UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 Chief Judge Beryl A. Howell

ORDER

On July 11, 2018, in connection with Special Counsel Robert S. Mueller, III's investigation into foreign interference with the 2016 presidential election, a federal grand jury sitting in the District of Columbia issued a subpoena to a Corporation from Country A. *See* Mem. Op. (Sept. 19, 2018) at 1, ECF No. 42. The Corporation moved to quash that subpoena, Corp.'s Mot. Quash, ECF No. 3, thus initiating this grand jury matter. Given that this case is about a grand jury subpoena, the resulting proceedings have largely been conducted under seal in this Court, in the D.C. Circuit, *see In re Grand Jury*, No. 18-3071 (D.C. Cir.), and in the Supreme Court, *see In re Grand Jury*, No. 18-948 (U.S.).

On February 26, 2019, the Reporters Committee for the Freedom of the Press moved to unseal, at least in redacted form, several types of records and information in this matter, including briefs, transcripts, orders, and the Corporation's identity. *See* Mov.'s Mot. Unseal, ECF No. 94. On April 1, 2019, the Court granted that motion in part.[1] Specifically, the Court: (1) denied the request for the release of orders as moot given that the Court had already released, with appropriate redactions, the orders issued in this matter, Mem. Op. & Order (Apr. 1, 2019) at 4, ECF 116; (2) denied the request that any publicly released documents identify the subpoena

[1] On April 23, 2019, the D.C. Circuit similarly granted in a part a motion from the Reporters Committee to unseal briefs, motions, and transcripts from that Court's proceedings. *See* Order, *In re Grand Jury*, No. 18-3071 (D.C. Cir. Apr. 23, 2019).

recipient, *id.* at 10–11; and (3) granted the request to unseal briefs and transcripts with appropriate redactions, *id.* at 5–10. As part of that Order, the government and the Corporation were directed to consult and file a joint report advising the Court which records may be unsealed, and to propose any necessary redactions. *Id.* at 11. On April 30, 2019, the parties were directed to review five additional records to determine whether they could be unsealed, and to propose any necessary redactions. *See* Min. Order (Apr. 30, 2019).

On June 3, 2019, the parties submitted their report. *See* Joint Report (June 3, 2019), ECF No. 130. Six records, they agreed, can be unsealed in full. *Id.* at 1. For the remaining records, the parties have agreed on proposed redactions to be applied prior to any unsealing. *Id.*[2] Having reviewed these proposed redactions, the records will be unsealed in conformity with the parties' recommendations. In addition, the Court will unseal without any redactions the parties' Joint Report and a redacted copy of the docket sheet, which is attached as Attachment A to this Order.

Thus, upon consideration of the Joint Report, it is hereby

ORDERED that the Clerk of the Court unseal and post to the Court's website, without any redactions, ECF Nos. 71, 73, 94, 103, 104, 108, and 130; and it is further

ORDERED that the Clerk of the Court unseal and post to the Court's website the redacted versions of ECF Nos. 3, 4, 5, 8, 9, 12, 16, 27, 28, 29, 38, 45, 51, 52, 53, 55, 56, 58, 59, 66, 67, 68, 69, 70, 74, 78, 79, 80, 81, 82, 84, 87, 92, 102, 106, 109, 114, 119, 120, 125, and 126, which are attached to the parties' Joint Report (June 3, 2019), ECF No. 130; and it is further

[2] Five filings in this case had attached as an exhibit a copy of a record that already has been made public in redacted form. In each instance, the parties replaced the original exhibit with the version that has been made public. *See* Joint Report (June 3, 2019) at 1–2.

ORDERED that the Clerk of the Court unseal and post to the Court's website this Order and a redacted copy of the docket sheet in this matter, which redacted docket sheet is attached as Attachment A to this Order.

Date: June 7, 2019

BERYL A. HOWELL
Chief Judge

Attachment A

Sealed_Case

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:18-gj-00041-BAH *SEALED*
Internal Use Only

IN RE: IN THE MATTER OF GRAND JURY SUBPOENA 7409
Assigned to: Chief Judge Beryl A. Howell
Case in other court: USCA, 18-03068
USCA, 18-03071
Cause: Civil Miscellaneous Case

Date Filed: 08/16/2018
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

In Re

GRAND JURY SUBPOENA 7409

Interested Party

[redacted]

represented by **Brian D. Boone**
ALSTON & BIRD LLP
Bank of America Plaza
[redacted]
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Edward T. Kang
ALSTON & BIRD LLP
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ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

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Zia Mustafa Faruqui
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Interested Party

UNITED STATES OF AMERICA represented by

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(See above for address)
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ATTORNEY TO BE NOTICED

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Movant

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

represented by **Theodore J. Boutrous , Jr.**
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ATTORNEY TO BE NOTICED

Lee Ross Crain
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Theane Evangelis
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PRO HAC VICE
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text

08/16/2018	1	MOTION to Seal Case by [redacted]. (Attachments: # 1 Proposed Order) (zmd) (Entered: 08/16/2018)
08/16/2018	2	ORDER GRANTING 1 Motion to Seal Case. Signed by Chief Judge Beryl A. Howell on 8/16/2018. (zmd) (Entered: 08/16/2018)
08/16/2018	3	MOTION to Quash Grand Jury Subpoena No. 7409 by [redacted] (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Declaration [redacted] # 7 Text of Proposed Order)(zjf) (Entered: 08/17/2018)
08/17/2018		MINUTE ORDER (paperless) ISSUING, upon consideration of the witness's 3 Motion to Quash Grand Jury Subpoena, the following schedule to govern further proceedings in this matter: (1) by Friday, August 24, 2018, the government shall file any opposition to the witness's motion; (2) by Friday, August 31, 2018, the witness shall file any reply to the government's opposition; (3) at 10 AM on Tuesday, September 11, 2018, the parties shall appear for a hearing before Chief Judge Beryl A. Howell in Courtroom 22. Signed by Chief Judge Beryl A. Howell on August 16, 2018.(lcbah1) (Entered: 08/17/2018)
08/17/2018		Filing fee received: $ 47.00, receipt number: 4616094164. (zjf) (Entered: 08/17/2018)
08/24/2018	4	GOVERNMENT'S RESPONSE in Opposition to 3 Motion to Quash Grand Jury Subpoena. (Attachments: # 1 Attachment A, # 2 Attachment B, # 3 Attachment C, # 4 Attachment D) (zad) (Entered: 08/27/2018)
08/24/2018	5	GOVERNMENT'S MOTION for Leave to File Ex Parte Supplement. (Attachment: # 1 Text of Proposed Order) (zad) (Entered: 08/27/2018)
08/24/2018		Ex Parte SUPPLEMENT re 4 Opposition to 3 Motion to Quash Grand Jury Subpoena filed by UNITED STATES OF AMERICA. (zrdj) Modified on 9/26/2018 (zrdj). (Entered: 09/26/2018)
08/29/2018	6	ORDER GRANTING the government's 5 Motion for Leave to File Ex Parte Supplement. See Order for further details. Signed by Chief Judge Beryl A. Howell on August 29, 2018. Counsel have NOT been notified. (lcbah4) (Entered: 08/29/2018)
08/29/2018	7	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Karl Greercken, [redacted] (Entered: 08/31/2018)
08/31/2018	8	REPLY to opposition to motion re 3 MOTION to Quash Grand Jury Subpoena No. 7409 filed by [redacted] (zrdj) (Entered: 09/04/2018)
09/04/2018		MINUTE ORDER (paperless) GRANTING the movant's 7 Motion for Admission Pro Hac Vice. Karl Geercken may enter an appearance pro hac vice for the purpose of representing the movant in this action. Signed by Chief Judge Beryl A. Howell on September 4, 2018. (lcbah1) (Entered: 09/04/2018)
09/11/2018		Minute Entry for proceedings held before Chief Judge Beryl A. Howell: Motion Hearing held on 9/11/2018. (Court Reporter [redacted].) (ztg) (Entered: 09/11/2018)
09/11/2018		MINUTE ORDER (paperless) DIRECTING the parties jointly to submit, by noon on Wednesday, September 12, 2018, [redacted]

		[redacted]. Signed by Chief Judge Beryl A. Howell on September 11, 2018. (lcbah1) (Entered: 09/11/2018)
09/12/2018	9	SUPPLEMENTAL Brief filed by UNITED STATES OF AMERICA. (Attachments: # 1 Attachment)(zrdj) (Entered: 09/12/2018)
09/12/2018	10	MOTION for Extension of Time by [redacted] (zrdj) (Entered: 09/12/2018)
09/12/2018	11	ORDER granting 10 Motion for Extension of Time to. Signed by Chief Judge Beryl A. Howell on 9/12/2018. Copy(s) made available to counsel of record.(zrdj) (Entered: 09/12/2018)
09/12/2018	12	SUPPLEMENTAL Brief filed by [redacted] (zrdj) (Entered: 09/12/2018)
09/12/2018	13	Joint Submission to 9/11/2018 MINUTE ORDER. (Attachments: # 1 Exhibit A) (zrdj) (Entered: 09/12/2018)
09/13/2018	14	MOTION FOR PERMISSION TO OBTAIN COPY OF THE SEALED SEPTEMBER 11, 2018 TRANSCRIPT by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(zrdj) Modified event on 9/18/2018 (znmw). (Entered: 09/13/2018)
09/13/2018	15	ORDER granting 14 Motion PERMISSION TO OBTAIN COPY OF THE SEALED SEPTEMBER 11, 2018 TRANSCRIPT. Signed by Chief Judge Beryl A. Howell on 9/13/2018. Copy(s) made available to counsel of record.(zrdj) (Entered: 09/13/2018)
09/14/2018		MINUTE ORDER (paperless) (ex parte) DIRECTING, upon consideration of the government's ex parte, in camera submission and arguments made at the hearing on Tuesday, September 11, 2018, the government to submit, by Monday, September 17, 2018, an additional ex parte, in camera submission addressing the following question: whether an act or activity of the kind described in 28 U.S.C. § 1605(a)(2) establishes a reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation. Signed by Chief Judge Beryl A. Howell on 9/13/2018. Copy(s) made available to ex parte filer. (ztg) (Entered: 09/14/2018)
09/14/2018		Set/Reset Deadlines: Government's response to order of the Court due by 9/17/2018. (ztg) (Entered: 09/14/2018)
09/14/2018	16	SEALED TRANSCRIPT OF Motion Hearing before Chief Judge Beryl A. Howell held on September 11, 2018; Page Numbers: 1-52. Court Reporter/Transcriber [redacted], RPR, FCRR, (zrdj) (Entered: 09/14/2018)
09/17/2018	17	MOTION REQUESTING RELEASE OF TRANSCRIPT OF SEPTEMBER 11, 2018 SEALED HEARING by [redacted] (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 09/18/2018)
09/17/2018		Ex Parte Submission in response to the Court's September 14, 2018 ex parte Minute Order filed by UNITED STATES OF AMERICA. (zrdj) (Entered: 09/26/2018)
09/18/2018	18	ORDER granting 17 Motion REQUESTING RELEASE OF TRANSCRIPT OF SEPTEMBER 11, 2018 SEALED HEARING. Signed by Chief Judge Beryl A. Howell on 9/18/2018. Copy(s) made available to counsel of record.(zrdj) (Entered: 09/18/2018)

09/19/2018	19	ORDER DENYING [redacted] 3 Motion to Quash Grand Jury Subpoena. See Order for further details. Signed by Chief Judge Beryl A. Howell on September 19, 2018 (lcbah1) (Entered 09/19/2018)
09/19/2018	20	MEMORANDUM OPINION regarding [redacted] 3 Motion to Quash Grand Jury Subpoena. Signed by Chief Judge Beryl A. Howell on September 19, 2018. (lcbah1) (Entered: 09/19/2018)
09/20/2018		Set/Reset Deadlines: Production of subpoenaed records due by 10/1/2018. (ztg) (Entered 09/20/2018)
09/24/2018	21	NOTICE of Appearance by Brian D. Boone on behalf of [redacted] (zrdj) (Entered: 09/25/2018)
09/24/2018	22	NOTICE OF APPEAL as to 19 Order on Motion to Quash, 20 MEMORANDUM OPINION by [redacted]. Fee Status: No Fee Paid. Parties have been notified (zrdj) (Entered 09/25/2018)
09/25/2018	23	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The fee remains to be paid and another notice will be transmitted when the fee has been paid in the District Court re 22 Notice of Appeal. (zrdj) (Entered: 09/25/2018)
09/25/2018		USCA Appeal Fees received $ 505 receipt number 4616094713 re 22 Notice of Appeal filed by [redacted] (zrdj) (Entered: 09/25/2018)
09/25/2018	24	Supplemental Record on Appeal transmitted to US Court of Appeals re 22 Notice of Appeal ; Filing fee paid, (zrdj) (Entered: 09/25/2018)
09/25/2018		USCA Case Number 18-3068 for 22 Notice of Appeal filed by [redacted] (zrdj) (Entered 09/26/2018)
09/26/2018	25	MOTION to Amend by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 09/26/2018)
09/26/2018	26	ORDER granting 25 Motion to Amend/Correct Signed by Chief Judge Beryl A Howell on 9/26/2018. Copy(s) made available to counsel of record.(zrdj) (Entered: 09/26/2018)
10/04/2018	27	MOTION to Hold Witness in Contempt by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 10/04/2018)
10/04/2018		MINUTE ORDER (paperless) ISSUING, upon consideration of the government's 27 Motion to Hold the Witness in Contempt for Failure to Comply with the Court's September 19, 2018 Order, the following SCHEDULING ORDER to control further proceedings: (1) by 12:00 p.m. on Friday, October 5, 2018, the witness shall file any response to the government's motion; (2) at 2 30 p m on Friday, October 5, 2018, the parties shall appear before Chief Judge Beryl A. Howell for a hearing on the government's motion Signed by Chief Judge Beryl A Howell on October 4, 2018. Counsel have NOT been notified. (lcbah4) (Entered: 10/04/2018)
10/05/2018	28	GOVERNMENT'S REPLY IN SUPPORT OF MOTION TO HOLD THE WITNESS IN CONTEMPT FOR FAILURE TO COMPLY WITH THE COURT'S SEPTEMBER 19, 2018, ORDER re 27 MOTION for Order filed by UNITED STATES OF AMERICA. (mw) (Entered: 10/05/2018)
10/05/2018		Minute Entry for proceedings held before Chief Judge Beryl A. Howell: Motion Hearing held on 10/5/2018 (Court Reporter [redacted]) (ztg) (Entered 10/05/2018)

10/05/2018	29	RESPONSE in Opposition re 27 MOTION to Hold Witness in Contempt filed by [redacted] (mw) (Entered: 10/05/2018)
10/05/2018	30	ORDER GRANTING the government's 27 Motion to Hold the Witness in Contempt for Failure to Comply with the Court's September 19, 2018 Order. See Order for further details. Signed by Chief Judge Beryl A. Howell on October 5, 2018. Certified copy(s) made available to counsel of record. (lcbah1) (Main Document 30 replaced on 1/31/2019, pursuant to the Errata docketed under ECF 75 .) (ztg). (Entered: 10/05/2018)
10/09/2018	31	MOTION Release of Transcript of October 5, 2018 sealed hearing by [redacted] (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 10/10/2018)
10/09/2018	32	NOTICE OF APPEAL as to 20 Order, 30 Order on Motion for Order, 19 Order on Motion to Quash by [redacted] Fee Status: No Fee Paid. Parties have been notified. (zrdj) (Entered: 10/10/2018)
10/10/2018	33	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The fee remains to be paid and another notice will be transmitted when the fee has been paid in the District Court re 32 Notice of Appeal. (zrdj) (Entered: 10/10/2018)
10/10/2018	34	ORDER granting 31 [redacted] Motion Requesting Release of the Transcript of the October 5, 2018 Sealed Hearing, and that the court reporter is authorized to release to [redacted] the transcript of the sealed hearing that occurred before the Court on October 5, 2018. Signed by Chief Judge Beryl A. Howell on 10/10/2018. Certified copy(s) made available to counsel of record. (zad) (Entered: 10/10/2018)
10/10/2018		USCA Appeal Fees received $ 505 receipt number 4616094892 re 32 Notice of Appeal filed by [redacted] (zrdj) (Entered: 10/10/2018)
10/10/2018	35	Supplemental Record on Appeal transmitted to US Court of Appeals re 32 Notice of Appeal ;USCA Appeal Fees received (zrdj) (Entered: 10/10/2018)
10/10/2018	36	GOVERNMENT's MOTION for Permission to Obtain a Copy of the Sealed October 5, 2018 Transcript. (Attachment: # 1 Text of Proposed Order)(zad) (Entered: 10/10/2018)
10/10/2018	37	ORDER granting 36 Government's Motion for Permission to Obtain a Copy of the Sealed October 5, 2018 Transcript; and IT IS FURTHER ORDERED that the court reporter may provide the government with a copy of the October 5, 2018, transcript. Signed by Chief Judge Beryl A. Howell on 10/10/2018. Certified copy(s) made available to counsel of record. (zad) (Entered: 10/10/2018)
10/10/2018		USCA Case Number 18-3071 for 32 Notice of Appeal filed by [redacted]. (zrdj) (Entered: 12/19/2018)
10/11/2018	38	SEALED TRANSCRIPT OF PROCEEDINGS before Chief Judge Beryl A. Howell held on October 5, 2018; Page Numbers: 1-25. Court Reporter/Transcriber [redacted], RPR, FCRR. (zrdj) (Entered: 10/11/2018)
10/17/2018	39	MOTION Requesting Release of Docket Sheet by [redacted] (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 10/17/2018)
10/17/2018		MINUTE ORDER (paperless) GRANTING 39 [redacted] Motion Requesting Release of Docket Sheet and ORDERING that the docket sheet in this matter be released to the parties. Signed by Chief Judge Beryl A. Howell on October 17, 2018. Counsel have NOT been notified.(lcbah1) (Entered: 10/17/2018)

11/05/2018	40	MANDATE of USCA as to 22 Notice of Appeal filed by [redacted]; USCA Case Number 18-3068. (Attachments: # 1 USCA Order)(zrdj) (Entered: 11/07/2018)
11/08/2018	41	ERRATA as to 20 Memorandum Opinion. Signed by Chief Judge Beryl A. Howell on November 8, 2018. Counsel have NOT been notified.(lcbah1) (Entered: 11/08/2018)
11/08/2018	42	CORRECTED MEMORANDUM OPINION regarding the [redacted] 3 Motion to Quash Grand Jury Subpoena. Signed by Chief Judge Beryl A. Howell on November 8, 2018. Counsel have NOT been notified.(lcbah1) (Entered: 11/08/2018)
12/18/2018	43	MANDATE of USCA as to 32 Notice of Appeal filed by [redacted] USCA Case Number 18-3071. (Attachments: # 1 USCA Judgment)(zrdj) (Entered: 12/19/2018)
01/08/2019	44	Letter to Chief Judge Beryl A. Howell from Special Counsel (Zainab Ahmad). "Filed Under Seal" signed by Chief Judge Beryl A. Howell on 1/08/2019. (zad) (Entered: 01/09/2019)
01/09/2019		MINUTE ORDER GRANTING the government's request for a status conference and DIRECTING the parties to appear before the Court on Thursday, January 10, 2019, at 9:30 AM in Courtroom 22A. Signed by Chief Judge Beryl A. Howell on 1/9/2019. Copies made available to counsel of record.(ztg) (Entered: 01/09/2019)
01/09/2019	45	COMBINED MOTION FOR A DECLARATION THAT THIS COURT'S OCTOBER 5, 2018 30 ORDER IS UNENFORCEABLE AND THAT [redacted] PROPERTY IS IMMUNE FROM EXECUTION OR ATTACHMENT, MOTION to Stay OF THIS COURT'S CONTEMPT ORDER PENDING THE SUPREME COURT'S DISPOSITION OF [redacted] PETITION FOR A WRIT OF CERTIORARI by [redacted] (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order)(zrdj) (Entered: 01/09/2019)
01/10/2019		Minute Entry for proceedings held before Chief Judge Beryl A. Howell: Status Conference held on 1/10/2019. (Court Reporter [redacted].) (ztg) (Entered: 01/10/2019)
01/10/2019		MINUTE ORDER (paperless) DIRECTING the parties to submit a joint status report, by 2:00 PM on January 11, 2019, (1) proposing a briefing schedule for resolution of [redacted] 45 Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [redacted] Property is Immune from Execution or Attachment; (2) explaining the parties' agreed upon understanding of when contempt sanctions begin to accrue in this case; and (3) proposing any order to limit [redacted] from issuing a public statement about this matter. Signed by Chief Judge Beryl A. Howell on January 10, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 01/10/2019)
01/10/2019	46	MOTION for Permission to Obtain a Copy of the Sealed January 10, 2019 Transcript by UNITED STATES OF AMERICA. (Attachment: # 1 Text of Proposed Order)(zad) (Entered: 01/10/2019)
01/10/2019	47	ORDER granting 46 Motion for Permission to Obtain a Copy of the Sealed January 10, 2019 Transcript. IT IS FURTHER ORDERED that the court reporter may provide the government with a copy of the January 10, 2019 transcript. Signed by Chief Judge Beryl A. Howell on 1/10/2019. Certified copy(s) made available to counsel of record. (zad) (Entered: 01/10/2019)

01/10/2019	48	ORDER DENYING IN PART the 45 Combined Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [redacted] Property is Immune from Execution or Attachment and Motion for a Stay of this Court's Contempt Order Pending the Supreme Court's Disposition of [redacted] Petition for a Writ of Certiorari. See Order for further details. Signed by Chief Judge Beryl A. Howell on January 10, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 01/10/2019)
01/11/2019	49	MOTION REQUESTING RELEASE OF THE TRANSCRIPT FOR THE JANUARY 10, 2019 SEALED HEARING by [redacted] (zrdj) (Entered: 01/11/2019)
01/11/2019	50	ORDER granting 49 Motion REQUESTING RELEASE OF THE TRANSCRIPT FOR THE JANUARY 10, 2019 SEALED HEARING. Signed by Chief Judge Beryl A. Howell on 1/11/2019. Counsel has not been notified.(zrdj) (Entered: 01/11/2019)
01/11/2019	51	STATUS REPORT by [redacted]. (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 01/11/2019)
01/11/2019	52	SEALED TRANSCRIPT OF Motion Hearing before Chief Judge Beryl A. Howell held on January 10, 2019; Page Numbers: 1-27. Court Reporter/Transcriber [redacted], RPR, FCRR, (zrdj) (Entered: 01/11/2019)
01/11/2019	53	PROPOSAL ON ACCRUAL AND SCHEDULE OF CONTEMPT SANCTIONS by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order) (zrdj) Modified on 1/11/2019 (zrdj). (Entered: 01/11/2019)
01/11/2019		MINUTE ORDER (paperless) ISSUING, upon consideration of the witness's 51 Status Report and the 53 Government's Proposal on Accrual and Schedule of Contempt Sanctions, the following SCHEDULING ORDER to govern further proceedings in this matter: (1) by Friday, January 18, 2019, the government shall file any opposition to the witness's 45 Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [redacted] Property is Immune from Attachment; (2) by Tuesday, January 22, 2019, the witness shall file any reply. Signed by Chief Judge Beryl A. Howell on January 11, 2019. (lcbah1) (Entered: 01/11/2019)
01/15/2019	54	LETTER to Chief Judge Beryl A. Howell from Attorney Brian D. Boone. "Filed Under Seal" signed by Chief Judge Beryl A. Howell on 1/15/2019. (zad) (Entered: 01/15/2019)
01/15/2019	55	SUPPLEMENT re 51 to the [redacted] January 11, 2019 Status Report and Proposed Order filed by [redacted]. "Filed Under Seal" signed by Chief Judge Beryl A. Howell on 1/15/2019. (Attachment: # 1 Text of Proposed Order) (zad) Modified on 1/15/2019 to include the filed under seal text (zad). (Entered: 01/15/2019)
01/15/2019	56	MOTION FOR A STAY of the Contempt Fines' Accrual Until This Court Rules on the [redacted] Pending Motion for a Declaration by [redacted] "Filed Under Seal" signed by Chief Judge Beryl A. Howell on 1/15/2019. (Attachment: # 1 Text of Proposed Order) (zad) (Entered: 01/15/2019)
01/15/2019		Set/Reset Deadlines: Government's opposition, if any, to 45 Motion due by 1/18/2019; Witness' Reply due by 1/22/2019. (ztg) (Entered: 01/15/2019)
01/15/2019	57	MEMORANDUM AND ORDER DENYING [redacted] 56 Motion for a Stay of the Contempt Fines' Accrual until this Court Rules on [redacted]

		[redacted] Pending Motion for a Declaration and RESOLVING issues raised at the January 10, 2019 status conference. See attached Memorandum and Order for more details. Signed by Chief Judge Beryl A. Howell on January 15, 2019. (lcbah1) (Entered: 01/15/2019)
01/16/2019		Set/Reset Deadlines: Government's response to Order of the Court due by 1/22/2019. (ztg) (Entered: 01/16/2019)
01/18/2019	58	Memorandum in opposition to re 45 MOTION COMBINED MOTION FOR A DECLARATION THAT THIS COURT'S OCTOBER 5, 2018 30 ORDER IS UNENFORCEABLE AND THAT [redacted] PROPERTY IS IMMUNE FROM EXECUTION OR ATTACHMENT, MOTION to Stay OF THIS COURT'S CONTEMPT ORDER PENDING THE SUPREME COURT'S DISPOSITION OF [redacted] PETITION FOR A WRIT OF CERTIORARI filed by UNITED STATES OF AMERICA. (zrdj) (Entered: 01/18/2019)
01/22/2019	59	[redacted] REPLY Supporting its 45 Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [redacted] Property is Immune from Execution or Attachment filed by [redacted] (zad) (Entered: 01/22/2019)
01/22/2019	60	GOVERNMENT'S REPORT ON UNSEALING. (Attachment: # 1 Exhibit A) (zad) (Entered: 01/22/2019)
01/23/2019	61	GOVERNMENT'S REPORT ON UNSEALING by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit A (Corrected))(zrdj) (Entered: 01/23/2019)
01/23/2019		MINUTE ORDER (paperless) DIRECTING the parties to file, by January 28, 2019, a joint status report advising the Court whether, in light of information made available through the D.C. Circuit's and the Supreme Court's docket, and a pending request by a media organization, the docket in this matter may be unsealed with redactions and proposing redactions to be made prior to any unsealing. Signed by Chief Judge Beryl A. Howell on January 23, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 01/23/2019)
01/23/2019		Set/Reset Deadlines: Joint Status Report due by 1/28/2019. (ztg) (Entered: 01/23/2019)
01/24/2019	62	MOTION Requesting Release of Docket Sheet by [redacted] (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 01/24/2019)
01/24/2019	63	ORDER granting 62 Motion Requesting Release of Docket Sheet. Signed by Chief Judge Beryl A. Howell on 1/24/2019. Counsel have NOT been notified.(zrdj) (Entered: 01/24/2019)
01/24/2019	64	ORDER DENYING [redacted] 45 Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [redacted] Property is Immune from Execution or Attachment. See Order for further details. Signed by Chief Judge Beryl A. Howell on January 24, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 01/24/2019)
01/24/2019	65	MEMORANDUM OPINION regarding [redacted] 45 Motion for a Declaration that this Court's October 5, 2018 Order is Unenforceable and that [redacted] Property is Immune from Execution or Attachment. Signed by Chief Judge Beryl A. Howell on January 24, 2019. Counsel have NOT been notified. (lcbah1) (Entered: 01/24/2019)
01/28/2019	66	STATUS REPORT concerning proposed redactions by [redacted] (zrdj) (Entered: 01/28/2019)

01/28/2019	67	RESPONSE TO COURTS JANUARY 23, 2019 MINUTE ORDER filed by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit A -- docketsheet redacted, # 2 Certificate of Service)(zrdj) (Entered: 01/28/2019)
01/28/2019		MINUTE ORDER (paperless) DIRECTING the government to file, by January 30, 2019, a response to the witness's 66 Status Report Concerning Proposed Redactions to this Court's Docket, [redacted] *See* 66 Witness's Status Report at 2 Signed by Chief Judge Beryl A Howell on January 28, 2019 Counsel have NOT been notified.(lcbah1) (Entered: 01/28/2019)
01/28/2019		Set/Reset Deadlines: Government's response to order of the Court due by 1/30/2019. (ztg) (Entered: 01/28/2019)
01/29/2019	68	GOVERNMENT'S RESPONSE to Court's January 28, 2019 Minute Order filed by UNITED STATES OF AMERICA (Attachment # 1 Attachment A) (zad) (Entered: 01/29/2019)
01/29/2019	69	RESPONSE to PROPOSED DOCKET REDACTIONS re 67 Response to Order of the Court, 68 Response to Order of the Court filed by [redacted] (zrdj) (Entered: 01/29/2019)
01/30/2019	70	GOVERNMENT'S REQUEST FOR CLARIFICATION of the Court's January 15, 2019 Memorandum and Order. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (zad) (Entered 01/30/2019)
01/30/2019	71	RESPONSE re 70 GOVERNMENT'S REQUEST FOR CLARIFICATION of the Court's January 15, 2019 Memorandum and Order. filed by [redacted]. (zrdj) (Entered: 01/30/2019)
01/30/2019	72	MEMORANDUM AND ORDER regarding limited unsealing of the docket sheet and 70 Government's Request for Clarification of the Court's January 15, 2019 Memorandum and Order. See attached Memorandum and Order for more details. Signed by Chief Judge Beryl A Howell on January 30, 2019 Counsel have NOT been notified.(lcbah1) (Entered: 01/30/2019)
01/31/2019	73	NOTICE of Filing of Exhibits A and B filed by [redacted] in Support of document 71 Response re 70 Government's Request for Clarification of the Court's January 15, 2019 Memorandum and Order. (zad) (Entered: 01/31/2019)
01/31/2019	74	GOVERNMENT'S SUPPLEMENTAL regarding 70 Request for Clarification filed by UNITED STATES OF AMERICA (Attachment # 1 Attachment A) (zad) (Entered: 01/31/2019)
01/31/2019	75	ERRATA as to 30 ORDER. Signed by Chief Judge Beryl A. Howell on January 31, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 01/31/2019)
01/31/2019	76	NOTICE that, consistent with the 72 Memorandum & Order, the attached redacted copy of the docket sheet for Grand Jury Action No 18 41 was posted to the Court's public website on January 30, 2019. See attachment to view copy of publicly released docket sheet (lcbah1) (Entered 01/31/2019)
01/31/2019		MINUTE ORDER (paperless) DIRECTING the parties to file, by February 15, 2019, a joint status report advising the Court whether, in light of a pending request

		by a media organization, the following docket entries may be unsealed with redactions and proposing redactions to be made prior to any unsealing: (1) 30 Memorandum & Order (Oct. 5, 2018); (2) 48 Memorandum & Order (Jan. 10, 2019); (3) 57 Memorandum & Order (Jan. 15, 2019); (4) 65 Memorandum Opinion (Jan. 24, 2019); (5) 72 Memorandum & Order (Jan. 30, 2019). Signed by Chief Judge Beryl A. Howell on January 31, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 01/31/2019)
01/31/2019		Set/Reset Deadlines: Joint Status Report due by 2/15/2019. (ztg) (Entered: 01/31/2019)
01/31/2019	77	NOTICE that, consistent with the 72 Memorandum and Order and the 74 Government's Supplement Regarding Request for Clarification, the attached redacted copy of the docket sheet for Grand Jury Action No. 18-41 was posted to the Court's public website on January 31, 2019. See attachment to view copy of publicly released docket sheet.(lcbah1) (Entered: 01/31/2019)
02/01/2019	78	GOVERNMENT'S NOTICE Regarding Recently Obtained Information by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4) (zad) (Entered: 02/01/2019)
02/04/2019		MINUTE ORDER (paperless) DIRECTING, upon consideration of the 78 Government's Notice Regarding Recently Obtained Information ("Gov't's Notice"), the witness, by February 6, 2019 at 12:00 PM, to show cause: (1) why the witness has not "waived its immunity either explicitly or by implication," *see* 28 U.S.C. § 1605(a)(1), [redacted]; and [redacted] hy the contempt fines imposed against the witness should not be doubled and why any such doubling should not be enforced *nunc pro tunc*. The government shall file any response by February 7, 2019 at 3:00 PM. The parties shall appear for a status conference on February 8, 2019 at 3:00 PM, unless the witness has fully complied with the subpoena before then. Signed by Chief Judge Beryl A. Howell on February 4, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 02/04/2019)
02/04/2019		Set/Reset Deadlines/Hearings: Witness' show cause due by 12:00 PM on 2/6/2019; Government's response due by 3:00 PM on 2/7/2019. Status Hearing scheduled for 2/8/2019, at 3:00 PM in Courtroom 22A before Chief Judge Howell. (ztg) (Entered: 02/05/2019)
02/06/2019	79	RESPONSE re COURT'S FEBRUARY 4, 2019 SHOW-CAUSE ORDER and 78 NOTICE Regarding Recently Obtained Information filed by [redacted] (zrdj) (Entered: 02/06/2019)
02/07/2019	80	REPLY re COURTS FEBRUARY 4 MINUTE ORDER filed by UNITED STATES OF AMERICA. (zrdj) (Entered: 02/07/2019)
02/08/2019	81	SUPPLEMENTAL Response to FEBRUARY 4 MINUTE ORDER filed by UNITED STATES OF AMERICA. (zrdj) (Entered: 02/08/2019)
02/08/2019	82	SUPPLEMENTAL Response re 78 NOTICE Regarding Recently Obtained Information filed by [redacted]. (zrdj) (Entered: 02/08/2019)
02/08/2019		*SEALED* Minute Entry for proceedings held before Chief Judge Beryl A.

