

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

AUG 28 2019

In Re:
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRAND JURY SUBPOENA NO. 7409

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) December 14, 2018
) 11:00 a.m.
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) Washington, D.C.
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**TRANSCRIPT OF EX PARTE PROCEEDINGS
BEFORE THE HONORABLE JUDGE DAVID S. TATEL,
JUDGE THOMAS B. GRIFFITH, and JUDGE STEPHEN F. WILLIAMS,
UNITED STATES CIRCUIT JUDGES FOR THE DISTRICT OF COLUMBIA**

APPEARANCES:

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MORNING SESSION, DECEMBER 14, 2018

(11:40 a.m.)

MS. SARGENT: Judge, tell me when you're ready.

JUDGE TATEL: Just hold on one second, if you would.

MS. SARGENT: And Judges, also, do you want them to do what they did before and state their names before they speak?

JUDGE TATEL: Yes, that would be helpful.

MS. SARGENT: Does everyone have their materials? Do you all have your materials?

MS. AHMAD: Yes, we do. Thank you.

JUDGE TATEL: I'm ready. Okay.

MS. SARGENT: This is an ex parte closed session in Case Number 18-3071, En re: Grand Jury subpoena. We're going to ask the attorneys to state their names before they speak, okay. Thank you.

JUDGE TATEL: Okay. Okay. Shall we proceed?

MR. JED: Yes, Your Honor.

THE COURT: Go ahead.

MR. JED: Adam Jed for the United States.

JUDGE TATEL: Okay.

MR. JED: Your Honor, obviously, for the purposes of the ex parte session, we're here to answer any questions that the Court may have. I don't think there are any particular affirmative ex parte submissions that we think are necessary.

1 JUDGE TATEL: Uh-huh. I have a couple of questions.

2 JUDGE WILLIAMS: Go ahead. You can go first. You're the
3 senior here.

4 JUDGE TATEL: So I had a couple of questions. So, our
5 responsibility here is to ensure that the evidence is sufficient
6 to provide a reasonable basis for thinking that one of the
7 exceptions applies, correct?

8 MR. JED: Yes, that's approximately the test that the
9 District Court applies, yes.

10 JUDGE TATEL: Yeah, that's the test. And so all we have
11 from the Special Counsel is basically a brief describing the
12 evidence, correct? We don't have any affidavits. We have
13 nothing from the Grand Jury. We just have these two supplements
14 from you, right?

15 MR. JED: Yes. The information was essentially put in the
16 record by proffer, which I understand is common place in criminal
17 cases, but that's correct. They were not done as declarations.

18 JUDGE TATEL: Uh-huh. But -- so, you said that's common
19 in the District Court?

20 MR. JED: That's my understanding. It's possible more of
21 the details may be better addressed by my colleague, Ms. Ahmad.

22 JUDGE TATEL: That would be fine. In FOIA cases we get a
23 formal affidavit from the agency, a sworn affidavit. We don't
24 have that here. [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 MR. JED: Well, the submission was obviously signed and
6 submitted by officers of the Court, and even when there are
7 declarations that are put into the record, generally those
8 declarations contain hearsay; they're not necessarily done, for
9 example, by the agent who happens to have interviewed the source.

10 MS. AHMAD: And this is Zainab Ahmad for the United
11 States, Your Honor.

12 JUDGE TATEL: Yes.

13 MS. AHMAD: One thing I would add to that is that the two
14 factors that are unique to this situation are, firstly, that
15 these are Grand Jury proceedings.

16 JUDGE TATEL: Right.

17 MS. AHMAD: And therefore submitting a declaration is more
18 complicated than it would be at the later stage of criminal
19 litigation, for example, post-indictment, because of the Grand
20 Jury secrecy proceedings and the fact that there is not, for
21 example, a federal agent who is aware of every single process
22 that's going out by the Grand Jury.

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 JUDGE TATEL: Right.

2 MS. AHMAD: [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 JUDGE TATEL: [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 MS. AHMAD: [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 JUDGE TATEL: -- I see --

16 MS. AHMAD: -- that we summarized.

17 JUDGE TATEL: But you said, Mr. Jed, that this is the way
18 the District Court proceeds, this is exactly the kind of
19 submissions that it traditionally acts on in a case like this?

20 MR. JED: You know, I don't want to make any blanket
21 statements.

22 JUDGE TATEL: Because we haven't had a case like this
23 before.

24 MR. JED: I certainly don't want to make binding
25 statements about how District Courts operate. It seems like it,

1 at least in my experience, but it's far more limited than
2 Ms. Ahmed's, that in these Grand Jury matters the Court will
3 often proceed by proffer, and particularly -- I mean here, I
4 should say, it's not just like someone stood up in court, even
5 know if they did so, they would be doing so as an officer of the
6 court, but here they signed their names to the statements.

