explicit command of Rule 6(e)(2) is trumped by 18 U.S.C. § 2705(b). The Court does not agree. Certainly section 2705 does not contain an explicit overruling of Rule 6(e)(2); it does not mention the rule at all. In the Court's view, the statute cannot properly be read as authorizing the Court to enjoin a provider from revealing that it has received a grand jury subpoena."). Regardless of whether § 2705(b) authorizes such an order, it is plain that proceedings under the statute to obtain non-disclosure orders explicitly prohibited by the grand jury secrecy rules are not themselves subject to grand jury secrecy.

More generally, requiring the government to disclose its desire to silence Twitter and Yahoo, and explain its legal rationale for doing so, would "in no way prejudice the underlying grand jury proceedings or render them public in any way." Mem. Op. and Order at 8, Misc. Case No. 14-480, ECF No. 2. And unsealing this Court's opinion and orders, redacted if necessary,

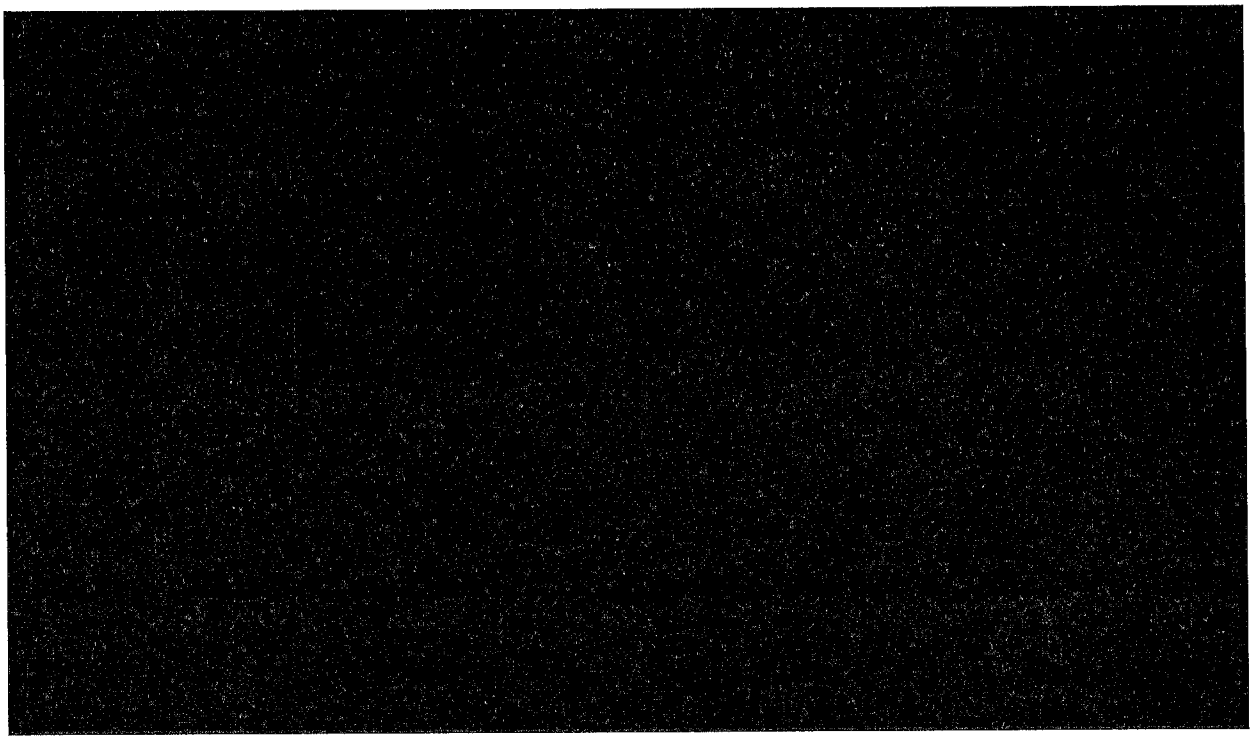
would inform the public of why the Court concluded that the government's request was justified. The statute authorizing gag orders was enacted by the elected representatives of the people and can be amended or repealed if the people come to believe it is unwise. But the people will be unable to form an educated opinion if they are prevented from knowing how the law is being implemented.

Moreover, if the opinion and orders at issue here also address the ACLU's initial unsealing motion, then they are even further removed from the grand jury proceedings that the government seeks to protect. *See In re Motions of Dow Jones & Co.*, 142 F.3d at 501 n.8 ("District court hearings on the [unsealing] motions filed by the press in this matter are of course an exception. These motions related to the grand jury but obviously revealed nothing about its workings. For that reason, we ordered the Chief Judge's orders denying the motions to be unsealed."). The D.C. Circuit has instructed that although sealing orders may themselves be filed under seal "if it is necessary to protect the secrecy" of the underlying documents, "[t]he trial court should only seal that part of its finding that is necessary" to protect such secrecy and "must make every effort to explain as much of its decision as possible on the public record to enable an interested person to intelligently challenge the decision." *Washington Post v. Robinson*, 935 F.2d 282, 289 & n.9 (D.C. Cir. 1991). Here, it seems likely that the Court could at the very least issue redacted versions of its opinion and orders, explaining why it has decided to seal the documents in this case, without compromising grand-jury secrecy. Such an explanation would allow members of the public to understand why these documents are being withheld and would facilitate further review of the Court's decision. At a minimum, if the Court has ruled on the ACLU's Motion to Unseal, that ruling should be reflected on the public docket.

To the extent that the documents at issue here contain actual grand jury information, the appropriate course under both Rule 6(e) and Local Criminal Rule 6.1 is to release the documents with that information redacted. *In re Motions of Dow Jones & Co.*, 142 F.3d at 500–01 ("A portion of a transcript filed in these appeals and the representations of non-press counsel at oral argument convince us that the Chief Judge is implementing Rule 302 [now Local Criminal Rule 6.1] by redacting documents."); *id.* at 506 ("If, however, the press clearly requests redacted versions of these transcripts in the future, we are confident that the Chief Judge would act on the motion consistent with the limits of Rule 6(e)(6) and local Rule 302."). Any broader interpretation of either rule would raise serious questions concerning judicial power and the constitutional right of access. *Cf. id.* at 501 (suggesting that an interpretation of the Local Rule requiring blanket closure of all ancillary grand jury proceedings, regardless of whether the proceedings would actually reveal grand jury information, would exceed the district court's authority to implement Rule 6(e)).

II. [redacted]

[redacted]



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CONCLUSION

For the foregoing reasons, the Court should unseal the opinion and orders entered in connection with these proceedings on April 28, 2014.

Respectfully submitted,

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