		Howell: Sealed status conference held on 2/8/2019. (Court Reporter [redacted]) (ztg) (Entered: 02/08/2019)
02/08/2019		MINUTE ORDER (paperless) DIRECTING the government to file, by Tuesday, February 12, 2019, a status report regarding the witness's document production and HOLDING IN ABEYANCE, upon consideration of the 81 Government's Supplemental Response to the February 4, 2019 Minute Order, and the February 8, 2019 status conference, accrual of the civil contempt sanctions against the witness pending further consideration of the government's submission on February 12, 2019. Signed by Chief Judge Beryl A. Howell on February 8, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 02/08/2019)
02/12/2019	83	MOTION for Leave to File Ex Parte Supplement by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 02/12/2019)
02/12/2019	84	MOTION for Evidentiary Hearing by UNITED STATES OF AMERICA (zrdj) (Entered: 02/12/2019)
02/12/2019	85	STATUS REPORT by UNITED STATES OF AMERICA. (See docket entry 84 to view document)(zrdj) (Entered: 02/12/2019)
02/12/2019	86	ORDER GRANTING the government's 83 Motion for Leave to File *Ex Parte* Supplement. See Order for further details. Signed by Chief Judge Beryl A. Howell on February 12, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 02/12/2019)
02/13/2019		MINUTE ORDER (paperless) DIRECTING the witness to respond, by February 14, 2019 at 2:00 PM, to the government's 84 Status Report and Motion for Evidentiary Hearing on Whether Witness had Complied with the Subpoena, and DIRECTING the parties to appear, on February 15, 2019 at 11:00 AM, for a status conference. Signed by Chief Judge Beryl A. Howell on February 13, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 02/13/2019)
02/13/2019		Set/Reset Deadlines/Hearings: Witness' response to the government's 84 status report due by 2/14/2019; Status Conference scheduled for 2/15/2019, at 11:00 AM in Courtroom 22A before Chief Judge Beryl A. Howell. (ztg) (Entered: 02/13/2019)
02/14/2019	87	[redacted] OPPOSITION to the 84 Government's Status Report and 84 Motion for Evidentiary Hearing and to the 83 Government's Motion for Leave to File an Ex Parte Supplement filed by [redacted]. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (zad) (Entered: 02/14/2019)
02/15/2019		MINUTE ORDER (paperless) DENYING, for the reasons stated on the record at the February 15, 2019 status conference, the 84 Government's Motion for Evidentiary Hearing on Whether Witness has Complied with the Subpoena, and ORDERING *nunc pro tunc* that the civil contempt sanctions against the witness resume accruing as of February 12, 2019. Signed by Chief Judge Beryl A. Howell on February 15, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 02/15/2019)
02/15/2019	88	MOTION REQUESTING RELEASE OF THE TRANSCRIPT FOR THE FEBRUARY 15, 2019 SEALED HEARING by [redacted] (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 02/15/2019)
02/15/2019		Minute Entry for proceedings held before Chief Judge Beryl A. Howell: Status Conference held on 2/15/2019. (Court Reporter [redacted].) (ztg)

		(Entered: 02/15/2019)
02/15/2019	89	ORDER granting 88 Motion Requesting Release of the Transcript for the February 15, 2019 Sealed Hearing by [redacted]. It is HEREBY ORDERED that the court reporter is authorized to release the transcript of that hearing only to the parties. SO ORDERED. Signed by Chief Judge Beryl A. Howell on 2/15/2019. Counsel have NOT been notified. (zad) (Entered: 02/15/2019)
02/15/2019	90	STATUS REPORT by [redacted]. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (zad) (Entered: 02/15/2019)
02/15/2019	91	PARTIES' JOINT PROPOSAL and Government's Proposal Regarding Unsealing and Redactions by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5) (zad) (Entered: 02/15/2019)
02/19/2019	92	TRANSCRIPT OF PROCEEDINGS before Chief Judge Beryl A. Howell held on February 15, 2019; Page Numbers: 1-30. Date of Issuance:February 19, 2019. Court Reporter/Transcriber [redacted], Telephone number (202) 354-3242, Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the co urt reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. (zad) (Entered: 02/19/2019)
02/26/2019	93	NOTICE of Appearance by Theodore J. Boutrous, Jr on behalf of REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (zrdj) (Entered: 02/26/2019)
02/26/2019	94	MOTION to Unseal Case by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(zrdj) (Entered: 02/26/2019)
02/26/2019	95	CERTIFICATE OF SERVICE by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS re 94 MOTION to Unseal Case. (zrdj) (Entered: 02/26/2019)
02/26/2019	96	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Theane Evangelis, :Firm- Gibson, Dunn & Crutcher LLP, [redacted] Fee Status: Fee Paid -- 4616096887. by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 02/26/2019)
02/26/2019	97	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Lee Ross Crain, :Firm- Gibson, Dunn & Crutcher LLP, [redacted]: Fee Paid -- 4616096886. by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 02/26/2019)

02/26/2019	98	LCvR 26.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (zrdj) (Entered: 02/26/2019)
02/27/2019		MINUTE ORDER (paperless) GRANTING the movant's 96 Motion for Admission *Pro Hac Vice* and 97 Motion for Admission *Pro Hac Vice*. Ms. Evangelis and Mr. Crain may enter an appearance *pro hac vice* for the purpose of representing the movant in this action. Signed by Chief Judge Beryl A. Howell on February 27, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 02/27/2019)
02/27/2019		MINUTE ORDER (paperless) DIRECTING the parties to respond, by March 15, 2019, to the movant's 94 Motion to Unseal. Signed by Chief Judge Beryl A. Howell on February 27, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 02/27/2019)
02/27/2019		Set/Reset Deadlines: Response to 94 Motion to Unseal due by 3/15/2019. (ztg) (Entered: 02/27/2019)
02/28/2019	99	NOTICE that, upon consideration of the 61 Government's Report on Unsealing, the 90 Witness's Status Report, and the 91 Parties' Joint Proposal and Government's Proposal Regarding Unsealing and Redactions, the attached notice was posted to the Court's public website. (lcbah1) (Entered: 02/28/2019)
03/01/2019	100	NOTICE of Appearance by Peter C. Lallas on behalf of UNITED STATES OF AMERICA (zrdj) (Entered: 03/04/2019)
03/01/2019	101	NOTICE of Appearance by Zia Mustafa Faruqui on behalf of UNITED STATES OF AMERICA (zrdj) (Entered: 03/04/2019)
03/07/2019	102	MOTION TO PURGE CONTEMPT AND STOP THE CONTEMPT FINES' ACCRUAL by [redacted]. (Attachment: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3) (zad) (Entered: 03/07/2019)
03/07/2019		MINUTE ORDER (paperless) DIRECTING the government to file, by March 21, 2019, any opposition to [redacted] 102 Motion to Purge Contempt and Stop the Contempt Fines' Accrual and DIRECTING [redacted] to file any reply by March 28, 2019. Signed by Chief Judge Beryl A. Howell on March 7, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 03/07/2019)
03/07/2019		Set/Reset Deadlines: Response to 102 Motion due by 3/21/2019; Reply due by 3/28/2019. (ztg) (Entered: 03/07/2019)
03/15/2019	103	COUNTRY A'S RESPONSE to the Reporters Committee for Freedom of the Press's Motion to Unseal re 94 MOTION to Unseal Case filed by [redacted] (zad) (Entered: 03/15/2019)
03/15/2019	104	Memorandum in opposition to re 94 MOTION to Unseal Case filed by UNITED STATES OF AMERICA. (zrdj) (Entered: 03/18/2019)
03/15/2019	105	NOTICE of Appearance by David Brian Goodhand on behalf of UNITED STATES OF AMERICA (zrdj) (Entered: 03/18/2019)
03/21/2019	106	MOTION TO ACCELERATE FINES, MOTION for AN EVIDENTIARY Hearing by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Text of Proposed Order)(zrdj) (Entered: 03/21/2019)
03/21/2019	107	Memorandum in opposition to re 102 MOTION filed by UNITED STATES OF AMERICA. (See docket entry 106 to view document)(zrdj) (Entered: 03/21/2019)

03/22/2019		NOTICE OF HEARING. The parties shall take notice that a Status Hearing is scheduled for 3/27/2019, at 10:00 AM in Courtroom 22A before Chief Judge Beryl A. Howell. (ztg) (Entered: 03/22/2019)
03/22/2019	108	REPLY to opposition to motion re 94 MOTION to Unseal Case filed by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS. (zrdj) (Entered: 03/22/2019)
03/25/2019		NOTICE OF HEARING on Motion 94 to Unseal Case by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS. The parties shall take notice that a Motion Hearing is scheduled for 3/27/2019, at 11:30 AM in Courtroom 22A before Chief Judge Beryl A. Howell. (ztg) (Entered: 03/25/2019)
03/26/2019	109	REPLY to opposition to motion re 102 MOTION TO PURGE CONTEMPT AND STOP THE CONTEMPT FINES' ACCRUAL filed by [redacted] (zrdj) (Entered: 03/26/2019)
03/26/2019	110	Memorandum in opposition to re 106 MOTION TO ACCELERATE FINES MOTION for Hearing filed by [redacted]. (See docket entry 109 to view document)(zrdj) (Entered: 03/26/2019)
03/27/2019		Minute Entry for proceedings held before Chief Judge Beryl A. Howell: Sealed Status Hearing held on 3/27/2019. (Court Reporter [redacted].) (ztg) (Entered: 03/27/2019)
03/27/2019		Minute Entry for proceedings held before Chief Judge Beryl A. Howell: Motion Hearing (public session) held on 3/27/2019, re 94 MOTION to Unseal Case filed by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS. (Court Reporter [redacted].) (ztg) (Entered: 03/27/2019)
03/27/2019		MINUTE ORDER (paperless) DIRECTING the government to file, by April 1, 2019, any supplement regarding the Witness's 102 Motion to Purge Contempt and to Stop the Contempt Fines' Accrual and the government's 106 Motion to Accelerate Fines, and DIRECTING the Witness to file, by April 4, 2019, any response. Signed by Chief Judge Beryl A. Howell on March 27, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 03/27/2019)
03/27/2019		Set/Reset Deadlines: Government's supplement regarding the Witness's 102 Motion and the government's 106 Motion due by 4/1/2019; Witness's response due by 4/4/2019. (ztg) (Entered: 03/27/2019)
03/28/2019	111	MOTION FOR PERMISSION TO OBTAIN A COPY OF THE SEALED MARCH 27, 2019 TRANSCRIPT by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 03/28/2019)
03/28/2019	112	MOTION for Extension of Time to File SUPPLEMENTAL EX PARTE PLEADING by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 03/28/2019)
03/28/2019	113	TRANSCRIPT OF PROCEEDINGS (Motions Hearing - Not SEALED)) before Chief Judge Beryl A. Howell held on March 27, 2019; Page Numbers: 1 - 22. Court Reporter/Transcriber [redacted], RPR, FCRR, (zrdj) (Entered: 03/28/2019)
03/28/2019		MINUTE ORDER (paperless) GRANTING the 111 Government's Motion for Permission to Obtain a Copy of the March 27, 2019 Transcript and DIRECTING that the court reporter may provide the government with a copy of the sealed March 27, 2019 transcript. Signed by Chief Judge Beryl A. Howell on March 28, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 03/28/2019)

03/28/2019		MINUTE ORDER (paperless) GRANTING the government's 112 Motion for Extension of Time to File Government's Supplemental *Ex Parte* Pleading and DIRECTING the government to file any supplemental *ex parte* pleading by April 5, 2019. Signed by Chief Judge Beryl A. Howell on March 28, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 03/28/2019)
03/29/2019	 114	SEALED TRANSCRIPT OF PROCEEDINGS (Motions Hearing) before Chief Judge Beryl A. Howell held on March 27, 2019; Page Numbers: 1-52. Court Reporter/Transcriber [redacted], RPR, FCRR.(zrdj) (Entered: 03/29/2019)
03/29/2019	115	MOTION REQUESTING RELEASE OF THE TRANSCRIPT FOR THE MARCH 27, 2019 SEALED HEARING by [redacted] (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 03/29/2019)
04/01/2019		MINUTE ORDER (paperless) GRANTING the Witness's 115 Motion Requesting Release of the Transcript for the March 27, 2019 Sealed Hearing and DIRECTING that the court reporter may provide the Witness with a copy of the sealed March 27, 2019 transcript. Signed by Chief Judge Beryl A. Howell on April 1, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 04/01/2019)
04/01/2019	116	MEMORANDUM OPINION AND ORDER GRANTING in part and DENYING in part the Reporters Committee's 94 Motion to Unseal. *See* Order for further details. Signed by Chief Judge Beryl A. Howell on April 1, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 04/01/2019)
04/01/2019	117	Supplemental Opposition to re 102 MOTION filed by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit A)(zrdj) (Entered: 04/01/2019)
04/01/2019	118	SUPPLEMENTAL CROSS MOTION TO ACCELERATE FINES by UNITED STATES OF AMERICA (See docket entry 117 to view document)(zrdj) (Entered: 04/01/2019)
04/02/2019		Set/Reset Deadlines: Joint Status Report due by the government and the corporation on or before 5/1/2019. (ztg) (Entered: 04/02/2019)
04/02/2019	119	ERRATA by UNITED STATES OF AMERICA 117 Supplemental Opposition filed by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit)(zrdj) (Entered: 04/03/2019)
04/04/2019	120	REPLY to opposition to motion re 102 MOTION TO PURGE CONTEMPT AND STOP THE CONTEMPT FINES' ACCRUAL filed by [redacted] (zrdj) (Entered: 04/04/2019)
04/04/2019	121	MOTION REQUESTING RELEASE OF DOCKET SHEET by [redacted] (zrdj) (Entered: 04/04/2019)
04/04/2019		MINUTE ORDER (paperless) GRANTING the Witness's 121 Motion Requesting Release of Docket Sheet and DIRECTING the Clerk of the Court to release a copy of the above-captioned docket sheet to the parties. Signed by Chief Judge Beryl A. Howell on April 4, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 04/04/2019)
04/05/2019	122	MOTION for Leave to File EX PARTE ANNEX by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 04/05/2019)
04/09/2019		MINUTE ORDER (paperless) GRANTING the government's 122 Motion for

		Leave to File *Ex Parte* Annex and DIRECTING that the Clerk of the Court shall accept and file under seal the government's *ex parte* supplement, which shall remain *ex parte* and under seal until further order of the Court. Signed by Chief Judge Beryl A. Howell on April 9, 2019. Counsel have NOT been notified. (lcbah1) (Entered: 04/09/2019)
04/12/2019	123	MOTION for Leave to File EX PARTE AND IN CAMERA SUPPLEMENTAL FILING by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit Supplemental Filing, # 2 Text of Proposed Order)(zrdj) (Entered: 04/12/2019)
04/15/2019	124	ORDER granting 123 Motion for Leave to File Ex Parte and In Camera Supplemental Filing (see Order for details). Signed by Chief Judge Beryl A. Howell on 4/15/2019. (zad) (Entered: 04/15/2019)
04/15/2019	125	TRANSCRIPT OF PROCEEDINGS before Chief Judge Beryl A. Howell held on 2/08/2019; Page Numbers: 1-10. Date of Issuance:4/15/2019. Court Reporter/Transcriber [redacted], Telephone number (202) 354-3242, Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter ref erenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. (zad) (Entered: 04/15/2019)
04/16/2019		MINUTE ORDER (paperless) DIRECTING the government to file a status report, by April 17, 2019 at 5:00 pm, advising whether the government's position on the witness's 102 Motion to Purge Contempt and Stop the Contempt Fines' Accrual has changed in light of Exhibit 5 to the witness's 120 Response to the Government's Supplemental Opposition, [redacted] Signed by Chief Judge Beryl A. Howell on April 16, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 04/16/2019)
04/16/2019		Set/Reset Deadlines: Government's status report due by 5:00 PM on 4/17/2019 (ztg) (Entered: 04/16/2019)
04/17/2019	126	STATUS REPORT by UNITED STATES OF AMERICA. (zrdj) (Entered: 04/17/2019)
04/17/2019		MINUTE ORDER (paperless) GRANTING, upon consideration of the government's 126 Status Report, the witness's 102 Motion to Purge Contempt and Stop the Contempt Fines' Accrual; TERMINATING the witness's contempt as of February 8, 2019; CONSTRUING the government's 126 Status Report to include a motion to withdraw the government's 106 Cross Motion to Accelerate Fines and for an Evidentiary Hearing; and GRANTING the government's motion to

		withdraw the government's 106 Cross Motion to Accelerate Fines and for an Evidentiary Hearing. Signed by Chief Judge Beryl A. Howell on April 17, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 04/17/2019)
04/29/2019	127	MOTION for Extension of Time to File Joint Status Report by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 04/29/2019)
04/29/2019		MINUTE ORDER (paperless) GRANTING the parties' 127 Joint Motion for Extension of Time to File Joint Status Report and DIRECTING the parties to file, by June 3, 2019, a joint status report advising the Court which transcripts and pleadings identified in the April 1, 2019 116 Memorandum Opinion and Order may be unsealed with redactions, and proposing redactions to be made to those documents. Signed by Chief Judge Beryl A. Howell on April 29, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 04/29/2019)
04/30/2019		Set/Reset Deadlines: Joint Status Report due by 6/3/2019. (ztg) (Entered: 04/30/2019)
04/30/2019		MINUTE ORDER (paperless) DIRECTING the parties to include in their joint status report due June 3, 2019 whether the following docket entries may be unsealed with redactions and, if so, proposing redactions: ECF Nos. 114, 119, 120, 125, and 126. Signed by Chief Judge Beryl A. Howell on April 30, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 04/30/2019)
05/28/2019	128	MOTION Requesting Release of Docket Sheet by [redacted] (Attachments: # 1 Text of Proposed Order)(zrdj) (Entered: 05/28/2019)
05/28/2019		MINUTE ORDER (paperless) GRANTING the Witness's 128 Motion Requesting Release of Docket Sheet and DIRECTING the Clerk of the Court to release a copy of the above-captioned docket sheet to the parties. Signed by Chief Judge Beryl A. Howell on May 28, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 05/28/2019)
05/30/2019	129	COUNTRY A'S MOTION REQUESTING Release of the Transcript for the February 8, 2019 Sealed Hearing by [redacted] (Attachment: # 1 Text of Proposed Order) (zad) (Entered: 05/30/2019)
05/30/2019		MINUTE ORDER (paperless) GRANTING the Witness's 129 Motion Requesting Release of the Transcript for the February 8, 2019 Sealed Hearing and DIRECTING that the court reporter may provide the Witness and the government with a copy of the sealed February 8, 2019 transcript. Signed by Chief Judge Beryl A. Howell on May 30, 2019. Counsel have NOT been notified.(lcbah1) (Entered: 05/30/2019)
06/03/2019	130	JOINT STATUS REPORT by [redacted], UNITED STATES OF AMERICA. (Attachments: # 1 Dkt. 3, # 2 Dkt. 4, # 3 Dkt. 5, # 4 Dkt. 8, # 5 Dkt. 9, # 6 Dkt. 12, # 7 Dkt. 16, # 8 Dkt. 27, # 9 Dkt. 28, # 10 Dkt. 29, # 11 Dkt. 38, # 12 Dkt. 45, # 13 Dkt. 51, # 14 Dkt. 52, # 15 Dkt. 53, # 16 Dkt. 55, # 17 Dkt. 56, # 18 Dkt. 58, # 19 Dkt. 59, # 20 Dkt. 66, # 21 Dkt. 67. (zad). (Entered: 06/03/2019)
06/03/2019	131	LARGE ADDITIONAL ATTACHMENT(S) by [redacted], UNITED STATES OF AMERICA 130 Status Report, filed by UNITED STATES OF AMERICA, [redacted]. (Attachments: # 1 Dkt. 68, # 2 Dkt. 69, # 3 Dkt. 70, # 4 Dkt. 74, # 5 Dkt. 78, # 6 Dkt. 79, # 7 Dkt. 80, # 8 Dkt. 81, # 9 Dkt. 82, # 10 Dkt. 84, # 11 Dkt. 87, # 12 Dkt. 92, # 13 Dkt. 102, # 14 Dkt. 106,

		# 15 Dkt. 109, # 16 Dkt. 114, # 17 Dkt. 119, # 18 Dkt. 120, # 19 Dkt. 125, # 20 Dkt. 126)(zad) (Entered: 06/03/2019)

ECF No. 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA
NO. 7409

FILED UNDER SEAL
PURSUANT TO LCrR 6.1

MOTION TO QUASH GRAND JURY SUBPOENA NO. 7409

Pursuant to Rules 6 and 17(c)(2) of the Federal Rules of Criminal Procedure, [redacted] moves to quash Grand Jury Subpoena No. 7409 issued by a federal grand jury sitting in the District of Columbia seeking documents pertaining to [redacted] on the grounds ("the Subpoena") that: (1) [redacted] is immune from compliance under the Foreign Sovereign Immunities Act ("FSIA") and (2) compliance with the Subpoena would violate [redacted] law.

BACKGROUND

[redacted]

On July 11, 2018, a federal grand jury in the District of Columbia issued the Subpoena to [redacted]. *See* **Exhibit A**, Grand Jury Subpoena dated July 11, 2018. The Subpoena, sent by Special Counsel Robert S. Mueller's office ("Special Counsel"), required the production of "all documents" from "any" of [redacted] "pertaining" to [redacted]

[redacted]

[redacted] as well as any other [redacted] [redacted] *Id.* The initial return date of the Subpoena was dated July 27, 2018. *Id.*

In an effort to cooperate with the Special Counsel's investigation, [redacted] conducted a thorough search for records on its system, but located no documents responsive to the Subpoena. [redacted]

Moreover, upon receipt of the Subpoena, [redacted] through the undersigned counsel, informed the Special Counsel that [redacted] and that as a result, it considered itself as immune from having to produce documents responsive to the Subpoena under the protections afforded by the FSIA. [redacted] that requiring the production of documents responsive to the Subpoena could constitute a waiver of its immunity, thereby undermining [redacted] *See* **Exhibit B** (July 26, 2018 Letter from Alston & Bird). The Special Counsel's office disagreed with [redacted] position on the applicability of the FSIA, and stated that "[t]he FSIA does not apply in criminal cases" and even if it did, the "commercial activity" exception to the FSIA would apply. *See* **Exhibit C** (July 30, 2018 Letter from Special Counsel's Office).

The undersigned counsel and the Special Counsel's Office thereafter sought to negotiate a resolution that would alleviate [redacted] concerns about waiver of immunity as well as to address the timing of the production of documents. In furtherance of these negotiations, the Special Counsel agreed to extend the Subpoena's return date from July 27 to August 16.

During those negotiations, [redacted] directed the Special Counsel to [redacted] law, which prohibits [redacted] from disclosing information about [redacted], absent: [redacted]

Upon [redacted] expressing these concerns, the Special Counsel offered to provide and subsequently provided a letter to [redacted], in which the Special Counsel confirmed that the grand jury's investigation involved inquiry [redacted] *See* **Exhibit D** (August 14, 2018 Letter from Special Counsel), at 1-2; [redacted] The Special Counsel stated that his office would not object to [redacted] sharing the letter as appropriate to [redacted] at a future date, for the purpose of demonstrating [redacted] compliance with [redacted]. *Id.* However, as the attached declaration of [redacted], demonstrates, such a letter from the Special Counsel would not be [redacted]

In response, [redacted] proposed that it be permitted to disclose the Special Counsel's letter to the [redacted] in advance of [redacted] production of documents to the Special Counsel, to obtain the [redacted] confirmation that such production would not violate [redacted] The Special Counsel rejected this proposal and refused to further extend the Subpoena's return date.

[redacted] wishes to cooperate with the investigation and reach a resolution that would provide the Special Counsel with the requested documents without waiving its protections under the FSIA [redacted]. However, the Special Counsel's conditions of compliance with the Subpoena are not feasible and necessitate the filing of this motion to quash.

ARGUMENT

I. [redacted]

Foreign states are generally immune from the jurisdiction of U.S. courts. *See* 28 U.S.C. § 1604. The Supreme Court has recognized the FSIA as "the sole basis for obtaining jurisdiction over a foreign state" in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 343. Included in the FISA's definition of a foreign state is any "agency or instrumentality" of a foreign state. *Id.* § 1603(a).

[redacted] is immune from jurisdiction of U.S. courts, as well as the reach of U.S. subpoenas.

The Special Counsel's office takes the position that the FSIA does not apply in criminal cases and, thus, [redacted] should not be immune from complying with the Subpoena here.[2] However, the jurisprudence regarding this issue is not uniform. While neither this Court nor this Circuit have spoken on the issue, other federal courts have held that the FSIA does apply in criminal cases. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002), abrogated on other grounds by *Samantar v. Yousuf*, 560 U.S. 305 (2010) ("The FSIA states that a 'foreign state shall be immune from the jurisdiction of the courts of the United States,' and does not limit this grant of immunity to civil cases . . . w]e conclude that the FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise."); *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 750 F. Supp. 838, 844 (N.D. Ohio) ("[N]o criminal jurisdiction exists in our courts over foreign sovereigns.").

Moreover, nothing in the FSIA's text or legislative history suggests that it is limited to civil actions only.[3] In fact, the FSIA itself instructs that claims of immunity should be decided by courts. *See e.g., Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2256 (2014) ("As the Act itself instructs, '[c]laims of foreign states to immunity should henceforth be decided by courts ... in conformity with the principles *set forth in this [Act].*'"); 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."). There is simply no qualifying language in the FSIA limiting immunity to civil actions only and this Court is not bound by precedent limiting the FSIA to civil actions. Extending the FSIA's immunity to criminal

[2] *See* **Exhibit C.**
[3] *See* David P. Stewart, "The Foreign Sovereign Immunities Act: A Guide for Judges," Fed. Jud. Ctr. Int'l Litig. Guide at 1 fn. 2 (2013).

proceedings would be consistent with the FSIA's text, legislative history, and rulings from other federal courts.

For these reasons, [redacted] respectfully requests this Court quash the subpoena against [redacted] an agent or instrumentality [redacted] that is immune from compliance under the FSIA.

II. There is No Indication that the "Commercial Activity" Exception to the FSIA Applies.

The commercial activity exception to the FSIA provides that a foreign state shall not be immune from the jurisdiction of the U.S. courts in any case: (1) in which the action is based upon a commercial activity carried on in the United States by the foreign state; (2) upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2). However, in order for the commercial activity exception to apply, there must be a jurisdictional nexus between the foreign state's commercial activity in the U.S. and the subject of the action, which in this case, would be the grand jury's investigation. *See Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146 (D.C. Cir. 1994) (holding that the alleged commercial activity must form the basis for plaintiff's suit in order to trigger the commercial activity exception to sovereign immunity).

While [redacted] has no insight into the details of the grand jury's secret investigation—other than that it may involve allegations of violations of [redacted]—the fact that there are no records responsive to the Subpoena located at [redacted] indicates that there is jurisdictional nexus between [redacted] commercial activity in the U.S. and the grand jury's investigation. The Special Counsel has not provided any information to

[redacted] to the contrary. For these reasons, [redacted] does not believe that the commercial activity exception to the FSIA applies in this case.

III. Compliance With the Subpoena Would Violate [redacted].

[redacted]

[redacted]

CONCLUSION

For the foregoing reasons, [redacted] through the undersigned counsel, respectfully requests that the Court issue an order quashing the Subpoena, and confirming that [redacted] is not required to comply with the Subpoena.

Dated: August 16, 2018

ALSTON & BIRD LLP

Edward T. Kang (D.C. Bar 1011251)
Emily S. Costin (D.C. Bar 500201)
Derek Zotto (D.C. Bar admission pending)
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Exhibit A

Exhibit B

ALSTON & BIRD

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202-239-3300 | Fax: 202-239-3333

Edward T. Kang Direct Dial: 202-239-3728 Email: edward.kang @alston.com

July 26, 2018

CONFIDENTIAL FOIA EXEMPTION REQUESTED
SUBJECT TO FED. R. CRIM. P. 6(E)

VIA EMAIL & FIRST CLASS MAIL

Ms. Zainab Ahmad, Esq.
Senior Assistant Special Counsel
U.S. Department of Justice
The Special Counsel's Office
950 Pennsylvania Avenue NW, Rm. B-103
Washington, D.C. 20530
zna@usdoj.gov

Re: [redacted]

Dear Ms. Ahmad:

As you know, Alston & Bird represents [redacted] with regard to the above-referenced subpoena served by your office [redacted], dated July 11, 2018. We have reviewed the subpoena in an effort to produce the requested information. However, as mentioned during our calls on July 16 and 26, our client has concerns that pertain to the potential waiver of its sovereign immunity, as well as with respect to the reach of the subpoena beyond [redacted]. I wanted to provide you in this letter some more background and context regarding those concerns.

[redacted]. The United States Supreme Court has identified the Foreign Sovereign Immunities Act ("FSIA") as "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 343 (1989). The applicability of the FSIA in the criminal context has been recognized by federal courts. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002), abrogated on other grounds by *Samantar v. Yousuf*, 560 U.S. 305 (2010) ("We conclude that the FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise."); *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 750 F. Supp. 838, 844 (N.D. Ohio 1990) ("[N]o criminal jurisdiction exists in our courts over foreign sovereigns.").

Moreover, [redacted]

[redacted]

jury subpoena in this matter could waive—or at a minimum, undermine—its right to assert an immunity defense under the FSIA [redacted] Indeed, one of the recognized exceptions to the FSIA is where a foreign state has waived immunity, either explicitly or by implication:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

[redacted] *See* 28 U.S.C. § 1605(a)(2) (recognizing an exception to the FSIA where: (1) the action is based upon a commercial activity carried on in the United States by the foreign state; (2) upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States). We believe that the other exceptions to the FSIA appear similarly inapplicable.

[redacted], that the validity of a grand jury subpoena issued to a U.S. representative of companies located outside the U.S. depends on whether the district court has personal jurisdiction over each of the companies whose records the subpoena seeks. *See In Re Sealed Case*, 832 F.2d 1268, 1272-73 (D.C. Cir. 1987), abrogated on other grounds by *Braswell v. United States*, 487 U.S. 99 (1988). In *Sealed Case*, the Independent Counsel's office sought to circumvent this personal jurisdiction analysis by arguing that because the subpoena was addressed to the representative as a "custodian" for the companies, rather than to the companies themselves, the

Independent Counsel did not need to prove that the district court had jurisdiction over the companies, since the court had personal jurisdiction over the representative as a U.S. citizen. *Id.* at 1272. The D.C. Circuit disagreed with this reasoning and held:

> By serving the Witness as "custodian" for the eight companies, the Independent Counsel has *for jurisdictional purposes* effectively attempted to serve the companies themselves. The Independent Counsel must therefore demonstrate that the District Court has personal jurisdiction over each of the companies in order to secure a valid order directing the production of the companies' records. The mere fact that the court has jurisdiction over an alleged representative of the companies is patently insufficient to establish jurisdiction over the companies or to entitle the Independent Counsel to view company documents. Just as service of a subpoena *duces tecum* on a corporate officer vacationing in the United States would not allow the Independent Counsel access to corporate records absent proof that a United States court had jurisdiction over the corporation itself, service of a subpoena on the Witness as a "custodian" for the companies cannot confer on the Independent Counsel a right to inspect their records unless it can show that the District Court possesses personal jurisdiction over them. The Independent Counsel has adduced no authority to the contrary. The fact that the Witness is an American citizen, not just sojourning here, is also irrelevant to establishing jurisdiction over foreign companies. The Independent Counsel's repeated claim that the Witness has a "duty" to comply with the subpoena simply because he enjoys United States citizenship is utterly baseless as an assertion about our law.

Id. at 1272-73 (emphases in original).

[redacted], without an adequate showing that a district court in the District of Columbia would have personal jurisdiction over each and every one of those [redacted]. No such showing has been made here.[1]

[redacted]

[redacted] and is therefore protected under the federal grand jury secrecy rules, Fed. R. Crim. P. 6(e). Furthermore, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b), [redacted] in addition to any memoranda, notes, or other writings of any sort that are or have been made by any government

[redacted]

agency that incorporate, include, or relate to any of the matters contained in this communication. Should your Office believe that this communication is not exempt from FOIA disclosure, we hereby request notice and an opportunity to be heard on this claim of exemption. Should your Office receive any request to inspect or copy this communication, either pursuant to FOIA or otherwise, we request that we be given an opportunity to object to such disclosure. Should your Office be inclined to disclose these documents to any third party, we request ten (10) business days' advance notice of any such decision to [redacted]. In this regard, I would ask that you call me directly at the number referenced above to provide such notice.

[redacted]

Sincerely,

Edward T. Kang

Exhibit C

U.S. Department of Justice

The Special Counsel's Office

Washington, D.C. 20530

July 30, 2018

Grand Jury Material

Edward T. Kang
Alston & Bird
950 F Street NW
Washington, D.C. 2004-1404

Re: [redacted]

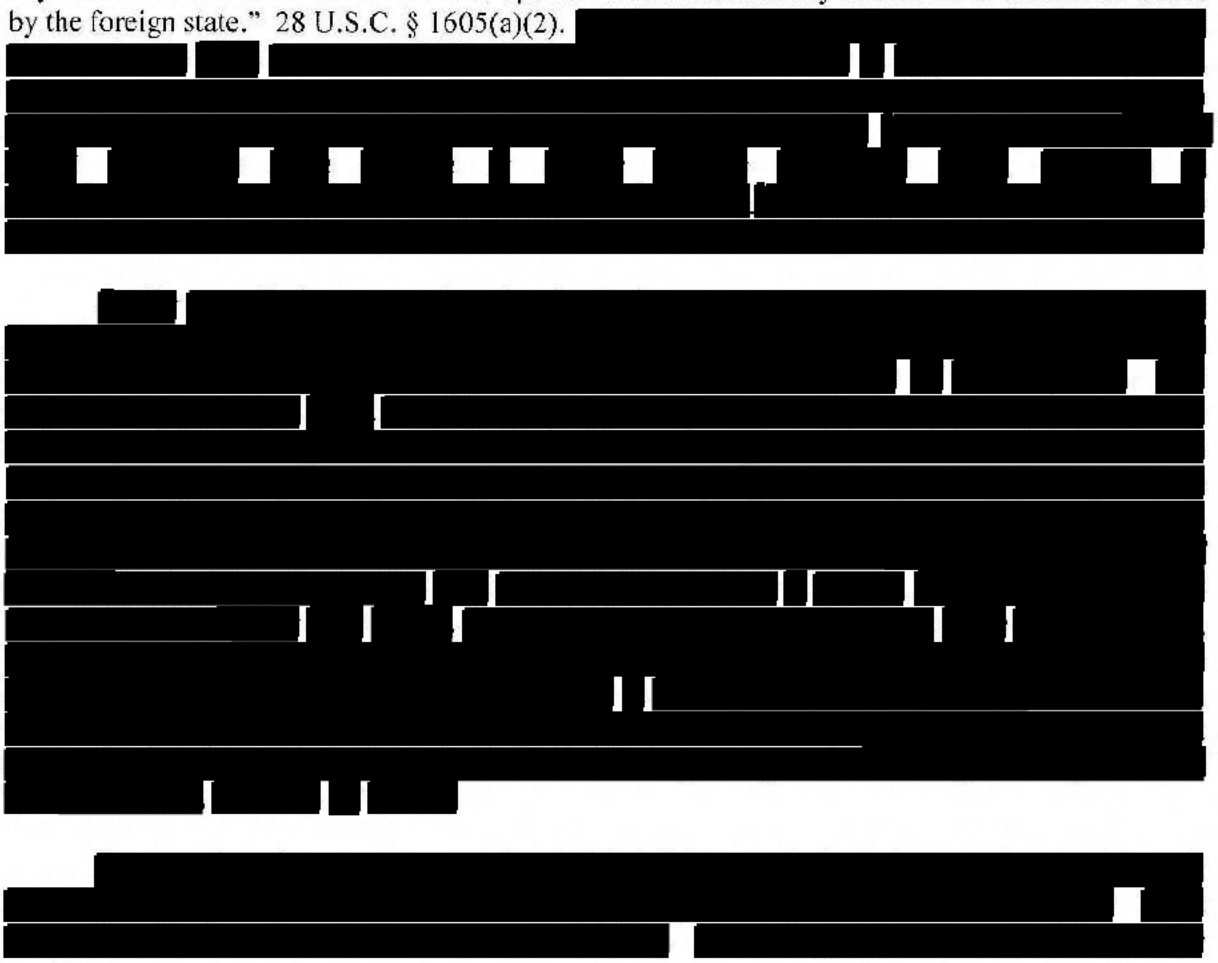
Dear Mr. Kang:

I have received your letter dated July 26, 2018, concerning the grand jury subpoena served on your client, [redacted] We do not agree with your suggestion that sovereign immunity or any other legal doctrine relieves your client from the obligation to produce the documents responsive to the [redacted], custody, or control—wherever the documents are located. We therefore expect your client to comply with the subpoena on its return date of August 3, 2018, or move to quash the subpoena pursuant to Fed. R. Crim. P. 17.

As an initial matter, we do not believe that the Foreign Sovereign Immunity Act (FSIA) applies in criminal cases or divests the district court of power to enforce the subpoena. The FSIA does not apply in criminal actions. Rather, it provides a "comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state." *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014) (emphasis added). Although your letter cites two cases indicating to the contrary, those cases overlook the background and structure of the FISA and contradict the better-reasoned holdings of other courts. See *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1214-1215 (10th Cir. 1999) ("We are unwilling to presume that Congress intended the FSIA to govern district court jurisdiction in criminal matters. . . . If Congress intended [foreign state] defendants to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state."); *United States v. Campa*, 529 F.3d 980, 1000 (11th Cir. 2008) ("We have stated in dicta that the Act does not address foreign sovereign immunity in the criminal context.") (internal quotation marks omitted), *cert. denied*, 557 U.S. 904 (2009); *United States v. Hendron*, 813 F. Supp. 973, 975 (E.D.N.Y. 1993) (the FSIA "contains a panoply of provisions that are consistent only with an application to civil cases and not to criminal proceedings"). And in the only case to the government's knowledge that considered whether the FSIA applies to a grand jury subpoena, the court held that it does not. *In re Grand Jury Proceeding Related to M/V Deltuva*, 752 F. Supp. 2d 173, 179-180 (D.P.R. 2010) ("[T]he Court sees no indication that Congress intended for the FISA to govern criminal proceedings against agencies or

instrumentalities of foreign governments," and therefore refusing to quash the grand jury subpoena at issue).

In any event, even assuming that the FSIA applied, the FSIA provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).



[redacted]

Sincerely yours,
Robert S. Mueller, III

By: _____
Zainab N. Ahmad
Senior Assistant Special Counsel

Exhibit D

U.S. Department of Justice

The Special Counsel's Office

Washington, D.C. 20530

August 14, 2018

Grand Jury Material

Edward T. Kang
Alston & Bird
950 F Street NW
Washington, D.C. 20004-1404

Re: [redacted]

Dear Mr. Kang:

I have received your emails dated August 6 and 7, 2018, regarding the grand jury subpoena served on your client, [redacted] In that correspondence, you referred to [redacted] disclosure of [redacted], and expressed concern that compliance with the grand jury subpoena could place [redacted] at risk of violating these provisions unless compliance would fit within one of the statute's exceptions.

Because you have only recently brought these provisions of [redacted] to our attention, the Special Counsel's Office has not been able to comprehensively evaluate the requirements they prescribe, any exceptions to those requirements, or any penalties applicable to violations of the requirements. Nor does the Special Counsel's Office concede that any risk of liability under [redacted] – if such a risk in fact exists – would suffice to excuse [redacted] obligation under United States law to comply with the grand jury subpoena served on [redacted] through the representatives at its [redacted]

As you pointed out in your August 7th email, [redacted] includes an exception for production of documents responsive to [redacted]. Specifically, [redacted] provides that the [redacted] imposed by other provisions of the [redacted]

As the Special Counsel understands its terms, [redacted] is applicable to the grand jury subpoena at issue. That is because the grand jury's investigation, while necessarily preliminary, includes inquiry into whether the conduct under investigation violates United States [redacted] *See United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) ("The function of the grand jury is to inquire into all information that might possibly

bear on its investigation until it has identified an offense or has satisfied itself that none has occurred."). Those statutes include, but are not limited to, [redacted]

The Special Counsel has no objection to [redacted] sharing this letter, as appropriate and as consistent with applicable law, with any [redacted] if doing so is required at a future date to demonstrate [redacted].

We will look forward to your compliance with the subpoena on its return date, absent the filing of a timely motion to quash.

Sincerely yours,
Robert S. Mueller, III

By: Zainab N. Ahmad
Senior Assistant Special Counsel

Exhibit E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
	)	
GRAND JURY SUBPOENA 7049	)	MOTION TO QUASH
	)	

CERTIFICATE OF SERVICE

This is to certify that I have this date served the within and foregoing **Motion to Quash Grand Jury Subpoena** by forwarding a true and correct copy of the same via e-mail and U.S. Mail as follows:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel's Office
950 Pennsylvania Ave NW
Room B-103
Washington, D.C.

This the 16th day of August, 2018.

Edward T. Kang (D.C. Bar 1011251)
Emily S. Costin (D.C. Bar 500201)
Derek Zotto (D.C. Bar admission pending)
950 F Street, NW
Washington, DC 20004
Telephone: 202-239-3000
Facsimile: 202-239-3333
E-mail: edward.kang@alston.com
E-mail: emily.costin@alston.com
E-mail: derek.zotto@alston.com

Karl Geercken (New York Bar 2536662)
Pro hac vice application pending
90 Park Avenue
15th Floor
New York, NY 10016
Telephone: 212-210-9400
Facsimile: 212-210-9444
E-mail: karl.geercken@alston.com

ECF No. 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	No. 18-gj-041 **Under Seal**

GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION TO QUASH GRAND JURY SUBPOENA

The United States of America, by Special Counsel Robert S. Mueller, III, files this response in opposition to the motion of [redacted] to quash a grand jury subpoena. [redacted] argues that (1) the Foreign Sovereign Immunities Act (FSIA) protects it from any obligation to comply with the subpoena, and (2) compliance with the subpoena would force [redacted] As explained further below, both of these arguments lack merit. The FSIA does not apply to criminal cases, including proceedings to enforce grand jury subpoenas, and would not shield [redacted] commercial activities in any event. And [redacted] has not carried its burden of establishing that compliance would violate [redacted]

BACKGROUND

On July 11, 2018, a federal grand jury in this District issued a subpoena to [redacted]

[redacted]

[redacted] *Id.* The subpoena had a return date of July 27, 2018, which the government later extended to August 3, 2018 after conversations with [redacted] counsel. [redacted]

On July 26, 2018, [redacted] sent the government a letter arguing (as relevant here) that [redacted] is immune from the jurisdiction of the federal courts under the FSIA and expressing concern that compliance with the grand jury subpoena at issue "could waive . . . its right to assert an immunity defense under the FSIA [redacted]." Exh. B at 1-2. Four days later, the government responded with a letter setting forth its position—which accords with the majority view among federal courts—that the FSIA does not apply to criminal cases and does not divest district courts of the authority to enforce grand jury subpoenas. Exh. C at 1-2. The government further explained that, even if the FSIA applied to criminal cases, the statute's [redacted]

On August 2, 2018, [redacted] sent a letter indicating its desire "to cooperate with the grand jury's investigation," but asking that the government take steps to alleviate [redacted] concerns about waiving sovereign immunity and to provide assurance that it was acting consistently with

[2] Contemporaneous with this response, the government is submitting a motion for leave to file an *ex parte* supplement that will provide additional information about [redacted]

[redacted] also asked the government to extend the subpoena's return date to September 3, 2018. *Id.* In a letter sent later on August 2, the government accepted [redacted], with a slight modification on the return date. The government agreed that [redacted] production of documents pursuant to the subpoena "is not intended to constitute either an express or implied waiver of any protections [redacted] might be entitled to pursuant to the FSIA," and further stated that, while demonstration of a "compelling need" is not legally required to enforce a grand jury subpoena, the government here "has a compelling need for records that are responsive to the . . . subpoena." Attach. B at 1, *infra*. The government also extended the subpoena's return date, but only through August 10, 2018. *Id.*

After the government extended the return date to August 10, 2018, [redacted] raised a new concern in an August 6 email—namely, that compliance with the subpoena would [redacted]. According to [redacted]

[redacted]

On August 14, 2018, the government sent [redacted] a letter expressing its understanding that the exception in [redacted] is applicable to the subpoena at issue "because the grand jury's investigation, while necessarily preliminary, includes inquiry into whether the [redacted] The government stated that it had "no objection to [redacted] sharing th[at] letter, as appropriate and as consistent with applicable law, with any [redacted] if doing so is required at a future date to demonstrate [redacted]

[redacted], however, pushed for permission to give [redacted] even more information about the subpoena. In a follow-up email to the government on August 14, 2018, [redacted] asked whether, in addition to providing the government's letter to [redacted], it could also "share the contents of the subpoena with [redacted] (or at least disclose the name of [redacted]), if necessary to do so to provide the [redacted] with background and context to the letter." Attach. D at 3, *infra*. In response, the government stated its view that disclosing to [redacted] either the subpoena itself or [redacted]. As to disclosure of the letter itself, the government reiterated its non-objection to sharing the letter "under certain conditions," but made clear its understanding that [redacted]

[redacted]

To allow for a further exchange of views and to permit [redacted] to fully consider its options, the government agreed to an additional final extension of the return date to August 16, 2018. On that date, after an additional exchange of emails and a telephone conversation, Attach. [redacted] filed the present motion to quash, along with copies of [redacted] The Court has scheduled a hearing on the motion for September 11, 2018.

