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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: GRAND JURY SUBPOENA) Case 1:19-dm-00003
FOR CHELSEA MANNING)
) Alexandria, Virginia
) March 5, 2019
) 9:34 a.m.
) Pages 1 - 32

TRANSCRIPT OF UNDER SEAL HEARING
BEFORE THE HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT COURT JUDGE

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

UNDER SEAL

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1 THE CLERK: Case No. 19-3, *In Re Grand Jury*
2 *Subpoena Regarding Chelsea Manning.*

3 MR. TRAXLER: Good morning, Your Honor.
4 Tommy Traxler on behalf of the United States. With me
5 at counsel table is Gordon Kromberg, Tracy McCormick,
6 Kellen Dwyer, and Nicolas Hunter also on behalf of the
7 United States, Your Honor.

8 THE COURT: All right.

9 MR. LEIBIG: Good morning, Judge. Chris
10 Leibig for Ms. Manning. With me is Sandra Freeman and
11 Moira Meltzer-Cohen.

12 As an initial matter, Judge, I would ask that
13 you grant my motion to move Ms. Meltzer-Cohen *pro hac*
14 *vice* for this matter.

15 THE COURT: All right. The motion is
16 granted.

17 MR. LEIBIG: Thank you, sir.

18 MS. FREEMAN: Good morning, Your Honor.
19 Sandra Freeman on behalf of Ms. Manning.

20 As a preliminary matter, I would request the
21 Court first take up our motion to unseal the pleadings,
22 and I would join that with a motion to open the
23 courtroom to the public.

24 THE COURT: All right.

25 MS. FREEMAN: Yes, sir. I just wanted to

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1 make sure the Court received the pleadings filed
2 yesterday and the motion to unseal the pleadings.

3 THE COURT: I have.

4 MS. FREEMAN: Judge, the matter before the
5 Court today is not a matter occurring before the grand
6 jury as we are not in front of the grand jury. The
7 pleadings filed on Ms. Manning's behalf by counsel are
8 not subject to the secrecy provisions in Rule 6(e), and
9 Ms. Manning, as a witness, is not contemplated by the
10 secrecy rules of 6(e).

11 The pleadings that we filed before you,
12 specifically the motion to quash and the motion to
13 unseal, do not contain any information about what has
14 occurred before the grand jury. The United States
15 Attorneys have not disclosed any of the information
16 that they are prohibited from disclosing. The
17 information that we have put before the Court within
18 our pleadings and the information that we anticipate
19 arguing to you today are all matters that are already
20 within the sphere of public knowledge and that are not
21 protected by the secrecy provisions within the law.

22 The motion to quash in and of itself is not
23 something that is subject to the rules of grand jury
24 secrecy.

25 We would ask the Court to authorize

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1 disclosure of the pleadings filed as to Ms. Manning
2 with the exception, of course, of Ms. Manning's
3 declaration that is sealed and secret pursuant to the
4 personal identifying detail provisions in the rules
5 regarding redaction.

6 The rules around grand jury secrecy, first, I
7 think are explicit in that they say that no one other
8 than those listed in 6(e)(2)(B) shall be required to
9 adhere to the rules of secrecy. The persons are
10 identified, such as the attorneys for the government
11 and court personnel. Of course, those people are
12 subject to the provisions, and they are explicitly
13 identified.

14 It's clear from the rule, from the advisory
15 committee notes to the rule, and from case law from
16 various circuits interpreting the rule that the witness
17 herself, the pleadings that we have filed that do not
18 contain nonpublic information regarding the nonpublic
19 proceedings before the grand jury are not subject to
20 those secrecy provisions.

21 What we are asking today is that the Court
22 authorize unsealing of the motion to quash filed on
23 Ms. Manning's behalf, authorize unsealing of the motion
24 to unseal, and we would further ask the Court open the
25 courtroom to the public for arguments on these matters.

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1 Of course, the public has no right to be
2 present for the grand jury itself. The public and
3 press have no First Amendment right of access. We are
4 not requesting that the public or the press or even
5 counsel have any access to the actual proceedings
6 before the grand jury.