7 JUDGE TATEL: Sure.

8 MR. JED: I mean, essentially the difference between this
9 and a declaration, other than just some of the, you know, other
10 kind of formalities of a declaration, I suppose is having sworn
11 it out. I would certainly hope that the DOJ attorneys when they
12 signed their names saying "I'm confident of this", you know,
13 believe that they are telling the truth and --

14 JUDGE TATEL: Well, I'm sure you understand. I'm asking
15 in part largely because we're ex parte. We don't have the
16 adversarial process at work here, for obviously reasons, right?

17 MR. JED: Yes.

18 JUDGE TATEL: So I think maybe the Court has maybe a
19 heightened obligation, right, to be sure that the proffer meets
20 the standard.

21 MR. JED: You know --

22 JUDGE TATEL: Right?

23 MR. JED: You know, I'm just going to say I certainly do
24 understand that. For what it's worth, I know sometimes when
25 matters proceed ex parte, to the extent that the other side may

1 disagree with the conclusion, obviously they may not have access
2 to the ex parte information, but with whatever information they
3 do have access to, they will make an argument or at least they
4 will ask a court to independently review it. You know, that's
5 not something that has happened here at all.

6 JUDGE TATEL: Yeah.

7 JUDGE WILLIAMS: Can you take us through your -- you
8 appear to rely on two theories under 1605a2. Can you take us
9 through your processes for those?

10 MR. JED: Sure. So, obviously the commercial activity
11 exception refers to the case being based upon commercial activity
12 and then flushes out some of the details of that commercial
13 activity. There is extensive Supreme Court case law on how that
14 applies in the civil context to civil actions.

15 Obviously, because we think the FSIA does not apply to
16 criminal cases at all, we think it's a little bit of trying to
17 put a square peg into a round hole.

18 JUDGE TATEL: But assuming we do what the District Court
19 did --

20 MR. JED: So, at that point I think there are essentially
21 two pathways for understanding how you apply the term "based
22 upon" to what is a Grand Jury subpoena, and one is -- and this
23 does not require any ex parte information, and so this is what we
24 offered in our brief just as an alternate grounds -- you focus on
25 the witness and say that if we have a witness in the United

1 States who is a repository of information amenable to a subpoena,
2 then they can be a witness, they can be subject to a Grand Jury
3 subpoena. And here the reason that this entity or repository
4 information in the United States is amenable to a subpoena is its
5 [REDACTED] commercial activity here in the United States, and
6 ultimately we think that that concept maps on to what is the
7 fundamental distinction in the FSIA, that if you're going to have
8 something operating in a kind of normal commercial manner, that
9 they should be treated in the same way that any other similar
10 commercial entity is treated.

11 JUDGE WILLIAMS: Yeah, you invoke that, but we have cases
12 saying that essentially for the exercise of that, there has to be
13 in personam jurisdiction. Of course, isn't -- the FSIA exists to
14 some extent in the world independent of that, but if for an
15 ordinary subpoena [REDACTED] in personam
16 jurisdiction is needed, and I take it we're talking about general
17 jurisdiction, how does it exist?

18 MR. JED: Well, certainly what is called the Bank of Nova
19 Scotia subpoena, the kind of subpoena that was issued [REDACTED]
20 [REDACTED]. I think under the same
21 theory of general jurisdiction, [REDACTED]
22 operating in the United States, you treat them as a witness. You
23 can say to them, We want whatever information you have about, you
24 know, the following subjects, and they have to produce that
25 information to you wherever it may be, whether it's [REDACTED]

1 [REDACTED]
2 JUDGE WILLIAMS: Is that consistent with *Daimler* and *Good*
3 *Year*, Supreme Court decisions on general inpersonam jurisdiction?

4 MR. JED: Certainly [REDACTED] has never challenged
5 that there is appropriate personal jurisdiction over them, and I
6 don't mean to push back on that question, but certainly they were
7 in any position to do so, and personal jurisdiction, obviously,
8 is waivable. So, because they haven't challenged it, I don't
9 think we've dug into it in substantial depth. I mean, I would
10 say just as a first time --

11 JUDGE WILLIAMS: Well, it's waivable, but on the other
12 hand, unless -- and it may be the case -- that any defense to the
13 exceptions under FSIA have been waived, they're still fulfilling
14 the requirements of FSIA, which, by your analogy, seems to fill
15 in the potentiality of being limited to entities subject to the
16 general in personam jurisdiction of the U.S.

17 MR. JED: Well, I guess maybe -- let me answer two answers
18 kind of at each place along that argument. The first is -- I
19 mean, just with respect to how to treat, I guess, the possibility
20 that there could have been a personal jurisdiction issue that
21 would then somehow inform the commercial activity issue, I think
22 that would be waivable to the extent that this Court a number of
23 times has held -- I think the *Sudan versus Owens* case that my
24 friend just cited in his brief is the most recent statement to
25 this effect, that once the government or -- well, sorry -- that

1 once a plaintiff has shown a kind of prima facie basis for one of
2 the exceptions applying, it's actually the ultimate burden of the
3 country to show why it is that the exception would not apply, and
4 so any kind of waiver argument, I think, would flow through.