ARGUMENT

[redacted] has moved to quash a subpoena duly issued by a grand jury sitting in this District. *See* Fed. R. Crim. P. 17(c)(2) (providing that a "court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive"). In moving to quash, [redacted] does not dispute [redacted] Instead, [redacted] argues only (A) that it is immune from compliance under the FSIA and (B) that compliance would violate [redacted].

As explained further below, both of these arguments lack merit. The FSIA does not apply to criminal cases, including proceedings to enforce a grand jury subpoena. [redacted]

A. The Foreign Sovereign Immunities Act Does Not Bar Enforcement Of The Grand Jury Subpoena To [redacted]

1. The FSIA Does Not Apply To Criminal Cases, Including Grand Jury Proceedings

The FSIA, 28 U.S.C. §§ 1330, 1602-1611, provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except" as the FSIA otherwise provides. 28 U.S.C. § 1604. A "foreign state" is defined under the FSIA to include "an agency or instrumentality of a foreign state," a term that is itself defined in the statute. *Id.* § 1603(a) and (b). [redacted] asserts (Mot. 4-5) that it qualifies as an "agency or instrumentality" of a foreign state under that definition because [redacted] the government does not dispute that proposition for purposes of this proceeding.

[redacted] immunity argument fails, however, because the FSIA does not apply to criminal cases. Rather, as the Supreme Court explained more than 30 years ago, the FSIA provides a "comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (emphasis added); *see Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014) (same). Noting that language in *Verlinden*, the majority of federal courts to consider the question have declined to presume "that Congress intended to provide foreign sovereigns with immunity from criminal indictment under the FSIA." *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1214-1215 (10th Cir. 1999) ("We are unwilling to presume that Congress intended the FSIA to govern district court jurisdiction in criminal matters. . . . If Congress intended [foreign state] defendants to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state."); *accord United States v. Campa*, 529 F.3d 980, 1000 (11th Cir. 2008) (noting that court's prior statement, in *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), that the FSIA "does not address 'foreign sovereign immunity in the criminal context'"), *cert.*

denied, 557 U.S. 904 (2009); *United States v. Hendron*, 813 F. Supp. 973, 975 (E.D.N.Y. 1993) (the FSIA "contains a panoply of provisions that are consistent only with an application to civil cases and not to criminal proceedings"). And in the only case to the government's knowledge that considered whether the FSIA applies to a grand jury subpoena, the court held that it does not. *In re Grand Jury Proceeding Related to M/V Deltuva*, 752 F. Supp. 2d 173, 179-80 (D.P.R. 2010) ("*M/V Deltuva*") (refusing to quash the grand jury subpoena at issue, because "the Court sees no indication that Congress intended for the FSIA to govern criminal proceedings against agencies or instrumentalities of foreign governments").

That conclusion is borne out by multiple features of the FSIA's text and structure. The very first substantive provision in the FSIA, for example, affirmatively "grants federal courts jurisdiction over *civil actions* against foreign states." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (emphasis added); *see* 28 U.S.C. § 1330(a) ("The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state[.]"). In a similar vein, the FSIA's "Findings and Declarations of Purpose" state that judicial resolution of foreign states' claims to immunity would protect the rights of "foreign states and *litigants*," 28 U.S.C. § 1602 (emphasis added), a term that "ordinarily refers to a party in a civil suit and not to the state or federal government as prosecutor of criminal charges." *Hendron*, 813 F. Supp. at 975. The statutory exceptions to immunity also indicate a uniform focus on civil cases. They refer to disputes over property rights, money damages, and arbitration awards, which are matters that arise "rarely if ever" in criminal prosecutions. *Id.* (discussing 28 U.S.C. § 1605). Other provisions of the FSIA specify the types of damages available when a foreign state is liable, rules governing counterclaims filed by a foreign states, and the principles applicable to execution of judgments against foreign states—all of which make sense only in the context of civil litigation.

See id. (discussing, respectively, 28 U.S.C. §§ 1606-1607, 1609-1611). Finally, any doubt about the statute's reach is dispelled by legislative history underscoring Congress's focus on "lawsuits" that are civil in character. H.R. Rep. No. 94-1487, at 6-7 (1976); *see Hendron*, 813 F. Supp. at 975 (explaining that the focus on civil suits "is confirmed by the examples given" in the House Report: "a price dispute between an American business person and foreign state trading company, and a real estate contract dispute between an American citizen and a foreign government"); *M/V Deltuva*, 752 F. Supp. 2d at 179 ("find[ing] no indication in the legislative history . . . that Congress intended for the [FSIA] to govern criminal actions as well as civil actions").

As [redacted] points out (Mot. 5), two courts have held, in the context of civil RICO claims, that the FSIA applies in criminal cases. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002); *Gould, Inc v. Mitsui Min. & Smelting Co.*, 750 F. Supp. 838, 844 (N.D. Ohio 1990). But those decisions do not meaningfully engage with the textual and structural features of the statute addressed above. Rather, they rely on the breadth of the FSIA's general immunity provision, *see* 28 U.S.C. § 1604 (a "foreign state shall be immune from the jurisdiction of the courts of the United States"), and a statement in the legislative history that the FSIA sets forth the exclusive standards to be used in resolving questions of a foreign state's sovereign immunity. *See Keller*, 277 F.3d at 819-20. That analysis, however, runs counter to the cardinal principle—as applicable to the FSIA as it is to other statutes—that "statutory phrases" are not construed "in isolation" and that statutes must be read "as a whole." *Samantur v. Yousuf*, 560 U.S. 305, 319 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)). For the reasons stated above, when the FSIA is construed "as a whole," *id.*, it is most naturally read not to apply in criminal cases, much less to immunize an instrumentality of a foreign state that does business in the United States from compliance with a grand jury subpoena.

The exclusion of criminal proceedings from the FSIA follows not only from statutory text and structure, but also from the FSIA's context and purpose. *See Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'"). The underlying concern that prompted the enactment of the FSIA was the desire to end disparate application of foreign sovereign immunity standards in the executive and judicial branches of government that resulted in unpredictable results for litigants. As the Supreme Court explained, under pre-FSIA practice, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden BV*, 461 U.S. at 488. But the congressional concern for establishing uniform standards and easing judicial decision-making has little force in the context of federal criminal prosecutions. In the criminal context, it is axiomatic that the executive's exercise of prosecutorial discretion takes into account myriad discretionary factors that are not fit for uniform judicial administration. *See Wayte v. United States*, 470 U.S. 598, 607 (1985) (the relevant factors—"the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan"—"are not readily susceptible to the kind of analysis the courts are competent to undertake"). And once the executive has determined to prosecute (or seek evidence from) an instrumentality of a foreign state, judicial evaluation of foreign-policy ramifications is neither necessary nor appropriate. *See Pasquantino v. United States*, 544 U.S. 349, 369 (2005) ("[B]y electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with [a foreign state], and concluded that it poses little danger of causing international friction. . . . [Judicial review] based on . . . foreign

policy concerns [would require courts to address] concerns that [they] have neither aptitude, facilities nor responsibility to evaluate.") (internal quotation marks omitted). Accordingly, no background principle or practice suggests any congressional design to substitute legislative standards and judicial review for the longstanding respect for prosecutorial discretion in criminal cases involving foreign-relations issues.

2. If The FSIA Applied To Criminal Cases, Jurisdiction Would Still Lie Under The Commercial-Activity Exception

Even assuming that the FSIA applied, the FSIA provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). [redacted]

[redacted] Accordingly, the commercial-activity exception affords this Court jurisdiction to enforce the subpoena even if the FSIA applied to criminal cases. *See M/V Deltuva*, 752 F. Supp. 2d at 180 n.3.

[redacted] Like any other witness subject to the Court's jurisdiction, [redacted] is obligated to produce information within its possession, custody, and control. *See United States v. First Nat. City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968) ("It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has in personam jurisdiction of the person in possession or control of the material.").

B. [redacted]

[redacted] separately argues (Mot. 7-8) that the subpoena should be quashed because compliance with it would force [redacted] to violate [redacted] has not met its burden of establishing that compliance would actually contravene those laws. And even if had done so, quashing the subpoena would still be unjustified given the U.S. law-enforcement interests at stake and the absence of other means to obtain the information sought.

[redacted] As the party "who relies on foreign law," [redacted] "assumes the burden of showing that such law prevents compliance with the" grand jury's subpoena or a court "order" enforcing it. *In re Sealed Case Nos. 87-5208, 87-5209*, 825 F.2d 494, 498 (D.C. Cir. 1987); *accord In re Grand Jury Proceedings*, 873 F.2d 238, 239-40 (9th Cir. 1989) ("A party relying on foreign law has the burden of showing that such law bars compliance with a court order."). "In order to meet that burden, the party resisting [production] must provide the Court with information of sufficient particularity and specificity to allow the Court to determine whether the [production] sought is indeed prohibited by foreign law." *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993) (so holding in the context of civil discovery).

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] alternative proposal thus provides no adequate substitute for timely compliance with the grand jury's subpoena.

2. In Any Event, U.S. Law Enforcement Interests Outweigh Any Conflicting Legal Obligations To Which [redacted] Is Subject

Even if [redacted] had shown that it is actually subject to conflicting legal obligations, that showing would not bar this Court from ordering [redacted] to comply with the subpoena. Rather, courts have long recognized that the operation of foreign law "do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that law." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.29 (1987); *see In re Sealed Case Nos. 87-5208, 87-5209*, 825 F.2d at 497-98 (noting that courts have generally thought it "acceptable" "to order a person to produce documents in contravention of foreign law," even if "impos[ing] sanctions for" disobeying such an order is "more problematic"). A court faced with a party's claim of conflicting legal obligations should "balance the interests," which include "the respective interests of the states involved[,] the hardship that would be imposed upon the person or entity subject to compliance, . . . the

[redacted]

importance of the documents requested to the underlying litigation, the availability of alternative means of disclosure, and the degree of specificity of the request." *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002); *see* Restatement (Third) of the Foreign Relations Law of the United States § 442(1)(c) (1987).[6] Particularly in the criminal context, the balance will often favor requiring compliance with a grand jury subpoena; [redacted]

The relevant "balance" here favors ordering [redacted] to comply with the subpoena. As set forth in the *ex parte* supplement, the documents sought are crucial to an ongoing law enforcement investigation, a matter in which the government unquestionably has a strong interest. *See, e.g.*, *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985) ("The United States has a strong national interest in the effective enforcement of its criminal laws."). The government has exhausted all other available investigative avenues, leaving no "alternative means of" obtaining the requested records. *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d at 554. The subpoena is also appropriately "specific[]" (and narrow in scope), *see id.*, since it seeks records [redacted] Accordingly, [redacted] claim of conflicting legal obligations provides no basis for excusing compliance with the subpoena.

[redacted]

[redacted]

[redacted]

CONCLUSION

For the foregoing reasons, [redacted] motion to quash should be denied.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: August 24, 2018

By: */s/ Zainab Ahmad*
Zainab Ahmad
Scott A.C. Meisler
Special Counsel's Office
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-0800

Attachment A

ALSTON & BIRD

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202-239-3300 | Fax: 202-239-3333

Edward T. Kang Direct Dial: 202-239-3728 Email: edward.kang @alston.com

August 2, 2018

CONFIDENTIAL FOIA EXEMPTION REQUESTED
SUBJECT TO FED. R. CRIM. P. 6(E)

VIA EMAIL & FIRST CLASS MAIL

Ms. Zainab Ahmad, Esq.
Senior Assistant Special Counsel
U.S. Department of Justice
The Special Counsel's Office
950 Pennsylvania Avenue NW, Rm. B-103
Washington, D.C. 20530

[redacted]

Dear Ms. Ahmad:

This letter is intended to follow up on our August 1 call, as well as on the issues raised in our respective written correspondence, dated July 26 and July 30.

As an initial matter, out of an abundance of caution, [redacted] would greatly appreciate receiving written confirmation from your Office that it is permissible for him to share the grand jury subpoena with other personnel at [redacted] who would be involved in collecting the documents requested, including personnel at [redacted] that may have responsive information.

Second, we want to emphasize to you that, notwithstanding the points raised in your July 30 letter, [redacted] continues to have concerns on how its protections under the Foreign Sovereign Immunities Act ("FSIA") [redacted] be impacted—or waived entirely—by producing documents responsive to the grand jury subpoena.

We understand the Special Counsel's position to the effect that the FSIA does not apply in the context of criminal cases and that the commercial activity exception would apply regardless. However, we do not believe that the jurisprudence regarding these issues is as clear or uniform as the Special Counsel views them—as is evidenced by the divergent case law on this subject. Consequently, [redacted] is concerned that a federal court in a future case could find that the FSIA does apply in this context and that [redacted] production of documents in response to the grand jury subpoena constitutes a waiver of [redacted] protections. *See* 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication").

Nevertheless, as we discussed, [redacted] would like to cooperate with the grand jury's investigation and is amenable to a resolution that would provide the Special Counsel's Office with the documents requested, but in a manner that (a) would alleviate, to the greatest extent possible, [redacted] concerns about waiver and (b) is consistent with applicable law in [redacted] that may have responsive information—which in this case, we understand, [redacted]

To that end, we would propose that [redacted] provide documents responsive to the subpoena consistent with, and as permitted by, the applicable laws of the jurisdictions in which information may located, subject to the following understandings:

1. The Special Counsel's Office agrees that, if the FSIA could somehow be deemed to be or to have been applicable in this case, [redacted] production of documents responsive to the grand jury subpoena is not intended to be either an express or implied waiver of [redacted] protections under the FSIA.

2. The Special Counsel's Office represents that it has a compelling need for the records requested in the grand jury subpoena.

3. The Special Counsel's Office agrees to a 30-day extension of the subpoena's return date, up to and including September 3, 2018, to give [redacted] adequate time to collect and process the documents and data that may reside at [redacted] that are on separate information systems.

If these terms are acceptable to your Office, we would request that you countersign this letter in the space below. Please do not hesitate to contact me if you have any questions or concerns. Thank you.

Sincerely,

Edward T. Kang
ALSTON & BIRD LLP

Acknowledged and agreed to this

_____ day of August, 2018.

By: _____
Robert S. Mueller, III
Special Counsel

Zainab N. Ahmad
Senior Assistant Special Counsel

Attachment B

U.S. Department of Justice

The Special Counsel's Office

Washington, D.C. 20530

August 2, 2018

Grand Jury Material

Edward T. Kang
Alston & Bird
950 F Street NW
Washington, D.C. 20004-1404

Re: [redacted]

Dear Mr. Kang:

I have received your letter dated August 2, 2018, concerning the grand jury subpoena served on your client, [redacted] As we discussed by telephone today, the Special Counsel's Office cannot agree to all of the representations made in your letter. Nonetheless, we offer the following assurances regarding your client's production of materials responsive to the subpoena.

First, the Special Counsel's Office agrees that in the event the Foreign Sovereign Immunity Act (FSIA) were deemed applicable to criminal cases in general, and to production in response to grand jury subpoenas in particular,* [redacted] production of documents responsive to the instant grand jury subpoena is not intended to constitute either an express or implied waiver of any protections [redacted] might be entitled to pursuant to the FSIA.

Second, the Special Counsel's Office has a compelling need for records that are responsive to the grand jury subpoena. We do not, however, believe that the government would be legally required to demonstrate such a compelling need in order to compel compliance with the subpoena. *See United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991).

Finally, the Special Counsel's Office agrees to a one-week extension of the subpoena's return date, through and including August 10, 2018.

* As discussed in our letter dated July 31, 2018, we do not believe that the FSIA is applicable to criminal matters or that it would apply here.

We look forward to your compliance with the subpoena on its return date, absent the filing of a timely motion to quash.

Sincerely yours,
Robert S. Mueller, III

By: Zainab N. Ahmad
Senior Assistant Special Counsel

Attachment C

ZNA

From: Kang, Edward <Edward.Kang@alston.com>
Sent: Tuesday, August 7, 2018 3:36 PM
To: ZNA
Subject: [redacted]

Thanks Zainab. I wanted to share with you a little more color on the situation and what I've learned since yesterday. First of all, [redacted] wants to cooperate with the investigation. To that end, [redacted] has already begun pulling together the documents responsive to the subpoena. However, before producing these to your office, [redacted] feels that it must [redacted] or else risk the potential for legal action [redacted].

This concern about potential legal action is heightened given the fact that [redacted] and as a result, [redacted] wants to proceed with extra caution on complying with [redacted]. We have instructed [redacted] not to disclose anything about the grand jury subpoena to [redacted] understands this obligation.

Although we're not privy to the exact nature of your investigation and the specific need for [redacted], you will see that [redacted] that I attached yesterday has an exception for production of documents responsive to [redacted]. If that exception were to apply in this case, my understanding is that your office [redacted]

Please let me know if you would like to discuss any of this further, but perhaps this could be a path forward. Thank you.

Ted

Edward T. Kang
ALSTON & BIRD | 950 F Street, NW, Washington, DC 20004
202-239-3728 O | 703-635-9373 C
edward.kang@alston.com
http://www.alston.com/professionals/edward-kang/

From: ZNA [mailto:ZNA@usdoj.gov]
Sent: Tuesday, August 7, 2018 3:22 PM
To: Kang, Edward <Edward.Kang@alston.com>
Subject: [redacted]

Thanks, Ted. We will take a look at this.

Best,
Zainab

Zainab Ahmad
The Special Counsel's Office
(202)514-1871

NOTICE: This email (including any attachments) is intended for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected by applicable law. If you are not the intended recipient (or the recipient's agent), you are hereby notified that any dissemination, distribution, copying, or use of this email or its contents is strictly prohibited. If you received this email in error, please notify the sender immediately and destroy all copies.

On Aug 6, 2018, at 4:52 PM, Kang, Edward <Edward.Kang@alston.com> wrote:

> Zainab:
>
> I hope you had a good weekend. Following up on our discussions from last week, it is my understanding [redacted] disclosure of [redacted] information. I further understand that those [redacted] permit [redacted] [redacted]:
>
> - [redacted]
> - [redacted]
> - [redacted]
> - [redacted]
>
> Breach of these conditions can result in criminal penalties, including imprisonment.
>
> As a result, production of documents responsive to the subpoena could constitute a violation of [redacted]. Given that the subpoena prohibits [redacted] we're in a bind as to how [redacted] could comply with the grand jury subpoena without also violating [redacted]. If you could share any thoughts your office has on this issue, that would be much appreciated.
>
> Ted

Edward T. Kang
<image002.jpg> I 950 F Street, NW, Washington, DC 20004
202-239-3728 O I 703-635-9373 C
edward.kang@alston.com
http://www.alston.com/professionals/edward-kang/

From: ZNA [mailto:ZNA@usdoj.gov]
Sent: Thursday, August 2, 2018 9:47 PM
To: Kang, Edward <Edward.Kang@alston.com>
Subject: Re: [redacted]

Hi Ted,

That's correct, as long as the subpoena is shared with [redacted] personnel for the purpose of gathering the responsive materials, we don't see any issue with that.

Zainab Ahmad
The Special Counsel's Office

(202)514-1871

On Aug 2, 2018, at 9:39 PM, Kang, Edward <Edward.Kang@alston.com> wrote:

> Thanks Zainab. I presume that your office does not have an issue with the representative at the [redacted] sharing the contents of the subpoena with other personnel at [redacted], in order to assist with the subpoena response?

Edward T. Kang
<image002.jpg> I 950 F Street, NW, Washington, DC 20004
202-239-3728 O I 703-635-9373 C
edward.kang@alston.com
http://www.alston.com/professionals/edward-kang/

From: ZNA [mailto:ZNA@usdoj.gov]
Sent: Thursday, August 2, 2018 9:25 PM
To: Kang, Edward <Edward.Kang@alston.com>
Subject: [redacted]

Hi Ted,

I've attached the letter we discussed this afternoon. Let me know if you have any questions.

Thanks,
Zainab

[redacted]

Attachment D

ZNA

From: ZNA
Sent: Thursday, August 16, 2018 9:57 AM
To: 'Geercken, Karl'; Kang, Edward
Cc: SACM
Subject: RE: letter

Hi Karl,

Thanks for your email. I write to correct a few points:

Firstly, our letter should not be considered a "draft." It is signed and final.

Secondly, your second bullet point does not correctly summarize our position regarding potential sharing of the letter with [redacted] That position remains as I stated in my initial email (I'll copy the language here for simplicity's sake): "As for disclosure of the letter, the letter itself says that we would not object to disclosure under certain conditions, *e.g.*, where it is "appropriate," "consistent with applicable law," and "doing so is required . . . to demonstrate [redacted] Ultimately, it will be up to [redacted] to assess whether those conditions are met. One thing I would point out, however, is that in our discussions leading up to the drafting of the letter, the scenario you suggested [redacted] was concerned with was [redacted] the situation where [redacted] and/or [redacted] had already been notified that [redacted] had produced records in compliance with the subpoena. We at no stage agreed that [redacted] seeking permission from either the government or [redacted] would be appropriate here, and as I mentioned yesterday, we are not aware of any requirement in [redacted] to do so."

Finally, I don't recall your mentioning anything about [redacted] needing time to provide direction in our conversation yesterday. The subpoena was served on [redacted] over one month ago, on July 11, 2018. From the very inception of our discussions about [redacted] concerns and how those concerns could be allayed, we have made clear to you that in light of our investigative exigencies we were not able to agree to a lengthy extension of the return date. In an attempt to allow [redacted] to fully consider the issue, we nonetheless granted extensions of that deadline totaling almost 3 weeks, and we told you when we agreed to your last extension request that it would likely be our final grant of an extension.

We look forward to hearing from you soon.

Best,
Zainab

Zainab Ahmad
Special Counsel's Office
(202)514-1871

From: Geercken, Karl <Karl.Geercken@alston.com>
Sent: Wednesday, August 15, 2018 7:52 PM

To: ZNA <ZNA@jmd.usdoj.gov>; Kang, Edward <Edward.Kang@alston.com>
Cc: SACM <SACM@jmd.usdoj.gov>
Subject: RE: letter

Zainab and Scott,

Thanks again for your below message and for taking the time to discuss this matter earlier this evening. For the sake of good order and to avoid any potential misunderstanding on our part, I am writing to summarize the main points of our conversation:

- As an initial matter, [redacted] and we appreciate your responsiveness and cooperation; [redacted] has also engaged in this process since the outset in the spirit of cooperation, has involved the highest levels of authority at [redacted] at every step and has sought legal advice in the [redacted] in an effort to arrange for a consensual production of responsive information;
- In response to our follow-up question about a potential disclosure to the [redacted] regarding aspects of the draft letter you provided, you reiterated that [redacted]
- When we asked about [redacted] potentially notifying the [redacted] generally about the draft letter, the pendency of an [redacted] investigation in the [redacted] and the subpoena (without identifying [redacted], the office issuing it or the information sought by it) in order to draw a reaction from [redacted] as to a potential path forward that could reduce [redacted] concerns about violation of [redacted], you indicated that, while you were not aware offhand of a [redacted] law that would prohibit this hypothetical generalized discussion, you had not researched the issue, would need to discuss this further internally, and could not give an authoritative view right away on the propriety of [redacted] engaging in it; and
- Finally, we also requested a further extension of the deadline for compliance with the subpoena until early September in view of the [redacted]; in response, you advised that you were unable to move the deadline for compliance beyond the current adjourned deadline of tomorrow, August 16.

As we mentioned on the phone, we will be in touch tomorrow to let you know how [redacted] is proceeding. In the meantime, we want you to know that (a) [redacted] understands the importance of the confidentiality relating to this matter and (b) it has not disclosed any information about it to any person or entity other than [redacted] and [redacted] counsel.

Best regards,

Karl Geercken
Alston & Bird LLP
Direct – (212) 210-9471
Mobile – (203) 979-4264

From: ZNA [mailto:ZNA@usdoj.gov]
Sent: Wednesday, August 15, 2018 10:49 AM
To: Kang, Edward <Edward.Kang@alston.com>
Cc: Geercken, Karl <Karl.Geercken@alston.com>; SACM <SACM@usdoj.gov>
Subject: RE: letter

Ted,

We believe that disclosure to [redacted] at this point in time of either the subpoena, or of the name [redacted]

As for disclosure of the letter, the letter itself says that we would not object to disclosure under certain conditions, *e.g.*, where it is "appropriate," "consistent with applicable law," and "doing so is required . . . to demonstrate [redacted] compliance with[redacted] Ultimately, it will be up to [redacted] to assess whether those conditions are met. One thing I would point out, however, is that in our discussions leading up to the drafting of the letter, the scenario you suggested [redacted] was concerned with was [redacted] in the situation where [redacted] and/or [redacted] had already been notified that [redacted] had produced records in compliance with the subpoena. We at no stage agreed that [redacted] seeking permission from either the government [redacted] in advance [redacted] would be appropriate here, and as I mentioned yesterday, we are not aware of any requirement in [redacted] to do so.

I hope this addresses your questions. We're happy to discuss further if necessary.

Best,
Zainab

Zainab Ahmad
Special Counsel's Office
(202)514-1871

From: Kang, Edward <Edward.Kang@alston.com>
Sent: Tuesday, August 14, 2018 8:29 PM
To: ZNA <ZNA@jmd.usdoj.gov>
Cc: Geercken, Karl <Karl.Geercken@alston.com>
Subject: RE: letter

Thank you very much Zainab. As I read the second to last paragraph of the letter, it appears that your office would not object to [redacted] sharing your letter with the [redacted]—even as early as right now. Is my reading correct? And if so, would [redacted] also be able to share the contents of the subpoena with [redacted] (or at least disclose the name of [redacted] at issue), if necessary to do so to provide the [redacted] with background and context to the letter? If we go down this path, I want to ensure that we don't run afoul of [redacted]. Much appreciated.

Ted

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From: ZNA [mailto:ZNA@usdoj.gov]
Sent: Wednesday, August 15, 2018 4:01 AM
To: Kang, Edward <Edward.Kang@alston.com>
Cc: Geercken, Karl <Karl.Geercken@alston.com>
Subject: letter

Hi Ted,

As we discussed, please see the attached letter. We will extend the return date on the subpoena to 8/16/18, but do not anticipate granting any further extensions. Please don't hesitate to reach out if you have any questions.

Best,
Zainab

Zainab Ahmad
Special Counsel's Office
(202)514-1871

ECF No. 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	No. 18-gj-041 **Ex Parte and Under Seal**

GOVERNMENT'S MOTION FOR LEAVE TO FILE *EX PARTE* SUPPLEMENT

The United States of America, by Robert S. Mueller, III, Special Counsel, files this motion for leave to file an *ex parte* supplement to its opposition to [redacted] Motion to Quash Grand Jury Subpoena No. 7409. As explained in the attached supplement, the government's submission is necessary to fully explain to the Court (1) the importance of the requested documents to the grand jury's investigation and (2) the unavailability of obtaining those documents through other means, both of which are factors that courts consider when faced with a claim—such as the one raised by [redacted] here—that compliance with a subpoena would force a party to violate foreign law. *See, e.g.*, *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002); *see also In re Sealed Case Nos. 87-5208, 87-5209*, 825 F.2d 494, 499 (D.C. Cir. 1987) (finding it "relevant" in such circumstances to consider whether the grand jury would be "left empty-handed" or whether the government had "alternative means to obtain additional information from or through" the subpoenaed entity).

It is appropriate that the supplement be filed *ex parte* for the Court's *in camera* review. "[C]ourts often use *in camera*, *ex parte* proceedings to determine the propriety of a grand jury subpoena . . . when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998). Here, the government must provide detail about the nature of the grand jury's inquiry to explain the importance of the subpoenaed materials to the investigation, the steps already taken in that

investigation, and the unavailability of other investigative channels at this stage. This unavailability showing includes an explanation of why, [redacted], one alternative channel suggested by [redacted] is not viable because it would [redacted]

For these reasons, the government respectfully requests that the Court grant it leave to file the attached *ex parte* supplement to its opposition to [redacted] motion to quash and that the Court maintain that supplement, and this motion, under seal. *See* LCrR 6.1. In accordance with LCrR 47(c), a proposed order accompanies this motion.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: August 24, 2018

By: */s/ Zainab Ahmad*

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Attorneys for United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	No. 18-gj-041 **Ex Parte and Under Seal**

ORDER

This matter having come before the Court pursuant to the government's motion for leave to file an *ex parte* supplement to its opposition to movant's motion to quash, it is hereby

ORDERED that the government's motion for leave to file is GRANTED; and

IT IS FURTHER ORDERED that the Clerk of the Court shall accept the government's supplement for filing *ex parte* and under seal and that the government's motion and supplement shall remain under seal until further order of the Court.

_____ _____

Date

THE HONORABLE BERYL A. HOWELL
CHIEF UNITED STATES DISTRICT JUDGE

ECF No. 8

Case No. 18-83-0041

RECEIVED
AUG 31 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA
NO. 7409

FILED UNDER SEAL
IN ACCORDANCE WITH LCrR 6.1

REPLY SUPPORTING MOTION TO QUASH GRAND JURY SUBPOENA NO. 7409

The Special Counsel concedes that [redacted] under the Foreign Sovereign Immunity Act. Opp. 6. And yet the Special Counsel continues his efforts to involve [redacted] in a domestic criminal case unrelated to [redacted] in or affecting the United States. The Special Counsel offers two arguments for overriding [redacted] sovereign interests in that way: (1) the FSIA does not apply to criminal proceedings, and (2) even if it does, the FSIA's commercial-activity exception applies such that [redacted] must comply with the subpoena. Opp. 1.

The Special Counsel is wrong on both counts. In keeping with longstanding international law, the FSIA recognizes that one foreign sovereign has no criminal jurisdiction over another—even if the criminal proceeding relates to the foreign sovereign's commercial activity. And in any case, the commercial-activity exception does not apply because the subpoena (as negotiated) is not based on [redacted] in the United States or on [redacted] elsewhere that has a "direct effect in the United States."

* * *

The rule prohibiting one foreign sovereign from embroiling another in a criminal matter takes on heightened significance here because complying with the subpoena would require [redacted]. The Special Counsel discounts those concerns, but they are real.

This Court should quash the subpoena to prevent the U.S. Government from violating the FSIA and international law.

I. [redacted] IS IMMUNE FROM CRIMINAL PROCESS IN THE UNITED STATES.

The Special Counsel would have this Court conclude that, in enacting the FSIA, Congress carved out narrow exceptions for civil jurisdiction over a foreign sovereign but imposed *no* limitations on criminal jurisdiction over a foreign sovereign (even though criminal proceedings present more acute diplomatic concerns). As the statute shows, Congress did not craft the counterintuitive regime that the Special Counsel imagines.

In establishing a foreign sovereign's immunity, the FSIA does not distinguish between criminal and civil proceedings: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" through certain exceptions. 28 U.S.C. § 1604. The statute *confers* jurisdiction over a foreign sovereign only in the *civil* context (28 U.S.C. § 1330(a))—and then only through narrow exceptions. *See* 28 U.S.C. § 1605. The background rule is immunity—whether the proceeding is criminal or civil—and there is no exception that confers jurisdiction over criminal matters.

That structure led the Supreme Court to conclude that the FSIA is the only basis for jurisdiction over a foreign sovereign:

> We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be *the sole basis for obtaining jurisdiction over a foreign state in our courts*. Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts [in the United States] from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by both United States citizens and by aliens when a foreign state is *not* entitled to immunity.

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (first emphasis added); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (explaining that the FSIA "must be applied by the District Courts *in every action against a foreign sovereign*") (emphasis added); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception [to the FSIA] applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.").

Following the statute's plain language and Supreme Court precedent, at least two lower courts have held (correctly) that no criminal jurisdiction exists over foreign sovereigns. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002), *abrogated on other grounds* by *Samantar v. Yousuf*, 560 U.S. 305 (2010) ("The statute provides that jurisdiction over a foreign sovereign will exist only if there is a relevant international agreement or exception listed in 28 U.S.C. §§ 1605–1607. Plaintiff has not cited [a relevant] international agreement . . . and the FSIA does not provide an exception for criminal jurisdiction."); *Gould, Inc. v. Mitsui Min. & Smelting Co., Ltd.*, 750 F. Supp. 838, 844 (N.D. Ohio 1990) ("[N]o criminal jurisdiction exists in our courts over foreign sovereigns."). The Special Counsel cites a few lower-court decisions reaching the opposite conclusion. Opp. 6–7 (citing, for example, *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1214–1215 (10th Cir. 1999), and *In re Grand Jury Proceeding Related to M/V Deltuva*, 752 F. Supp. 2d 173, 179–80 (D.P.R. 2010)). But on close inspection, those courts undervalued or misapprehended the Supreme Court's teaching that the FSIA is the "sole basis" for exercising jurisdiction over a foreign sovereign and must be applied "in every action against a foreign sovereign."

As important, the rule from those cases would violate international law. International law has long recognized—probably always recognized—that one foreign sovereign may not exercise criminal jurisdiction over another. *See, e.g.*, Hazel Fox CMG QC & and Philippa Webb, *The Law of State Immunity* 91 (Oxford University Press 3d ed. 2013) ("The exercise of criminal jurisdiction directly over another State infringes international law's requirements of equality and non-intervention."). Forcing [redacted] to comply with a Rule 17(c) subpoena under threat of criminal penalties (*see* Fed. R. Crim. P. 17(g); Fed. R. Crim. P. 42) would [redacted].

II. THE COMMERCIAL-ACTIVITY EXCEPTION DOES NOT APPLY.

Contrary to the Special Counsel's argument, the FSIA's commercial-activity exception (28 U.S.C. § 1605) does not apply—for at least two reasons.

First, the exception applies only in the civil context. *See* 28 U.S.C. § 1330(a); 28 U.S.C. § 1605.

Second, the subpoena is not based on [redacted] commercial activity in the United States or on its commercial activity elsewhere that has a "direct effect in the United States." The Special Counsel does not specify which subpart of the exception supposedly applies and instead argues generically that the exception applies because [redacted]. Opp. 10–11. Two other courts have rejected similar argument about [redacted] In any case, the Special Counsel ignores the statutory text because it requires a jurisdictional nexus that the subpoena lacks.

For the commercial-activity exception to apply in a civil proceeding, the commercial activity must form the basis of the underlying proceeding. *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146 (D.C. Cir. 1994); *see also Peterson v. Islamic Republic of Iran*, 563 F. Supp.2d

268, 273 (D.D.C. 2008) ("[T]he jurisdictional nexus requirement of the FSIA mandates not only that commercial acts be tied to the United States, but that they form the basis of the plaintiff's causes of action."); [redacted] (*see* Mot. to Quash 2, Ex. B; [redacted] so what the Special Counsel now seeks cannot be "based upon" [redacted] commercial activity "carried on in the United States." 28 U.S.C. § 1605(a)(2). Nor has the Special Counsel made any effort to demonstrate that the subpoena is "based upon" [redacted] commercial activity that "causes a direct effect in the United States." *Id.*

As in *Goodman*, there is no nexus between [redacted] and what the Special Counsel seeks, so [redacted] business is "legally irrelevant" and cannot satisfy the commercial-activity exception. 26 F.3d at 1146. Indeed, subjecting [redacted] to criminal process based on foreign activities unrelated to the documents now sought would cause the commercial-activity exception to swallow the background rule of immunity.

The cases that the Special Counsel cites betray the weakness of his position. Most have nothing to do with sovereign immunity or the FSIA. *See e.g. In re Sealed Case No. 87-5256*, 832 F.2d 1268 (D.C. Cir. 1987) (personal jurisdiction over foreign companies' custodian); *Matter of Marc Rich & Co., A.G.*, 707 F.2d 663 (2d Cir. 1983) (private foreign corporation). One (the *Deltuva* case discussed above) mentions the commercial-activity exception in one sentence in one footnote. 752 F. Supp. 2d at 180 n.3. And another—the D.C. Circuit's decision in *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014)—supports [redacted] position, not the Special Counsel's: The D.C. Circuit held that the commercial-activity exception did not apply because

(among other reasons) the plaintiff's claims were not based on Kenya's commercial activities in the United States or its commercial activities elsewhere that had a direct effect in the United States. *Id.* at 36–43.

III. CONCERNS OVER COMITY AND SOVEREIGN DIGNITY ALSO COUNSEL IN FAVOR OF QUASHING THE SUBPOENA.

"Actions against foreign sovereigns in [American] courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V.*, 461 U.S. at 493. Such has been the Supreme Court's understanding since America's founding:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

The Schooner Exchange v. McFaddon, 11 U.S. 116, 137 (1812).

In seeking to enmesh an instrumentality of [redacted] in a U.S. criminal proceeding, the subpoena ignores those sensitivities—sensitivities that are even more pronounced given [redacted] representations that complying with the subpoena would violate [redacted]; *In re Sealed Case 87-5208, 87-5209*, 825 F.2d 494, 498–99 (D.C. Cir. 1987) ("We have little doubt . . . that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders.").

CONCLUSION

For all these reasons, as well as those stated in [redacted] opening brief, the Court should grant the motion to quash the subpoena.

Dated: August 31, 2018

ALSTON & BIRD LLP

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
	)	
GRAND JURY SUBPOENA 7409	)	MOTION TO QUASH
	)	

CERTIFICATE OF SERVICE

This is to certify that I have this date served the within and foregoing **Reply Supporting Motion to Quash Grand Jury Subpoena No. 7409** by forwarding a true and correct copy of the same via e-mail and U.S. Mail as follows:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel's Office
950 Pennsylvania Ave NW
Room B-103
Washington, D.C.

This the 31st day of August, 2018.

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EXHIBIT A

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

ECF No. 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	No. 18-gj-041 **Under Seal**

GOVERNMENT'S SUPPLEMENTAL BRIEF ON [redacted]

The United States of America, by Special Counsel Robert S. Mueller, III, submits this brief in response to the Court's September 11, 2018 Minute Order requesting a copy of, and any supplemental briefing on, the [redacted] referenced by the [redacted][1] As the government argued in its opposition to the motion to quash and again at the hearing held on September 11, 2018, [redacted] forfeited any argument that compliance with the grand jury subpoena would violate [redacted] by failing to mention that law or explain its application in the body of its motion to quash or reply brief. In any event, [redacted] argument fails [redacted].

1. As an initial matter, and as the government argued in opposing the motion to quash, [redacted] has forfeited any argument that compliance with the subpoena would run afoul of [redacted] motion to quash based its claim of a conflict with [redacted] solely on [redacted] or [redacted] and, in particular, [redacted]

[redacted]

[redacted] Although a declaration appended to the Motion described [redacted], the body of the Motion makes no mention of that provision and develops no substantive argument based on it. The same is true of [redacted] reply brief. The [redacted] attached to the reply brief does [redacted] address [redacted] and include an [redacted] But [redacted] reply brief itself refers only to [redacted], and, even more generically, to [redacted]. Such "perfunctory" discussion of [redacted] in the body of [redacted] briefs is insufficient to present the argument for this Court's consideration. *See Stoller v. United States*, 216 F. Supp. 3d 171, 176 n.8 (D.D.C. 2016) ("In this circuit it is clear that 'perfunctory and undeveloped arguments . . . are deemed waived.'" (quoting *Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013))); *see also Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. 2003) ("Arguments that are insufficiently addressed in the body of the brief, however, are waived.").