7 Our request here is for these proceedings
8 specifically before you regarding whether or not to
9 quash Ms. Manning's subpoena, regarding whether or not
10 to unseal the pleadings, that those matters the public
11 does have a particularized interest and a right of
12 access to be present. Ms. Manning has a right for the
13 public to be able to be present for specifically these
14 arguments that do not involve protected information and
15 material.

16 There are questions and tests set out. We
17 have to show a particularized need and that those
18 materials were present and opening of the courtroom
19 would be needed to avoid injustice at other
20 proceedings. This is another proceeding being
21 contemplated by the rule. We are not asking the Court
22 to open up the proceedings of the grand jury itself.
23 We are asking that these proceedings particularly be
24 opened. The request has been narrowly tailored as to
25 these pleadings.

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1 So based on all of that, we would ask that
2 the Court be opening the pleadings and the public
3 information, the information that has already been
4 disclosed and revealed by both the government and by
5 socialists throughout the past decade, to be accessible
6 by the public and the hearing as well.

7 THE COURT: All right.

8 MR. TRAXLER: Thank you, Your Honor.

9 As a preliminary matter, I want to observe
10 that the government has not received a copy of the
11 motion to unseal. So we don't have the benefit of
12 responding to the specific arguments that were in that
13 pleading. But instead, we just heard about it today
14 from Ms. Manning's counsel. We would oppose
15 Ms. Manning's request to open the courtroom and to
16 unseal the pleadings in this matter.

17 First, I want to take up opening the
18 courtroom. Rule 6(e)(5), Your Honor, states, and I
19 quote, that aside from criminal contempt proceedings,
20 the Court must close any hearing to the extent
21 necessary to prevent disclosure of a matter occurring
22 before a grand jury.

23 We would submit, Your Honor, that this entire
24 hearing concerns a matter occurring before a grand
25 jury, and that is a subpoena that the grand jury has

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1 issued for Ms. Manning to testify in connection with a
2 grand jury investigation. That investigation is
3 ongoing. It's hard to imagine, Your Honor, how we can
4 have an effective hearing this morning without
5 discussing or potentially discussing matters that are
6 occurring before a grand jury.

7 Moreover, the pleadings and the hearing
8 directly involve matters occurring before the grand
9 jury. Rule 6(e) would preclude the government from
10 confirming Ms. Manning's subpoena, a matter occurring
11 before a grand jury; Ms. Manning's immunity order,
12 another order that was issued in connection with a
13 matter occurring before a grand jury; and other items.

14 So practically speaking, Your Honor, we
15 wouldn't be able to have an effective hearing if the
16 government is constantly evaluating under Rule 6(e)
17 whether it can say certain things because the media is
18 present in the courtroom. So we would submit, Your
19 Honor, that Rule 6(e)(5) answers the question this
20 morning, and that is the hearing, because it addresses
21 a matter occurring before the grand jury, should be
22 closed.

23 With respect to sealing, Your Honor, I would
24 direct the Court's attention to the following
25 subsection of Rule 6(e), and that's Rule 6(e)(6). That

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1 specifically states that records, orders, and subpoenas
2 relating to grand jury proceedings must be kept under
3 seal to the extent and as long as necessary to prevent
4 the unauthorized disclosure of a matter occurring
5 before a grand jury.

6 Your Honor, at the outset, we would submit,
7 having not had the benefit of receiving the pleading
8 that Ms. Manning filed yesterday, that the Court should
9 defer ruling on unsealing at this time. There is no
10 reason to go to a rushed judgment today. There is too
11 much at stake, and whatever the Court's ruling is, it
12 would likely be appealed to the Fourth Circuit.

13 Instead, let the parties brief this issue in
14 due course, and that would give the parties an
15 opportunity to work through these issues. It would
16 also give the Court an opportunity to make a considered
17 judgment in light of full briefing and the parties'
18 views on the issue.

19 But if the Court is inclined to rule today,
20 we would oppose unsealing all of the pleadings and
21 papers that they request be unsealed.