5 And similarly, actually 1605a1 does say that the FSIA's
6 immunity, if applicable, of course, is waivable by, among other
7 things, implication. And while I wouldn't want to lightly
8 suggest that any litigation conduct would necessarily constitute
9 implication under a1, we do here have [REDACTED]
10 with very sophisticated lawyers that's been actively litigating
11 and obviously at no point has chosen to suggest that there's not
12 personal jurisdiction. They have accepted that the Court has
13 jurisdiction over them. They have accepted that they are
14 amenable to subpoena and can be treated as a witness, other than
15 obviously the FSIA and the Rule 17 arguments that they've made.

16 JUDGE WILLIAMS: Suppose we try to invoke [REDACTED]
17 [REDACTED] the third clause of a2, the direct effect
18 provision.

19 MR. JED: Yes.

20 JUDGE WILLIAMS: Trace out for me the direct effect here.

21 MR. JED: I'm sorry, I should -- I've just been handed a
22 note just also as a reminder that the District Court expressly
23 said that any personal jurisdiction issue had been waived.

24 So the direct effect would be the sort of second pathway,
25 rather than focusing on [REDACTED]; instead

1 looking at the actual subpoena and the Grand Jury's investigation
2 itself. And here -- I mean, essentially I think what our
3 evidence suggests, of course, does not definitively prove --
4 because that's the very nature of a Grand Jury investigation --
5 is [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] [REDACTED] [REDACTED]

12 JUDGE GRIFFITH: Yes.

13 MR. JED: [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 JUDGE WILLIAMS: [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 MR. JED: [REDACTED]

22 [REDACTED]

23 JUDGE WILLIAMS: [REDACTED]

24 MR. JED: [REDACTED]

25 [REDACTED] [REDACTED] [REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

JUDGE WILLIAMS:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

MR. JED:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

JUDGE WILLIAMS:

[REDACTED]

[REDACTED]

JUDGE GRIFFITH: What do you have in terms of

[REDACTED]

[REDACTED]

[REDACTED]

MR. JED: So, obviously we don't know anything definitively. That is, of course, the nature of a Grand jury investigation. I apologize for continuing to say that, but it's important.

[REDACTED]

[REDACTED]

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[REDACTED], and
Ms. Ahmad, [REDACTED] might be able to
provide a little more detail or color around that.

JUDGE GRIFFITH: That would be helpful.

MS. AHMAD: I will try to make good on the promise. As we
laid out in our brief, [REDACTED]

[REDACTED]

JUDGE GRIFFITH: What's your basis for knowing enough to
know [REDACTED]

[REDACTED]

MS. AHMAD: [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

JUDGE GRIFFITH: [REDACTED]

JUDGE TATEL: Anything else you want to add?

MS. AHMAD: I don't believe so, Your Honor.

JUDGE TATEL: Okay. Any other questions?

JUDGE GRIFFITH: No.

JUDGE WILLIAMS: No.

JUDGE TATEL: I just have two sort of nonrecord questions. Number one, I'm curious -- suppose we agree with the District Court. How would we enforce this subpoena?

JUDGE GRIFFITH: Could you say that again?

JUDGE TATEL: How will you enforce this subpoena? What's the next step, if we agree?

MR. JED: I think, as is the case with a number of these things, we may kind of have to see how things progress step-by-step. I think we're hoping, and I think this has probably been suggested by opposing counsel, that ultimately if they do lose in the litigation, that they would comply.

JUDGE TATEL: They would comply. Okay, I got you. The second question is, again, can you tell us anything about your timing in terms of how quickly you need a ruling from this court, other than tomorrow?

JUDGE GRIFFITH: This afternoon.

1 JUDGE TATEL: Maybe you can't just answer the question, in
2 which case I would completely accept that, but if you can tell us
3 something about that, that would be helpful.

4 MR. JED: I think we can say this is very time sensitive.
5 Obviously, any Grand Jury investigation is a time sensitive
6 investigation, but this is particularly time sensitive, and this
7 has been -- with all due respect to my friends on the other side,
8 this has been dragged out for quite a bit. This was a subpoena
9 that was initially issued in July, so I think it -- did you want
10 to add?

11 MS. AHMAD: The only thing I would add is [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 JUDGE TATEL: Okay. Thanks for your help. Well, unless
21 you have anything.

22 JUDGE GRIFFITH: No, I don't have anything.

23 JUDGE TATEL: I don't either. Thank you, all, very much.
24 Thank you. This as been very helpful.

25 (Proceedings adjourned at 12:00 p.m.)

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C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Scott L. Wallace

12/21/18

Scott L. Wallace, RDR, CRR
Official Court Reporter

Date