2. In any event, [redacted] argument fails on the merits. As the government understands it, [redacted] position is that disclosure to the [redacted] pursuant to the [redacted] is the exclusive means of triggering [redacted] in [redacted].[2] Disclosure through any other means, according to [redacted], would violate not only the [redacted] as well. That provision states:

[redacted]

[redacted]

[redacted]

The text of [redacted] belies [redacted] treatment of it as a broad disclosure prohibition that would apply to the records covered by the grand jury subpoena. Rather, [redacted] is most naturally read to apply when a [redacted] In that situation, [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

CONCLUSION

For these reasons and those set forth in the government's opposition brief, [redacted] motion to quash should be denied.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: September 12, 2018

By: */s/ Zainab Ahmad*

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ATTACHMENT:

ECF No. 12

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	Case No. 18-gj-0041 **FILED UNDER SEAL** PURSUANT TO LCrR 6.1

[redacted] SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO QUASH GRAND JURY SUBPOENA 7409

Pursuant to the Court's Minute Order on September 11, 2018, [redacted] submits this supplemental brief regarding issues raised by the [redacted]. In support of this brief, [redacted] attaches, as [redacted], signed and dated September 12, 2018 [redacted] protects all [redacted]

[redacted]

[redacted]

Dated: September 12, 2018

ALSTON & BIRD LLP

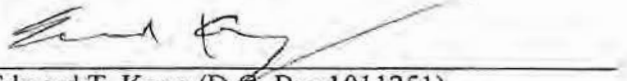

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EXHIBIT A

EXHIBIT A

ECF No. 16

* * * S E A L E D * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * * *

IN RE:	)	GJ 18-41
Grand Jury Subpoena 7049	)	
	)	
Interested Parties,	)	September 11, 2018
[redacted],	)	10:02 a.m.
UNITED STATES OF AMERICA.	)	Washington, D.C.

* * * * * * * * * * * * * * * * * * *

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES:

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Court Reporter:

Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter
Washington, D.C. 20001

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY: Matter before the Court, Grand Jury matter No. 18-41, in regards to grand jury subpoena 7049; interested parties, [redacted] and United States of America.

Counsel, please come forward and identify yourselves for the record.

THE COURT: Let's start with the movant.

MR. GEERCKEN: Good morning, Your Honor. My name is Karl --

THE COURT: Could you step forward to the podium?

MR. GEERCKEN: Absolutely.

Good morning, Your Honor. My name is Karl Geercken. I'm from Alston & Bird on behalf of [redacted] along with my colleague Ted Kang.

MR. KANG: Good morning, Your Honor.

THE COURT: And who else is at counsel table?

MR. ZOTTO: I am Derek Zotto, Your Honor, with Alston & Bird.

THE COURT: Okay. Welcome.

MR. GEERCKEN: Thank you, Your Honor.

For the Government?

MR. MEISLER: Good morning, Your Honor.

Scott Meisler from the Special Counsel's Office, along with Zainab Ahmad. With us at counsel table is

Michael Dreeban.

THE COURT: Okay. Good morning, everyone.

MS. AHMAD: Good morning.

THE COURT: All right. Well, we'll start with you, Mr. Geercken, if you are the person arguing on behalf of [redacted].

MR. GEERCKEN: I am, Your Honor.

THE COURT: All right. Why don't you come on up.

MR. GEERCKEN: Thank you, Your Honor.

Good morning, Your Honor. Thank you for hearing us this morning.

As I said, I'm here on behalf of [redacted]. And we're moving to quash a subpoena that was issued --

THE COURT: I know all of that.

Okay. So I understand that one of your concerns was that if [redacted] complies with the subpoena it's going to constitute some sort of waiver under the FSIA in some future proceeding. If there is a court order in effect quashing the subpoena -- if not, compelling compliance with the subpoena, does that alleviate your concern about waiver?

MR. GEERCKEN: I don't think it does, Your Honor.

THE COURT: And why not?

MR. GEERCKEN: I think the concern here is that the Foreign Sovereign Immunities Act, we believe, applies.

THE COURT: Let's assume it does.

MR. GEERCKEN: If you assume it doesn't, [redacted] was willing to --

THE COURT: I said "assume it does."

MR. GEERCKEN: Let's assume it does.

Then -- in that case, then a finding that we have somehow -- we're compelled to produce information in response to the subpoena I believe would be a finding [redacted]

THE COURT: Isn't that a stretch of what even the Government is arguing?

Of course, the Government argues that the FSIA doesn't apply in criminal proceedings or criminal investigative matters. But the Government's position is assuming it does that, even under the FSIA, an exception applies here.

So the Government's not proposing to say, you know, the blanket application -- in a blanket way that [redacted] is not entitled to any immunity under the FSIA. I think the Government's argument is much more limited, isn't it, in that --

MR. GEERCKEN: I think it is more narrow --

THE COURT: -- their view is that the commercial

exception applies here.

MR. GEERCKEN: Yes. And we --

THE COURT: So where is -- so given that basis, if I assume the FSIA does apply here, without getting into the thorny merits of whether it does or doesn't, why -- why would this constitute an immunity waiver?

MR. GEERCKEN: The issue is, Your Honor, the exception that they're invoking, the commercial activity exception, just doesn't apply here.

THE COURT: Okay. Well, that's a different question.

MR. GEERCKEN: Right. And so it would represent a finding that [redacted] has somehow -- is subject to the jurisdiction of the courts in the absence of a grant of jurisdiction by the Foreign Sovereign Immunities Act and in the absence of a finding that one of the exceptions applies. And, as a result, we would be in a situation where there would be a judicial determination that can be used against [redacted] in the future that would say: [redacted] is just not subject to immunity. Especially in a case like this where --

THE COURT: But let's turn to the Government's position that the commercial activity exception applies in this case on the particular circumstances, you know, at issue in this case.

And let me just note that assuming the FSIA applies in a criminal investigative grand jury matter, and looking at the specific terms of the commercial activities exception that: A foreign state shall not be immune from a civil court's jurisdiction in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state, do you -- in looking at what is the proper test in a criminal investigative matter for me to determine whether the commercial activity is based upon whether the immunity doesn't apply because of commercial activities with a focus on the term "based upon," in order to evaluate what the standard is that I should apply here, I look first to the Supreme Court's decision in *U.S. v R. Enterprises, Inc.* from 1991, which states that: Where a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation. This is a general test.

So, in this context, would you agree that an action involving a grand jury subpoena is based upon a foreign state's commercial activity carried on in the United States within the meaning of 28 U.S.C. 1605(a)(2) where the Government shows that there is a reasonable possibility that

the materials sought to be disclosed will produce information relevant to such commercial activity?

MR. GEERCKEN: That's a great question, Your Honor. And I think it's --

THE COURT: Because I'm -- you know, this is a little bit of an unusual context.

MR. GEERCKEN: Yeah.

THE COURT: And so, really, you know, I want to make sure I am applying the right test. And your papers don't really detail for me what your view of the "right test" is that I should be looking at, other than saying: The subpoena has no nexus to our [redacted] because our [redacted] wasn't able to find any responsive records. Well, I am not sure that's the test because, clearly, the subpoena calls for records not just in the [redacted], but the [redacted] and, I think, the [redacted], and any [redacted].

MR. GEERCKEN: I think that's correct, Your Honor, in terms of what the subpoena --

THE COURT: So is that the test? I will repeat it for you, if that will be helpful.

MR. GEERCKEN: No. I think I understand your question, Your Honor.

THE COURT: Okay.

MR. GEERCKEN: I don't think it's the test. And I

think it's a very nuanced area here because of a couple of issues.

As I said before, the Sovereign Immunities Act, Section 1330, does not confer jurisdiction over criminal matters; it only confers jurisdiction over civil, nonjury civil matters.

THE COURT: Well, so how does -- I mean, I know you made that argument in your brief. I have to say I scratched my head --

MR. GEERCKEN: Sure.

THE COURT: -- because how do you square that with your position that the FSIA applies in criminal matters then?

MR. GEERCKEN: Oh. If I may, Your Honor, in 1604 of the Foreign Sovereign Immunities Act it codifies the general rule that existed prior to the Tate Letter which is that sovereigns are immune from suit. *Amerada Hess* states that the Foreign Sovereign Immunities Act is the sole basis for obtaining jurisdiction in the United States. So the act has two key aspects; one is a broad grant of immunity, in 1604, that codifies the history behind the act.

THE COURT: So if I understand -- so let me see if I'm understanding your argument correctly. Because I understand -- understood your argument that the FSIA applies in this circumstance, to criminal investigations. But I

think your position is a little bit more nuanced.

I think, if I am understanding your argument correctly, then, its foreign sovereigns and their agents, like [redacted] here, which the Government has conceded is an [redacted] instrumentality, can only be sued as allowed under the FSIA. The FSIA only covers civil actions, and -- leading to the conclusion that there can be no legal process against an instrumentality of a foreign government criminal process. Is that your position?

MR. GEERCKEN: I think that's essentially right. And the only difference that I would make is --

THE COURT: So your position is that, basically, the foreign sovereign is immune from any -- any instrumentality of a foreign sovereign is immune completely from any criminal legal process or investigative process at all, and that the commercial activities exception under the FSIA only applies in a civil context; it doesn't even apply here. And so I shouldn't worry about that test at all and just basically go, hmmm, gosh, any instrumentality or agent of foreign government, even if it's engaged in lots of commercial activities in this country, is totally immune from criminal process here? Is that [redacted] position?

MR. GEERCKEN: I think that is. And I think it's consistent with the Sixth Circuit's decision in *Keller* and the Northern District of Ohio's decision in *Gould*.

THE COURT: The 1990 decision?

MR. GEERCKEN: I believe that might have been 1990. And I think the Sixth Circuit is more recent than that, in *Keller*.

But, Your Honor, just -- it is a little bit nuanced. But I do think the Foreign Sovereign Immunities --

THE COURT: It's not that nuanced. It's pretty bold.

MR. GEERCKEN: Well, I think it is. But I think it's fairly straightforward; and I think that's what Congress intended.

And I think if you look at the legislative history and the concerns of Congress leading up to enactment of the Foreign Sovereign Immunities Act in 1976, the backdrop against which Congress was enacting this particular statute was a backdrop of concern about international comity, Your Honor.

THE COURT: But, really, the consequence of that argument -- isn't it that foreign governments can send their instrumentalities and agents over here just to run amuck and, if caught, can just escape with impunity?

MR. GEERCKEN: Well, I think --

THE COURT: Wow. That's pretty extraordinary.

MR. GEERCKEN: I don't think there is an encouragement to do that; but Congress can deal with that

issue if it would like.

It has conferred broad immunity on foreign sovereigns.

THE COURT: Okay. I think I understand your position.

MR. GEERCKEN: Yes.

THE COURT: Okay. Let's turn to your argument that compliance with a subpoena would be unreasonable or oppressive because it would require you to violate [redacted] law. You have, very helpfully, provided [redacted]

But as I look at that law, clearly, [redacted]

And the Government, as I saw from your correspondence back and forth, has represented that these [redacted] are part of an investigation that could lead to [redacted]; and you voice no doubt as to the veracity of that representation. So why doesn't that clear [redacted] give you an escape valve from your purported concern about violating [redacted]?

MR. GEERCKEN: Because we have consulted with [redacted] on the issue, both within [redacted] and

outside [redacted], and we have submitted some declarations by them. And they have concluded that --

THE COURT: Well, I have seen one declaration. Do you have more than one declaration?

MR. GEERCKEN: We have a second declaration, a reply declaration of [redacted], that's attached as an exhibit to the reply papers. That also -- merely, it confirms what [redacted] was saying in [redacted] declaration at [redacted] that compliance with a subpoena, in their view, would cause them to disclose information in a manner that is violative, among others, at least [redacted].

THE COURT: Have you provided them the [redacted]

[redacted]

MR. GEERCKEN: We have exchanged copies. I sent a copy to --

THE COURT: You haven't provided it to the Court?

MR. GEERCKEN: Not to the Court. But [redacted] and, I think, [redacted] quoted from those sections. And [redacted] provided translated versions of the relevant provisions in her reply declaration.

Now, I will be candid with you. Last night, the Special Counsel came to me and said: We have some issue; we think that [redacted]. They provided it to us last night. We have looked at it. Our client has said, preliminarily, that there is no substantive

difference -- confirmed that it might be more recent, but there is no substantive difference on the issue. I expect that Special Counsel will talk to that.

But the fact of the matter is that the only evidence in the record right now, Your Honor, is that compliance with the subpoena would constitute a violation of [redacted].

THE COURT: Well, there seem to be two outs here that Special Counsel has identified. And just looking at [redacted] that you have provided that seemed to sort of jump out, one is the [redacted] that the -- that [redacted]. Now, I know, in your papers, you say, hey, that's limited solely to [redacted]; but it doesn't say that. It doesn't say: [redacted]

So why is it that -- why isn't a ruling from this court, [redacted]

[redacted] --

MR. GEERCKEN: [redacted] --

THE COURT: [redacted]

[redacted] --

MR. GEERCKEN: Right.

THE COURT: -- save you from this concern --

MR. GEERCKEN: Because we --

THE COURT: -- and allow you to do what you say you want to do, which is cooperate with the Special Counsel's investigation.

MR. GEERCKEN: Right. Well, we want to within reason. And we have considered this at length with our client. And they have concluded they are the experts on [redacted] -- respectfully, not I; not the Special Counsel; not you, Your Honor, are.

They have come up and said that it does indeed make clear, under their jurisprudence, that [redacted] --

THE COURT: But they haven't -- I know they have said that. But they have cited no judicial ruling; they have cited no statute. They have said nothing but their own words. I mean, it's -- I guess I have to rely on their expertise. But really, typically, you know, we rely some -- there is actually even no reasoning; they have just opined it.

So how is that a basis for me to look at the plain language of [redacted], which you have helpfully provided, and say, hmm, no. It has this gloss on it that [redacted] experts say -- even though I can't see it here; but they say [redacted]

MR. GEERCKEN: Well, I think it's in the context. They do cite to other laws. And they say the interplay between that and the [redacted] law which makes clear that, under [redacted]; and that's their conclusion.

THE COURT: But that's reliance on another -- that's not reliance on [redacted]. That's, then, reliance on the exception in [redacted] which has to do with [redacted].

So I view these two -- you know, there are [redacted] --

MR. GEERCKEN: Yeah.

THE COURT: -- [redacted] -- [redacted] [redacted].

And as you have outlined, [redacted] lists [redacted] [redacted]

[redacted]

So the whole [redacted] really relies on -- is [redacted]; but that doesn't have -- to my mind, that's totally separate. That's a totally separate [redacted].

MR. GEERCKEN: Well, Your Honor, the thing I will tell you is that --

THE COURT: Am I wrong on that?

MR. GEERCKEN: No. I think that we have testimony that says it would be a violation of [redacted] to disclose in the record; but I understand your concern. And we'd be happy, within a day or two -- if you think this is dispositive, we will get you information on this specific issue; good, bad, or indifferent on it from our point.

And it is -- our main argument here, as you know, Your Honor, is -- what you characterize as a bold argument, we characterize as clearly within the legislative history and within the text of the Foreign Sovereign Immunities Act that it does not confer jurisdiction. But even if that --

THE COURT: Also, the implications of your argument are as follows -- as I understand it this morning -- if your argument is that any instrumentality of any foreign government is absolutely immune from any criminal investigative process and grand jury process in the

United States -- and I reject that -- your argument is that the FSIA, as I now understand it, only applies to civil actions, then it sort of leads me right squarely to the Government's point of view that the FSIA doesn't apply to criminal proceedings at all. And if I reject your argument that foreign instrumentalities are completely -- can operate illegally with impunity in the United States, then I don't even have to deal with the commercial activities exception.

MR. GEERCKEN: Well, we're not encouraging -- and I don't think the statute was designed to encourage that; it was designed to encourage reciprocity --

THE COURT: I know that's your understanding of it --

MR. GEERCKEN: -- reciprocity -- and I understand the way you're --

THE COURT: -- but I think that --

MR. GEERCKEN: And Your Honor --

THE COURT: I understand your argument now.

MR. GEERCKEN: Your Honor, if I may --

THE COURT: I thought your argument was somewhat different than that.

MR. GEERCKEN: But even if -- we don't believe the direct effect -- there is no direct effect in the United States. They have only identified -- as you've said, even if the commercial activity exception applies -- we don't

believe it applies. We don't think the test is just because it's relevant to the subpoena --

THE COURT: I mean, in fact, I'm looking at your memo. On page 5 it says: The FSIA does apply in criminal cases, which is why I thought your argument was that --

MR. GEERCKEN: Absolutely. That's correct.

THE COURT: -- the FSIA applies in criminal cases, and so the Government has to establish some exception under the FSIA applies here; as opposed to the FSIA actually only applies in civil actions, and instrumentalities of foreign governments are completely immune from criminal process altogether.

MR. GEERCKEN: Your Honor, let me make it clear then. The FSIA absolutely applies in civil and criminal matters. Section 1604 provides a broad grant of immunity, and it does not distinguish between civil or criminal matters. So the default rule, as it was pre the Tate Letter of 1952 is absolute immunity.

Congress then shows that in civil nonjury cases to except certain limited situations where jurisdiction would be available and immunity would not apply. Those include the commercial activity exception, and some of the other exceptions. But the fact of that matter is is the Foreign Sovereign Immunities Act was enacted in 1976. It has two aspects; one is a broad grant of immunity that absolutely

applies in criminal and civil cases, and the other is a jurisdictional grant.

In the *Verlinden* case that the Government cited -- rather, the Special Counsel cited -- deals with this directly, Your Honor. There, as you recall, the Second Circuit had held below there is no reference to criminal matters in the FSIA, hence, we have no jurisdiction; case dismissed. Right. That's the default rule; not the *Hendron* rule that we think is wrong, where they presume that immunity doesn't apply.

The backdrop has always been international comity. And you see it even in the case -- the *In Re Sealed Case*, 825 F.2d 494, that's a key case; that's controlling authority in this court. Now, I see, Your Honor, and the Government has -- I am sure you are familiar with that case.

The Government is saying that there is not a clear cut violation of foreign law. We submit that we have submitted the affidavit. We are the only ones that have submitted evidence that shows that there has been a violation. If there are questions, we want to address them; and we'll do them post haste. We will do them very quickly, Your Honor. But the concerns there --

THE COURT: Well, let's turn to the *In Re Sealed Case* because it seems like the extreme discomfort there that the circuit was expressing had to do with compelling the

witness to take actions -- a foreign witness to take actions that would violate the laws of yet a third nation.

MR. GEERCKEN: Correct.

THE COURT: You haven't made that argument here.

MR. GEERCKEN: Well, we have. We have --

THE COURT: You are saying that you would -- compelling an agent of [redacted] to take action that would violate the [redacted], which is somewhat different from the *In Re Sealed Case* set of circumstances where -- you know, even though the circuit didn't really explain the extreme discomfort reasoning, one can say that the circuit was concerned that having a foreigner in a third nation violate the laws of the third nation -- the third nation would have not the same kind of restraint -- wouldn't be compelled to exercise the same kind of constraint it might in understanding that witness's situation as if that witness had been actually a citizen of that nation. And so I think that there were a particular unique set of circumstances that caused the circuit to express this discomfort, right? And that's not the situation here.

MR. GEERCKEN: Well, it is, Your Honor.

THE COURT: And how so?

MR. GEERCKEN: Arguably, we haven't submitted a lot of evidence on this. But we shared with the Special Counsel, and in the [redacted] there is --

[redacted] notes that there was an opinion given by [redacted] that said that provision of the information would constitute a violation of [redacted] as well.

THE COURT: But you haven't argued anything about [redacted] in your brief at all.

MR. GEERCKEN: Agreed.

THE COURT: You throw this a little bit in both declarations, but you don't make anything of it in your papers.

MR. GEERCKEN: I understand, Your Honor. And I think the affront is greater in the field of foreign relations.

The *In Re Sealed Case* was all about concerns about international comity and excursions into a different branch's authority. Separation of powers and international comity concerns were at the forefront of that case.

THE COURT: Well, wasn't there another fairly significant distinction factually in *In Re Sealed Case* from this case, in addition to the third nation --

MR. GEERCKEN: Yes.

THE COURT: -- having a foreign witness from one nation compelling that witness to violate the laws of yet a third nation?

It seems to me that another distinction in that case was that, unlike here, the Government had alternative

mechanisms to get the documents that they were -- the information that they were seeking to get from the witness. That's different from here where the Government has the position that -- it's necessary to get these documents; there aren't alternatives.

MR. GEERCKEN: I think it's slightly different in *In Re Sealed Case*. I have it here. We can look at it, if we'd like to. But I think --

THE COURT: I have looked at it already.

MR. GEERCKEN: I have looked at it carefully, as well. You may be right, Your Honor.

But I thought the distinction was that there was a bank manager that could provide testimony, maybe some limited documents. And the Court there said: And you might be able to work something out on a government-to-government basis. The holding was not that, you know, we feel fine for you because you will be able to get information on a government-to-government basis.

And I have no doubt -- and we have set this out in the declarations as well; there is a mechanism by which they can engage in a government-to-government discussion to get information --

THE COURT: Well, I'm looking at the quote from the In Re Sealed Case. It is therefore also relevant to our conclusion that the grand jury is not left empty-handed by

today's decision because the Government can have alternative means of obtaining the information at issue.

I mean, clearly, the Special Counsel looked carefully at that case and made the argument that that's not their situation here. They have tried to exhaust all alternative means.

MR. GEERCKEN: Well, we have tried to identify an alternative means by working through a [redacted]. But the Court there also recognized that the grand jury's investigation may be hampered -- nonetheless be hampered, perhaps significantly, but still determine that it wasn't able to uphold the contempt order against the bank.

THE COURT: Well, you know, we have been focusing on the *In Re Sealed Case* from 1987. I think it's at 825 Supp. 2d.

MR. GEERCKEN: Right.

THE COURT: But that same year, after that case, another *In Re Sealed Case* was decided. And the D.C. Circuit made it pretty clear that -- now I'm quoting: Although courts recognize comity is an important objective, there is little doubt that a U.S. court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary.

And, in my mind, doesn't that subsequent *In Re Sealed Case* make it clear that a court may enforce a subpoena that -- even if it requires a respondent to violate foreign law --

MR. GEERCKEN: I think it --

THE COURT: -- particularly in circumstances where all alternatives mechanism to get the records have been exhausted?

MR. GEERCKEN: I think the context is slightly different there.

THE COURT: Okay. Tell me why.

MR. GEERCKEN: And I think that's because in *In Re Sealed Case* -- the 825 F.2d case, whatever the page number is, 494 -- you are dealing with a bank -- a foreign government-owned bank. And, there, you are really asking the sovereign itself to violate its own laws or violate, in that case, the laws of a third country. I do think the affront is greater when you're telling a sovereign: Not only will you have to comply with the subpoena, but you have to do so even if you're violating your own country's laws that, as a sovereign, you are sworn to uphold. So I think the affront is great.

And I think, Your Honor, it really boils down to our concerns, both on the foreign sovereign immunities front -- and I think this is a safety valve case for you,

Your Honor -- if you find, and I think you should, that there are serious issues, at a minimum, as to whether [redacted] would be exposed to civil and criminal violations in [redacted], that the [redacted], without input from any other branch of government, to violate its own laws or potentially violate its own laws -- we do believe we have met our burden and shown that there would be a violation by virtue of the declarations. But even giving the Government the benefit of the doubt, I think even if there is a substantial risk of that -- which we think there is, I think the reasoning of *In Re Sealed Case*, 825 F.2d 494, applies with equal if not greater force in a situation where you're asking a foreign sovereign to violate its own laws so that the Government can -- here, a Special Counsel, not the executive branch -- can get information.

I have full respect for the fact that Special Counsel has a job to do. But what we're really dealing with are constitutional issues of separations of power, international comity, and respect for nations; and there is a long history of cases on this. It's a fascinating subject, and forgive me for going on about this.

But I really do submit that under the circumstances, if you parse through the statute -- I think our position vis-à-vis the Foreign Sovereign Immunities Act

is correct. It does apply in terms of a broad grant, does not confer jurisdiction though; so end of story. Even if you did, I think the test is different than just showing, hey, we need this information for an investigation. It's the underlying act, I think. We don't know anything much about that, other than it may involve [redacted] concerns. You have received a submission on that, but we have not.

But *Saudi Arabia v Nelson* talks about the direct effect and the based-upon standard. It said this is narrowly construed. You have to establish an essential element of your claim. And we're in the dark --

THE COURT: That was in the civil context, wasn't it? And, really, I have looked at the *Nelson* case, and it was in the civil context. It talks about the elements of the claims, in terms of interpreting what the term "based upon" means. And I really struggle to figure out how *Nelson* actually can apply in a grand jury proceeding where the Supreme Court has also made pretty clear what the applicable standard is in terms of, you know, relevancy and reasonable probability that the information sought is relevant to an investigation.

So -- you don't cite *Nelson* in your papers, do you?

MR. GEERCKEN: I think we do. I am not sure if we do. I think we do. But it is -- it is cited in the papers.

It's cited in someone's papers because I reviewed it in connection with this, Your Honor.

THE COURT: Okay.

MR. GEERCKEN: So forgive me. I can check through.

THE COURT: Well, if it was cited in the papers, I actually didn't think it really grappled with what I viewed as the disconnect between applying *Nelson's* based-upon interpretation which was so clearly focused and, to my mind, on the civil context --

MR. GEERCKEN: I agree with you, Your Honor.

THE COURT: -- and how it could even apply in a reasonable way in the grand jury context.

MR. GEERCKEN: And that's the difficult aspect that we're grappling with.

THE COURT: That's why I started with: What is the standard I need to apply here?

MR. GEERCKEN: I agree with you. And I think that it is the "based upon," in connection with an essential element of a claim is important; and I think it's the underlying claim. Otherwise --

THE COURT: My trustee law clerk says that someone in some of their briefs cites a case that is self-relied on *Nelson*, but no one cited *Nelson* itself.

MR. GEERCKEN: Okay. Well, it was in my

materials. Otherwise, I assume that it was cited. But I think it's a relevant --

THE COURT: Okay. Let me hear from the Special Counsel.

MR. GEERCKEN: Thank you, Your Honor.

THE COURT: Thank you.

MR. MEISLER: Good morning, Your Honor.

THE COURT: All right. Mr. Meisler, what's the standard here?

MR. MEISLER: I think the standard, Your Honor -- we have struggled in the same way that Your Honor has with --

THE COURT: *Nelson*?

MR. MEISLER: -- with *Nelson*, with the based-upon language of how it applies to the context of a subpoena enforcement action, which there isn't a claim as you -- or a civil action, as that's referred to. We -- our view, and as set forth in our brief, is that [redacted] commercial activities in the United States is what makes it amenable to service of subpoena. And once it is served with that subpoena it becomes a witness. And like any other witness, it must provide to the grand jury any information in its possession, custody or control wherever housed.

So thinking back to the sealed case kind of paradigm, if an individual witness, a [redacted], who had

worked in [redacted] and its [redacted] and then in [redacted] came in, we don't think that person would be able to compartmentalize his testimony before the grand jury by saying: Okay, I will tell you what I saw in [redacted], but I can't tell you what I saw -- what I learned in [redacted] just because that information --

THE COURT: But you are sort of confusion jurisdiction with the standard to apply on enforcement of the subpoena, right? So, really, I am just focused on -- I really -- I don't think *Nelson* really is -- in terms of its interpretation of based-upon language is particularly helpful in this context; which leaves me with then the issue of so, gosh, what should I be -- what should I be -- what's the standard? What's the test here that I should be evaluating? And so I think that's more -- that's more the question.

MR. MEISLER: Well, if the Court is not inclined to accept that, our analysis from the briefing, I think we would be --

THE COURT: They haven't really posed a -- you know, an exercise of personal jurisdiction kind of argument here. They just claim they have got complete immunity.

MR. MEISLER: Right. I think we would be prepared then to accept an analysis along the lines of the one the Court proposed. And I think that would be supported not

just by the analogy to our enterprises but, actually, to the second of the --

THE COURT: Okay.

MR. MEISLER: -- sealed cases the Court referred to, the 832 F.3d 1987 sealed case drawn from Second Circuit principles. And I think it did involve actually an assertion of personal jurisdiction in there.

But when the Court was confronted with the threshold issue in the grand jury context of the Government's burden to establish jurisdiction, it did, I think, adopt a reasonable probability standard; reasonable probability that it will ultimately succeed in establishing the facts necessary for the exercise of jurisdiction.

And so, again, while we focused in our papers on the first prong, I will call it, of the commercial activity section, just the based-upon commercial activities; opposing counsel has referred to the direct effect prong of it. And we're in a situation here where, if we're thinking about [redacted] has represented that the [redacted] didn't have any records. If we're thinking about [redacted] abroad at this early stage, it is quite plausible, under this reasonable probability standard, that records housed abroad could reveal a direct effect on the U.S. we are not privy to at this moment. So we do think it should be the forgiving standard at the grand jury phase.

I should be clear, Your Honor, none of this is to concede the threshold point that the FSIA applies. We understand the temptation may be to jump over that issue and to try to fall back on the commercial activities. But in some ways we think --

THE COURT: Why should I resist that temptation?

MR. MEISLER: I think, in some ways, Your Honor's struggle with what the standard is makes it clear that is an exercise of statutory construction. I think the threshold question is actually a much easier one. There is not only a circuit split on this. The Court said -- you identified, Your Honor, the initial case in this line, from the *Gould* case from 1990, is rather dated.

THE COURT: Yes.

MR. MEISLER: The Sixth Circuit analysis is quite cursory. Both of those cases --

THE COURT: Both of those cases are in my --

MR. MEISLER: -- very different contexts, too. Those arose in civil RICO, in trying to figure out whether a foreign state was capable of committing an indictable act. It wasn't really addressing this issue, at least not in depth.

And I think one intervening factor, of course, is the Supreme Court's decision in *Samantur versus Yousuf*, which is cited in our brief where the Court made clear that,

even in the context of the civil realm, not every aspect of foreign interaction with the U.S. and not every civil suit against a foreign nation is actually covered by the FSIA. In that case it was whether foreign officials were covered by the FSIA. The Court held no. And you don't lightly displace the common law that had governed in this area beforehand.

So we think given the developments in the law, and given the numerous textual clues that we've pointed to, that the *Herndon* case from the Eastern District of New York cited is actually a fairly straightforward conclusion to determine that the FSIA does not apply to civil cases, and certainly not to, A, the grand jury phase of a potential and eventual criminal proceeding.

I can walk through some of those factors if it would be helpful to the Court. It started with the very same Section 1330 that opposing counsel mentioned which speaks of a non -- jurisdiction over a nonjury civil action. A statement of purpose, a declaration of purpose, in 28 U.S.C. 1602 refers to litigants, as does the house report talks about private litigants. I think that speaks to the purpose point that counsel mentioned, which is: What was Congress trying to accomplish here? It was worried about a regime in which private litigants would sue foreign nations and potentially embroil this nation in foreign affairs

disputes, and it implicated the state department and the courts.

Well, in a situation where criminal prosecution is brought or a grand jury is serving a subpoena, you have the executive branch of government -- which includes the state department, of course -- making the judgment that seeking the evidence or bringing the charges is -- furthers an important U.S. interest, and that interest is worth any foreign policy friction.

I should mention that we're dealing here with [redacted]

These are not matters that are taken lightly. They do have the approval of the executive branch of government, which is the same one that originally made or contributed to immunity determinations before the Foreign Sovereign Immunities Act was passed.

The other portions of the act as I mentioned refer to civil actions. They discuss the measure of damages available to a litigant. They address the execution of garnishment, attachment of property when a litigant sues a foreign government, succeeds, and obtains a judgment. Those are all contexts that really have no analog in criminal law.

One kind of larger structural point which is that all of these provisions are codified in Title 28 of the judicial code, which governs civil proceedings. The jurisdiction of courts in criminal prosecutions is set forth in Title 18, Section 3231.

So, again, strange that Congress -- without a whisper in legislative history, without touching a single provision of Title 18, the federal criminal code -- would have taken a sweeping step of immunizing a foreign instrumentality or agency, that agency's conduct in the U.S. -- not just from prosecution, but even from the criminal process to obtain evidence. And that evidence, of course, might relate to misconduct not just by the sovereign, but by a U.S. citizen. If a U.S. citizen was [redacted] --

THE COURT: But in other ways, though, doesn't [redacted] cite -- without relying on these hints, to use your word, in the legislative history in -- in .2, the FSIA's plain language which provides that: With certain exceptions, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states, which is not limited to just civil matters?

MR. MEISLER: I agree. If that was the entirety of the statute, it would be a much more difficult question for us to have a language that is broad on its face. But we

don't read statutes in isolation, we read them with the provisions -- operative provisions read together; and that's what the Court actually did in *Samantur*. The Court text I think was a little bit different there. But the Court was considering whether a foreign official was -- could be an agency or instrumentality. The Court said it is literally possible to read it that way.

THE COURT: Okay. So let me just move on for a second because --

MR. MEISLER: Yes.

THE COURT: -- it's not the Government's position here that I must decide this issue for suppression in this circuit in connection with this subpoena matter, do I?

MR. MEISLER: No. You would not if you concluded that the commercial activity exception applied.

THE COURT: Exactly.

MR. MEISLER: And I was simply making the point that, as Your Honor struggled with how to adapt, it has to be focused on the ingredients or elements of the civil action under the Supreme Court decision in *Nelson* and, more recently, a case called *OBB versus Sachs* from 2015. Those -- in some sense, it seems difficult to apply those tests.

So, as I said, we don't oppose the Court's effort to incorporate the *In Re Sealed Case* standard that has

applied personal jurisdiction. If the Court concludes, based on our representations here and the ex parte submission, that that standard has been met, that is a way to avoid the threshold question.

THE COURT: All right.

MR. MEISLER: But, of course, the Court would be deciding what is a novel issue, which is how you would adapt the commercial activity exception to the subpoena context itself.

THE COURT: All right. So you mentioned this, that the FSIA contains three separate strands of the commercial activity exceptions. One, you know, actions based upon a commercial activity carried on in the United States with a foreign state; and that's the one that you relied on in your papers, right, the first prong?

MR. MEISLER: Yes.

THE COURT: Also, the second prong is for the personal activity exception is where there is an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. And the third prong, which is an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere, and that act causes a direct effect in the United States.

Plainly, you rely on the first of those strands.

Is there a reason that you rely only on that strand and not the second or third? And have you waived arguments as to the second or third?

MR. MEISLER: Well, I am not sure we have waived arguments if the Court is raising, for the first time, for the parties' consideration, application of a different standard and different analysis under the reasonable probability standard.

But we certainly relied on the first strand because it was along the lines of the analysis I tried to articulate about [redacted] amenability to subpoena in the U.S. The Court has explained that it views that as more of a personal jurisdiction kind of argument.

So I'm hesitant to say that we have waived the argument if the Court is raising it for the first time. If both sides, I guess, have at least a preliminary opportunity to address it. If the Court wanted the parties to submit further briefing, we, of course, would welcome that opportunity. But given that I think it's a fairly forgiving standard that we have made in an ex parte submission describing the kind of actions at issue --

THE COURT: Okay. Well, without getting into any details about the ex parte submission -- and you can just say yes or no. But would that submission support the commercial activity exception on other prongs in addition to

prong one?

MR. MEISLER: I think it might, especially as to prong three. And I think what I feel comfortable saying in the court is that, again, we're at a preliminary stage here. We have reason to suspect that records sought might establish a further nexus to [redacted] commercial activity in the U.S. or, in effect, on the United States.

THE COURT: Okay. So if the movant's -- [redacted] motion to quash is denied -- the Government hasn't submitted any kind of proposed order, but what's your recommendation as to how much time [redacted] would have to comply? Forthwith? What?

MR. MEISLER: If I can consult with --

THE COURT: I mean, I think -- based on what I read in the emails, [redacted] has been quite diligently collecting information. I don't know how long they might need, but what's -- you all are much closer to timing issues.

MR. MEISLER: May I just consult for one moment, Your Honor?

THE COURT: Yes, you may.

(Whereupon, Government counsel confer.)

MR. MEISLER: We would suggest no longer than two weeks, given the efforts that Your Honor has made and any representations [redacted] may make to the Court today. We

would think that given the timeline here and the extensions granted on compliance with the subpoena, two weeks would be reasonable.

THE COURT: All right. Are there any other arguments you want to respond to that were made by [redacted]

MR. MEISLER: One -- I guess two housekeeping issues, at the very least, Your Honor.

One -- Your Honor knows this, but I will make it clear for the record. The Special Counsel's Office is part of the Department of Justice, part of the executive branch. So the arguments I made before about the views of the executive branch are those that the Special Counsel has set forth, including consultation with the criminal division of DOJ, per the U.S. Attorneys' manual --

THE COURT: Just to be absolutely clear about that -- and I think you have already said this. But since this was -- the subpoena issue was issued to an instrumentality of a foreign government. Was this approved in the normal manner --

MR. MEISLER: Yes.

THE COURT: -- within the ranks of the Department of Justice?

MR. MEISLER: Yes, it was.

The second housekeeping matter regards the [redacted] Your Honor asked if that had

been supplied. I think --

THE COURT: It hasn't been.

MR. MEISLER: Not in full. I agree with Mr. Geercken that, in attachment to the [redacted] appended to the reply brief, they excerpted certain provisions. But if the Court is going to --

THE COURT: I get very suspicious about excerpts.

MR. MEISLER: Right. Well, we do have -- if [redacted] has no objection, we would just offer for the Court's consideration the version that we sent to [redacted] last night, which we think is the more recent one. If the Court would like a full copy of the law, if [redacted] doesn't object, we have copies. We have a copy we can hand the Court --

THE COURT: Well, this is what I would prefer you to do -- and I am not going to put [redacted] -- I am not going to hold up [redacted] here in the middle of a hearing; they are consulting with other experts.

Why don't the parties jointly confer and make a joint submission to the Court by noon tomorrow as to what they both agree. If they don't agree, to lay out the contentious parts of what the [redacted] is that I should be looking at for [redacted].

MR. MEISLER: Right. So we understand -- and this

is the role that we understand the [redacted] to play in the Court's analysis. [redacted] raised, in its opening motion, the contention that compliance with the subpoena would be unreasonable or oppressive because it would force [redacted] to violate one particular law, [redacted]. It's true that the [redacted] is mentioned in the [redacted], but the body of [redacted] motion makes no mention of it. We have included a footnote in our brief saying we deem that any mention of that forfeited.

So if the Court is considering seriatim the objections which I think first consider the [redacted] and then would have to decide whether it, too, deems [redacted] reliance on the [redacted] forfeited. And if it doesn't, then it would reach, I guess, a potential merits objection. That's the issue on which I think the text of the law does matter. Because we just don't understand the -- we don't quite understand what the comment is supposed to be.

By the very terms of the [redacted], it seems like [redacted] basically prohibits [redacted]. So that when [redacted]

[redacted]

And, again, compliance with a --

THE COURT: [redacted]?

MR. MEISLER: [redacted].