22 Just to reiterate, the fact that Ms. Manning
23 has been subpoenaed to testify in an ongoing grand jury
24 proceeding is a matter occurring before the grand jury.
25 Again, the fact that she's been granted immunity is

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1 directly contemplated in the advisory notes of
2 Rule 6(e)(5) as being a matter that should be sealed,
3 as being paper that should be sealed, and is a matter
4 occurring before the grand jury. Therefore, the briefs
5 that talk about that immunity order and the subpoena,
6 those are related to an ongoing grand jury proceeding
7 and should be sealed.

8 Thank you, Your Honor.

9 THE COURT: All right. Well, I find that
10 Rule 6(e)(5) and Rule 6(e)(6) require that we go
11 forward with these matters at this point in time under
12 seal and also that the courtroom be closed for the
13 hearing.

14 The government hasn't had time to respond to
15 your brief. I will give time for you all to look
16 further at this issue as to what ought to be unsealed
17 or not unsealed.

18 As far as the hearing on the motion to quash
19 this grand jury subpoena, that's a matter before the
20 grand jury, and we'll go forward with the courtroom
21 closed.

22 MS. MELTZER-COHEN: Good morning, Your Honor.
23 So thank you for hearing us this morning, Your Honor.

24 We understand that this is a robust and
25 complicated motion, so I will try to simplify it. This

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1 is an omnibus motion. The motion to quash is an
2 omnibus motion that contains several smaller motions
3 within it, many of which contain arguments that
4 interact with each other or are somewhat overlapping.

5 Each of the quash motions in our omnibus
6 motion represents an independent legal basis that would
7 constitute just cause for objecting to the subpoena
8 generally. Each of these quash motions might also
9 constitute grounds to object to individual questions
10 that would be propounded before the grand jury.

11 So to the extent that the government has said
12 that some of these motions may be premature, they're
13 not entirely incorrect because it is true that we can't
14 litigate these issues today with respect to questions
15 that we have not yet heard. But these motions may be
16 appropriate both today and then, again, revisited after
17 Ms. Manning hears questions.

18 THE COURT: Aren't you conceding the
19 government's position in regard to what questions may
20 be asked? I don't know how I can rule on that. I have
21 no idea what questions are there. You don't have any
22 idea what questions are there. Clearly, we can't go
23 forward with today; can we?

24 MS. METZLER-COHEN: Judge, I'm sorry. Your
25 Honor, what I'm suggesting and I believe what the law

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1 says is we can object to the subpoena generally, and we
2 can also, you know, in a later hearing object on
3 similar or the same grounds to individual questions.

4 So what's not premature here are the
5 following issues: With regard to Ms. Manning's Fifth
6 Amendment privileges, it would appear that the
7 government has worked to moot this issue by not only
8 securing an immunity order from you but by securing a
9 parallel order from the military.

10 So, first, as we said in the motion, we do
11 have concerns about a perjury trap. Ms. Manning gave
12 extensive and truthful testimony at her court marshal.
13 If you look at the document that's appended to the
14 government's reply, you will, in fact, see the
15 painstaking detail with which Ms. Manning accounted for
16 each instance of her conduct. I mean down to file
17 names, Your Honor.

18 So if the government intends to question her
19 about any of the same matters, which the reply seems to
20 suggest they do, she's sort of faced with the choice of
21 reiterating her previous answers, which the government
22 appears not to accept, or being untruthful, which she
23 refuses to do.

24 Ms. Manning has not given and would not give
25 untruthful testimony. However, since her prior

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1 testimony made clear that she acted alone and since we
2 have been advised that she is herself not a target in
3 this investigation, it would appear that the government
4 may harbor an interest in undermining her previous
5 testimony since it doesn't inculcate anyone else who
6 might be a target.

7 THE COURT: Aren't you getting back where we
8 were just a minute ago? You're saying if or what.
9 There's no way of knowing this. This is just entire
10 speculation. I can't base a ruling on that.

11 MS. METZLER-COHEN: Okay. Judge, I think
12 I -- I think it's important for me to make the record
13 of the argument here. So if you'll --

14 THE COURT: Well, you have that in your
15 papers, but go ahead and make your argument quickly.
16 It seems to me we're right at the same ground we were
17 before.