And compliance with a grand jury subpoena, that's not saying: Tell us what you think is suspicious. It's just saying: Give us the [redacted]. It's not a violation of [redacted] by the plain terms of the [redacted].

And by the plain terms of how [redacted] describes it in [redacted] of his declaration -- this is the one that's appended to [redacted] opening brief -- where he says: [redacted]

THE COURT: So as I understood the rest of his declaration, in paragraphs 12 and 13, in his arguments on the [redacted] is that the [redacted] lays out a process by which the [redacted] can operate. And that process is that you go through their [redacted] -- I guess they call it the [redacted]. And that's what -- though I haven't seen it, apparently, that's what the [redacted]

law lays out.

If you have got [redacted] that would fall into the exception of [redacted], you have got to go through these different processes, through this [redacted]. And so, as I understood the [redacted], by the Special Counsel conducting its own [redacted] and getting records in connection with that investigation without going through the [redacted], the [redacted] was not applicable. Is that essentially it?

MR. GEERCKEN: I think that's correct, Your Honor.

THE COURT: Okay. So that's how I understood the [redacted], sort of relying on the [redacted] to give a lot more process loss to the [redacted] Of course, I haven't seen the [redacted]; I don't know what it says.

MR. MEISLER: Right. Well, again, if [redacted] argument is narrower, as I understand it; that's one thing. But we understood both the submissions -- certainly, [redacted] declaration on reply to assert a straight up [redacted]

For the reasons I just tried to explain, Your Honor, we don't think by its plain terms -- again, we have translations here -- we have competing translations. But, by its plain terms, it seems to mirror kind of the provision

[redacted] I described, Your Honor. It seems very -- it seems kind of very common sense.

And just to make it -- on the record, I know the Court doesn't have the text of this statute, but a neighboring provision -- we're talking about [redacted] is, basically, [redacted]. I think those work hand in hand, right, saying: [redacted]

Let's see, here. Your Honor described the [redacted]

wanted to explain to the Court very briefly, if I could, why we do not think that is viable at all. Part of that rests on the ex parte submission the Court has. I won't refer to that further.

There are two other reasons I think we can discuss today. [redacted]

As I understand it, the memorandum of understanding between the parties just requires [redacted] to say no. The U.S. has no recourse. And I think, very importantly, [redacted] --

THE COURT: Can I just stop you for a second.

MR. MEISLER: Yes.

THE COURT: Because I had understood that the [redacted]

MR. MEISLER: I understand them --

THE COURT: [redacted]?

MR. MEISLER: [redacted]

THE COURT: I know.

MR. MEISLER: [redacted]

MR. GEERCKEN: [redacted]

THE COURT: [redacted]

MR. MEISLER: Right.

Just a few other points, Your Honor, very quickly.

[redacted]. We believe any --

THE COURT: There are little teases put in the declarations, but then no discussion or explanation --

MR. MEISLER: Exactly. So we would certainly resist any effort for [redacted] to supplement it. We have not seen any substantive explanation of why [redacted] would bar compliance here; that would be a whole other round of proceedings before the Court, we think.

The burden -- again, the party claiming the conflict bears the burden; that is clear under sealed case.

THE COURT: Yes.

MR. MEISLER: And so we believe [redacted] has waived any claim in that regard and waived any analogy to the third nation posture of sealed cases that Your Honor described.

And the last thing I want to mention is, in terms of the -- Mr. Geercken had mentioned the safety valve. One other item I will mention to the Court as well -- while we understand the Court wouldn't likely want to assume any violation of foreign law here, even if the [redacted] exception to the [redacted] didn't apply, we actually think, under the balancing tests that generally apply here, the Court could do that. The Court could say maybe -- even if there is a violation, I am going to weigh the factors.

The distinctions between this case and In Re

Sealed cases are clear. Mr. Geercken alluded to the possibility of civil liability or criminal liability; but I think that's actually where the third nation posture of the sealed case cuts in our favor again. Because it's highly unlikely as a practical matter, I think, that, again, the [redacted]

Likewise, there are two mentions I believe of civil liability in both declarations, with no reference to the [redacted] here I think should face the consequences of having not fully developed those arguments in the record. Just alluding to civil liability, I think, is not enough.

So we would certainly argue, Your Honor, that if the Court applies the balancing tests under the restatement factors, we have strong need, no alternatives, very speculative claim of hardships to [redacted] given these, again, I think highly attenuated and speculative

possibilities of civil and criminal liability, and a very narrow request that seeks a specific set of [redacted] records for a defined period of time.

So we think of the Court again -- I will say one last thing about that which is that --

THE COURT: Can I just clarify one thing under the subpoena --

MR. MEISLER: Yes.

THE COURT: -- because I have got [redacted]

[redacted]

MR. MEISLER: They do. They do.

THE COURT: Okay.

MR. MEISLER: Unless the Court has any further questions, I think we would just ask that the motion to quash be denied and that an order be entered compelling compliance within the 14-day period that I mentioned.

THE COURT: Thank you.

Mr. Geercken, would you like to respond?

MR. GEERCKEN: Just a few points, Your Honor, if I may.

I think, you know, there is some discussion about the direct -- rather the 605(a)(2)'s [sic] commercial activity exception. And the standard there is -- you know,

we said in *Nelson* v Saudi Arabia, but it's also in *Goodman versus Rafidain Bank*, 26 F.3d 1143, the D.C. Circuit; and I think that articulates the same standard. And it's more than a mere connection to the commercial activity or a relation to the commercial activity. That's all that the general counsel has -- rather the Special Counsel has come up with.

If you look at page 11 of their brief, they talk about providing evidence to a grand jury relating to its business operations; that's not the standard under *Goodman* in this circuit. It's got to be more than a mere connection; and that's all that they have articulated here. So we don't think that the commercial activity exception applies.

The only other point I would make is that --

THE COURT: Well, I think they would have to establish a reasonable possibility that the materials sought from the [redacted] would produce information relevant to the general subject of the grand jury's investigation which is, at a minimum, what they have [redacted]. And I know that you are at a disadvantage. You haven't seen what's set out in the ex parte submission so, because of that, you have to acknowledge that they may very well have established that under one or more prongs of the commercial activity

exception.

MR. GEERCKEN: We just don't know, Your Honor.

THE COURT: Exactly.

MR. GEERCKEN: You are right.

What we know from their papers is that they have talked about a relating-to standard that doesn't apply; it's more than a mere connection or a relation to an essential element of a claim for relief.

The other point I would make out -- there is a lot of discussion about whether the independent counsel -- there is an arm of the executive branch. *In Re Sealed Case*, the 825 F.2d case that we referred to, that was brought by a -- that involved a subpoena as well issued by the executive branch and, still, you had that holding of finding it unreasonable or improper to hold the foreign bank that was owned by a foreign country in contempt.

In that case, I just come back to the Court talked about there may be alternative means by which information could be obtained. And we have heard the Special Counsel talk about the [redacted]. And it does set out a process by which information may be obtained. Now, the Special Counsel has talked about what it can be used for. But, certainly, this is similar to the *In Re Sealed Case* in that some information could potentially be obtained for

certain purposes.

So for all of the reasons that we have discussed in our papers and we have discussed here with you today, Your Honor, we believe that this is an instance where there is no basis for the Court to find -- to abrogate the immunity that [redacted] is entitled to. And even if there was, we think that this case is very similar to the *In Re Sealed Case*. And this is an instance where the Court ought to not enforce the subpoena at issue.

THE COURT: All right.

MR. GEERCKEN: Thank you, Your Honor.

THE COURT: Thank you. And I will look forward to getting the submissions by noon tomorrow.

I plan to have a fairly prompt -- as I do in these grand jury matters, I like to expedite them -- a decision promptly. Thank you. You are all excused.

THE DEPUTY: All rise. This Honorable Court is adjourned.

(Whereupon, the proceeding concludes, 11:08 a.m.)

* * * * *

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 14th day of September, 2018.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

ECF No. 27

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409

No. 18-gj-41

Under Seal

GOVERNMENT'S MOTION TO HOLD THE WITNESS IN CONTEMPT FOR FAILURE TO COMPLY WITH THE COURT'S SEPTEMBER 19, 2018 ORDER

The United States of America, by and through Special Counsel Robert S. Mueller, III, respectfully moves this Court for an order holding [redacted] in civil contempt for failure to comply with the Court's September 19, 2018 Order (Order) requiring [redacted] to produce by October 1, 2018, documents subpoenaed by the grand jury. Because [redacted] challenges to the grand jury subpoena and its jurisdictionally defective appeal have already resulted in significant delay to the grand jury's investigation, the government asks that the Court order [redacted] to file any opposition to this motion promptly and schedule any hearing in short order. Given that this motion concerns a grand jury proceeding, the government further requests that it be filed under seal. *See* Fed. R. Crim P. 6(e); LCrR 6.1 ("A motion or application filed in connection with a grand jury subpoena . . . shall be filed under seal.").

BACKGROUND

A. July 11, 2018 Subpoena and August 16, 2018 Motion to Quash

1. On July 11, 2018, a federal grand jury in this District issued a subpoena to [redacted] requiring [redacted]

[redacted] The subpoena was personally served [redacted] The subpoena specified that [redacted] and had a return date of July 27, 2018. *Id.*

2. The government and [redacted] counsel engaged in an extensive back and forth discussion to address various concerns raised by [redacted]. In order to attempt to resolve [redacted] concerns, the government extended the subpoena's return date several times, ultimately to August 16, 2018. *Id.* at 6.

3. On August 16, 2018, [redacted] filed a Motion to Quash. The government responded on August 24, 2018, and [redacted] filed its reply on August 31, 2018. The Court held argument on the motion on September 11, 2018, after which it received supplemental briefing from the parties.

B. September 19, 2018 Court Order and Subsequent Appeal and Noncompliance

4. On September 19, 2018, the Court issued a Memorandum Opinion and Order ordering [redacted], "pursuant to the grand jury subpoenas served by the Special Counsel's Office, to complete production of the subpoenaed records by October 1, 2018." Order at 1; Op. at 31. In so doing, the Court noted that it was "prepared to impose contempt sanctions for failure to comply with the subpoena." Op. at 30.

5. On September 24, 2018, [redacted] filed a Notice of Appeal from the Court's Order. ECF No. 22. On September 26, 2018, [redacted] inquired of government counsel as to whether the government would consent to the entry of a stay. The government replied that it would not consent

[1] Citations are to the exhibits accompanying [redacted] Motion to Quash ("Mot."); the government's opposition to [redacted] motion to quash, filed on August 24, 2018 ("Opp."); and the Court's memorandum opinion dated September 19, 2018 ("Op.").

because this Court's denial of the motion to quash was a non-appealable order and the court of appeals thus lacked jurisdiction to hear it. In particular, the government explained that under settled Supreme Court precedent, the denial of a motion to quash is not appealable until the moving party disobeys the order to comply with the subpoena and is cited for contempt. *See United States v. Ryan*, 402 U.S. 530, 532 (1971). The government nonetheless offered to enter into a stipulated order of contempt and to agree that the imposition of sanctions would be stayed until [redacted] appeal of the contempt order was decided, but [redacted] declined the offer on September 27, 2018.[2]

6. Later that same day, [redacted] filed a motion to stay the Order in the D.C. Circuit, despite Federal Rule of Appellate Procedure 8's clear instruction that motions for stays pending appeal must be filed first in the district court, unless doing so would be "impracticable." On October 1, 2018, the government filed a motion to dismiss the appeal for lack of jurisdiction combined with its opposition to [redacted] motion for a stay pending appeal.

7. On October 3, 2018, the D.C. Circuit issued an order granting the government's motion to dismiss the appeal and dismissing [redacted] stay motion as moot. A copy of the court of appeals' order is appended as Attachment A.

8. As of this date, [redacted] has not complied with the subpoena and has not produced any records to the government.

ARGUMENT

A. A witness who fails to comply with a grand jury subpoena, or a court order compelling

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[2] The government modeled the order proposed to [redacted] after one that this Court entered in another recent case involving a challenge to compulsory government process. *See* Contempt Order, *In re Search of Information Associated With [Redacted]@gmail.com That Is Stored At Premises Controlled By Google, Inc.*, No. 16-mj-00757 (BAH) (D.D.C. Sept. 5, 2017), available at http://www.dcd.uscourts.gov/sites/dcd/files/Order-ECF37.pdf.

compliance with that subpoena, may be held in contempt. Fed. R. Crim. P. 17(g); *see Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."). Contempt proceedings can result in either criminal or civil sanctions or both. *See* 28 U.S.C. 1826(a) (civil); 18 U.S.C. 401(3) (criminal). "Criminal contempt is a crime in the ordinary sense," and generally requires "the protections that the Constitution requires of such criminal proceedings." *Int'l Union v. Bagwell*, 512 U.S. 821, 826 (1994) (citations and quotation marks omitted); *see id.* at 829. "In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *Id.* at 827; *see id.* at 828, 829. Courts ordinarily "first consider the feasibility of prompting [compliance] through the imposition of civil contempt, utilizing criminal sanctions only if the civil remedy is deemed inadequate." *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 801 (1987); *see NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981) ("Civil contempt . . . is a remedial sanction used to obtain compliance with a court order[.]").

When, as here, an order of civil contempt is at issue, "[t]he procedures" governing the "proceedings are quite simple." Beale & Bryson, *Grand Jury Law & Practice* § 11:16 (2d ed. 2017). The witness is entitled to notice, time to prepare any factual or legal defenses, and the opportunity to present any such defenses to the court. *Id.* In deciding the nature of the notice required and the extent of any hearing held, a court may consider whether the witness "had an opportunity to present his defenses to the district court at some point in the course of the litigation, such as the point that he filed his motion to quash the subpoena." *Id.*

B. Under the foregoing framework, the government respectfully requests that the Court issue an order holding [redacted] in civil contempt for failure to comply with the Court's Order. The Order required [redacted] to comply with the grand jury subpoena by October 1, 2018. [redacted] however, has failed to produce the requested materials, despite this Court's statement that it was "prepared to impose contempt sanctions for failure to comply with the subpoena." Op. at 30.

The government further requests that the Court proceed expeditiously in considering this motion for civil contempt. [redacted] has already presented its defenses against complying with the subpoena in its motion to quash, and should therefore require little time to respond to this motion. *See Grand Jury Law & Practice*, *supra*, § 11:16. Likewise, because this Court has already considered [redacted] defenses in detail in denying the motion to quash, any civil contempt hearing should be straightforward and can be held promptly. And a prompt hearing, followed by immediate entry of a contempt order, would facilitate any appeal that [redacted] seeks to pursue.

Finally, any suggestion that [redacted] notice of appeal deprives this Court of the authority to enter a contempt order would lack merit. *See* [redacted] D.C. Circuit Stay Motion 5-6. Courts in this District have long recognized that, "[w]here no stay pending appeal has been granted[,] the district court retains the power to enforce its judgment and to take steps in aid of execution," including "enforcing its unstayed judgment [through] contempt." *SEC v. Diversified Growth Corp.*, 595 F. Supp. 1159, 1170 (D.D.C. 1984); *accord NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) ("Where, as here, the district court is attempting to supervise its judgment and enforce its order through civil contempt proceedings, pendency of appeal does not deprive it of jurisdiction for these purposes.") (internal quotation marks and citation omitted). Accordingly, the Court has the authority to—and should—enter an order of civil contempt.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court issue an order holding [redacted] in civil contempt for failure to comply with the Court's September 19, 2018 Order. The government asks that the Court order [redacted] to file promptly any opposition to this motion and that any hearing on the motion be scheduled at the earliest possible date.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: October 4, 2018

By: _____

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409	**No. 18-gj-41** **UNDER SEAL**

[PROPOSED] ORDER

Upon consideration of the government's motion for entry of an order holding the [redacted] in civil contempt, it is hereby

ORDERED that the government's motion is **GRANTED**; it is further

ORDERED that [redacted] is found in civil contempt of the Court's September 19, 2018 order; and it is further

ORDERED that [redacted] assessed sanctions of $10,000 per day, payable to the United States, until it complies with the Court's order.

SO ORDERED.

Date

HON. BERYL A. HOWELL
CHIEF UNITED STATES DISTRICT JUDGE

Attachment A

UNDER SEAL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3068 **September Term, 2018**

1:18-gj-00041-BAH

Filed On: October 3, 2018

In re: Grand Jury Subpoena

BEFORE: Rogers, Srinivasan, and Wilkins, Circuit Judges

ORDER

Upon consideration of the emergency motion for stay, the response thereto, and the reply; and the motion to dismiss for lack of jurisdiction, and the response thereto, it is

ORDERED that the motion to dismiss be granted. [redacted] has not met its burden of establishing this court's jurisdiction, see Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), over its appeal from the district court's order denying the motion to quash the subpoena for documents issued by the Special Counsel's Office. Generally, "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." United States v. Ryan, 402 U.S. 530, 532 (1971); see also In re Sealed Case, 827 F.2d 776, 777 (D.C. Cir. 1987) (per curiam) ("[D]enials of motions to quash subpoenas are ordinarily not appealable."). [redacted] has not shown that its claim of sovereign immunity creates an exception under the circumstances here. In particular, the authority relied upon by [redacted] In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998), does not control an appeal of a non-final order requiring [redacted] to comply with a grand jury subpoena issued by the Executive Branch. Requiring [redacted] to obtain a contempt order before appealing does not subject [redacted] to the burdens of litigation contemplated by the cases allowing immediate appeals of discovery orders and denials of motions to dismiss where an appellant asserted sovereign immunity. See Nyambal v. Int'l Monetary Fund, 772 F.3d 277, 280 (D.C. Cir. 2014); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990). It is

FURTHER ORDERED that the emergency motion for stay be dismissed as moot.

UNDER SEAL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3068 **September Term, 2018**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk

ECF No. 28

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 7409

No. 18-gj-41

Under Seal

GOVERNMENT'S REPLY IN SUPPORT OF MOTION TO HOLD THE WITNESS IN CONTEMPT FOR FAILURE TO COMPLY WITH THE COURT'S SEPTEMBER 19, 2018 ORDER

The United States of America, by and through Special Counsel Robert S. Mueller, III, submits this reply in support of its motion for an order holding [redacted] in contempt for failure to comply with the Court's September 19, 2018 order. In its opposition ("Opp'n"), [redacted] makes two basic arguments: (1) that this Court lacks the authority to enter a contempt order because, although the D.C. Circuit has issued an order dismissing its appeal for lack of jurisdiction, the court of appeals has not yet issued its mandate; and (2) this Court lacked jurisdiction to enforce the subpoena in the first place in light of [redacted] immunity claim. These arguments lack merit.

1. As the government explained in its motion (at 5), the settled rule is that a district court retains the authority to enforce an unstayed order or judgment, including through civil contempt, while that order or judgment is challenged on appeal. That rule is a recognized exception to the general principle, invoked by [redacted] that two courts do not exercise jurisdiction over a case simultaneously and that jurisdiction rests in the court of appeals once an appeal has been properly noticed. *See Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, 467 F.3d 634, 638 (7th Cir. 2006) ("One established exception to the rule against simultaneous exercise of jurisdiction is that the district court may enforce its judgment while an appeal to test that

judgment's validity proceeds."); *accord, e.g.*, *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1223 (8th Cir. 2006); *SEC v. Diversified Growth Corp.*, No. 81-0084, 1984 WL 21134, at *1 (D.C. Cir. Sept. 24, 1984) ("The district court retains the power to enforce an unstayed, unsuperseded judgment throughout the pendency of appeal, and may hold appellant in contempt for failing to obey its order.") (internal citation omitted).

It makes no difference that [redacted] has (as of today) petitioned for rehearing and that the court of appeals has not yet issued its mandate. As the D.C. Circuit explained 40 years ago,

> It is well established that the District Court is without jurisdiction to alter a judgment of its own while an appeal therefrom is ongoing. But it is equally clear that the vitality of that judgment is undiminished by pendancy of the appeal. Unless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative. To be sure, for as long as the appellate court retains its mandate it maintains its jurisdiction over the case, and thus the power to alter the mandate. *But non-issuance of the mandate by the appellate court has no impact on the trial court's powers to enforce its unstayed judgment since the latter court has retained that power throughout the pendancy of the appeal.*

Deering Milliken, Inc. v. FTC, 647 F.2d 1124, 1128-29 (D.C. Cir. 1978) (footnotes omitted) (emphasis added). The "non-issuance" of the D.C. Circuit's mandate therefore does not affect this Court's contempt authority. *Id.*; *cf. Vo Van Chau v. U.S. Dep't of State*, 891 F. Supp. 650, 654 (D.D.C. 1995) ("The fact that a party has petitioned for rehearing, automatically resulting in the stay of the mandate under Rule 41, Fed. R. App. P., is irrelevant" to a district court's duty to follow an appellate decision).

Nothing in the two-judge order in *Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993), cited by [redacted] (Opp'n 3-4), supports a contrary result. The question there was whether Germany's "properly pursued" interlocutory appeal deprived the district court of jurisdiction to "proceed to trial," such that an "emergency motion for stay of *all* proceedings" was unnecessary. *Id.* (emphasis added). *Princz* did not involve a district court's authority to enforce

an order, through contempt or otherwise, while an appeal from that order was pending. Nor did it involve, as does this case, an appeal that the court of appeals has determined *not* to have been "properly pursued," *id.*, because it was taken from a non-appealable order.

2. [redacted] remaining contentions provide no basis for declining to hold it in civil contempt. Its suggestion (Opp'n 5) that the Court cannot issue a contempt order because it lacked jurisdiction in the first place is a restatement of the sovereign-immunity claim that the Court already considered and rejected. And, as [redacted] commendably acknowledges (Opp'n 8), the D.C. Circuit has held "that contempt sanctions against a foreign sovereign are available under the FSIA," thus foreclosing [redacted] contrary position. *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 379 (D.C. Cir. 2011).

CONCLUSION

For these reasons and those set forth in the government's motion, the Court should issue an order holding [redacted] in civil contempt for failure to comply with the Court's September 19, 2018 Order.

Respectfully submitted,

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Dated: October 5, 2018

By: _____

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ECF No. 29

18-5-41

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA
NO. 7409

FILED UNDER SEAL
IN ACCORDANCE WITH LCrR 6.1

RESPONSE IN OPPOSITION TO THE GOVERNMENT'S MOTION TO HOLD [redacted] IN CONTEMPT FOR FAILURE TO COMPLY WITH THE COURT'S SEPTEMBER 19, 2018 ORDER

The Special Counsel's Office asks this Court to hold [redacted] in contempt for failing to comply with this Court's September 19, 2018 Order compelling [redacted] response to a subpoena. But the Court of Appeals has not yet issued a mandate granting the Special Counsel's motion to dismiss or denying [redacted] motion to stay, so the D.C. Circuit retains jurisdiction over the case. Until the D.C. Circuit issues a mandate, this Court has no power to enter contempt. Beyond that, the Court lacked jurisdiction to order [redacted] to comply with the subpoena in the first instance, so it cannot enter contempt based on that order. The FSIA's plain language and the Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) make clear that this Court has (and had) no jurisdiction over [redacted] under 18 U.S.C. § 3231.

BACKGROUND

In July 2018, a federal grand jury in the District of Columbia issued a subpoena to [redacted] wholly-owned by the [redacted]. July 11, 2018 Grand Jury Subpoena No. 7409, Exhibit A to Mot. to Quash. From the outset, [redacted] explained to the Special Counsel's Office that [redacted] is an instrumentality of the [redacted] and thus entitled to sovereign immunity from the subpoena. [redacted] attempted to negotiate with the Special

Counsel's Office to achieve a resolution acceptable to both parties, but the parties reached an impasse.

On August 16, 2018, [redacted] moved to quash the subpoena. *See generally* Mot. to Quash. [redacted] argued that (1) [redacted] (as a foreign sovereign) is immune from complying with the subpoena under the FSIA and (2) it would be unreasonable and oppressive to force [redacted] to comply with the subpoena because compliance would require [redacted]. *Id.* at 1–3. The Special Counsel's Office conceded that [redacted] qualifies as a foreign sovereign under the Foreign Sovereign Immunities Act but argued that immunity under the FSIA doesn't apply in criminal cases. Opp. at 6. The Special Counsel's Office then filed two *ex parte* briefs, ostensibly supporting its alternative argument that the "commercial-activity" exception to the FSIA supplies jurisdiction over [redacted]. *Id.* at 10.

On September 19, 2018, the Court denied [redacted] motion to quash and ordered [redacted] to comply with the subpoena. September 19, 2018 Order; September 19, 2018 Memorandum Opinion. The Court held that it has jurisdiction under 28 U.S.C. § 3231—a general criminal-jurisdiction statute—not under the FSIA's jurisdictional provision, 28 U.S.C. § 1330(a) (Op. 10–11). The Court also held—using information that the Special Counsel provided to the Court *ex parte* and that [redacted] has had no way of contesting—that the FSIA's commercial-activity exception applies, stripping [redacted] of its sovereign immunity. [redacted] timely filed its notice of appeal on September 24, 2018, divesting this Court of jurisdiction over the matter.

On September 27, 2018, [redacted] moved in the D.C. Circuit to stay this Court's order compelling it to comply with the subpoena. [redacted] explained that a stay was unnecessary under D.C. Circuit precedent but that [redacted] was filing the motion "out of an abundance of caution." Mot. to Stay, attached as **Exhibit A,** at 2. The Special Counsel moved to dismiss the appeal on October

1, 2018. On October 3, 2018, the D.C. Circuit granted that motion and denied [redacted] motion to stay as moot. October 3, 2018 D.C. Circuit Order, attached as Exhibit A to Contempt Mot. The Order directed the "Clerk . . . to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc." *Id.* at 2. On October 5, 2018, [redacted] filed its petition for panel rehearing and for rehearing *en banc*. Pet. for Rehearing, attached as **Exhibit B**.

I. THIS COURT HAS NO POWER TO HOLD [redacted] IN CONTEMPT BECAUSE THE D.C. CIRCUIT RETAINS JURISDICTION OVER THE MATTER.

It is [redacted] position that this Court did not have jurisdiction over this matter to begin with (as we argued at the September 11 hearing and as explain further in Part II below), but even if it did, this Court no longer had jurisdiction once [redacted] filed its notice of appeal. This Court's order compelled [redacted] to comply with a criminal subpoena, denying [redacted] its sovereign immunity. The D.C. Circuit has explained that once a foreign sovereign appeals an order denying sovereign immunity, the district court no longer has jurisdiction over the issues on appeal. *See Princz v. Fed. Republic of Germany*, 998 F.2d 1, 1 (D.C. Cir. 1993) (denying a motion to stay proceedings as unnecessary because the appellate court had "exclusive jurisdiction to resolve the threshold issue" of sovereign immunity).

Although the D.C. Circuit has issued an order dismissing [redacted] appeal and denying [redacted] motion to stay as moot, it has not yet issued its mandate. Until the appellate court issues its mandate, it retains jurisdiction over the appeal and this Court is without jurisdiction over any matters related to the appeal, including this Court's September 19, 2018 Order. *See e.g. Kusay v. United States*, 62 F.3d 192, 193-95 (7th Cir. 1995) ("[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. . . . Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district

court. Until the mandate issues, the case is 'in' the court of appeals, and any action by the district court is a nullity."); *Zaklama v. Mount Sinai Med. Ctr.*, 906 F.2d 645, 649 (11th Cir. 1990) ("[A] district court generally is without jurisdiction to rule in a case that is on appeal, despite a decision by this court, until the mandate has issued."); *United States v. Cook*, 592 F.2d 877, 880 (5th Cir.), *cert. denied*, 442 U.S. 921 (1979) ("This court retains jurisdiction over an appeal until it has issued a mandate to implement its disposition.").

Indeed, the D.C. Circuit here directed its Clerk of Court not to issue the mandate until "seven days after resolution of any timely petition for rehearing or petition for rehearing en banc." October 3, 2018 D.C. Circuit Order, attached as Exhibit A to Contempt Mot. at 2. [redacted] filed a timely petition for rehearing this morning (Ex. B), and thus the D.C. Circuit retains jurisdiction to alter its previous order upon rehearing. Because the D.C. Circuit retains jurisdiction over [redacted] appeal of this Court's September 19, 2018 Order, this Court lacks jurisdiction to hold [redacted] in contempt.

The Special Counsel's Office cites *NLRB v. Cincinnati Bronze, Inc.* 829 F.2d 585, 588 (1987) and *SEC v. Diversified Growth Corp.*, 595 F. Supp. 1159, 1170 (D.D.C. 1984) for the proposition that the Court has authority to "supervise its judgment" despite the pending appeal, but those cases have no bearing here. In *Cincinnati Bronze*, the district court had jurisdiction to enter contempt against a defendant (who was not a foreign sovereign) because the stay of the district court's order had expired and the court of appeals had denied the defendant's petition for rehearing of its motion to stay. In *Diversified Growth*, the defendant (who was not a foreign sovereign) never requested a stay in the first instance. 595 F. Supp. at 1170 n.3. Here, the Court did not have jurisdiction under D.C. Circuit precedent once [redacted] filed its notice of appeal. *Princz*, 998 F.2d at 1. And the Court of Appeals retains jurisdiction over the case because it has not yet

issued its mandate on [redacted] stay motion or the Special Counsel's motion to dismiss, and [redacted] petition for rehearing is pending.

One more point: This Court should also decline to rule on the contempt motion at this time to avoid a potentially inconsistent ruling with the D.C. Circuit. If this Court enters a contempt order but the D.C. Circuit holds—on panel rehearing or rehearing *en banc*—that it has jurisdiction over the appeal, then this Court will have entered an order that it had no power to enter. The Court should delay contempt proceedings for this reason too.

II. THIS COURT LACKS JURISDICTION TO COMPEL [redacted] TO COMPLY WITH THE SUBPOENA OR TO HOLD [redacted] IN CONTEMPT.

[redacted] also addresses here the issue of this Court's subject-matter jurisdiction (out of an abundance of caution) to preserve its arguments for appeal. The Special Counsel's contempt motion is premised on [redacted] purported "failure to comply with this Court's September 19, 2018 Order." Contempt Mot. at 1. But this Court cannot hold [redacted] in contempt when it had no jurisdiction to issue the September 2018 order in the first place. *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (if a district court lacks subject-matter jurisdiction over the underlying action, it has no power to hold a witness in civil contempt).

This Court's holding that it had jurisdiction over [redacted] under 28 U.S.C. § 3231—a general criminal-jurisdiction statute—is irreconcilable with the FSIA and Supreme Court precedent. The FSIA has only one jurisdictional provision—28 U.S.C. § 1330(a)—and that provision works in tandem with the FSIA's exceptions: "The district courts shall have original jurisdiction without regard to amount in controversy of any *nonjury civil action* against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a) (emphasis added); 28 U.S.C. § 1604 ("a

foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" through certain exceptions). Section 1330(a) is the sole basis for exercising jurisdiction over an action against a foreign sovereign. *See* H.R. Rep. 94-1487, at 14 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6613 ("jurisdiction in actions against foreign states is comprehensively treated by the new section 1330"); *Verlinden*, 461 U.S. at 493 ("The [FSIA] must be applied by the District Courts in *every* action against a foreign sovereign"); *Amerada Hess*, 488 U.S. at 443 ("the FSIA provides the sole basis for obtaining jurisdiction over a foreign sovereign"); *see also Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) ("The statute provides that jurisdiction over a foreign sovereign will exist only if there is a relevant international agreement or exception listed in 28 U.S.C. §§ 1605–1607. Plaintiff has not cited [a relevant] international agreement . . . and the FSIA does not provide an exception for criminal jurisdiction."). The FSIA's text and legislative history and Supreme Court decisions interpreting the same confirm that this Court erred in looking to 18 U.S.C. § 3231 as a basis for jurisdiction over [redacted]

Indeed, the Supreme Court in *Amerada Hess* explicitly rejected the notion that *any statute other than the FSIA* could provide jurisdiction over a matter against a foreign sovereign. 488 U.S. at 434–39. There, two Liberian corporations sued Argentina seeking damages for an alleged tort by the Argentine military. *Id.* at 431. The plaintiffs invoked the court's jurisdiction under the Alien Tort State, 28 U.S.C. § 1350, as well as under the statute governing general admiralty and maritime jurisdiction, § 1333. *Id.* at 432. The district court rejected the plaintiffs' arguments and held that it lacked jurisdiction over Argentina. *Id.* at 433. The court of appeals reversed, holding that the federal courts had jurisdiction under the Alien Tort Statute. *Id.* The Supreme Court reversed again, holding that "the FSIA provides the *sole basis for obtaining jurisdiction over a foreign sovereign in the courts of this country*." *Id.* at 443 (emphasis added).

In coming to that conclusion, the Court rejected the argument that other statutes—including the Alien Tort Statute and the general admiralty and maritime statute—can provide a basis for jurisdiction over a foreign sovereign. *Id.* at 438. The Court emphasized Congress's intention that "claims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles" in the FSIA, suggesting that the FSIA preempts other laws that otherwise would have provided jurisdiction over foreign sovereigns. *Id.* at 437–38 (emphasis in original) (quoting 28 U.S.C. § 1602). The Court went on:

> We think that Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA and the express provision in § 1604 that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605–1607," preclude a construction of the Alien Tort Statute that permits the instant suit. . . .

Id. at 438.

As with the Alien Tort Statute, the jurisdictional statute that this Court relied on (18 U.S.C. § 3231) "does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states." *Id.*; *see also* § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the court of the States, of all offenses against the laws of the United States."). In that regard, this Court committed the same error that the Supreme Court corrected in *Amerada Hess*.

One more point about *Amerada Hess*. In its opinion denying [redacted] sovereign immunity, this Court quoted a sentence from *Amerada Hess* to support its jurisdictional analysis, but the Court stripped the sentence of its context. In context, the sentence—in italics below—undercuts this Court's jurisdictional analysis:

> Respondents also argue that the general admiralty and maritime jurisdiction, § 1333(1), provides a basis for obtaining jurisdiction over petitioner for violations of international law, notwithstanding the FSIA. Brief for Respondents 42–49. But Congress dealt with the admiralty jurisdiction of the federal courts when it enacted the FSIA. Section 1605(b) expressly permits an in personam suit in admiralty to

> enforce a maritime lien against a vessel or cargo of a foreign state. *Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner.*

Amerada Hess, 488 U.S. at 483. That context makes clear that the admiralty-and-maritime statute was relevant to the Supreme Court's analysis, not because it independently supplied jurisdiction over foreign sovereigns separate from the FSIA, but because the FSIA exception in § 1605(b) *cross-references and incorporates* the admiralty-and-maritime statute. There is no similar cross-reference to 18 U.S.C. § 3231. This Court's error is plain.[1]

Accordingly, this Court has no jurisdiction over [redacted], the Court's September 19, 2018 Order has no force, and the Court cannot hold [redacted] in contempt.

Even if this Court could hold [redacted] in contempt, the FSIA does not authorize the Court to levy a monetary penalty. The FSIA "describe[s] the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included." *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006). In other words, "[u]nder the FSIA, a court's power to make an order does not always entail a power of enforcement by sanctions." *Id.* Although the D.C. Circuit has rejected the Fifth Circuit's reasoning (*see FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 379 (D.C. Cir. 2011)), we include the argument to preserve it for appellate review.

CONCLUSION

The Court should deny Special Counsel's motion to hold [redacted] in contempt and should dismiss the motion for lack of jurisdiction.

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[1] For all the reasons explained in the Motion to Quash, [redacted] denies that any of the listed exceptions to sovereign immunity applies here—including the commercial-activity exception. [redacted] nonetheless reserves its right to appeal the Court's September 19, 2018 Order in all respects.

Dated: October 5, 2018

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CERTIFICATE OF SERVICE

This is to certify that I have this date served this **Opposition to the Government's Motion to Hold [redacted] in Contempt for Failure to Comply with the Court's September 19, 2018** by forwarding a true and correct copy by e-mail and U.S. Mail as follows:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
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This the 5th day of October, 2018.

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[redacted]

EXHIBIT A

No. 18-3068

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

IN RE GRAND JURY SUBPOENA NO. 7409
FILED UNDER SEAL

Appeal from the United States District Court
For the District of Columbia
Case No. 18-gj-0041
The Honorable Chief Judge Beryl A. Howell

EMERGENCY MOTION TO STAY THE DISTRICT COURT'S ORDER COMPELLING [redacted] TO RESPOND TO GRAND JURY SUBPOENA NO. 7409

The district court's order compelling [redacted]—a foreign sovereign—to respond to Grand-Jury Subpoena No. 7409 is immediately appealable. *See, e.g.*, *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990). And "[b]ecause an appeal properly pursued from [a] district court's order divests the district court of control over those aspects of the case on appeal," this Court has "exclusive jurisdiction to resolve the threshold issue[s]" in the case—including whether [redacted] is entitled to sovereign immunity from the subpoena. *Princz v. Fed. Republic of Germany*, 998 F.2d 1, 1 (D.C. Cir. 1993) (denying a motion to stay district court's order as unnecessary because the appellate court had exclusive

jurisdiction to decide "the threshold issue" of sovereign immunity); *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002) (denying motion to stay "as unnecessary" because the notice of appeal "divest[ed] the district court of jurisdiction over those aspects of the case on appeal").

But in case there is some question about whether [redacted] appeal divested the district court of jurisdiction to enforce the subpoena, [redacted] moves, out of an abundance of caution, for a stay under Federal Rule of Appellate Procedure 8(a)(2) to preserve its claimed immunity while its appeal is pending.[1] The Court should grant [redacted] motion because (1) denials of sovereign immunity present special circumstances warranting a stay and (2) in any event, the traditional stay factors weigh in favor of a stay. And because the district court has ordered [redacted] to comply with the subpoena by October 1, 2018, [redacted] asks the Court to rule on [redacted] motion before that deadline. An expedited ruling will prevent irreparable harm to [redacted] sovereign immunity.[2]

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[1] In accordance with Circuit Rule 8(a)(2), [redacted] counsel reached out to the Special Counsel's Office by email and phone notifying them of [redacted] intent to file this stay motion. The Special Counsel's Office opposes the motion.

[2] The district court issued its order on September 19. [redacted] prepared this motion in the days following and conferred with the Special Counsel's Office about it before filing.

BACKGROUND

In July 2018, a federal grand jury in the District of Columbia issued a subpoena to [redacted] wholly owned by [redacted]—requesting "all documents" from "any" of [redacted]. July 11, 2018 Grand Jury Subpoena, Exhibit A to Motion to Quash, Dkt. 3-1. From the outset, [redacted] explained to the Special Counsel's Office that [redacted] is an [redacted] and thus entitled to sovereign immunity from the subpoena. [redacted] nevertheless asked its [redacted]—which has no access to records or documents at other [redacted]—to search for records responsive to the subpoena. Dkt. 3 at 2. That search turned up nothing responsive. *Id.*

The Special Counsel's Office also asked [redacted] to search its [redacted] for responsive records. *Id.* at 1-2. [redacted] explained that disclosing those materials would expose [redacted] to criminal sanctions under [redacted]. *Id.* at 3. The parties negotiated for a while but reached an impasse. *Id.*

On August 16, 2018, [redacted] moved to quash the subpoena because (1) federal courts lack criminal jurisdiction over foreign sovereigns like [redacted] and (2) [redacted] compliance with the subpoena would be unreasonable and oppressive because it would force [redacted] to violate

[redacted]. *Id.* at 1-3; *see also* Fed. R. Crim. P. 17(c)(2) ("the court may quash or modify the subpoena if compliance would be unreasonable or oppressive"). Despite the concession by the Special Counsel's Office that [redacted] qualifies as a foreign sovereign under the Foreign Sovereign Immunities Act (Opp. to Mot. to Quash, Dkt. 4 at 6), the district court denied [redacted] motion to quash and ordered [redacted] to produce responsive documents (which are not located at [redacted] by October 1, 2018. September 19, 2018 Order, Dkt. 19 (attached as Exh. A).