18 MS. METZLER-COHEN: Okay. I will attempt to
19 be clear and quick.

20 THE COURT: Well, that is, we can't base a
21 decision on that.

22 MS. METZLER-COHEN: Okay.

23 THE COURT: I mean, you can conjure up
24 anything, or I could too. Who knows whether that's
25 going to happen or not?

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1 MS. METZLER-COHEN: Well, Judge, there are
2 questions as to the subpoena as a whole that I think
3 deserve to be heard and are ripe for review today. So,
4 you know, if in case the subpoena has been propounded
5 with an interest in either coercing perjury or
6 attempting to build a case against Ms. Manning for
7 perjury, you know, in order to undermine her as a
8 potential defense witness, since the immunity order
9 can't immunize that potential perjury, she retains an
10 interest in not testifying.

11 I do also want to clarify for the record that
12 the government correctly repeated my statement of the
13 law with respect to foreign prosecution. It is
14 absolutely the case that the Supreme Court ruled in
15 *Balsys*, which both of us cite, that the immunity order
16 and immunity orders coextensive with the Fifth
17 Amendment privilege and that that privilege extends
18 only to domestic and not foreign prosecution. I am not
19 suggesting that it does extend to foreign prosecution
20 but that because the immunity order does not extend to
21 foreign prosecution, it does create an unresolved
22 problem for Ms. Manning, which I think is worth
23 considering.

24 With respect to constitutional rights, it
25 appears to be the government's position that this

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1 challenge is premature. While we, of course, agree
2 that we can't make arguments today about grand jury
3 questions that we haven't yet heard, there are other
4 issues with respect to the subpoena generally, again,
5 that can be heard today.

6 As mentioned, Ms. Manning has disclosed to
7 the government everything she can about her involvement
8 in the 2010 disclosures for which she took full
9 responsibility. If the government wishes to question
10 her further about these issues, as I said before, we
11 have concerns about a perjury trap.

12 But maybe they have interest in asking her
13 about subjects beyond those disclosures, and that would
14 be very concerning because Ms. Manning has no
15 information material or relevant to any other violation
16 of federal law. So we can only conclude at that point
17 that the government wants to ask questions of
18 Ms. Manning that do not implicate any crimes. That
19 would be information to which the grand jury is not
20 entitled because it would be an obvious violation of
21 her First Amendment expressive and associational
22 rights.

23 As we discussed in our pleadings, there is a
24 long and well-documented history with grand juries
25 being used for improper purposes, specifically to

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1 disrupt communities of activists and journalists who
2 are engaged in lawful and constitutionally valuable
3 activities. Ms. Manning is not bringing this up in
4 order to assert the constitutional rights of
5 journalists or other third parties but to ensure that
6 the issue of the grand jury's purpose here and the
7 issue of this particular subpoena here is duly
8 considered.

9 The administration has been very publicly
10 hostile to the press. This administration has also
11 been very publicly hostile to Ms. Manning. The highest
12 ranking government officials have called her out by
13 name and called for her reincarceration and expressed
14 displeasure at her release. So tremendous executive
15 pressure has been brought to bear on issues that are
16 implicated by this grand jury with respect to the
17 press, and tremendous executive pressure has been
18 brought to bear more specifically on Ms. Manning, who
19 is the subject of this individual subpoena.

20 So we think it makes sense for Ms. Manning to
21 be worried about a possible improper motive for this
22 subpoena in general. We believe that that issue is
23 ripe today.

24 We have, of course, expressed our concerns
25 about the potential for a perjury trap and our concerns

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1 that this grand jury subpoena is being used to
2 undermine Ms. Manning potentially as a witness, put her
3 in jeopardy of contempt and reincarceration, or to go
4 on a fishing expedition to constitutionally protected
5 activity.

6 As the government noted, there is a
7 presumption of regularity that attaches to grand jury
8 proceedings. There is -- either must be a real
9 compelling need for judicial intervention into grand
10 jury proceedings, but we think that's present here.
11 Because once evidence of abuse has been introduced, it
12 is the prosecution that must demonstrate that
13 regularity.