ARGUMENT

Congress enacted the FSIA in light of the "sensitive issues concerning the foreign relations of the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983). Keeping with those concerns and background rules of sovereign immunity long established in international law, this Court has held that an order denying sovereign immunity is immediately appealable and that a proper appeal divests the district court of jurisdiction over the foreign sovereign. For essentially the same reasons, several courts have concluded that a foreign sovereign is entitled to a stay pending appeal when sovereign immunity is at stake. And besides that, the traditional factors counsel in favor of a stay.

I. [redacted] APPEAL DIVESTED THE DISTRICT COURT OF JURISDICTION TO ENFORCE THE SUBPOENA.

As this Court has explained, once a foreign sovereign appeals an order denying sovereign immunity, the district court no longer has jurisdiction over the issues on appeal.[3] *See Princz*, 998 F.2d at 1 (denying a motion to stay proceedings as unnecessary because the appellate court had "exclusive jurisdiction to resolve the threshold issue" of sovereign immunity). That is why [redacted] has not moved for a stay in the district court. It would be unnecessary—"impracticable" in the words of Federal Rule of Appellate Procedure 8(a)(2)—for [redacted] to move for relief that the district court has no jurisdiction to order. *See, e.g., id.* (ordering that "appellant's emergency motion for stay of all

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[3] An order denying sovereign immunity is immediately appealable. *See, e.g., Foremost-McKesson*, 905 F.2d at 443 (appeal from denial of motion to dismiss proper in FSIA case even though order would typically not be immediately appealable); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 91 (D.C. Cir. 2002) (same); *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("Respondents' suggestion that the [Greek] Ministers should be forced to take the contempt route betrays a misunderstanding of immunity or diplomacy or both. . . . A contempt order offends diplomatic niceties even if it is ultimately set aside on appeal."), *superseded by statute on other grounds*; *see also Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("the denial of a substantial claim of absolute immunity is an order appealable before final judgment"); *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 789 (7th Cir. 2011) ("The district court's discovery order effectively rejected Iran's claim of sovereign immunity and is therefore immediately appealable under the collateral-order doctrine."); *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 (9th Cir. 2007) ("an order denying immunity under the FSIA is appealable under the collateral order doctrine").

proceedings in the district court be denied as unnecessary"); *see also* Fed. R. App. P. 8(a)(1)-(2) (although movant must ordinarily move first in the district court for a stay, it does not need to do so if "impracticable").

For similar reasons, this stay motion is also unnecessary. But out of an abundance of caution, [redacted] moves for a stay. In similar circumstances, courts have granted stays to preserve claims of sovereign immunity.

Because a foreign sovereign's claim of immunity implicates sensitive diplomatic and jurisdictional questions (*see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)), several courts have concluded that a denial of sovereign immunity warrants a stay "*[r]egardless of the traditional criteria for considering a stay.*" *Ministry of Oil of the Republic of Iraq v. 1,032,212 Barrels of Crude Oil Aboard the United Kalavrvta*, No. CIV.A. G-14-249, 2015 WL 851920, at *4 (S.D. Tex. Feb. 26, 2015) (emphasis added); *see also Philipp v. Fed. Republic of Germany*, 253 F. Supp. 3d 84, 88–89 (D.D.C. 2017) (granting stay pending appeal in sovereign-immunity case without analyzing traditional stay factors); *DRFP L.L.C. v. Republica Bolivariana De Venezuela*, No. 2:04-CV-793, 2009 WL 3756372, at *8 (S.D. Ohio Nov. 9, 2009) (concluding that "Defendants will in fact be injured by allowing discovery to continue, because the sovereign

immunity at issue in this case is an immunity from legal action and proceedings altogether").

The same result should obtain here: The district court's order denying [redacted] motion to quash and ordering [redacted] to comply with the subpoena strips [redacted] of its sovereign immunity. If this Court disagrees with the district court—and for many reasons, it should—then the district court lacked jurisdiction over [redacted] in the first place. Requiring [redacted] to comply with the subpoena while [redacted] appeal is pending would defeat the purpose of sovereign immunity, which is an immunity from, among other things, "the attendant burdens of litigation, and not just a defense to liability on the merits." *Foremost-McKesson*, 905 F.2d at 443 (internal quotation marks omitted). Given those special circumstances, the Court should stay the district court's order compelling [redacted] to comply with the subpoena by October 1, 2018.

II. THE TRADITIONAL FACTORS WEIGH IN FAVOR OF A STAY.

The same result would follow under the traditional stay analysis. This Court typically weighs four factors to determine whether a stay is appropriate: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) whether a stay would "substantially harm other parties interested in the proceedings"; and (4) the public interest in granting the stay. *Wash. Metro. Area*

Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). Irreparable injury and likelihood of success are the "most critical" factors (*Nken v. Holder*, 556 U.S. 418, 435 (2009)), but courts may weigh the "balance of [the] equities" and grant a stay even if the party seeking the stay cannot make a strong showing on one of the factors. *Wash. Metro.*, 559 F.2d at 843.

All the traditional factors weigh in favor of a stay:

A. **Forcing [redacted] to comply with the subpoena while its appeal is pending would rob [redacted] of its immunity defense.**

The specter of irreparable injury to [redacted] sovereign interests alone is enough to warrant a stay. *See Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced."); *see also Wash. Metro.*, 559 F.2d at 843. If forced to comply with the subpoena before this Court decides its immunity defense on appeal, [redacted] will suffer irreparable injury in two distinct ways.

First, forcing [redacted] to comply with the subpoena forces it to "endure the very burden [it is] arguing [it] should not be subjected to in the first place." *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1282 (3d Cir. 1993). The point of sovereign immunity is to shield

foreign sovereigns from the American judicial process. *Foremost-McKesson*, 905 F.2d at 443. If [redacted] complied with the subpoena, the injury to its sovereign immunity (dignity) in this case would be complete and irreversible. "[P]roviding review only after [compliance with the subpoena] would destroy the 'legal and practical value' of [the] sovereign immunity defense." *Fed. Ins. Co.*, 12 F.3d at 1282. That is the definition of irreparable harm. *See e.g., In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065–66 (D.C. Cir. 1998) ("[T]he infliction of the 'burdens of discovery might cause irreparable harm to one who asserts an immunity from those very burdens.'"); *In re Papandreou*, 139 F.3d at 251 ("The infliction of [the burdens of litigation on a foreign sovereign] may compromise it just as clearly as would an ultimate determination of liability.").

Second, forcing [redacted] to comply with the subpoena would force it to violate [redacted] which is by definition unreasonable and oppressive under Rule 17. *See* [redacted], attached as Exhibit A to [redacted] Reply in Support of Mot. to Quash, Dkt. 8-1; [redacted] Suppl. Br. at 1-2, Dkt. 12. In determining that "complying with the subpoena . . . would not require [redacted] to violate foreign law" (Dkt. 20 at 26), the district court parsed the (translated) language of a foreign statute *according to American interpretive standards* and discounted the opinions from [redacted] attorneys who practice [redacted] On top of that, and in an affront to [redacted], the district

court concluded that the interest of the Special Counsel's Office in the requested documents outweighs [redacted] interests in complying with its own laws. *Id.* at 27.

If [redacted] later sought to prosecute [redacted] for its (forced) compliance, there is little that U.S. authorities and courts could do to minimize those consequences [redacted] At the very least, causing [redacted] to violate its own laws—exposing it to legal consequences at home—constitutes irreparable harm (as well as an unreasonable and oppressive burden under Federal Rule of Criminal Procedure 17(c)(2)). *See In re Sealed Case 87-5208, 87-5209*, 825 F.2d 494, 498–99 (D.C. Cir. 1987) ("We have little doubt . . . that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders.").

B. [redacted] will likely prevail on the merits because U.S. courts lack criminal jurisdiction over foreign sovereigns.

[redacted] will likely succeed on its immunity claim. "[I]t will ordinarily be enough [to show likelihood of success on the merits] that the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Wash. Metro.*, 559 F.2d at 844. Here, the FSIA's plain text confirms that it does not vest U.S. courts with criminal jurisdiction over foreign sovereigns. *See* 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction

of the courts of the United States and of the States except as provided" through certain exceptions); 28 U.S.C. § 1330(a) ("The district courts shall have original jurisdiction without regard to amount in controversy of any *nonjury civil action* against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.") (emphasis added); H.R. Rep. 94-1487, at 14 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6613 ("jurisdiction in actions against foreign states is comprehensively treated by the new section 1330"); *Verlinden*, 461 U.S. at 493 ("The [FSIA] must be applied by the District Courts *in every action* against a foreign sovereign") (emphasis added); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception [to the FSIA] applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.").

The district court's ruling to the contrary conflicts with the FSIA's plain text and longstanding international law. *See* Hazel Fox CMG QC & Philippa Webb, *The Law of State Immunity* 91 (Oxford University Press 3d ed. 2013) ("The exercise of criminal jurisdiction directly over another State infringes international law's requirements of equality and non-intervention."). At the very least, [redacted] claim raises "a fair

ground for litigation and thus for more deliberative investigation" because other courts (including the Sixth Circuit) have agreed with [redacted] *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010) ("The statute provides that jurisdiction over a foreign sovereign will exist only if there is a relevant international agreement or exception listed in 28 U.S.C. §§ 1605-1607. Plaintiff has not cited [a relevant] international agreement . . . and the FSIA does not provide an exception for criminal jurisdiction."); *Gould, Inc. v. Mitsui Min. & Smelting Co., Ltd.*, 750 F. Supp. 838, 844 (N.D. Ohio 1990) ("[N]o criminal jurisdiction exists in our courts over foreign sovereigns.").

[redacted] will also likely prevail on its argument that complying with the subpoena would prove unreasonable or oppressive because it would force [redacted] to violate [redacted]. *See In re Sealed Case 87-5208, 87-5209*, 825 F.2d at 498–99.

C. A stay pending appeal will not substantially injure the Special Counsel's Office.

The third factor—whether a stay would "substantially injure" the Special Counsel's Office (*Nken*, 556 U.S. at 435)—also points in [redacted] favor. Nothing in the opposition by the Special Counsel's Office to [redacted] motion to quash suggests that the Special Counsel's Office has an urgent need for the requested documents, much less a need so

urgent that it should trump [redacted] irreparable injury from responding to the subpoena.

D. A stay would serve the public's interest in preserving sovereign immunity.

Foreign sovereign immunity is premised on comity and reciprocity. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) ("immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present protection from the inconvenience of suit as a gesture of comity"); *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812) (sovereign immunity is rooted in "perfect equality and absolute independence of sovereigns, and [a] common interest impelling [sovereigns] to mutual intercourse"). The American public has a strong interest in shielding the U.S. from criminal proceedings in foreign courts. In ruling that American courts have essentially plenary criminal jurisdiction over foreign sovereigns—a conclusion that runs counter to Congress's efforts through the FSIA to shield foreign sovereigns from American litigation—the district court has broken with immunity principles long established in America and other countries. *See, e.g.*, State Immunity Act 1978, c. 33, § 16(4) (U.K. statute specifying exceptions to sovereign immunity in civil matters but making no exceptions to immunity for criminal matters); Foreign State Immunities Act 1985 (Cth) pt.1, s.3 (similar Australian statute);

Singapore State Immunity Act 1985, Pt. II § 19(2) (Singaporean statute providing that exceptions to sovereign immunity do not apply to criminal matters). That could erode American immunity abroad.

CONCLUSION

Because the Court will decide [redacted] sovereign immunity and whether the subpoena is otherwise oppressive or unreasonable, it should stay the district court's order to preserve [redacted] immunity while its appeal is pending.

Respectfully submitted on September 27, 2018.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3085 words.
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CERTIFICATE OF SERVICE

I certify that today I served this **Motion to Stay** and the attached **Addendum** by e-mail on the following:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel's Office
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[redacted]

ADDENDUM

CORPORATE DISCLOSURE STATEMENT

Movant-Appellant [redacted] is wholly-owned by the [redacted] and has no parent company.

Respectfully submitted on September 27, 2018.

ALSTON & BIRD LLP

/s/ BDB

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[redacted]

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), Movant-Appellant [redacted] certifies as follows:

A. Parties and Amici

The Appellant (Movant below) is the [redacted]. The Appellee (Respondent below) is Special Counsel Robert S. Mueller's Office. There were no amici before the district court and none are currently anticipated in this Court.

B. Ruling Under Review

The ruling under review is the district court's order, issued by Chief Judge Beryl A. Howell on September 19, 2018 (Dkt. 19), denying [redacted] motion to quash Grand Jury Subpoena No. 7409, and ordering [redacted] to comply with the subpoena by October 1, 2018. A memorandum opinion was issued with the Order (Dkt. 20).

C. Related Cases

[redacted] counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). This case has not previously been before this Court or any other court.

Respectfully submitted on September 27, 2018.

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/ etc

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EXHIBIT A
UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL**

MEMORANDUM OPINION

A federal grand jury sitting in the District of Columbia has issued a subpoena to [REDACTED] to produce certain records in connection with an ongoing investigation conducted by the United States, through the Special Counsel's Office ("SCO"). Pending before the Court is [REDACTED] Motion to Quash Grand Jury Subpoena ("Mov.'s Mot."), ECF No. 3, on grounds that (1) [REDACTED] is immune, under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, from compliance with the subpoena, and (2) compliance would require [REDACTED] to violate foreign law, and thus be "unreasonable or oppressive" under Federal Rule of Criminal Procedure 17(c)(2). For the reasons explained in further detail below, neither argument persuades. [REDACTED] motion therefore is denied, and [REDACTED] is ordered to complete production of records responsive to the grand jury subpoena by October 1, 2018.

I. BACKGROUND

The SCO is investigating foreign interference in the 2016 presidential election and potential collusion in those efforts by American citizens. The SCO has identified certain [REDACTED] as relevant to the investigation and, on July 11, 2018, the grand jury issued a subpoena to [REDACTED], which is [REDACTED] by Country A, to produce by, July 27,

2018, any such records held [REDACTED], in the United States or abroad. *See* Subpoena, ECF No. 3-1.[1]

On July 26, 2018, [REDACTED], through counsel, expressed to the SCO "concerns that pertain to the potential waiver of its sovereign immunity, as well as with respect to the reach of the subpoena beyond [REDACTED]." Mov.'s Ltr., dated July 26, 2018 ("Mov.'s July 26 Ltr.") at 1, ECF No. 3-2. [REDACTED] counsel asserted that [REDACTED] "[REDACTED] under the FSIA" as "[REDACTED] by [Country A]," and therefore "is immune from the jurisdiction of U.S. courts as well as the reach of U.S. subpoenas." *Id.* at 1–2. "While [REDACTED] wishes to cooperate with the Special Counsel's investigation," [REDACTED] counsel wrote, "it cannot do so at the cost of potentially waiving or undermining its legal position with respect to the applicability of the FSIA and the protections that the FSIA affords [REDACTED]." *Id.* at 2. [REDACTED] counsel also expressed doubt that any exception to the FSIA applied, noting specifically that the FSIA's exception for cases in which "the action is based upon a commercial activity carried on in the United States by [a] foreign state," 28 U.S.C. § 1605(a)(2), likely did not apply because [REDACTED]. *Id.*[2]

In response, the SCO disagreed "with your suggestion that sovereign immunity or any other legal doctrine relieves your client from the obligation to produce the documents responsive

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[1] [REDACTED].

[2] [REDACTED] counsel questioned whether this Court has personal jurisdiction [REDACTED], *see* Mov.'s July 26 Ltr. at 2, to which the SCO responded that "[t]he subpoena was served on [REDACTED]" which "is not an independent entity." SCO's Ltr., dated July 30, 2018 at 2, ECF No. 3-3. The SCO argued that "[b]ecause the subpoena was served on [REDACTED], it is immaterial whether [REDACTED] has access to or visibility into documents in the possession [REDACTED]," as [REDACTED] itself "unquestionably does have such access and visibility." *Id.* (internal quotation marks omitted). The next letter [REDACTED] counsel sent the SCO made no reference to personal jurisdiction, *see* Mov.'s Ltr., dated Aug. 2, 2018, ECF No. 4-1, and [REDACTED] has not disputed this Court's personal jurisdiction over [REDACTED] in either subsequent correspondence with the SCO or its briefs supporting its motion to quash, thus waiving any objection on that ground. *See Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 344 (D.C. Cir. 2018) ("Unlike subject matter jurisdiction, personal jurisdiction is a personal defense that can be waived or forfeited" by "cho[osing] not to brief or argue the question of personal jurisdiction.").

to the subpoena in [REDACTED] possession, custody, or control—wherever the documents are located." SCO's Ltr., dated July 30, 2018 ("SCO's July 30 Ltr.") at 1, ECF No. 3-3. The SCO asserted that the FSIA neither "applies in criminal cases [n]or divests the district court of power to enforce the subpoena," and that even if the FSIA applies, the FSIA's commercial activity exception would apply due to [REDACTED] activities in the United States." *Id.* at 1–2.

On August 2, 2018, [REDACTED] counsel sought from the SCO "written confirmation . . . that it is permissible . . . to share the grand jury subpoena with other personnel [REDACTED] who would be involved in collecting the documents requested, including personnel at [REDACTED] in [City A] and at [REDACTED] that may have responsive information." Mov.'s Ltr., dated Aug. 2, 2018 ("Mov.'s Aug. 2 Ltr.") at 1, ECF No. 4-1.[3] While reiterating [REDACTED] desire "to cooperate with the grand jury's investigation" and to find "a resolution that would provide the [SCO] with the documents requested," [REDACTED] emphasized its continuing "concerns on how its protections under the [FSIA] [REDACTED] could be impacted—or waived entirely—by producing documents responsive to the grand jury subpoena," as well as concern that compliance would violate "applicable law in [Country A] [REDACTED]." *Id.* at 1–2.[4] As to the latter concern, [REDACTED] proposed that it produce responsive documents "consistent with, and as permitted by, the applicable laws of the jurisdictions in which the information may [be] located," subject to three conditions: the SCO's (1) agreement that [REDACTED] production "is not intended to be either an express or implied waiver of [REDACTED] protections under the FSIA," (2) representation "that [the SCO] has a compelling need for the records requested," and (3) agreement "to a 30-day extension of the

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3 [REDACTED].
4 [REDACTED].

subpoena's return date, up to and including September 3, 2018, to give [REDACTED] adequate time to collect and process [REDACTED]." *Id.* at 2.

The SCO responded the same day, informing [REDACTED] that the SCO "cannot agree to all of the representations made in your letter," but "offer[ing] the following assurances regarding your client's production of materials responsive to the subpoena." SCO's Ltr., dated Aug. 2, 2018 ("SCO's Aug. 2 Ltr.") at 1, ECF No. 4-2. The SCO "agree[d] that in the event the [FSIA] were deemed" to apply, [REDACTED] "production of documents responsive to the instant grand jury subpoena is not intended to constitute either an express or implied waiver of any protections [REDACTED] might be entitled to pursuant to the FSIA." *Id.* The SCO further represented that it had "a compelling need for records that are responsive to the grand jury subpoena," while maintaining nonetheless that the government need not "demonstrate such a compelling need in order to compel compliance with the subpoena." *Id.* Finally, the SCO agreed to extend the subpoena's return date by one week, to August 10, 2018. *Id.*

On August 6, 2018, [REDACTED] counsel communicated to the SCO his belief that [REDACTED]." [REDACTED] and that compliance with the subpoena thus "could constitute [REDACTED]." [REDACTED] and requested that the SCO "share any thoughts your office has on this issue." *Id.* The SCO responded that "[w]e will take a look at this." SCO's Email, dated Aug. 7, 2018, ECF No. 4-3.

[REDACTED] counsel then shared "a little more color on the situation and what I've learned since" sending the prior email. Mov.'s Email, dated Aug. 7, 2018, ECF No. 4-3. Although [REDACTED] "has already begun pulling together the documents responsive to the subpoena," [REDACTED] counsel said, "before producing these to your office," [REDACTED]. [REDACTED]. At the same time, [REDACTED] counsel assured the SCO that [REDACTED].

Acknowledging that "we're not privy to the exact nature of your investigation and the specific need for [REDACTED]." [REDACTED]. *Id.*

On August 14, 2018, the SCO responded that [REDACTED]. In an accompanying email, dated one day later, the SCO stated that "[w]e will extend the return date on the subpoena to [August 16, 2018], but do not anticipate granting any further extensions." SCO's Email, dated Aug. 15, 2018 ("SCO's Aug. 15 Email"), ECF No. 4-4.

In response to the SCO's letter, [REDACTED] counsel asked whether (1) the SCO would [REDACTED] and (2) [REDACTED]. Mov.'s Email, dated Aug. 14, 2018 ("Mov.'s Aug. 14 Email"), ECF No. 4-4. The SCO objected, cautioning [REDACTED].

[REDACTED] counsel subsequently "requested a further extension of the deadline for compliance with the subpoena until early September." Mov.'s Email, dated Aug. 15, 2018, ECF No. 4-4. The SCO denied this request, stating that (1) "[t]he subpoena was served on [REDACTED] over one month ago," (2) "[f]rom the very inception of our discussions about [REDACTED] concerns and how those concerns could be allayed, we have made clear to you that in light of our investigative exigencies we were not able to agree to a lengthy extension of the return date," (3) "[i]n an attempt to allow [REDACTED] to fully consider the issue, we nonetheless granted extensions of that deadline totaling almost 3 weeks," and (4) "we told you when we agreed to your last extension request that it would likely be our final grant of an extension." SCO's Email, dated Aug. 16, 2018, ECF No. 4-4.

On August 16, 2018, [REDACTED] filed a motion to quash the grand jury subpoena. *See* Mov.'s Mot.[5] The SCO's opposition, *see* SCO's Opp'n Mov.'s Mot. ("SCO's Opp'n"), ECF No. 4, was accompanied by a motion for leave to file an *ex parte*, *in camera* supplement, *see* SCO's

[5] [REDACTED] also filed a motion to seal case, *see* Mov.'s Mot. Seal Case, ECF No. 1, which the Court granted, *see* Order Granting Mov.'s Mot. Seal Case, ECF No. 2.

Mot. Leave File *Ex Parte* Suppl. ("SCO's Mot. *Ex Parte* Suppl."), ECF No. 5, which the Court granted, *see* Order Granting SCO's Mot. *Ex Parte* Suppl., ECF No. 6. [REDACTED] filed a reply on August 31, 2018. *See* Mov.'s Reply SCO's Opp'n ("Mov.'s Reply"), ECF No. 8. Following a hearing on September 11, 2108, at which the SCO confirmed that the instant subpoena's issuance to an instrumentality of a foreign government was "approved in the normal matter . . . within the ranks of the Department of Justice," Hr'g Tr. (Sept. 11, 2018) at 39:16–23, ECF No. 16, and the SCO's filing of two *ex parte*, *in camera* submissions, *see* Order Granting SCO's Mot. *Ex Parte* Suppl.; Minute Order, dated Sept. 14, 2018, [REDACTED] motion to quash now is ripe for review.

II. LEGAL STANDARD

"On motion made promptly, the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c)(2). "[O]ne who relies on foreign law assumes the burden of showing that such law prevents compliance with the court's order." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987); *accord SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000). "Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source." FED. R. CRIM. P. 26.1.

III. DISCUSSION

[REDACTED] seeks to quash the grand jury subpoena on grounds that (1) the FSIA grants [REDACTED] immunity from compliance with the subpoena and the jurisdiction of this Court to enforce the subpoena, and (2) compliance would be unreasonable or oppressive, as [REDACTED] would violate foreign law. As explained below, neither argument persuades.

A. The FSIA Does Not Immunize [REDACTED] From Compliance With the Grand Jury Subpoena

[REDACTED] contends that as an agency or instrumentality of Country A, it "is immune from [the] jurisdiction of U.S. courts, as well as the reach of U.S. subpoenas." Mov.'s Mem. Supp. Mot. ("Mov.'s Mem.") at 4, ECF No. 3.[6] Foreign states and their agencies and instrumentalities generally are immune from the jurisdiction of American courts, but the FSIA recognizes an exception to immunity for certain actions relating to foreign states' commercial activities. 28 U.S.C. §§ 1603(a), 1604, 1605(a)(2). Assuming the FSIA's grant of immunity applies outside civil cases, the exceptions do as well. The SCO, through an *ex parte*, *in camera* submission, has demonstrated that the commercial activity exception applies here. The FSIA thus does not immunize [REDACTED] from compliance with the grand jury subpoena.

1. Assuming the FSIA Applies Outside Civil Cases, the FSIA's Exceptions to Immunity Apply Outside Civil Cases As Well

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to certain exceptions. 28 U.S.C. § 1604. The FSIA thus "renders a foreign government 'presumptively immune from the jurisdiction of United States courts unless one of the Act's express exceptions to sovereign immunity applies.'" *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017) (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 n.1 (2016)). [REDACTED] argues that these exceptions, set out in 28 U.S.C. §§ 1605–07, apply only to civil cases and, consequently, that the FSIA grants foreign states unqualified immunity outside the civil context. *See* Mov.'s Reply at 4. The SCO disputes that the FSIA applies outside the civil context, but contends that, if the statute applies here, the exceptions must apply as well. *See* SCO's Opp'n at 6–11. The Court assumes, without deciding, that the FSIA applies to grand jury investigative matters and concludes, contrary to

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[6] [REDACTED].

[REDACTED] position, that the FSIA's exceptions to immunity, which are not by their plain terms limited to civil cases, apply outside the civil context as well.

The FSIA's commercial activity exception, for example, provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). This language is not textually limited to civil matters. To the contrary, Section 1605(a)(2)'s unqualified language provides that the exception applies "in any case." *Id.*; *see SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) ("[T]the word 'any' naturally carries an expansive meaning.' . . . When used (as here) with a singular noun in affirmative contexts, the word 'any' ordinarily refers to a member of a particular group or class without distinction or limitation and in this way implies *every* member of the class or group." (quoting OXFORD ENGLISH DICTIONARY (3d ed. Mar. 2016) (alterations and internal quotation marks omitted))). The FSIA's other exceptions to immunity likewise apply "in any case" or "in any action" without any express limitation to civil matters. *See* 28 U.S.C. § 1605(a), (b) (enumerating six exceptions to sovereign immunity that apply "in any case"); *id.* § 1605(d) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage."); *id.* § 1607 (enumerating counterclaim-based exceptions to immunity that apply "[i]n any action").

Even though the FSIA's commercial activity exception is not facially limited to civil cases, [REDACTED] argues nonetheless that courts cannot exercise jurisdiction over non-plaintiff foreign states in non-civil matters because 28 U.S.C. §1330(a), the FSIA's jurisdictional statute, confers jurisdiction only over "civil action[s] against a foreign state." Mov.'s Reply at 4

(citing 28 U.S.C. § 1330(a)). Section 1330(a) does not facially purport to be the exclusive basis for exercising jurisdiction over a non-plaintiff foreign state, however.[7] Jurisdiction here is proper under 28 U.S.C. § 3231, as the grand jury is investigating "offenses against the laws of the United States." 28 U.S.C. § 3231.

[REDACTED] posits that jurisdiction can lie only under Section 1330(a), not under Section 3231, because "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). "[O]btaining jurisdiction over a foreign state" under the FSIA, *id.*, however, requires merely that one of the FSIA's substantive exceptions to immunity apply, not also, as [REDACTED] argues, that jurisdiction lie under Section 1330(a) itself. Indeed, *Amerada Hess* expressly recognizes that jurisdiction over a foreign state may lie under a statute other than Section 1330(a), so long as one of the FSIA's exceptions to immunity applies. *See id.* at 438–39 ("Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner."). The Supreme Court elsewhere has explained that "subject matter jurisdiction in any [action against a foreign state] depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). *Amerada Hess* thus best is read merely to reject a litigant's ability to make an end-run around the FSIA's substantive immunity provisions by invoking a separate jurisdictional statute, such as the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, as the plaintiff there attempted, *see*

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[7] The general diversity jurisdiction statute confers jurisdiction, subject to a greater-than-$75,000 amount in controversy requirement, over civil actions between "a foreign state . . . as plaintiff and citizens of a State or of different States," 28 U.S.C. §1332(a)(4), but does not confer jurisdiction over actions against foreign states.

488 U.S. at 432. A litigant who demonstrates that one of the FSIA's exceptions to immunity applies thus may rely on a jurisdictional statute other than Section 1330(a), such as Section 3231.

This reading of *Amerada Hess* best accords with the FSIA's language. Section 1604 provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States . . . *except* as provided in sections 1605 to 1607." 28 U.S.C. § 1604 (emphasis added). This mandatory phrasing naturally implies that *if* an exception to immunity in Sections 1605 through 1607 applies, a foreign state *shall not* have immunity. Sections 1605 through 1607 do not distinguish between civil and non-civil matters. *See id.* §§ 1605–07. To conclude that a foreign state is entitled to immunity in a non-civil matter despite that an exception to immunity applies "as provided in sections 1605 to 1607," *id.* § 1604, does not square with Section 1604.

Language in another section of the statute supports this reading of the FSIA. Section 1602 instructs courts to resolve "[c]laims of foreign states to immunity . . . in conformity with the principles *set forth in this chapter*." *Id.* § 1602 (emphasis added). The FSIA's exceptions to immunity, *see id.* §§ 1605–07, and Section 1602 are located in the same chapter, *see id.* ch. 97, while Section 1330(a) is located in a separate chapter, *see id.* ch. 85. To conclude that a foreign state has immunity because an action falls outside Section 1330(a)'s scope, notwithstanding that an exception to immunity otherwise would apply, would be to resolve a claim of immunity "in conformity with" "principles" other than those "set forth in this chapter," *id.* § 1602, in violation of Section 1602.

Nor would allowing litigants to invoke a district court's jurisdiction over a foreign state by relying on statutes other than Section 1330(a) render Section 1330(a) superfluous, as Section 1330(a)'s enactment allowed district courts to hear actions over which jurisdiction otherwise did not exist. Section 1330(a) grants the district courts "original jurisdiction without regard to

amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). At the time the FSIA was enacted, the general federal question jurisdiction statute, 28 U.S.C. § 1331, granted jurisdiction over "civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1976), *amended by* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369.[8] Section 1330(a) thus allowed district courts to hear two categories of actions that Section 1331, as then written, did not. First, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of the amount in controversy. Second, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of whether the litigant had satisfied the well-pleaded complaint rule, which requires "that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Verlinden B.V.*, 461 U.S. at 494 (recognizing that the well-pleaded complaint rule does not apply to actions under Section 1330(a)).

Other specialized jurisdictional statutes in existence when the FSIA was enacted, such as the ATS, 28 U.S.C. § 1333 (admiralty, maritime, and prize), 28 U.S.C. § 1335 (interpleader), 28 U.S.C. § 1337 (commerce and antitrust), and 28 U.S.C. § 1338 (intellectual property), likewise did not grant the full scope of jurisdiction Section 1330(a) provides. *Cf. Amerada Hess*, 488 U.S. at 437 (observing that these jurisdictional statutes predated the FSIA). The FSIA's omission of any statute specifically conferring jurisdiction over non-civil matters against foreign states thus

[8] Section 1331(a)'s amount-in-controversy requirement did not apply to actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," 28 U.S.C. § 1331(a) (1976), but this exception rarely if ever would apply in an action against a foreign state.

simply may reflect Congress's judgment that the existing scope of federal jurisdiction over non-civil actions against foreign states required no expansion.

For these reasons, the FSIA's exceptions to immunity are co-extensive with the FSIA's scope of potential immunity, such that if FSIA immunity extends outside the civil context, so too do the exceptions.

2. The Commercial Activities Exception

The FSIA's commercial activities exception sets, out in three separate clauses, the circumstances under which a foreign state is not "immune from the jurisdiction of courts of the United States"—when "the action is based upon" (1) "a commercial activity carried on in the United States by the foreign state," (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "[C]ommercial activity" is "a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). An activity's "commercial character" is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than . . . to its purpose." *Id.* A foreign state's acts are "commercial" within the FSIA's meaning "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Moreover, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Id.* (internal quotation marks omitted).

As to the exception's first clause, "commercial activity carried on in the United States by a foreign state" is "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). "Thus, to invoke the district court's jurisdiction under clause one, the plaintiff's claim must be based upon some commercial activity by the foreign state that had substantial contact with the United States." *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014) (internal quotation marks omitted). As to the third clause, "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity," but such effect need not be "substantial" or "foreseeable." *Weltover, Inc.*, 504 U.S. at 618 (alteration and internal quotation marks omitted); *see also Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) ("A direct effect is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." (alterations and internal quotation marks omitted)).

The Supreme Court has explained that "an action is 'based upon' the particular conduct that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *see also Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) ("[A] court's jurisdiction under the Foreign Sovereign Immunities Act turns on the 'gravamen,' or 'essentials,' of the plaintiff's suit." (quoting *Sachs*, 136 S. Ct. at 395–97)).[9] "[T]he particular conduct that constitutes the 'gravamen,'" *Sachs*, 136 S. Ct. at 396, of an action to compel enforcement of or quash a grand jury subpoena most sensibly is said to be such conduct (1) that is part of "the general subject of the grand jury's investigation" and (2) as to which there exists a "reasonable

[9] In *Nelson v. Saudi Arabia*, the Supreme Court said that "the phrase 'based upon,'" as used in Section 1605(a)(2), "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. 349, 357 (1993). The D.C. Circuit, relying on *Nelson*'s language, explained that "a claim is 'based upon' commercial activity if the activity establishes one of the elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Odhiambo*, 764 F.3d at 36. More recently, however, *Sachs* rejected a "one-element approach" to Section 1605(a)(2), holding that a court instead must "zero[] in on the core of [a plaintiff's] suit." 136 S. Ct. at 396.

possibility that the category of materials the Government seeks will produce information" that is "relevant." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991). This yields the following rule: a grand jury subpoena matter fits within the commercial activity exception if an activity or act of the kind Section 1605(a)(2) describes is part of the general subject of the grand jury's investigation, and there exists a reasonable possibility that the category of materials the subpoena identifies will produce information relevant to such activity or act.[10]

3. Analysis

The SCO argues that the commercial activity exception applies here. SCO's Opp'n at 10. Through an *ex parte*, *in camera* submission, the SCO has elaborated on the relationship between [REDACTED] Section 1605(a)(2) activities or acts and the materials sought to be produced. Having thoroughly reviewed this *ex parte*, *in camera* submission, the Court is satisfied that the SCO has met its burden to show that (1) a Section 1605(a)(2) activity or act is part of the general subject of the grand jury's investigation and (2) a reasonable possibility exists that the instant subpoena will produce information relevant to such activity or act. *Cf. United States v. Nixon*, 418 U.S. 683, 700 (1974) ("Our conclusion is based on the record before us, much of which is under seal.").[11] The contents of the SCO's *ex parte*, *in camera* submission overcome any

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[10] The SCO argues that the relevant standard here is not *R. Enterprises, Inc.*'s standard to determine a grand jury subpoena's relevancy, but rather the standard to determine whether a court has personal jurisdiction to enforce a subpoena compelling production of [REDACTED]. *See* SCO's Opp'n at 10–11. The commercial activity exception applies only where a Section 1605(a)(2) activity or act "constitutes the 'gravamen' of the suit," however. *Sachs*, 136 S. Ct. at 396 (2015). Although establishing personal jurisdiction over an entity is necessary to obtain relief in the sense that a court lacks authority to grant relief against an entity not within the court's personal jurisdiction, *see Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1779 (2017), personal jurisdiction alone cannot ordinarily be said to be the "gravamen" of a matter as *Sachs* uses that term, 136 S. Ct. at 396. A Section 1605(a)(2) activity or act thus may establish a court's personal jurisdiction over an entity without establishing a court's subject-matter jurisdiction under the FSIA.

[11] On September 14, 2018, the Court directed the government to submit an *ex parte*, *in camera* submission "addressing the following question: whether an act or activity of the kind described in 28 U.S.C. § 1605(a)(2) establishes a reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Minute Order, dated Sept. 14, 2018. On September 17, 2018, the SCO filed a submission responsive to the Court's order.

inference one otherwise might draw from [REDACTED]." Mov.'s Mem. at 6 (parentheses omitted).

[REDACTED] argues that the commercial activity exception does not apply because the SCO "argues generically that the exception applies because [REDACTED]" without specifying any "jurisdictional nexus" between a Section 1605(a)(2) activity or act and the subpoenaed materials. Mov.'s Reply at 4. Obviously, [REDACTED] cannot address the contents of the SCO's *ex parte*, *in camera* submission, which persuades the Court that a nexus exists between [REDACTED] Section 1605(a)(2) activities or acts and the materials sought to be produced, and thus that the instant matter is "based upon" such activities or acts. The Court recognizes [REDACTED] difficult position in not being privy to the information reviewed and relied upon in resolving the pending motion. *See In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982) ("[A]ppellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case."). The law is well-settled, however, that courts may "use *in camera, ex parte* proceedings to determine the propriety of a grand jury subpoena" when "necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998); *see also In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006); *In re Grand Jury Investigation*, No. MC 17-2336 (BAH), 2017 WL 4898143, at *7 (D.D.C. Oct. 2, 2017). "The alternatives" to *ex parte*, *in camera* review here would "sacrific[e] the secrecy of the grand jury." *John Doe Corp.*, 675 F.2d at 490; *see also R. Enters.*, 498 U.S. at 299 ("Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand jury proceedings.'" (internal quotation marks omitted)).

For these reasons, the FSIA does not immunize [REDACTED] from complying with the subpoena.

B. Compliance With the Subpoena Would Not Be Unreasonable or Oppressive

[REDACTED] further argues that compliance with the grand jury subpoena would require violating [REDACTED], and thus be unreasonable and oppressive. [REDACTED] fails to show, however, that the subpoena and foreign law impose conflicting obligations and, in any event, the grand jury's strong need for the materials sought and [REDACTED] warrant the subpoena's enforcement notwithstanding any foreign [REDACTED]. Foreign law thus does not excuse [REDACTED] from complying with the subpoena.

1. Compliance With the Instant Subpoena Would Not Violate Foreign Law

[REDACTED] argues that complying with the subpoena would require violating [REDACTED].. For the reasons that follow, [REDACTED] fails to show that the grand jury subpoena and foreign law impose conflicting legal obligations.

[REDACTED].[12] [REDACTED].

[REDACTED].

[REDACTED] cites no contrary authority [REDACTED], relying instead on conclusory declarations by [REDACTED] retained counsel, which themselves cite no legal authority on this question of [REDACTED]. The Court gives these declarations little weight. *See Doak v. Johnson*, 798 F.3d 1096, 1107 (D.C. Cir. 2015) (declining, in the summary judgment context, to credit "bare, conclusory statement[s] . . . in [a] declaration").

[REDACTED]. As an initial matter, the Court teased this argument from the declaration, as [REDACTED] failed to raise this argument in its briefs. This argument is therefore waived.

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12 [REDACTED].

See Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1142 (D.C. Cir. 1999) ("We routinely and for good reason refuse to consider contentions not raised in a party's brief."). The argument fares no better on the merits, [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED]. [REDACTED] identifies no contrary authority other than assertions by [REDACTED] neither of whom cite or analyze Country A legal authorities. The Court simply need not credit such conclusory opinions. *See Doak*, 798 F.3d at 1107. [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

Finally, [REDACTED] argued at the September 11 hearing and via declarations of [REDACTED], though not through its briefs, [REDACTED]. [REDACTED] has waived this argument in two ways. First, [REDACTED] failure to raise this argument in any briefs constitutes waiver. *See Berger*, 170 F.3d at 1142. Second, [REDACTED] are entirely conclusory, offering no substantive analysis and failing even to identify [REDACTED]; *see also Doak*, 798 F.3d at 1107; *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (internal quotation marks omitted)).

For these reasons, compliance with the subpoena at issue would not require [REDACTED] to violate foreign law.

2. Enforcement of the Grand Jury Subpoena is Required Even If Disclosure Violates Foreign Law

Even if complying with the grand jury subpoena would require [REDACTED] to violate foreign law, the government's important interest in obtaining the materials sought [REDACTED] justify compelling compliance with this subpoena nonetheless. "[A]lthough courts recognize comity as an important objective, there is little doubt that a United States Court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary." *In re Sealed Case*, 832 F.2d 1268, 1283 (D.C. Cir. 1987) (alterations and internal quotation marks omitted); *see also In re Sealed Case*, 825 F.2d at 497–98 ("[A] court's ability to order a person to produce documents in contravention of foreign law [] is thought to be acceptable.").[13] In the grand jury context, courts regularly have concluded that government law enforcement interests outweigh [REDACTED].[14]

Section 442(1)(c) of the *Restatement (Third) of the Foreign Relations Law of the United States* directs that "[i]n deciding whether to issue an order directing production of information located abroad," a court "should take into account" (1) "the importance to the investigation . . . of the documents or other information requested," (2) "the degree of specificity of the request," (3) "whether the information originated in the United States," (4) "the availability of alternative

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[13] *Braswell v. United States* held that a "custodian of corporate records" cannot "resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment," 487 U.S. 99, 100 (1988), abrogating that aspect of *In re Sealed Case* holding otherwise, *see* 832 F.2d at 1274–82; *see also In re Sealed Case (Gov't Records)*, 950 F.2d 736, 739 n.5 (D.C. Cir. 1991) ("*Braswell* effectively rejects the portion of this court's opinion in *In re Sealed Case* . . . that recognizes a corporate custodian's right to resist a grand jury subpoena on the ground that the act of production itself might incriminate him."). *Braswell* did not purport to abrogate the aspect of *In re Sealed Case* recognizing district courts' power to enforce grand jury subpoenas compelling disclosure prohibited by foreign law, however, and *In re Sealed Case* remains good law in this respect.

[14] [REDACTED].

means of securing the information," and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987). The Supreme Court, citing a draft version of Section 442(1)(c), identified these factors as "relevant to any comity analysis." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).[15]

The subpoena at issue cannot be faulted for insufficient specificity, and the SCO does not argue that the information sought originated in the United States. The SCO's *ex parte*, *in camera* submission, meanwhile, persuades the Court that the materials sought are important to the grand jury's investigation and that failure to secure the materials would undermine important interests of the United States. [REDACTED]. For these reasons, under the circumstances presented, the Court concludes that the subpoena should be enforced.

Section 442(2) of the *Restatement (Third)* further provides that "[i]f disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national," an American court "*may* require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available," and "*should not ordinarily* impose sanctions of contempt . . . on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a)." *Restatement (Third)* § 442(2)(a)–(b) (emphases

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15 [REDACTED].

added). As the emphasized terms indicate, however, these provisions are not absolute, and their application may be inappropriate under particular circumstances. [REDACTED].[16] [REDACTED].

In re Sealed Case, which voiced "considerable discomfort" with the idea "that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question," 825 F.2d at 498, involved circumstances materially different than those presented here. The consideration that was "[m]ost important to [the *Sealed Case* panel's] decision [wa]s the fact that" contempt "sanctions represent[ed] an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory." *Id.* That consideration is absent here, as [REDACTED] only substantive arguments assert that compliance with the subpoena would require [REDACTED]. *See* Mov.'s Mem. at 7–8. Moreover, in *Sealed Case* "the government concede[d] that it would be impossible for the bank to comply with the contempt order without violating the laws of Country Y on Country Y's soil," 825 F.2d at 498. Here, in contrast, the SCO asserts that compliance with the subpoena would not require [REDACTED] to violate foreign law, and the record before the Court supports this conclusion, for the reasons discussed above. [REDACTED]. As already discussed, [REDACTED]. The *Sealed Case* panel "emphasize[d] [] the limited nature of our holding on this issue," and explained that "[i]f any of the facts we rest on here were different, our holding could well be different." *Id.* Given the significant factual dissimilarity between that and the instant matter, enforcing the instant grand jury subpoena does not cause the "considerable discomfort," *id.* at 498, the *Sealed Case* panel expressed.

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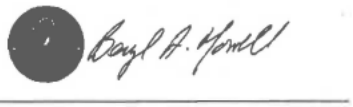
[16] [REDACTED]

IV. CONCLUSION

For the foregoing reasons, [REDACTED] Motion to Quash Grand Jury Subpoena is denied. [REDACTED] shall complete production of the subpoenaed records by October 1, 2018.

An appropriate Order accompanies this Memorandum Opinion.

Date: September 19, 2018



BERYL A. HOWELL
Chief Judge

EXHIBIT B

No. 18-3068

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

IN RE GRAND JURY SUBPOENA NO. 7409
FILED UNDER SEAL

Appeal from the United States District Court
For the District of Columbia
Case No. 18-gj-0041
The Honorable Chief Judge Beryl A. Howell

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC* OF THE COURT'S ORDER GRANTING THE SPECIAL COUNSEL'S MOTION TO DISMISS [redacted] APPEAL AND DENYING [redacted] STAY MOTION AS MOOT

INTRODUCTION

[redacted] moves under Federal Rules of Appellate Procedure 35 and 40 and Circuit Rule 35 for panel rehearing or rehearing *en banc* of the panel's October 3, 2018 order dismissing [redacted] appeal and denying its stay motion as moot. [redacted] petition raises an issue of exceptional importance—a foreign sovereign's right to immediate appeal of an order denying sovereign immunity—and the panel's October 3 order conflicts with published decisions from this Court and other Courts of Appeals.

The panel held that although foreign sovereigns can generally immediately appeal denials of sovereign immunity (including in the motion-to-dismiss context), that rule does not apply when a district court denies a foreign sovereign's motion to quash a grand-jury subpoena. The upshot of the panel's order is that [redacted] (a foreign sovereign) must wait for the district court to hold it in contempt before it can appeal the denial of its sovereign immunity.

That is not the law and should not be the law. Courts across the country have held that a party claiming unqualified immunity can immediately appeal the denial of immunity—whether the denial comes in the context of a motion to dismiss, a discovery dispute, or (as here) a motion to quash a subpoena. In *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998), this Court granted a writ of mandamus to hold that Greek government officials could seek immediate appellate review of a district court's order compelling their depositions *before* the district court held them in contempt for refusing to sit for the deposition. So far as appealability is concerned, there is no meaningful difference between *Papandreou* and this case: The district court has ordered [redacted] to comply with a grand-jury subpoena, which (like a deposition) is a form of discovery, but one for which noncompliance carries the threat of criminal contempt.

In ruling as it did, the panel created an unworkable regime under which a foreign sovereign may seek an immediate appeal of an order

denying sovereign immunity in every circumstance except those involving challenges to a subpoena. That regime is contrary to applicable law and would pave the way for courts in this Circuit to infringe foreign sovereigns' immunity and dignity anytime a party seeks information from a foreign sovereign under a subpoena. If anything, a foreign sovereign's right to immediately appeal an order requiring it to comply with a federal *criminal* subpoena should be greater, not less, than the right to immediately appeal an order to comply with a *civil* deposition notice. The Court should grant panel rehearing or rehearing *en banc*, vacate the October 3 order, and hold that it has jurisdiction to hear [redacted] appeal. And when it does, it should also grant rehearing on [redacted] stay motion and hold—consistent with *Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993)—that the district court has no jurisdiction over this case while [redacted] appeal is pending. Alternatively, this Court could and should hold that a stay pending appeal is warranted.

BACKGROUND

In July 2018, a federal grand jury issued a subpoena to [redacted] asking for documents related to certain [redacted] After negotiations with the Special Counsel's Office stalled, [redacted] moved to quash the subpoena because federal courts lack criminal jurisdiction over foreign sovereigns and because complying with the subpoena would be unreasonable and oppressive in that it would require [redacted]

[redacted]. Motion to Quash, Dkt. 3 at 1-3. The district court recognized that [redacted] is a foreign sovereign but denied the motion to quash, concluding that [redacted] is not immune from responding to the subpoena. The court ordered [redacted] to comply with the subpoena by October 1, 2018. September 19, 2018 Order, Dkt. 19 (attached as Exh. A).

[redacted] filed a notice of appeal on September 24, citing cases from this Court holding that a foreign sovereign can immediately appeal an order denying sovereign immunity. Notice of Appeal at 1 (citing *Nyambal v. IMF*, 772 F.3d 277, 280 (D.C. Cir. 2014) and *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 2006)). The following week, [redacted] moved this Court for a stay of the district court's order. In its motion, [redacted] explained that its notice of appeal deprived the district court of jurisdiction over the case[1] and that, in all events, this Court should stay the district court's order under the traditional stay factors. *See* Motion to Stay at 5-14.

On September 28, the panel ordered the Special Counsel's Office to respond to [redacted] stay motion by noon on October 1. In its response, the Special Counsel's Office opposed a stay and moved to dismiss [redacted]

[1] *See Princz*, 998 F.2d at 1 ("Because an appeal properly pursued from the district court's order divests the district court of control over those aspects of the case on appeal . . . exclusive jurisdiction to resolve the threshold issue [of sovereign immunity] vests in this court, and the district court may not proceed to trial until the appeal is resolved.").

appeal as premature. According to the Special Counsel's Office, [redacted] must wait for the district court to hold it in contempt before it can appeal.

Thinking that this Court would rule on the issues quickly, [redacted] filed a response three hours after receiving the Special Counsel's brief. On the appealability question, [redacted] cited cases from nearly every Court of Appeals (including this one) holding that a foreign sovereign claiming immunity can immediately appeal the denial of sovereign immunity. [redacted] cited, for instance, *Papandreou*, 139 F.3d at 251, a case from this Court holding that two foreign ministers—whom the district court had ordered to submit to deposition—did not need to wait for a contempt order before appealing the district court's order.

On October 3, the panel issued a *per curiam* order granting the Special Counsel's motion to dismiss [redacted] appeal and denying [redacted] motion to stay as moot. *See* October 3, 2018 Order (attached at Addendum, p.1). Although the Court recognized that a foreign sovereign can appeal the denial of sovereign immunity in the context of a motion to dismiss or a district court's order compelling jurisdictional discovery, it held that "[r]equiring [redacted] to obtain a contempt order before appealing does not subject [redacted] to the burdens of litigation contemplated by [those cases]." *Id.* The Court stayed its mandate until seven days after its resolves [redacted] rehearing petition.

ARGUMENT

The panel's order denying [redacted] the right to appeal before a contempt order conflicts with this Court's decisions in *Papandreou*, *Foremost-McKesson*, and *Nyambal* (among others) and multiple decisions from other Courts of Appeals. At least three other Courts of Appeals have held that a party claiming immunity from a subpoena can immediately appeal the denial of a motion to quash the subpoena. Those courts have not distinguished a motion to quash a subpoena from a motion to dismiss or a challenge to a discovery order. And for good reason: When it comes to claims of unqualified immunity (sovereign or otherwise), there is no meaningful distinction across those contexts.

A. A PARTY CLAIMING UNQUALIFIED IMMUNITY FROM A SUBPOENA CAN IMMEDIATELY APPEAL THE DENIAL OF A MOTION TO QUASH THE SUBPOENA.

The panel's order conflicts with cases from three Courts of Appeals holding that a party claiming unqualified immunity from a subpoena can immediately appeal the denial of a motion to quash the subpoena.

1. In *In re Grand Jury Subpoenas Returnable Dec. 16, 2015*, 871 F.3d 141, 146 (2d Cir. 2017), a grand-jury subpoena directed seven Chinese nationals to appear before the grand jury. The witnesses moved to quash on diplomatic-immunity grounds. *Id.* The district court denied the motion. *Id.* When the witnesses appealed, the Second Circuit

rejected the argument that the witnesses had to wait for a contempt order before appealing. Recognizing that "[a]n order disposing of a motion to quash a grand jury subpoena *generally* is not . . . a final judgment," the Second Circuit held that the order denying the motion to quash was appealable because it denied the witnesses their claimed immunity. *Id.* at 146 (emphasis added). The court explained that "because the issue of whether these individuals are entitled to immunity determines whether they will be subjected to any further processes in the United States courts, a later recognition of immunity does not mitigate the harm and the order is 'effectively unreviewable on appeal from a final judgment.'" *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985)).

In arguing against an immediate appeal, the Special Counsel's Office has relied primarily on *United States v. Ryan*, 402 U.S. 530 (1971) and *Cobbledick v. United States*, 309 U.S. 323 (1940), but neither case addresses a denial of sovereign immunity. Those cases teach that a witness *generally* cannot appeal a motion-to-quash denial before a court holds them in contempt. *See also In re Grand Jury*, 490 F.3d 978, 980–81 (D.C. Cir. 2007) ("witness *ordinarily* cannot appeal" until held in contempt) (emphasis added). But the point of a general rule is that it admits of exceptions—and one exception is a claim of sovereign immunity. Indeed, the Second Circuit in *In re Grand Jury Subpoenas* articulated the general rule from *Ryan* and *Cobbledick* but then

explained that the general rule does not apply when a district court denies a witness's claim of unqualified immunity. 871 F.3d at 146.

2. In *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155 (10th Cir. 2014), the Tenth Circuit reached the same conclusion in a case involving tribal sovereign immunity. There, the Ute Indian Tribe moved to quash a non-party subpoena on sovereign-immunity grounds. *Id.* at 1157. The district court denied the motion, and the Tribe immediately appealed. *Id.*

Before reaching the immunity question, the Tenth Circuit held that "the district court's denial of tribal sovereign immunity is an immediately appealable collateral order even [though] the tribe is a non-party." *Id.* at 1158-59. The court explained that "[a]ssuming the district court had no jurisdiction to enforce Plaintiffs' subpoena against the Tribe because of tribal immunity, to deny the Tribe the opportunity to appeal and thereby vest the district court with jurisdiction over the Tribe by estoppel where no jurisdiction previously existed would be absurd." *Id.* at 1158. The court went on: "[T]he denial of tribal immunity is effectively unreviewable on appeal from a final judgment because, if the Tribe is entitled to immunity from a particular judicial process, this immunity is effectively lost as soon as the Tribe is subjected to that process." *Id.*

3. In *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1102 (8th Cir. 2012), the Eighth Circuit reached the same result—also

in a case involving tribal sovereign immunity. The Tribe moved to quash a subpoena on sovereign-immunity grounds. *Id.* at 1101-02. The district court denied the motion, and the Tribe immediately appealed. *Id.* at 1102. The Eighth Circuit had no question about its jurisdiction to hear the Tribe's appeal. Explaining that "[w]e clearly have appellate jurisdiction," the Eighth Circuit cited a Supreme Court case holding that a state claiming sovereign immunity can immediately appeal the denial of a motion to dismiss contesting jurisdiction on immunity grounds. *Id.* at n.1 (citing *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993)).

Those cases confirm that the district court's denial of [redacted] motion to quash is immediately appealable. As those other courts understood, a denial of unqualified immunity—whatever the context—justifies an immediate appeal under the collateral-order doctrine because the district court's decision satisfies all three *Cohen* factors: It (1) conclusively determines the immunity question, (2) resolves an important issue separate from the merits (in this case, the enforceability of the underlying subpoena), and (3) would effectively evade appellate review after a final judgment. *See In re Grand Jury Subpoenas*, 871 F.3d at 146; *see also La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 843 (D.C. Cir. 2008) ("For this collateral order exception to apply,. . . the district court's decision must [1] conclusively determine the disputed question, [2]

resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."); *Papandreou*, 139 F.3d at 251.

B. THE PANEL ERRED IN DRAWING A DISTINCTION BETWEEN A MOTION-TO-QUASH ORDER (ON THE ONE HAND) AND A MOTION-TO-DISMISS ORDER OR A DISCOVERY ORDER (ON THE OTHER).

The panel decision also conflicts with this Court's decisions in *Papandreou*, *Foremost-McKesson*, and *Nyambal*.

Contrast the panel's statement that

> [r]equiring [redacted] to obtain a contempt order before appealing does not subject [redacted] to the burdens of litigation contemplated by the cases allowing immediate appeals of discovery orders and denials of motions to dismiss where an appellant asserted sovereign immunity.

with the following language from *Papandreou*:

> Respondents' suggestion that the Ministers should be forced to take the contempt route betrays a misunderstanding of immunity or diplomacy or both. . . . A contempt order offends diplomatic niceties even if it is ultimately set aside on appeal.

139 F.3d at 251. One sees language similar to *Papandreou*'s in this Court decisions in *Foremost-McKesson* and *Nyambal*. *See, e.g.*, *Foremost-McKesson*, 905 F.2d at 443 ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits"); *Nyambal*, 772 F.3d at 280 ("Just as a district court's denial of sovereign immunity finally

determines the foreign state's right to be immune from the burden of a lawsuit, a court's grant of jurisdictional discovery denies an international organization protection from similar burdens.").

As this Court and the other Courts of Appeals understood in those earlier cases, a denial of a motion to dismiss, an order compelling discovery, and the denial of a motion to quash a subpoena impose the same burden on a sovereign. With each, the denial of immunity subjects the sovereign to the judicial process when the sovereign claims immunity from that process. And as this Court put it in *Papandreou*, a contempt order adds insult to injury because it "offends diplomatic niceties even if it is ultimately set aside on appeal." *Papandreou*, 139 F.3d at 251.

The panel overlooked those sensitive issues. It missed that so far as a sovereign's right to an immediate appeal is concerned, the key is not the degree to which the district court's order burdens the sovereign with the judicial process but that it burdens the sovereign with the judicial process *at all*. *See, e.g.*, *Nyambal*, 772 F.3d at 280 ("Just as a district court's denial of sovereign immunity finally determines the foreign state's right to be immune from the burden of a lawsuit, a court's grant of jurisdictional discovery denies an international organization protection from similar burdens."). If [redacted] must get a contempt order before appealing and this Court later holds on the

merits that [redacted] is entitled to immunity, then nothing can undo the contempt order's blow to [redacted] sovereignty dignity.

Again from *Papandreou*: "The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, *this is not good enough*." 139 F.3d at 251 (emphasis added).

Not good enough for an order compelling the *Papandreou* depositions (one form of discovery). *Not good enough* for an order compelling [redacted] to respond to a subpoena (another form of discovery).

* * *

Shielding [redacted] from the indignity of a contempt order is reason enough to justify an immediate appeal. But the Court should also turn back that threatened blow to [redacted] sovereign interests because the district court's order denying [redacted] [redacted] sovereign immunity is indefensible as a legal matter. The FSIA's plain text confirms that it does not vest U.S. courts with criminal jurisdiction over foreign sovereigns: "The district courts shall have original jurisdiction without regard to amount in controversy of any *nonjury civil action* against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a)

(emphasis added); *see also* H.R. Rep. 94-1487, at 14 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6613 ("jurisdiction in actions against foreign states is comprehensively treated by the new section 1330"); 28 U.S.C. § 1604 ("A foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" through certain exceptions); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("The [FSIA] must be applied by the District Courts *in every action* against a foreign sovereign") (emphasis added).

In finding jurisdiction over [redacted] where no statute confers it, the district court ignored the FSIA's plain meaning and claimed to find jurisdiction in 18 U.S.C. § 3231, a statute that says nothing about foreign sovereigns. ("The district courts of the United States shall have original jurisdiction, exclusive of the court of the States, of all offenses against the laws of the United States."). In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Supreme Court could not have been clearer: The FSIA's grant of jurisdiction over foreign sovereigns for certain limited nonjury civil matters is the exclusive basis for jurisdiction over a foreign sovereign. A district court may not create jurisdiction over a foreign sovereign by invoking a statute like § 3231 that "does not distinguish among classes of defendants" and "has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states." *Id.* at 295.

The district court's ruling also conflicts with longstanding international law. *See* Hazel Fox CMG QC & Philippa Webb, *The Law of State Immunity* 91 (Oxford University Press 3d ed. 2013) ("The exercise of criminal jurisdiction directly over another State infringes international law's requirements of equality and non-intervention.").

CONCLUSION

The Court should vacate the panel's October 3 order and hold that it has jurisdiction over [redacted] appeal. It should also hold (consistent with *Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993)) that the district court has no jurisdiction over this case while [redacted] appeal is pending. The Court should also reconsider its order denying [redacted] stay motion as moot and should hold that a stay pending appeal is warranted.

Respectfully submitted on October 5, 2018.

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[redacted]

[redacted]

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Respectfully submitted on October 5, 2018.

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CERTIFICATE OF SERVICE

I certify that today I served this Petition for Panel Rehearing or Rehearing *En Banc* by email on the following:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
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[redacted]

ADDENDUM

UNDER SEAL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3068 **September Term, 2018**

1:18-gj-00041-BAH

Filed On: October 3, 2018

In re: Grand Jury Subpoena

BEFORE: Rogers, Srinivasan, and Wilkins, Circuit Judges

ORDER

Upon consideration of the emergency motion for stay, the response thereto, and the reply; and the motion to dismiss for lack of jurisdiction, and the response thereto, it is

ORDERED that the motion to dismiss be granted. [redacted] has not met its burden of establishing this court's jurisdiction, see Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), over its appeal from the district court's order denying the motion to quash the subpoena for documents issued by the Special Counsel's Office. Generally, "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." United States v. Ryan, 402 U.S. 530, 532 (1971); see also In re Sealed Case, 827 F.2d 776, 777 (D.C. Cir. 1987) (per curiam) ("[D]enials of motions to quash subpoenas are ordinarily not appealable."). [redacted] has not shown that its claim of sovereign immunity creates an exception under the circumstances here. In particular, the authority relied upon by [redacted] In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998), does not control an appeal of a non-final order requiring [redacted] to comply with a grand jury subpoena issued by the Executive Branch. Requiring [redacted] to obtain a contempt order before appealing does not subject [redacted] to the burdens of litigation contemplated by the cases allowing immediate appeals of discovery orders and denials of motions to dismiss where an appellant asserted sovereign immunity. See Nyambal v. Int'l Monetary Fund, 772 F.3d 277, 280 (D.C. Cir. 2014); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990). It is

FURTHER ORDERED that the emergency motion for stay be dismissed as moot.

UNDER SEAL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3068 **September Term, 2018**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk

CORPORATE DISCLOSURE STATEMENT

Movant-Appellant [redacted] is wholly-owned by the [redacted] and has no parent company.

Respectfully submitted on October 5, 2018.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), Movant-Appellant [redacted] certifies as follows:

A. Parties and Amici

The Appellant (Movant below) is the [redacted] The Appellee (Respondent below) is Special Counsel Robert S. Mueller's Office. There were no amici before the district court and none are currently anticipated in this Court.

B. Ruling Under Review

The ruling under review is the district court's order, issued by Chief Judge Beryl A. Howell on September 19, 2018 (Dkt. 19), denying [redacted] motion to quash Grand Jury Subpoena No. 7409, and ordering [redacted] to comply with the subpoena by October 1, 2018. A memorandum opinion was issued with the Order (Dkt. 20).

C. Related Cases

[redacted] counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). This case has not previously been before this Court or any other court.

Respectfully submitted on October 5, 2018.

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL**

MEMORANDUM OPINION

A federal grand jury sitting in the District of Columbia has issued a subpoena to [REDACTED] to produce certain records in connection with an ongoing investigation conducted by the United States, through the Special Counsel's Office ("SCO"). Pending before the Court is [REDACTED] Motion to Quash Grand Jury Subpoena ("Mov.'s Mot."), ECF No. 3, on grounds that (1) [REDACTED] is immune, under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, from compliance with the subpoena, and (2) compliance would require [REDACTED] to violate foreign law, and thus be "unreasonable or oppressive" under Federal Rule of Criminal Procedure 17(c)(2). For the reasons explained in further detail below, neither argument persuades. [REDACTED] motion therefore is denied, and [REDACTED] is ordered to complete production of records responsive to the grand jury subpoena by October 1, 2018.

I. BACKGROUND

The SCO is investigating foreign interference in the 2016 presidential election and potential collusion in those efforts by American citizens. The SCO has identified certain [REDACTED] as relevant to the investigation and, on July 11, 2018, the grand jury issued a subpoena to [REDACTED], which is [REDACTED] by Country A, to produce by, July 27,

2018, any such records held [REDACTED], in the United States or abroad. *See* Subpoena, ECF No. 3-1.[1]

On July 26, 2018, [REDACTED], through counsel, expressed to the SCO "concerns that pertain to the potential waiver of its sovereign immunity, as well as with respect to the reach of the subpoena beyond [REDACTED]." Mov.'s Ltr., dated July 26, 2018 ("Mov.'s July 26 Ltr.") at 1, ECF No. 3-2. [REDACTED] counsel asserted that [REDACTED] "[REDACTED] under the FSIA" as "[REDACTED] by [Country A]," and therefore "is immune from the jurisdiction of U.S. courts as well as the reach of U.S. subpoenas." *Id.* at 1–2. "While [REDACTED] wishes to cooperate with the Special Counsel's investigation," [REDACTED] counsel wrote, "it cannot do so at the cost of potentially waiving or undermining its legal position with respect to the applicability of the FSIA and the protections that the FSIA affords [REDACTED]." *Id.* at 2. [REDACTED] counsel also expressed doubt that any exception to the FSIA applied, noting specifically that the FSIA's exception for cases in which "the action is based upon a commercial activity carried on in the United States by [a] foreign state," 28 U.S.C. § 1605(a)(2), likely did not apply because [REDACTED]. *Id.*[2]

In response, the SCO disagreed "with your suggestion that sovereign immunity or any other legal doctrine relieves your client from the obligation to produce the documents responsive

---

[1] [REDACTED].

[2] [REDACTED] counsel questioned whether this Court has personal jurisdiction [REDACTED], *see* Mov.'s July 26 Ltr. at 2, to which the SCO responded that "[t]he subpoena was served on [REDACTED]" which "is not an independent entity." SCO's Ltr., dated July 30, 2018 at 2, ECF No. 3-3. The SCO argued that "[b]ecause the subpoena was served on [REDACTED], it is immaterial whether [REDACTED] has access to or visibility into documents in the possession [REDACTED]," as [REDACTED] itself "unquestionably does have such access and visibility." *Id.* (internal quotation marks omitted). The next letter [REDACTED] counsel sent the SCO made no reference to personal jurisdiction, *see* Mov.'s Ltr., dated Aug. 2, 2018, ECF No. 4-1, and [REDACTED] has not disputed this Court's personal jurisdiction over [REDACTED] in either subsequent correspondence with the SCO or its briefs supporting its motion to quash, thus waiving any objection on that ground. *See Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 344 (D.C. Cir. 2018) ("Unlike subject matter jurisdiction, personal jurisdiction is a personal defense that can be waived or forfeited" by "cho[osing] not to brief or argue the question of personal jurisdiction.").

to the subpoena in [REDACTED] possession, custody, or control—wherever the documents are located." SCO's Ltr., dated July 30, 2018 ("SCO's July 30 Ltr.") at 1, ECF No. 3-3. The SCO asserted that the FSIA neither "applies in criminal cases [n]or divests the district court of power to enforce the subpoena," and that even if the FSIA applies, the FSIA's commercial activity exception would apply due to [REDACTED] activities in the United States." *Id.* at 1–2.

On August 2, 2018, [REDACTED] counsel sought from the SCO "written confirmation . . . that it is permissible . . . to share the grand jury subpoena with other personnel [REDACTED] who would be involved in collecting the documents requested, including personnel at [REDACTED] in [City A] and at [REDACTED] that may have responsive information." Mov.'s Ltr., dated Aug. 2, 2018 ("Mov.'s Aug. 2 Ltr.") at 1, ECF No. 4-1.[3] While reiterating [REDACTED] desire "to cooperate with the grand jury's investigation" and to find "a resolution that would provide the [SCO] with the documents requested," [REDACTED] emphasized its continuing "concerns on how its protections under the [FSIA] [REDACTED] could be impacted—or waived entirely—by producing documents responsive to the grand jury subpoena," as well as concern that compliance would violate "applicable law in [Country A] [REDACTED]." *Id.* at 1–2.[4] As to the latter concern, [REDACTED] proposed that it produce responsive documents "consistent with, and as permitted by, the applicable laws of the jurisdictions in which the information may [be] located," subject to three conditions: the SCO's (1) agreement that [REDACTED] production "is not intended to be either an express or implied waiver of [REDACTED] protections under the FSIA," (2) representation "that [the SCO] has a compelling need for the records requested," and (3) agreement "to a 30-day extension of the

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3 [REDACTED].
4 [REDACTED].

subpoena's return date, up to and including September 3, 2018, to give [REDACTED] adequate time to collect and process [REDACTED]." *Id.* at 2.

The SCO responded the same day, informing [REDACTED] that the SCO "cannot agree to all of the representations made in your letter," but "offer[ing] the following assurances regarding your client's production of materials responsive to the subpoena." SCO's Ltr., dated Aug. 2, 2018 ("SCO's Aug. 2 Ltr.") at 1, ECF No. 4-2. The SCO "agree[d] that in the event the [FSIA] were deemed" to apply, [REDACTED] "production of documents responsive to the instant grand jury subpoena is not intended to constitute either an express or implied waiver of any protections [REDACTED] might be entitled to pursuant to the FSIA." *Id.* The SCO further represented that it had "a compelling need for records that are responsive to the grand jury subpoena," while maintaining nonetheless that the government need not "demonstrate such a compelling need in order to compel compliance with the subpoena." *Id.* Finally, the SCO agreed to extend the subpoena's return date by one week, to August 10, 2018. *Id.*

On August 6, 2018, [REDACTED] counsel communicated to the SCO his belief that [REDACTED]." [REDACTED] and that compliance with the subpoena thus "could constitute [REDACTED]." [REDACTED] and requested that the SCO "share any thoughts your office has on this issue." *Id.* The SCO responded that "[w]e will take a look at this." SCO's Email, dated Aug. 7, 2018, ECF No. 4-3.

[REDACTED] counsel then shared "a little more color on the situation and what I've learned since" sending the prior email. Mov.'s Email, dated Aug. 7, 2018, ECF No. 4-3. Although [REDACTED] "has already begun pulling together the documents responsive to the subpoena," [REDACTED] counsel said, "before producing these to your office," [REDACTED]. [REDACTED]. At the same time, [REDACTED] counsel assured the SCO that [REDACTED].

Acknowledging that "we're not privy to the exact nature of your investigation and the specific need for [REDACTED]." [REDACTED]. *Id.*

On August 14, 2018, the SCO responded that [REDACTED]. In an accompanying email, dated one day later, the SCO stated that "[w]e will extend the return date on the subpoena to [August 16, 2018], but do not anticipate granting any further extensions." SCO's Email, dated Aug. 15, 2018 ("SCO's Aug. 15 Email"), ECF No. 4-4.

In response to the SCO's letter, [REDACTED] counsel asked whether (1) the SCO would [REDACTED] and (2) [REDACTED]. Mov.'s Email, dated Aug. 14, 2018 ("Mov.'s Aug. 14 Email"), ECF No. 4-4. The SCO objected, cautioning [REDACTED].

[REDACTED] counsel subsequently "requested a further extension of the deadline for compliance with the subpoena until early September." Mov.'s Email, dated Aug. 15, 2018, ECF No. 4-4. The SCO denied this request, stating that (1) "[t]he subpoena was served on [REDACTED] over one month ago," (2) "[f]rom the very inception of our discussions about [REDACTED] concerns and how those concerns could be allayed, we have made clear to you that in light of our investigative exigencies we were not able to agree to a lengthy extension of the return date," (3) "[i]n an attempt to allow [REDACTED] to fully consider the issue, we nonetheless granted extensions of that deadline totaling almost 3 weeks," and (4) "we told you when we agreed to your last extension request that it would likely be our final grant of an extension." SCO's Email, dated Aug. 16, 2018, ECF No. 4-4.

On August 16, 2018, [REDACTED] filed a motion to quash the grand jury subpoena. *See* Mov.'s Mot.[5] The SCO's opposition, *see* SCO's Opp'n Mov.'s Mot. ("SCO's Opp'n"), ECF No. 4, was accompanied by a motion for leave to file an *ex parte*, *in camera* supplement, *see* SCO's

[5] [REDACTED] also filed a motion to seal case, *see* Mov.'s Mot. Seal Case, ECF No. 1, which the Court granted, *see* Order Granting Mov.'s Mot. Seal Case, ECF No. 2.

Mot. Leave File *Ex Parte* Suppl. ("SCO's Mot. *Ex Parte* Suppl."), ECF No. 5, which the Court granted, *see* Order Granting SCO's Mot. *Ex Parte* Suppl., ECF No. 6. [REDACTED] filed a reply on August 31, 2018. *See* Mov.'s Reply SCO's Opp'n ("Mov.'s Reply"), ECF No. 8. Following a hearing on September 11, 2108, at which the SCO confirmed that the instant subpoena's issuance to an instrumentality of a foreign government was "approved in the normal matter . . . within the ranks of the Department of Justice," Hr'g Tr. (Sept. 11, 2018) at 39:16–23, ECF No. 16, and the SCO's filing of two *ex parte*, *in camera* submissions, *see* Order Granting SCO's Mot. *Ex Parte* Suppl.; Minute Order, dated Sept. 14, 2018, [REDACTED] motion to quash now is ripe for review.

II. LEGAL STANDARD

"On motion made promptly, the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c)(2). "[O]ne who relies on foreign law assumes the burden of showing that such law prevents compliance with the court's order." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987); *accord SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000). "Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source." FED. R. CRIM. P. 26.1.

III. DISCUSSION

[REDACTED] seeks to quash the grand jury subpoena on grounds that (1) the FSIA grants [REDACTED] immunity from compliance with the subpoena and the jurisdiction of this Court to enforce the subpoena, and (2) compliance would be unreasonable or oppressive, as [REDACTED] would violate foreign law. As explained below, neither argument persuades.

A. The FSIA Does Not Immunize [REDACTED] From Compliance With the Grand Jury Subpoena

[REDACTED] contends that as an agency or instrumentality of Country A, it "is immune from [the] jurisdiction of U.S. courts, as well as the reach of U.S. subpoenas." Mov.'s Mem. Supp. Mot. ("Mov.'s Mem.") at 4, ECF No. 3.[6] Foreign states and their agencies and instrumentalities generally are immune from the jurisdiction of American courts, but the FSIA recognizes an exception to immunity for certain actions relating to foreign states' commercial activities. 28 U.S.C. §§ 1603(a), 1604, 1605(a)(2). Assuming the FSIA's grant of immunity applies outside civil cases, the exceptions do as well. The SCO, through an *ex parte*, *in camera* submission, has demonstrated that the commercial activity exception applies here. The FSIA thus does not immunize [REDACTED] from compliance with the grand jury subpoena.

1. Assuming the FSIA Applies Outside Civil Cases, the FSIA's Exceptions to Immunity Apply Outside Civil Cases As Well

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to certain exceptions. 28 U.S.C. § 1604. The FSIA thus "renders a foreign government 'presumptively immune from the jurisdiction of United States courts unless one of the Act's express exceptions to sovereign immunity applies.'" *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017) (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 n.1 (2016)). [REDACTED] argues that these exceptions, set out in 28 U.S.C. §§ 1605–07, apply only to civil cases and, consequently, that the FSIA grants foreign states unqualified immunity outside the civil context. *See* Mov.'s Reply at 4. The SCO disputes that the FSIA applies outside the civil context, but contends that, if the statute applies here, the exceptions must apply as well. *See* SCO's Opp'n at 6–11. The Court assumes, without deciding, that the FSIA applies to grand jury investigative matters and concludes, contrary to

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[6] [REDACTED].

[REDACTED] position, that the FSIA's exceptions to immunity, which are not by their plain terms limited to civil cases, apply outside the civil context as well.

The FSIA's commercial activity exception, for example, provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). This language is not textually limited to civil matters. To the contrary, Section 1605(a)(2)'s unqualified language provides that the exception applies "in any case." *Id.*; *see SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) ("[T]the word 'any' naturally carries an expansive meaning.' . . . When used (as here) with a singular noun in affirmative contexts, the word 'any' ordinarily refers to a member of a particular group or class without distinction or limitation and in this way implies *every* member of the class or group." (quoting OXFORD ENGLISH DICTIONARY (3d ed. Mar. 2016) (alterations and internal quotation marks omitted))). The FSIA's other exceptions to immunity likewise apply "in any case" or "in any action" without any express limitation to civil matters. *See* 28 U.S.C. § 1605(a), (b) (enumerating six exceptions to sovereign immunity that apply "in any case"); *id.* § 1605(d) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage."); *id.* § 1607 (enumerating counterclaim-based exceptions to immunity that apply "[i]n any action").

Even though the FSIA's commercial activity exception is not facially limited to civil cases, [REDACTED] argues nonetheless that courts cannot exercise jurisdiction over non-plaintiff foreign states in non-civil matters because 28 U.S.C. §1330(a), the FSIA's jurisdictional statute, confers jurisdiction only over "civil action[s] against a foreign state." Mov.'s Reply at 4

(citing 28 U.S.C. § 1330(a)). Section 1330(a) does not facially purport to be the exclusive basis for exercising jurisdiction over a non-plaintiff foreign state, however.[7] Jurisdiction here is proper under 28 U.S.C. § 3231, as the grand jury is investigating "offenses against the laws of the United States." 28 U.S.C. § 3231.

[REDACTED] posits that jurisdiction can lie only under Section 1330(a), not under Section 3231, because "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). "[O]btaining jurisdiction over a foreign state" under the FSIA, *id.*, however, requires merely that one of the FSIA's substantive exceptions to immunity apply, not also, as [REDACTED] argues, that jurisdiction lie under Section 1330(a) itself. Indeed, *Amerada Hess* expressly recognizes that jurisdiction over a foreign state may lie under a statute other than Section 1330(a), so long as one of the FSIA's exceptions to immunity applies. *See id.* at 438–39 ("Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner."). The Supreme Court elsewhere has explained that "subject matter jurisdiction in any [action against a foreign state] depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). *Amerada Hess* thus best is read merely to reject a litigant's ability to make an end-run around the FSIA's substantive immunity provisions by invoking a separate jurisdictional statute, such as the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, as the plaintiff there attempted, *see*

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[7] The general diversity jurisdiction statute confers jurisdiction, subject to a greater-than-$75,000 amount in controversy requirement, over civil actions between "a foreign state . . . as plaintiff and citizens of a State or of different States," 28 U.S.C. §1332(a)(4), but does not confer jurisdiction over actions against foreign states.

488 U.S. at 432. A litigant who demonstrates that one of the FSIA's exceptions to immunity applies thus may rely on a jurisdictional statute other than Section 1330(a), such as Section 3231.