14 Ms. Manning, of course, is not in a position
15 to introduce highly specific concrete evidence of
16 abuse. But given the kind of attention that she has
17 been subject to, it is absolutely reasonable for her to
18 balk at being compelled to cooperate with a government
19 that has been actively and publicly hostile to her. We
20 believe that the prosecution should be called upon to
21 establish the regularity, not simply this grand jury
22 proceeding but specifically of this subpoena.

23 The electronic surveillance motion we believe
24 is also ripe for review but might also be appropriately
25 revisited after questioning before the grand jury.

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1 Unlawful electronic surveillance, if used to propound a
2 subpoena or any question before a grand jury, would
3 constitute just cause excusing testimony. The subject
4 of covert surveillance is rarely well positioned to
5 prevent overwhelming evidence of that surveillance, and
6 Ms. Manning is no exception.

7 That is why the law is well settled that
8 making even an allegation or at most, I think, in this
9 circuit a colorable claim of electronic surveillance is
10 sufficient to trigger the government's obligation to
11 either affirm or deny that electronic surveillance took
12 place. This is not a particularly onerous task for
13 them, and we think it's worth noting that the
14 government did not make such a denial in their reply.

15 The government's argument here on the law is
16 a little misplaced. Ms. Manning certainly has standing
17 to object to any electronic surveillance that would
18 have led to -- any unlawful electronic surveillance of
19 her that would have led to this subpoena or to
20 questions that may occur before it.

21 The case that is cited by both Ms. Manning
22 and the government, *U.S. v. Apple*, makes clear that a
23 cognizable claim -- and this is a quote from the
24 case -- need be no more than a mere assertion but must
25 have a colorable basis.

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1 While this circuit may overwhelmingly find
2 that government denials of electronic surveillance are
3 sufficient to defeat this kind of claim, making a
4 colorable claim suffices to trigger the government's
5 obligation. So the government would be expected to
6 make the requisite canvas of agencies and state their
7 unambiguous denials for the record.

8 So, Your Honor, all we're asking for here is
9 a very simple answer. You know, to start with, if --
10 you know, if you ask the government now, "Are you aware
11 of any electronic surveillance," and if he says, "Yes,
12 we're done," you know, we know and we can go from
13 there. If he says no, then all the government has to
14 do is make the relevant inquiries of the federal
15 agencies, and either they say yes, this kind of
16 surveillance happened, or no, it didn't.

17 Your Honor, we also included a motion to
18 instruct the grand jury to which the government
19 objects. It is our position -- and I think it is
20 noncontroversial -- that the grand jurors are entitled
21 to fully understand not only the full scope of their
22 rights and power, but also the rights afforded to a
23 witness called to testify before them. There is
24 nothing in our set of proposed grand jury instructions
25 that is legally questionable. Each proposed

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1 instruction is a simple statement of fact regarding the
2 powers of the grand jury or the rights of the witness.
3 In that the government painted such a plainly
4 educational document as in some way controversial is
5 perplexing and does not necessarily bode well for the
6 grand jury's independence.

7 Your Honor, there is also a motion for
8 disclosure of prior statements that I do want to
9 clarify in light of the government's response to us.
10 The government has objected to our request for
11 disclosure of prior statements based on the admittedly
12 stringent rules around disclosing grand jury testimony.
13 They are correct also that there is no prior grand jury
14 testimony to disclose. I want to clarify that with
15 respect to the law on which this request is based, I am
16 arguing here by analogy. Presumably, nongrand jury
17 testimony or other statements that are not bound by
18 Rule 6 would be significantly less tightly controlled
19 than grand jury testimony.

20 In preliminary discussions with the
21 government, counsel was given to understand that the
22 government believes Ms. Manning may have made prior
23 statements that were either incorrect or in some way at
24 variance with her prior statements or testimony.
25 Ms. Manning, of course, has raised concerns that this

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1 grand jury may be working toward eliciting
2 contradictory statements or worse, and her perceptions
3 have not been helped by the public resentment that has
4 been expressed by other actors in the government. So
5 one way in which the government might make a show of
6 good faith here would be to disclose whatever prior
7 statements they seem to be relying on to justify the
8 subpoena.

9 It is in no way a violation of grand jury
10 secrecy to reveal to a witness statements that they
11 themselves are said to have made. Doing so could have
12 many collateral benefits, including clarifying
13 authorship and attribution and refreshing the witness'
14 recollection. There is certainly no law that forbids
15 such disclosure, and there does appear to be law both
16 encouraging and compelling it.

17 The final component of our omnibus motion
18 concerns our motion to disclose ministerial documents,
19 and Ms. Freeman will speak to that now. I thank you,
20 Your Honor.

21 MS. FREEMAN: Thank you, Your Honor. Just
22 briefly, I would reincorporate everything that I said
23 regarding our motion to unseal in that I think that the
24 law that applies in terms of determining what is a
25 matter that occurs before the grand jury also applies

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1 to this when you're looking at the analysis under
2 Rule 6(e). Cases are clear not only from the Ninth
3 Circuit but from circuits across the country that
4 documents reflecting the commencement and termination,
5 reflecting that the grand jury has been -- a term has
6 been extended, records of impanelment to include
7 manuals, procedures, and the impanelment instructions,
8 that none of those issues have been held to be matters
9 occurring before the grand jury. It would not affect
10 deliberations of a grand jury for us to know them. It
11 would not potentially undermine the integrity of the
12 investigation or any witness' testimony to the grand
13 jury itself.

14 THE COURT: You have available the
15 impanelment of this grand jury.

16 MS. FREEMAN: No, sir, we do not.

17 THE COURT: It was impaneled in the
18 courtroom; wasn't it?

19 MS. FREEMAN: Judge, we do not have any of
20 the documents reflecting the --

21 THE COURT: Every grand jury I've impaneled
22 is done here in the open courtroom.

23 MS. FREEMAN: Understood, Judge. It is
24 something that we would request access to. It appears
25 that the --

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1 THE COURT: I don't have it. I don't know if
2 the clerk has it somewhere. There is some record of it
3 around here; isn't it? We don't impanel the grand jury
4 in secret.

5 MS. FREEMAN: Judge, I think the issue is
6 that the -- what different courts and what different
7 clerks -- I think that it is understandable the clerks
8 would be acting in abundance of caution in refusing to
9 disclose some of those documents. It's our position
10 that things, such as an impanelment --

11 THE COURT: While they're here, that's a
12 matter of information they may not give out, as to who
13 in particular is sitting on a grand jury.

14 MS. FREEMAN: Yes. We would not be
15 requesting identifying information of who those grand
16 jurors are. These would just be documents basically
17 affecting the form and function, the mode, if you will,
18 of operation of this particular grand jury, not
19 regarding persons specifically on the grand jury, not
20 regarding witnesses who have testified before it, but
21 simply the -- what we would call the ministerial
22 documents.

23 THE COURT: That's impaneling the grand jury
24 and the termination of the grand jury when it's over.

25 MS. FREEMAN: Yes, sir. So that would be the

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1 request. It's not for any of the private information.

2 THE COURT: All right. I understand.

3 MS. FREEMAN: Thank you, Judge.

4 All right. Mr. Traxler.

5 MR. TRAXLER: Thank you, Your Honor.

6 Your Honor, I'd like to pick up where the
7 Court began, and that is that Ms. Manning's arguments
8 today are premature. As Your Honor noted, there has
9 been no questioning yet. Ms. Manning has not appeared
10 before the grand jury. So she can only speculate that
11 the questions that might be asked would infringe upon
12 the rights that she cites in her papers. As we
13 explained in our submission, such premature arguments
14 should be rejected. They should be normally answered
15 on a question-by-question basis.

16 That said, Your Honor, we did argue
17 alternatively that this motion could be denied on its
18 merits. We would, in fact, urge the Court, if it's so
19 inclined, to deny the motion on its merits now. We
20 submit that the advantage of doing that would be it
21 would hopefully reduce the number of times or eliminate
22 the parties coming up here during the actual grand jury
23 questioning to have the Court rule on various issues
24 that have already been teed up in the papers.

25 So with that, I would like to address the

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1 merit arguments that Ms. Manning makes in her papers.
2 First would be her Fifth Amendment claim. As the
3 government argued in its papers, under *Kastigar*
4 (phonetic), there are no Fifth Amendment concerns here.
5 Ms. Manning has received full use and derivative use
6 immunity for her testimony by both this Court and the
7 Department of the Army. Under *Kastigar*, that
8 eliminates any Fifth Amendment concerns.

9 The next argument Ms. Manning makes is a
10 First Amendment claim, and the government submits, as
11 we argued in our papers, that she has not asserted any
12 legitimate First Amendment interest that could be
13 infringed upon.

14 We submit, Your Honor, that the Supreme
15 Court's decision in *Branzburg v. Hayes* forecloses
16 Ms. Manning's arguments. There the Supreme Court held
17 that reporters had to testify in front of the grand
18 jury even if it required them to disclose their
19 sources. The reporters argued that they should have a
20 First Amendment privilege to not have to go before the
21 grand jury because disclosing those sources would have
22 an inhibiting effect for reporters to recruit sources
23 and it would diminish the flow of news. The Supreme
24 Court rejected that argument. It held it was
25 speculative. We submit, Your Honor, that Ms. Manning

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1 has an even weaker claim than the reporters had in
2 *Branzburg*.

3 Even assuming the questioning in the grand
4 jury were to touch on the disclosures from 2009 and
5 2010, Ms. Manning had no First Amendment rights with
6 respect to those disclosures. As the government noted
7 in its papers, Ms. Manning was a government insider who
8 signed a nondisclosure agreement, and under
9 well-established precedent, that means that she had no
10 First Amendment rights.

11 Ms. Manning talks about the concerns that the
12 questioning would have for journalists. I'll say at
13 the outset: Certainly, Ms. Manning seems to be
14 speculating that at some future date the grand jury may
15 return an indictment that she speculates might violate
16 the First Amendment. That's not a legitimate basis,
17 Your Honor, for a fact witness to refuse to testify in
18 front of the grand jury. If it was, the whole grand
19 jury process would break down if every fact witness who
20 came in front of the grand jury could speculate that
21 the crimes being investigated might violate someone
22 else's constitutional rights. She has no standing to
23 make that argument.

24 Next, Your Honor, Ms. Manning argues that the
25 grand jury subpoena was improperly motivated, and we

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1 emphasize to the Court that Ms. Manning's speculations
2 are exactly that. They are mere speculations. As the
3 cases that we cited in our papers show, speculation and
4 conjecture is not enough to rebut the long-standing
5 presumption that the grand jury acts reasonably and
6 properly when it issues a subpoena.

7 Your Honor, I want to address in particular
8 one thing that we heard throughout counsel's argument,
9 and that is the speculation that the government issued
10 a grand jury subpoena just so it could catch
11 Ms. Manning in a so-called perjury trap. Again, we
12 emphasize to the Court that's just speculation as to
13 what the government's motives are. There's no basis
14 for that.

15 We also submit, Your Honor, that that
16 argument is premature. Any concerns about an alleged
17 perjury trap are properly raised if there was some
18 charge for perjury at a future date. It's not a
19 justification for a fact witness to refuse to go in
20 front of the grand jury.

21 Finally, Your Honor, we submit that
22 Ms. Manning has not provided the Court with a colorable
23 basis for believing that the government has -- I'm
24 sorry -- that she might have been subjected to unlawful
25 electronic surveillance. As the Court noted in its

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1 papers, there's certain threshold requirements that
2 Ms. Manning has to meet to even trigger the
3 government's obligation to affirm or deny or generally
4 respond to her allegations. She has to come forward
5 with something more than mere suspicion that she might
6 have been subjected to unlawful electronic
7 surveillance.

8 If you read her papers, she clearly has not
9 done that. You can tell by the way she couches her
10 argument throughout her papers, that she has reason to
11 believe, that she believes she might have been subject
12 to unlawful electronic surveillance. The truth is she
13 has no idea, and she is using this statute improperly
14 as an attempt to get discovery from the government.
15 Therefore, the government submits that Ms. Manning is
16 not entitled to even that threshold affirmance or
17 denial from the government about whether there is any
18 such surveillance in this case.

19 There is one last topic I want to touch on,
20 and that's the ministerial documents issue that counsel
21 raised just a moment ago. I would emphasize that, as
22 Judge Ellis noted in the decision we cited in our
23 papers, the Fourth Circuit has not adopted the approach
24 of the cases that Ms. Manning cites. We submit that
25 Ms. Manning, if there is anything done in open court,

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1 should figure out on her own what's available. If it's
2 not available because it was not done in open court, we
3 submit she should not receive those materials.

4 There is no right of access to the grand jury
5 proceedings. Ms. Manning has provided no justification
6 or no need or has not provided any justification or
7 explained why she needs those documents. In light of
8 that, we submit to the Court that the general rule of
9 secrecy should apply here and she should not receive
10 any documents relating to the grand jury proceedings
11 that have not otherwise already been done in open
12 court.

13 So with that, Your Honor, we would rest on
14 our papers for the rest of the arguments. We submit
15 that the Court should deny the motion to quash. It's a
16 bedrock principal, a long-standing principal in our
17 jurisprudence that the grand jury is entitled to every
18 person's evidence. We submit that Ms. Manning is no
19 different. She has been lawfully subpoenaed to testify
20 in the grand jury. The Court has ordered her to
21 testify already fully and truthfully in front of the
22 grand jury. She's been fully immunized with use and
23 derivative use testimony -- I'm sorry -- immunity in
24 connection with her testimony. Like every other
25 citizen in this nation, Ms. Manning should be required

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1 to appear before the grand jury pursuant to the
2 subpoena and to testify fully and truthfully. We
3 submit that there is no reason to treat Ms. Manning
4 differently than we would any other civilian in
5 responding to a grand jury subpoena.

6 Thank you, Your Honor.

7 THE COURT: All right. Well, as I've
8 listened to the arguments here, it's almost like
9 listening to lawyers discussing a case that they're
10 looking into and finding out what issues are involved.
11 This whole thing is just really speculation about what
12 may or may not happen. Most of this is really
13 premature except your issue of the Fifth Amendment. I
14 find that you have no rights in that regard because of
15 the immunity order that I've entered, and you have one
16 from the military. I also find that there's no First
17 Amendment implication here that's been represented to
18 me or that I can even get my hands around to rule on.
19 There just isn't anything.

20 There's no evidence presented of any improper
21 motive. You've raised questions about what might or
22 might not be the motive. I don't have anything in
23 front of me that would require me to rule on it.

24 Also, your motion to instruct the grand jury,
25 I see no need to instruct the grand jury.

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1 Your motion for disclosure of prior
2 statements, that's going to be denied as well.
3 Disclosing the ministerial documents here, I don't see
4 any relevancy that's been presented to me that would
5 require that at all.

6 So with that said, your motion to quash the
7 subpoena will be denied.

8 Now, I don't know if you want to set a time
9 frame on this unsealing or whatever it is, time to
10 respond to it. I mean, I'll deal with that.

11 MR. TRAXLER: Your Honor, the government
12 would request two weeks to prepare a response. Like I
13 mentioned, we still need to receive the papers from
14 Ms. Manning and then time to formulate a response.

15 THE COURT: All right. Why don't you all get
16 together on that. Two weeks sounds reasonable. Just
17 notice it to a Friday, and I'll deal with it when you
18 get ready to argue it again.

19 MR. TRAXLER: We will. Thank you, Your
20 Honor.

21 MR. KROMBERG: If I may, Your Honor. Our
22 time before the grand jury is tomorrow at 9:30. We ask
23 the Court -- we just let the Court know that so in case
24 these issues recur tomorrow or new issues come up
25 tomorrow, that's when we're expecting to be before the

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1 grand jury.

2 THE COURT: Well, I hope that I have dealt
3 with enough of them that we won't have any problems
4 like that. If not, I'll be around.

5 MR. KROMBERG: Thank you, Your Honor.

6 THE COURT: All right. We'll adjourn until
7 tomorrow morning at 9:30.

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Time: 10:15 a.m.

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I certify that the foregoing is a true and
accurate transcription of my stenographic notes.

Rhonda F. Montgomery, CCR, RPR

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