This reading of *Amerada Hess* best accords with the FSIA's language. Section 1604 provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States . . . *except* as provided in sections 1605 to 1607." 28 U.S.C. § 1604 (emphasis added). This mandatory phrasing naturally implies that *if* an exception to immunity in Sections 1605 through 1607 applies, a foreign state *shall not* have immunity. Sections 1605 through 1607 do not distinguish between civil and non-civil matters. *See id.* §§ 1605–07. To conclude that a foreign state is entitled to immunity in a non-civil matter despite that an exception to immunity applies "as provided in sections 1605 to 1607," *id.* § 1604, does not square with Section 1604.

Language in another section of the statute supports this reading of the FSIA. Section 1602 instructs courts to resolve "[c]laims of foreign states to immunity . . . in conformity with the principles *set forth in this chapter*." *Id.* § 1602 (emphasis added). The FSIA's exceptions to immunity, *see id.* §§ 1605–07, and Section 1602 are located in the same chapter, *see id.* ch. 97, while Section 1330(a) is located in a separate chapter, *see id.* ch. 85. To conclude that a foreign state has immunity because an action falls outside Section 1330(a)'s scope, notwithstanding that an exception to immunity otherwise would apply, would be to resolve a claim of immunity "in conformity with" "principles" other than those "set forth in this chapter," *id.* § 1602, in violation of Section 1602.

Nor would allowing litigants to invoke a district court's jurisdiction over a foreign state by relying on statutes other than Section 1330(a) render Section 1330(a) superfluous, as Section 1330(a)'s enactment allowed district courts to hear actions over which jurisdiction otherwise did not exist. Section 1330(a) grants the district courts "original jurisdiction without regard to

amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). At the time the FSIA was enacted, the general federal question jurisdiction statute, 28 U.S.C. § 1331, granted jurisdiction over "civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1976), *amended by* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369.[8] Section 1330(a) thus allowed district courts to hear two categories of actions that Section 1331, as then written, did not. First, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of the amount in controversy. Second, a litigant could bring an action under Section 1330(a), but not under Section 1331, regardless of whether the litigant had satisfied the well-pleaded complaint rule, which requires "that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Verlinden B.V.*, 461 U.S. at 494 (recognizing that the well-pleaded complaint rule does not apply to actions under Section 1330(a)).

Other specialized jurisdictional statutes in existence when the FSIA was enacted, such as the ATS, 28 U.S.C. § 1333 (admiralty, maritime, and prize), 28 U.S.C. § 1335 (interpleader), 28 U.S.C. § 1337 (commerce and antitrust), and 28 U.S.C. § 1338 (intellectual property), likewise did not grant the full scope of jurisdiction Section 1330(a) provides. *Cf. Amerada Hess*, 488 U.S. at 437 (observing that these jurisdictional statutes predated the FSIA). The FSIA's omission of any statute specifically conferring jurisdiction over non-civil matters against foreign states thus

[8] Section 1331(a)'s amount-in-controversy requirement did not apply to actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," 28 U.S.C. § 1331(a) (1976), but this exception rarely if ever would apply in an action against a foreign state.

simply may reflect Congress's judgment that the existing scope of federal jurisdiction over non-civil actions against foreign states required no expansion.

For these reasons, the FSIA's exceptions to immunity are co-extensive with the FSIA's scope of potential immunity, such that if FSIA immunity extends outside the civil context, so too do the exceptions.

2. The Commercial Activities Exception

The FSIA's commercial activities exception sets, out in three separate clauses, the circumstances under which a foreign state is not "immune from the jurisdiction of courts of the United States"—when "the action is based upon" (1) "a commercial activity carried on in the United States by the foreign state," (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "[C]ommercial activity" is "a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). An activity's "commercial character" is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than . . . to its purpose." *Id.* A foreign state's acts are "commercial" within the FSIA's meaning "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Moreover, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Id.* (internal quotation marks omitted).

As to the exception's first clause, "commercial activity carried on in the United States by a foreign state" is "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). "Thus, to invoke the district court's jurisdiction under clause one, the plaintiff's claim must be based upon some commercial activity by the foreign state that had substantial contact with the United States." *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014) (internal quotation marks omitted). As to the third clause, "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity," but such effect need not be "substantial" or "foreseeable." *Weltover, Inc.*, 504 U.S. at 618 (alteration and internal quotation marks omitted); *see also Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) ("A direct effect is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." (alterations and internal quotation marks omitted)).

The Supreme Court has explained that "an action is 'based upon' the particular conduct that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *see also Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) ("[A] court's jurisdiction under the Foreign Sovereign Immunities Act turns on the 'gravamen,' or 'essentials,' of the plaintiff's suit." (quoting *Sachs*, 136 S. Ct. at 395–97)).[9] "[T]he particular conduct that constitutes the 'gravamen,'" *Sachs*, 136 S. Ct. at 396, of an action to compel enforcement of or quash a grand jury subpoena most sensibly is said to be such conduct (1) that is part of "the general subject of the grand jury's investigation" and (2) as to which there exists a "reasonable

[9] In *Nelson v. Saudi Arabia*, the Supreme Court said that "the phrase 'based upon,'" as used in Section 1605(a)(2), "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. 349, 357 (1993). The D.C. Circuit, relying on *Nelson*'s language, explained that "a claim is 'based upon' commercial activity if the activity establishes one of the elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Odhiambo*, 764 F.3d at 36. More recently, however, *Sachs* rejected a "one-element approach" to Section 1605(a)(2), holding that a court instead must "zero[] in on the core of [a plaintiff's] suit." 136 S. Ct. at 396.

possibility that the category of materials the Government seeks will produce information" that is "relevant." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991). This yields the following rule: a grand jury subpoena matter fits within the commercial activity exception if an activity or act of the kind Section 1605(a)(2) describes is part of the general subject of the grand jury's investigation, and there exists a reasonable possibility that the category of materials the subpoena identifies will produce information relevant to such activity or act.[10]

3. Analysis

The SCO argues that the commercial activity exception applies here. SCO's Opp'n at 10. Through an *ex parte*, *in camera* submission, the SCO has elaborated on the relationship between [REDACTED] Section 1605(a)(2) activities or acts and the materials sought to be produced. Having thoroughly reviewed this *ex parte*, *in camera* submission, the Court is satisfied that the SCO has met its burden to show that (1) a Section 1605(a)(2) activity or act is part of the general subject of the grand jury's investigation and (2) a reasonable possibility exists that the instant subpoena will produce information relevant to such activity or act. *Cf. United States v. Nixon*, 418 U.S. 683, 700 (1974) ("Our conclusion is based on the record before us, much of which is under seal.").[11] The contents of the SCO's *ex parte*, *in camera* submission overcome any

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[10] The SCO argues that the relevant standard here is not *R. Enterprises, Inc.*'s standard to determine a grand jury subpoena's relevancy, but rather the standard to determine whether a court has personal jurisdiction to enforce a subpoena compelling production of [REDACTED]. *See* SCO's Opp'n at 10–11. The commercial activity exception applies only where a Section 1605(a)(2) activity or act "constitutes the 'gravamen' of the suit," however. *Sachs*, 136 S. Ct. at 396 (2015). Although establishing personal jurisdiction over an entity is necessary to obtain relief in the sense that a court lacks authority to grant relief against an entity not within the court's personal jurisdiction, *see Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1779 (2017), personal jurisdiction alone cannot ordinarily be said to be the "gravamen" of a matter as *Sachs* uses that term, 136 S. Ct. at 396. A Section 1605(a)(2) activity or act thus may establish a court's personal jurisdiction over an entity without establishing a court's subject-matter jurisdiction under the FSIA.

[11] On September 14, 2018, the Court directed the government to submit an *ex parte*, *in camera* submission "addressing the following question: whether an act or activity of the kind described in 28 U.S.C. § 1605(a)(2) establishes a reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Minute Order, dated Sept. 14, 2018. On September 17, 2018, the SCO filed a submission responsive to the Court's order.

inference one otherwise might draw from [REDACTED]." Mov.'s Mem. at 6 (parentheses omitted).

[REDACTED] argues that the commercial activity exception does not apply because the SCO "argues generically that the exception applies because [REDACTED]" without specifying any "jurisdictional nexus" between a Section 1605(a)(2) activity or act and the subpoenaed materials. Mov.'s Reply at 4. Obviously, [REDACTED] cannot address the contents of the SCO's *ex parte*, *in camera* submission, which persuades the Court that a nexus exists between [REDACTED] Section 1605(a)(2) activities or acts and the materials sought to be produced, and thus that the instant matter is "based upon" such activities or acts. The Court recognizes [REDACTED] difficult position in not being privy to the information reviewed and relied upon in resolving the pending motion. *See In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982) ("[A]ppellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case."). The law is well-settled, however, that courts may "use *in camera, ex parte* proceedings to determine the propriety of a grand jury subpoena" when "necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998); *see also In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006); *In re Grand Jury Investigation*, No. MC 17-2336 (BAH), 2017 WL 4898143, at *7 (D.D.C. Oct. 2, 2017). "The alternatives" to *ex parte*, *in camera* review here would "sacrific[e] the secrecy of the grand jury." *John Doe Corp.*, 675 F.2d at 490; *see also R. Enters.*, 498 U.S. at 299 ("Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand jury proceedings.'" (internal quotation marks omitted)).

For these reasons, the FSIA does not immunize [REDACTED] from complying with the subpoena.

B. Compliance With the Subpoena Would Not Be Unreasonable or Oppressive

[REDACTED] further argues that compliance with the grand jury subpoena would require violating [REDACTED], and thus be unreasonable and oppressive. [REDACTED] fails to show, however, that the subpoena and foreign law impose conflicting obligations and, in any event, the grand jury's strong need for the materials sought and [REDACTED] warrant the subpoena's enforcement notwithstanding any foreign [REDACTED]. Foreign law thus does not excuse [REDACTED] from complying with the subpoena.

1. Compliance With the Instant Subpoena Would Not Violate Foreign Law

[REDACTED] argues that complying with the subpoena would require violating [REDACTED].. For the reasons that follow, [REDACTED] fails to show that the grand jury subpoena and foreign law impose conflicting legal obligations.

[REDACTED].[12] [REDACTED].

[REDACTED].

[REDACTED] cites no contrary authority [REDACTED], relying instead on conclusory declarations by [REDACTED] retained counsel, which themselves cite no legal authority on this question of [REDACTED]. The Court gives these declarations little weight. *See Doak v. Johnson*, 798 F.3d 1096, 1107 (D.C. Cir. 2015) (declining, in the summary judgment context, to credit "bare, conclusory statement[s] . . . in [a] declaration").

[REDACTED]. As an initial matter, the Court teased this argument from the declaration, as [REDACTED] failed to raise this argument in its briefs. This argument is therefore waived.

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12 [REDACTED].

See Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1142 (D.C. Cir. 1999) ("We routinely and for good reason refuse to consider contentions not raised in a party's brief."). The argument fares no better on the merits, [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED]. [REDACTED] identifies no contrary authority other than assertions by [REDACTED] neither of whom cite or analyze Country A legal authorities. The Court simply need not credit such conclusory opinions. *See Doak*, 798 F.3d at 1107. [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

Finally, [REDACTED] argued at the September 11 hearing and via declarations of [REDACTED], though not through its briefs, [REDACTED]. [REDACTED] has waived this argument in two ways. First, [REDACTED] failure to raise this argument in any briefs constitutes waiver. *See Berger*, 170 F.3d at 1142. Second, [REDACTED] are entirely conclusory, offering no substantive analysis and failing even to identify [REDACTED]; *see also Doak*, 798 F.3d at 1107; *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (internal quotation marks omitted)).

For these reasons, compliance with the subpoena at issue would not require [REDACTED] to violate foreign law.

2. Enforcement of the Grand Jury Subpoena is Required Even If Disclosure Violates Foreign Law

Even if complying with the grand jury subpoena would require [REDACTED] to violate foreign law, the government's important interest in obtaining the materials sought [REDACTED] justify compelling compliance with this subpoena nonetheless. "[A]lthough courts recognize comity as an important objective, there is little doubt that a United States Court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary." *In re Sealed Case*, 832 F.2d 1268, 1283 (D.C. Cir. 1987) (alterations and internal quotation marks omitted); *see also In re Sealed Case*, 825 F.2d at 497–98 ("[A] court's ability to order a person to produce documents in contravention of foreign law [] is thought to be acceptable.").[13] In the grand jury context, courts regularly have concluded that government law enforcement interests outweigh [REDACTED].[14]

Section 442(1)(c) of the *Restatement (Third) of the Foreign Relations Law of the United States* directs that "[i]n deciding whether to issue an order directing production of information located abroad," a court "should take into account" (1) "the importance to the investigation . . . of the documents or other information requested," (2) "the degree of specificity of the request," (3) "whether the information originated in the United States," (4) "the availability of alternative

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[13] *Braswell v. United States* held that a "custodian of corporate records" cannot "resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment," 487 U.S. 99, 100 (1988), abrogating that aspect of *In re Sealed Case* holding otherwise, *see* 832 F.2d at 1274–82; *see also In re Sealed Case (Gov't Records)*, 950 F.2d 736, 739 n.5 (D.C. Cir. 1991) ("*Braswell* effectively rejects the portion of this court's opinion in *In re Sealed Case* . . . that recognizes a corporate custodian's right to resist a grand jury subpoena on the ground that the act of production itself might incriminate him."). *Braswell* did not purport to abrogate the aspect of *In re Sealed Case* recognizing district courts' power to enforce grand jury subpoenas compelling disclosure prohibited by foreign law, however, and *In re Sealed Case* remains good law in this respect.

[14] [REDACTED].

means of securing the information," and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987). The Supreme Court, citing a draft version of Section 442(1)(c), identified these factors as "relevant to any comity analysis." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).[15]

The subpoena at issue cannot be faulted for insufficient specificity, and the SCO does not argue that the information sought originated in the United States. The SCO's *ex parte*, *in camera* submission, meanwhile, persuades the Court that the materials sought are important to the grand jury's investigation and that failure to secure the materials would undermine important interests of the United States. [REDACTED]. For these reasons, under the circumstances presented, the Court concludes that the subpoena should be enforced.

Section 442(2) of the *Restatement (Third)* further provides that "[i]f disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national," an American court "*may* require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available," and "*should not ordinarily* impose sanctions of contempt . . . on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a)." *Restatement (Third)* § 442(2)(a)–(b) (emphases

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15 [REDACTED].

added). As the emphasized terms indicate, however, these provisions are not absolute, and their application may be inappropriate under particular circumstances. [REDACTED].[16] [REDACTED].

In re Sealed Case, which voiced "considerable discomfort" with the idea "that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question," 825 F.2d at 498, involved circumstances materially different than those presented here. The consideration that was "[m]ost important to [the *Sealed Case* panel's] decision [wa]s the fact that" contempt "sanctions represent[ed] an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory." *Id.* That consideration is absent here, as [REDACTED] only substantive arguments assert that compliance with the subpoena would require [REDACTED]. *See* Mov.'s Mem. at 7–8. Moreover, in *Sealed Case* "the government concede[d] that it would be impossible for the bank to comply with the contempt order without violating the laws of Country Y on Country Y's soil," 825 F.2d at 498. Here, in contrast, the SCO asserts that compliance with the subpoena would not require [REDACTED] to violate foreign law, and the record before the Court supports this conclusion, for the reasons discussed above. [REDACTED]. As already discussed, [REDACTED]. The *Sealed Case* panel "emphasize[d] [] the limited nature of our holding on this issue," and explained that "[i]f any of the facts we rest on here were different, our holding could well be different." *Id.* Given the significant factual dissimilarity between that and the instant matter, enforcing the instant grand jury subpoena does not cause the "considerable discomfort," *id.* at 498, the *Sealed Case* panel expressed.

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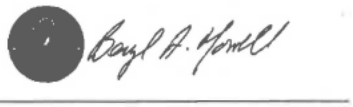
[16] [REDACTED]

IV. CONCLUSION

For the foregoing reasons, [REDACTED] Motion to Quash Grand Jury Subpoena is denied. [REDACTED] shall complete production of the subpoenaed records by October 1, 2018.

An appropriate Order accompanies this Memorandum Opinion.

Date: September 19, 2018



BERYL A. HOWELL
Chief Judge

ECF No. 38

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN RE: Grand Jury Subpoena 7049	)	GJ 18-41
Interested Parties, [redacted]	)	October 5, 2018 2:28 p.m.
UNITED STATES OF AMERICA.	)	Washington, D.C.

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***** *SEALED* *****
TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

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Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

* * * * * SEALED * * * * *

PROCEEDINGS

THE DEPUTY: Matter before the Court, Grand Jury Action No. 18-41, in regards to grand jury subpoena 7049; interested parties, [redacted] and United States of America.

Counsel, please come forward and identify yourselves for the record.

MS. AHMAD: Good afternoon, Your Honor. Zainab Ahmad and Scott Meisler for the United States. We are joined at counsel table by Michael Dreeben and Adam Jed.

THE COURT: Yes. Good afternoon.

MR. KANG: Good afternoon, Your Honor. Edward Kang from Alston & Bird. With me, at counsel's table, is Brian Boone, representing [redacted]

THE COURT: Yes. Good. Thank you.

Thank you for having an extra copy of your brief since the clerk's office didn't get it to me.

MR. KANG: Our apologies, Your Honor.

THE COURT: Yes. Well, in the future, if you email it to Howell chambers it's probably easier for me to get it because I thought, perhaps, you have spent all of your time filing your papers in the Circuit and forgotten about the District Court until I saw the Government's reply. Reply to what?

So, in the end, I was able very quickly to read everybody's briefs. In the future, we're going to -- we'll make an effort to make sure I get the papers I need in preparation for the hearing.

MR. KANG: Sure.

THE COURT: So I guess the first big question we need to address that has been raised by [redacted] here is whether -- given the fact that the mandate hasn't come down from the Circuit and they haven't resolved your motion for a re-hearing en banc, whether I have jurisdiction to consider the Government's motion to compel which was filed quite promptly. You know, the case law is clear as it could be on this particular issue, to my mind. But I will hear the Government first on that threshold issue.

Be thinking about the following:

Even if I don't have jurisdiction, at least until the mandate comes down from the Circuit, would that preclude me from going through -- going forward with this proceeding but holding off issuing a contempt order until after the mandate comes down having done all of the preliminaries in advance? And that might resolve the whole thing, or not.

So I will hear from you, Ms. Ahmad.

MS. AHMAD: Thank you, Your Honor.

We believe that the Court does retain jurisdiction to enforce its as yet unstayed order, the September 19th

order, that [redacted] comply with the request in the grand jury subpoena.

And we actually think there is D.C. Circuit law that is directly on point to the question; and that would be the case of *Deering Milliken*. It is cited in our reply brief, 647 F.2d 1124. And, at 1129, the Court says: Nonissuance of the mandate by the appellate court has no impact on the trial court's powers to enforce its unstayed judgment, since the latter court has retained that power throughout the pendency of the appeal.

So while the default rule announced that --

I'm sorry. Question?

THE COURT: No.

MS. AHMAD: While the default rule announced by the Supreme Court in *Griggs*, that a properly pursued appeal divest the District Court of jurisdiction over the aspects of the case that are on appeal is, of course, undisputed; there are also exceptions to it that have been noted by all of the circuits time and time again, and that are applicable here.

The most relevant one is that a court always retains jurisdiction to enforce any unstayed order; and there has been no stay issued in this case. Even if we consider [redacted] petition for a stay that was dismissed by the court is moot to be live, a motion for a stay is not

the same thing as a stay. And a motion for a stay has never been held to divest the District Court of jurisdiction to enforce the judgment that is the subject of that motion.

So because of that well-established case law, we think the Court always had jurisdiction, even after [redacted] had first filed its notice of appeal, even while the Circuit was considering the Government's motion to dismiss and [redacted] motion for a stay to enforce the order at issue. And we don't think the decision and/or the nonissuance of a mandate or the fact that [redacted] is petitioning for re-hearing change any of that.

THE COURT: Okay. But does the *Deering Milliken* case actually involve a subpoena? It doesn't, does it? No.

MS. AHMAD: No. I don't think --

THE COURT: It has to do with -- it doesn't involve a subpoena.

And the Court's ability to enforce -- in this case, it's difficult to say that there is no overlap between the issue that's on appeal, which is challenging the validity of the grand jury subpoena and this action to compel enforcement of the court order when the issue on appeal has to do with the validity of that subpoena altogether with respect to this particular party.

So, in some ways, isn't that somewhat different from the *Milliken* case?

MS. AHMAD: I don't think that the distinction, Your Honor, alludes to is actually --

THE COURT: Let me just look at the *Milliken* case for a second, actually.

MS. AHMAD: Okay.

THE COURT: Well, that is very strong language.

There is language, in other courts as well, that absent a stay of an order directing compliance, the Court can proceed with a contempt order. But I am a little concerned about the language from the Supreme Court's decision in *Griggs* where it does, you know, say that the District Court is divested of control over those aspects of the case involved in the appeal.

And in this case, the court of the issue in front of the Circuit still -- until they resolve -- or issue the mandate, is the validity of this grand jury subpoena directed to this party.

So, I mean, do you disagree with that?

MS. AHMAD: I do think that it is frequently the case that that the order appealed from, which is -- which the Court retains the ability to enforce unless it's stayed, as the case law makes clear, is also the gravamen of the appeal. So I think that there are probably many scenarios where the distinction that Your Honor is drawing collapses similarly, as it does here; which is to say that an

appellant appeals from an order that it says was subjected to all sorts of ultravirus harms. And while that appeal is pending, unless anyone moves for a stay -- and that's why the ability to move for a stay exists and is so firmly engrained in our law -- the Court can enforce it. The remedy to that -- the thing that makes this all workable -- is the availability of a stay.

And so I think that the exception to *Griggs* that has been noted for a court retaining the ability to enforce any unstayed judgment accounts -- combined with the availability of a stay accounts for the tension that Your Honor is pointing out.

THE COURT: So that, in some ways, the issue before the Circuit is whether [redacted] is immune from -- immune from having to comply with the grand jury subpoena. And the issue on your motion to compel is whether the Court should enforce its order compelling -- directing [redacted] to comply with the grand jury subpoena; both of which involve the grand jury subpoena, but in somewhat different ways.

MS. AHMAD: Yes. That is correct.

THE COURT: So they're, in those respects, somewhat separate issues.

All right. Well, I will hear -- before you leave, let me just ask you a couple of questions about the sanction here.

You have asked for $10,000 a day, is that right --

MS. AHMAD: Yes, Your Honor.

THE COURT: -- for a sanction?

Where did you get that $10,000 a day?

MS. AHMAD: Well, it was the --

THE COURT: It just seems low to me [redacted]

MS. AHMAD: Fair enough.

THE COURT: When the statute, you know, itself sort of imposes $10,000 a day on an individual who happens to aid somebody escaping, that's where $10,000 leaps off the page from 1826. But that's -- [redacted] so it seems like that's a fairly low amount.

MS. AHMAD: I think that is fair, Your Honor.

To be candid, that is the number that we had discussed with [redacted] when we were trying to convince them to stipulate to a contempt order so that their appeal would properly lie. So we didn't want to change it and seem like we were penalizing them for not having agreed to that, so we stuck with that number. But it is certainly true; and we do think a higher number would be appropriate. But just to give Your Honor the full understanding of the procedural history, when we were engaging with [redacted] in negotiations about their stipulated contempt order, that's the number that we floated.

THE COURT: What do you think about just avoiding

the whole issue -- jurisdictional issue that's been raised if I adopt a procedure here where I make a plan I'm going to hold [redacted] in contempt the day the mandate issues from the D.C. Circuit for an amount certain per day. And, then, to the extent that they've got an issue with my jurisdiction to issue a contempt citation before -- while the mandate hasn't issued, we have sort of resolved that.

Because even if I oppose -- I mean, I am not sure -- because, quite frankly, if I hold them in contempt today, impose a fine of $50,000 a day -- which I think is more appropriate for [redacted] to have any coercive effect whatsoever -- then they're going to ask for a stay of that. So until they resolve their appellate -- fully exhaust all of their appellate rights; so we would sort of be in the same spot.

MS. AHMAD: I think we would be in a better spot, Your Honor, because then [redacted] would have an order that was actually appealable. And so the proceedings at the Circuit can get started in earnest.

THE COURT: But they really don't want that.

MS. AHMAD: I understand that. But --

THE COURT: So shouldn't I give the Circuit -- the Circuit can sort of -- the Circuit, I thought, spoke pretty plainly that they've got to be held in contempt before the Circuit will consider it. But they don't want to do that,

for reasons having to do with sort of the -- I guess the comity considerations and how unseemly it seems to hold [redacted] in contempt. Perhaps they'll have other reasons; but that's what I quickly gleaned from their papers.

MS. AHMAD: I recognize that.

THE COURT: So you think it should just be in the same -- so you think you'll might have to wait the full seven days for the mandate? My court -- my contempt order will then be in an effect and, then, they'll get more time for an appeal further delaying the response; is that your concern?

MS. AHMAD: That's exactly our concern.

THE COURT: Okay.

MS. AHMAD: We issued the subpoena on July 11th. [redacted] raised an issue with us through the Foreign Sovereign Immunities Act -- we sent to them a waiver --

THE COURT: I know.

MS. AHMAD: -- so the clock is really running out for us. And we're here urging this now, as a matter of investigative exigency; not standing on any particular principle.

And if we had the time to be prudent or to be cautious, I should say, we would. But I think, in our view, it's clear that the Court retains the authority to issue

this order. And, in light of the investigative exigency, we would ask the Court to do it sooner rather than later.

THE COURT: So that they can properly --

MS. AHMAD: Yes.

THE COURT: -- get reviewed by the D.C. Circuit --

MS. AHMAD: Exactly.

THE COURT: -- under the Circuit's fairly blunt and direct statement of what was necessary for them to have taken an appeal.

MS. AHMAD: That is correct. And that statement remains controlling law, despite the pendency of a petition for re-hearing under D.C. Circuit law.

THE COURT: Okay. All right.

MS. AHMAD: Thank you.

THE COURT: Mr. Kang.

MR. KANG: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. KANG: Edward Kang on behalf of [redacted]

I think Your Honor is obviously attune to the issues in this case. I am not going to --

THE COURT: Not as well as I would like to be. I am trying to catch up with you all.

MR. KANG: Sure. I think the concerns that you pointed out with respect to *Griggs* is exactly what -- is exactly part of our argument here.

Obviously, we have a mandate that's not been issued yet. Our view is that until such time -- and, particularly, given that we've now filed a petition for re-hearing with the D.C. Circuit this morning, we've taken the D.C. Circuit upon, essentially, their invitation and order.

Our position is, as a result of that, the jurisdiction of this case properly lies with the D.C. Circuit as well as, as Your Honor mentioned, all of the core considerations which particularly overlaid with our sovereign immunity issues here -- and I will get to that in a minute.

THE COURT: You don't have to rehash sovereign immunity issues.

MR. KANG: Sure.

THE COURT: I have really -- I have dealt with those. I have resolved those in a way that I thought was appropriate. And I understand those arguments.

MR. KANG: Right.

THE COURT: You are going to make them again in front of the Circuit, and perhaps they'll hear you again.

MR. KANG: Sure.

THE COURT: So you don't have to make them here.

Why don't -- and I think I want to -- you know, I am going to take a few minutes, after this hearing, to

resolve, in my own mind, from reading these cases more closely and reading your brief more closely than I've had an opportunity to do in the ten minute that I had --

MR. KANG: Sure. Absolutely.

THE COURT: But let me just say that my plan -- and so you should address the substance of what the contempt citation will be. My plan is, at a minimum, if I do not -- because I think there is no dispute that you haven't complied with the order to produce the documents by October 1, clearly.

So, at a minimum, I'm going to issue an order of contempt that that will be effective as of the date the D.C. Circuit mandate is returned to this court. That -- I think Ms. Ahmad is correct, that's probably not enough to hold you in contempt to give you a clear right to appeal. And in that order holding [redacted] in contempt, I plan to impose a fine that's $50,000 a day, unless you point me to something that tells me I should do something different from that. So, at a minimum, I would do that. That would address your jurisdictional issue on whether -- until the mandate comes down, I have jurisdiction to even consider this.

But, as I said, once I consider all of this, I might issue the contempt order today; and you'd be able to appeal that immediately.

So, I mean, why don't you explain -- other than

what I have said before, why you just wouldn't accept the stipulation of -- the stipulation offered by Special Counsel's Office, agree to a contempt -- the contempt citation so that you could automatically go up on appeal.

MR. KANG: Sure. I think that [redacted] position -- this is why we believe, Your Honor, all of the cases that the Special Counsel cites, the diversified growth -- I haven't had a chance to read *Deering* yet --

THE COURT: You and I are in the same position. I was reading part of it.

MR. KANG: -- but I assume that didn't involve a foreign sovereign.

THE COURT: I know, it didn't. And it didn't involve a subpoena I don't think; but you can correct us.

MR. KANG: Right. We believe that any case that doesn't involve a foreign sovereign is materially different because a foreign sovereign -- the issues that are at stake when there is a claim for immunity -- that's a claim for complete immunity, a party is essentially saying the Court doesn't have jurisdiction over them for that particular action.

Any action that's taken upon that entity -- for example, if we stipulated to contempt, would essentially be undermining the position of that foreign -- [redacted] sovereign immunity by stipulating and agreeing to the

subject matter jurisdiction of the court to issue a contempt order. That's why --

THE COURT: Okay. Well, that explains it.

MR. KANG: We appreciate the Special Counsel's willingness to try to work through this; but, as a theoretical matter, that was just not acceptable to our client.

And that, I think, is the reason why -- with all due respect, we think the proposal that Your Honor has laid out about issuing a contempt order today would also, in our view, not be consistent with law, given that it's a foreign sovereign.

If Your Honor were to hold the contempt order in abeyance entirely until the minute the mandate issues and then the contempt order with a fine -- and I will address the 50,000 in a minute -- I think that might be something we'd be willing to entertain.

But, again, we would disagree --

THE COURT: Well, that's what I'm going to do at a minimum. But because -- I will say that, in looking at this -- I mean, there are other cases -- not necessarily from this Circuit; but, for example, an Eleventh Circuit case from 2016, fair recently, *Sergeeva v Tripleton*, which didn't involve a foreign sovereign to be sure. But, there, the Eleventh Circuit called the ultimate contemnors'

argument frivolous -- a frivolous jurisdictional argument when that party argued that a contempt order was unlawful because there had been an appeal pending, divest the District Court jurisdiction to consider the sanctions motion. They go on to say that: Absent entry of a stay on appeal, which the witness failed to obtain here, the District Court retained jurisdiction to enforce its orders, and then called the witness' argument frivolous. That's a 2016 case. There is a Fifth Circuit case; essentially, the same thing from 2015.

So there is a body of law -- none involving foreign sovereigns to be sure -- that, basically, say that -- you know, exactly the principle articulated by Ms. Ahmad that: The Court, you know, has the authority to enforce its orders, including in the subpoena context.

And I do want to look at this a little more thoroughly before I decide whether or not the contempt order will be issued as of today -- or issued but, essentially, stayed or held in abeyance until the mandate comes down.

MR. KANG: Sure.

THE COURT: So why don't we move on and address the $50,000, the amount of the fine.

MR. KANG: Sure. And, actually, all I was going to add to that is: I think we might need a little bit more time to look at that issue. I don't think we've fully

looked into the issue of what is an appropriate sanction and what other cases have done. We've always been in discussion about the $10,000 a day.

So, with the Court's permission, if we can have just some --

THE COURT: Well, let me just say that -- you know, the numbers range [redacted] So I think -- with inflation and all considerations and [redacted] -- a doubling of that seemed reasonable, and not out of line.

MR. KANG: Right.

THE COURT: So I have actually looked at a whole swath of cases. [redacted]

MR. KANG: [redacted] So, I guess, without having looked at it as deep as --

THE COURT: That was one where it was a stipulated -- stipulated contempt.

MR. KANG: Correct. Correct.

THE COURT: [redacted] They might have more money --

MR. KANG: [redacted]

THE COURT: -- [redacted]

MR. KANG: Right. Understood.

THE COURT: Right.

MR. KANG: Understood.

THE COURT: I am not going to give you more time to research that. There are lots of -- in other situations, [redacted]

MR. KANG: Understood. If we can just preserve our objection on that, that will be helpful. We think 10,000 is reasonable.

THE COURT: Yes.

MR. KANG: I did -- if I could, Your Honor -- just to turn back on the issue of the case law that you talked about -- and I also want to address this issue about the stay because Ms. Ahmad addressed it, about, well, a stay would cure for [redacted] concerns.

You know, in terms of the case that you cited, the Eleventh Circuit case about the contemnors being frivolous -- again, I do believe the distinction that this is a foreign sovereign is very different. The *Princz* case, in the D.C. Circuit, in that case involving a foreign sovereign, appealing right away -- immediately appealing was not viewed as a frivolous action. I think the --

THE COURT: The Circuit has already not taken that approach in this case.

MR. KANG: Well, I think that's one of the grounds for our petition for a panel re-hearing.

THE COURT: I have read that brief, and I know. But, I mean, you made that point in your original briefing, too, when they had a lot of time to consider it.

MR. KANG: We think that, respectfully, the D.C. Circuit reasoning -- their half page per curiam order -- probably did not take a look at the issues particularly in the *Princz* case; and, then, also looking at the inconsistency with foreign sovereign claims of immunity in other contexts. We just don't see that there is a material difference in why -- in the context of sitting for a deposition, why that would be any more or less appealable than in the context of a grand jury subpoena.

THE COURT: Good luck to you in front of the Circuit. But that's not I don't think -- that's not an issue I have to consider.

MR. KANG: Sure. Yes. Yes. But we also think -- we don't think that the position here -- the issues that are frivolous -- we don't think that a stay, as a result, would at the end of the day -- even if, for example, Your Honor were to issue a contempt order and then stay it until a mandate issued, we don't think that that sufficiently addresses the concerns that we have for our client's foreign sovereign immunity.

THE COURT: Well, I understand that you couldn't agree out of concern about what impact that would have on your continued assertion of immunity to enter into a stipulation agreeing to be held in contempt; I get that.

But if I order you held in contempt today and impose a fine of $50,000 a day until you comply with my court order ordering compliance with the subpoena, stay that until Tuesday at 5, so you can make whatever motion of a stay of that that you want; then, frankly, your problem about being a foreign sovereign, you know, exceeding to contempt jurisdiction is gone because I have imposed it on you. You are not agreeing to it.

It gives you time to make a motion for a stay of the penalties pending your appeal, which I know your way to -- the path to the D.C. Circuit is well worn by now, by you all, on behalf o[redacted] And the Circuit can then have a contempt order that they can, therefore, turn to the merits of your appeal.

MR. KANG: Right.

THE COURT: Doesn't that -- I mean, in some ways that sounds like a better plan than my alternative.

MR. KANG: That would address the concern if our only concern was about waiver. But the concern that we have here about the Court's approach is, respectfully, we don't think that the Court has jurisdiction.

And I know -- I don't want to rehash and recycle all of the arguments under the FSIA and 1330. But we think that there would be no legal basis for Your Honor to impose an order until such time -- at the very least, until the mandate comes back. Even then, you know, we'd have some issues of foreign sovereign immunity. But definitely, at this juncture, we think that this Court -- again, respectfully, doesn't have jurisdiction over any of these issues.

THE COURT: Okay.

Okay. Ms. Ahmad, anything further?

MS. AHMAD: Just two quick things, Your Honor.

One. We are aware of at least one case where the Eighth Circuit applied the rule -- the exception to the *Griggs* rule for a court retaining the authority to enforce its own order in a grand jury subpoena context. The citation for that is 85 F.3d 372 at 375.

THE COURT: That was the In Re: Grand jury subpoena from Starr's independent counsel?

MS. AHMAD: Yes, Your Honor.

THE COURT: Yes. I have seen that also. So, yes, I am looking at that as well. There are a few other cases that I really want to look at before I totally resolve this. Yes.

MS. AHMAD: In the event that Your Honor retains

some doubt as to whether you have the authority to issue a contempt order today, I would like to propose a potential compromise. We would be happy to put this in a proposed order, if it sounds like something Your Honor would consider; which is that: Your Honor issue an order imposing contempt as of today, a final appealable order; but note, in that order, that in the event the Circuit decides that you did not have jurisdiction to issue the order at the time you did, i.e., today, that you deem the order to have been issued whenever the date is that the mandate returns to the District Court.

THE COURT: Very clever.

MS. AHMAD: I wish I could claim credit for it; but my neighbor at counsel table does deserve that.

THE COURT: Thank you, Mr. Dreeben.

MS. AHMAD: Just to point out, Your Honor, the re-hearing petition that [redacted] filed with the Circuit is a petition for a re-hearing en banc --

THE COURT: I know.

MS. AHMAD: -- so it has to go to every judge on the Circuit. So I am not sure that we're really in a position where we even think the mandate is coming back in seven days. So the delay potential is real here.

THE COURT: Although, you know, the original panel's order was quite short.

MS. AHMAD: Yes.

THE COURT: It wouldn't take them at all long to read that. Why don't you send that to me.

MS. AHMAD: Okay.

THE COURT: That sounds like an interesting proposal.

MS. AHMAD: Okay. Thank you, Judge.

THE COURT: So I am planning on issuing an order today. So if you can get that to me as soon as possible via email.

If you want an opportunity to say anything else to me about the amount of the fine, you know, please -- you are welcome to do so.

MR. KANG: Sure.

Again, not having studied the issue as closely as the Court, I would ask -- although [redacted] it is still a foreign sovereign. So to the extent that Your Honor is comparing it with [redacted] -- obviously, we have foreign dignity concerns here; comity. On that ground, we would ask for a lower fine, and consideration from the Court on that issue.

THE COURT: Okay. All right. Thank you. I will take that into account.

MR. KANG: Could I just confer with Ms. Ahmad for one minute?

THE COURT: Absolutely.

(Whereupon, counsel confer.)

MR. KANG: Your Honor, we have spoken with the Government before the hearing today; and we've discussed the possibility that the Court may issue a contempt order.

So we've agreed that -- if this is amenable to Your Honor, if the Court is inclined to issue a contempt order against [redacted] today, the parties would agree to a stay of the contempt order in exchange for [redacted] and parties agreeing to an expedited appeal briefing schedule with the D.C. Circuit where we would file a notice of appeal perhaps today, or as soon as possible. And then two weeks thereafter, [redacted] would file its brief and, then, two weeks after that Special Counsel's office would file and, then, we would have one week to reply. So we would jointly request the Court to consider that as a possible alternative here.

THE COURT: Okay. So in the proposed order, which you will probably send to me in an hour or so -- why don't you just put all of that in writing --

MS. AHMAD: We will, Your Honor.

THE COURT: -- so that we have a very clear record on the docket of it, in the event the Circuit overlooks the District Court docket, which I am not sure that they do.

What time did you actually file your brief with

the clerk's office?

MR. KANG: We filed it about ten minutes before noon, 11:50.

THE COURT: Okay. You handed it to somebody in the clerk's office?

MR. KANG: Yes, Your Honor. I personally didn't, but we had somebody --

THE COURT: I wouldn't expect that.

All right. Is there anything further today?

MS. ZAINAB: No, Your Honor.

THE COURT: Thank you.

THE DEPUTY: All rise. This honorable court is adjourned.

(Whereupon, the proceeding concludes, 3:09 p.m.)

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 11th day of October, 2018.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter