IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1287

In re: GRAND JURY SUBPOENA

UNITED STATES OF AMERICA,

Appellee,

v.

CHELSEA MANNING,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
at Alexandria

The Honorable Claude M. Hilton, District Judge

RESPONSE BRIEF OF THE UNITED STATES

G. Zachary Terwilliger
United States Attorney

Gordon D. Kromberg
Thomas W. Traxler
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3700

Attorneys for the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Chelsea Manning was lawfully subpoenaed by a grand jury to testify in connection with an ongoing criminal investigation. The district court ordered her to testify and, along with the Department of the Army, granted her full use and derivative use immunity. Without the risk that her testimony could be used against her, Manning needed only to appear before the grand jury and testify truthfully. "The duty to testify [before the grand jury] has long been recognized as a basic obligation that every citizen owes [her] Government." *United States v. Calandra*, 414 U.S. 338, 345 (1974). Manning is no exception.

Manning instead chose a path of obstruction and delay. After serving the subpoena, the Government agreed to postpone her appearance by a month at her request. Even with this extra time, however, Manning waited until only a few days before her scheduled appearance to file an extensive motion to quash the subpoena, raising no fewer than seven constitutional, common-law, and statutory issues. Despite the last-minute nature of the filing, the district court promptly heard Manning on her motion. At the conclusion of the hearing, the district court rejected all of her arguments for why she should not have to testify.

[redacted]

[redacted] The court then opened the courtroom to hear argument on the appropriate sanction, reiterate its finding that she was in contempt, and order that she be incarcerated until she purged herself of the contempt or for the life of the grand jury.

As of this filing, Manning continues to refuse to comply with the court's order to testify in front of the grand jury. The Government hopes that she will change her mind. She holds the keys to the jailhouse door. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911). She "can end the sentence and discharge

[herself] at any moment by doing what [s]he ha[s] previously refused to do," *id.*, that is, by complying with the court order to testify in front of the grand jury.

In the meantime, this Court should reject Manning's arguments on appeal and affirm the order of the district court. As explained below, Manning's allegations about unlawful electronic surveillance and grand-jury abuse are built on mere suspicion and conjecture. A presumption of regularity attaches to grand-jury proceedings. In the absence of any indication of electronic surveillance or other wrongdoing, the district court properly declined to put the Government to the task of canvassing federal agencies to ensure that no unlawful electronic surveillance occurred or of making a preliminary showing about the relevance of Manning's testimony.

Moreover, the district court handled the proceedings in accordance with settled law. It allowed Manning an opportunity to be heard on all issues. Consistent with the governing rules and precedent, the district court closed the courtroom during hearings that addressed matters occurring before the grand jury and then opened the courtroom for the final stage of her contempt proceeding. By doing so, the district court properly afforded Manning due process while protecting grand-jury secrecy.

ISSUES PRESENTED

1. Whether the district court correctly denied Manning's motion to require the Government to canvas all relevant federal agencies and affirm or deny that she was subjected to electronic surveillance.

2. Whether the district court correctly held that Manning failed to rebut the presumption of regularity that attaches to grand-jury proceedings.

3. Whether the district court correctly closed portions of the proceedings that addressed matters occurring before the grand jury.

STATEMENT OF THE CASE

A. Manning's Court-Martial Convictions

Manning is a former intelligence analyst in the United States Army who was dishonorably discharged for leaking classified information. *See* Appx4-5, 73.[1] In October 2009, she deployed to Forward Operating Base Hammer in Iraq. *See* Appx134. During her deployment, she downloaded hundreds of thousands of classified documents and transmitted them to one or more agents of WikiLeaks for disclosure on its website. *See* Appx35, 255-88. The classified documents included, among other things, significant activity reports related to the ongoing wars in Iraq and Afghanistan, *see* Appx267-70, Guantanamo Bay detainee assessment briefs, *see* Appx280-82, and United States Department of State cables, *see* Appx284-86.

[1] "Appx__" citations are to the addendum and sealed addendum that Manning filed with her merits brief.

Manning's disclosure of these documents to WikiLeaks remains one of the largest leaks of classified information in American history.

In May 2010, Manning was arrested for these disclosures. *See* Appx35. She was prosecuted in a military court-martial. *See* Appx4. During her court-martial proceedings, she pleaded guilty to lesser-included offenses of some but not all of the charges against her. *See* Appx72, 120, 387. Manning did not have a plea agreement with the prosecution. *See* Appx250-51.

When Manning entered her pleas to the lesser-included offenses, the military judge conducted a "providence inquiry" pursuant to the Rules for Courts-Martial. *See* Appx72-253. A providence inquiry is simply "a more elaborate relative of the Rule 11 proceeding under the Federal Rules of Criminal Procedure" that serves to "ensure that a plea is voluntary and that there is a factual basis for the plea." *Partington v. Houck*, 723 F.3d 280, 282-83 (D.C. Cir. 2013). Similar to Rule 11, the Rules for Courts-Marital provide that "[t]he military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." Appx69.

At her providence inquiry, Manning first read a voluntary statement to provide a factual basis for her pleas. *See* Appx73-119. Then, the military judge questioned her specifically about the factual basis of certain elements to which she was pleading guilty. *See* Appx120-253. After Manning entered her pleas, the military prosecutors

elected to go forward with the more serious offenses with which she was charged. *See* Appx253.

Manning was ultimately convicted of Espionage Act and other offenses related to her unauthorized disclosures. *See* Appx35. In 2013, she was sentenced to 35 years of imprisonment. *See* Appx4. In January 2017, the President commuted Manning's sentence so that she would be released in May 2017, after serving approximately seven years in prison. *See* Appx5, 35.

B. Grand-Jury Subpoena

In January 2019, the Government served Manning, through her counsel, with a subpoena to testify before a grand jury empaneled in the Eastern District of Virginia. *See* Appellant's Mem. of Opening Br. 5 (Mar. 29, 2019) ("Opening Br."). The subpoena originally required Manning to appear before the grand jury on February 5, 2019. *See id.* at 1. At her counsel's request, the government agreed to postpone the appearance date by one month. *See id.* at 5.

Meanwhile, the United States District Court for the Eastern District of Virginia entered a compulsion order requiring Manning to testify before the grand jury. *See* Appx60-61. The order, issued pursuant to 18 U.S.C. § 6003, provided that Manning "shall testify fully, completely and truthfully" in front of the grand jury. Appx60. The district court also expressly conferred use and derivative use immunity on Manning. *See* Appx61.

After Manning raised concerns that the district court's immunity order might not protect her from future court-martial proceedings, *see* Appx10-13, a general court-martial convening authority in the Department of Army issued its own order, *see* Appx63. The Army's order also provided Manning with use and derivative use immunity, and explicitly extended the immunity to court-martial proceedings. *See id.*

C. Manning's Motion to Quash

Manning was scheduled to appear before the grand jury on Tuesday, March 5, 2019. The Friday before her scheduled appearance—on March 1—she filed a 30-page omnibus motion to quash the subpoena. *See* Appx4-33. In the motion, she raised at least seven distinct issues, including a number of constitutional claims. *See id.* As particularly relevant here, Manning alleged that the subpoena was issued for improper purposes—to harass and retaliate against her, set up a perjury trap for her, or obtain otherwise "inaccessible" information. *See* Appx20-23.

Manning also moved under 18 U.S.C. § 3504 for the district court to require the Government to affirm or deny whether she had been subjected to any unlawful electronic surveillance. *See* Appx23-27. She claimed that she "believed" or "had reason to believe" that she had been subjected to electronic surveillance. *See* Appx8, 23, 388.

[redacted]

For relief, she asked the district court to compel

the Government to canvas all federal agencies that might have engaged in such surveillance and affirm or deny whether it existed. *See* Appx25, 32.

With only days before Manning's scheduled appearance, the Government prepared a response over the weekend and filed it on Monday, March 4. *See* Appx34-58. In its response, the Government noted that Manning's arguments for quashing the subpoena were premature, as she had not yet appeared before the grand jury and therefore could only speculate as to whether the questioning would violate her rights or be based on electronic surveillance. *See* Appx34. The Government also explained in detail why each of Manning's arguments failed on its merits. *See* Appx37-56.

The next day, on March 5, the district court held a hearing on the motion to quash. *See* Appx289-320. At the outset, Manning's attorneys requested that the court unseal the pleadings related to the motion to quash and open the courtroom. *See* Appx291. They referenced a motion to unseal that they had filed with the district court the day before but had not served on the Government. *See* Appx291-95.

The Government opposed the request to unseal the pleadings and open the courtroom. As the Government argued, Rule 6(e)(5) required the courtroom to remain closed because the issue being addressed—a subpoena for Manning to testify in an ongoing grand-jury investigation—involved a matter occurring before the grand jury. *See* Appx295-96. The Government also requested that the court allow

it an opportunity to respond to Manning's brief on the sealing issue. *See* Appx296-98.

The district court held that the proceedings would remain closed and under seal. *See* Appx298. It specifically acknowledged that "Rule 6(e)(5) and Rule 6(e)(6) require that [it] go forward with these matters at this point in time under seal and also that the courtroom be closed for the hearing." *Id.* It held that the courtroom should be closed because "the motion to quash this grand jury subpoena" involved "a matter before the grand jury." *Id.* Recognizing that the Government had not been afforded the opportunity to respond to the motion to unseal, the court allowed the parties further time to brief the sealing issue. *See id.*

After hearing extensive argument from the parties on the issues, the district court denied Manning's omnibus motion. *See* Appx318-19. It reasoned that the motion was premature because it was based on speculation about what might happen in the grand jury. *See* Appx318 ("This whole thing is just really speculation about what may or may not happen. Most of this is really premature . . . ."). The court also addressed the merits of some of the issues. In rejecting the argument about improper motives, the court noted that there was no evidence of improper motives and reiterated that Manning's arguments were based on speculation. *Id.* ("There's no evidence presented of any improper motive. You've raised questions about what might or might not be the motive. I don't have anything in front of me that would

require me to rule on it."). The district court did not specifically address the merits of the electronic-surveillance issue.

D. Manning's Recalcitrance in the Grand Jury

[redacted]

[redacted]

[redacted]

[redacted]

Significantly, prior to that day, Manning never informed the Government of medical needs that might affect her incarceration. *See* Appx322. Instead, her attorneys first raised the issue with the Government after her recalcitrance in the grand-jury room. *See id.*

[redacted]

E. Manning's Show-Cause Hearing

The district court conducted the show-cause hearing on March 8. [redacted]

[redacted]

[redacted]

[redacted] It then opened the courtroom. *See* Appx322. After the courtroom was opened, the court allowed the parties additional time to argue the proper coercive sanction. *See* Appx322-27. At the conclusion, the district court reiterated its finding that Manning was "in contempt of [its] order requiring [her] to testify before the grand jury." Appx327. The court ordered that she "be committed to the custody of the Attorney General until such time as [she] either purge[s] [herself] of the contempt or for the life of th[e] grand jury." *Id.*

One week later, on March 15, Manning filed her notice of appeal.

SUMMARY OF ARGUMENT

1. The district court correctly denied Manning's motion under 18 U.S.C. § 3504 to require the Government to canvas all relevant federal agencies and admit or deny whether she had been subjected to unlawful electronic surveillance. To obtain such relief, the text of the statute required that Manning (1) make a valid "claim" that she was subjected to unlawful electronic surveillance, (2) demonstrate that she was a "party aggrieved" by such surveillance, and (3) show that the grand jury questioning or evidence was a "primary product" or "obtained by the exploitation" of such surveillance. § 3504(a)(1).

Manning failed to satisfy any of these three requirements. First, under this Court's precedent in *United States v. Apple*, a valid claim must consist at least of "a positive statement that illegal surveillance has taken place." 915 F.2d 899, 905 (4th Cir. 1990). Under the caselaw interpreting this requirement, Manning's equivocal assertions that she "believed" or "had reason to believe" she was subjected to electronic surveillance were insufficient. Second, to demonstrate she was a "party aggrieved," *Apple* required Manning to provide a "colorable basis" that she was subjected to electronic surveillance. *Id.* Manning's allegations, [redacted] did not satisfy that standard. Finally, Manning did not show that the questions or evidence at the grand jury had any connection whatsoever to electronic surveillance. On their face, the questions reflect that they had no basis in electronic surveillance. Because Manning did not satisfy these threshold requirements, the district court was correct in denying the motion outright.

2. The district court also properly rejected Manning's arguments of grand-jury abuse. Her arguments were based on mere speculation as to the Government's motives, which is insufficient to rebut the presumption of regularity that attaches to grand-jury proceedings. The questions posed at the grand jury were plainly legitimate. [redacted]

[redacted] In the absence of evidence of abuse, the district court correctly declined to interfere in the grand-jury process.

3. Finally, the district court did not err in closing portions of the proceedings. As reflected above, the district court struck the proper balance between accommodating Manning's right to a public proceeding and protecting grand-jury secrecy. It closed hearings that required divulging matters occurring before the grand jury (i.e., the identity of a witness subpoenaed by the grand jury, the fact that immunity was given to the witness, the questions posed in the grand jury, and the witness's responses to the questions). The district court opened the courtroom to reiterate its finding of contempt and impose its sentence because that portion did not involve matters occurring before the grand jury. This bifurcated approach was consistent with Rule 6(e)(5), the Supreme Court's precedent in *Levine v. United States*, 362 U.S. 610 (1960), and subsequent caselaw.

ARGUMENT

The district court has the inherent authority to enforce a grand-jury subpoena through its civil contempt powers. *See Shillitani v. United States*, 384 U.S. 364, 370 (1966). Its inherent authority is supplemented by the recalcitrant witness

statute. *See* 28 U.S.C. § 1826. Under that statute, if a witness "refuses without just cause to comply" with a court order to testify before the grand jury, the district court may "order his confinement at a suitable place until such time as the witness is willing to give such testimony." *Id.* § 1826(a). As the statute reflects, a recalcitrant witness may defend against a contempt finding by showing she had "just cause" in refusing to testify. *See In re Askin*, 47 F.3d 100, 102 (4th Cir. 1995).

Generally, this Court reviews a district court's "ultimate decision as to whether the contempt was proper for abuse of discretion." *In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014). It reviews "underlying legal questions de novo and any factual findings for clear error." *Id.* And it may affirm "on any ground appearing in the record, including theories not relied upon . . . by the district court." *United States v. McHan*, 386 F.3d 620, 623 (4th Cir. 2004) (quoting *Scott v. United States*, 328 F.3d 132, 137 (4th Cir. 2003)) (internal quotation marks omitted).

Where Manning failed to raise an argument at the district court, this Court's review is more circumscribed. *See Under Seal*, 749 F.3d at 285-86. In those circumstances, its review is only for "'fundamental error' or a denial of fundamental justice." *Id.* at 285 (quoting *Stewart v. Hall*, 770 F.2d 1267, 1271 (4th Cir. 1985)). Because "'[f]undamental error' is 'more limited' than the 'plain error' standard . . . appl[ied] in criminal cases," the Court often uses the "plain-error

standard . . . as something of an intermediate step in a civil case." *Id.* at 285-86 (quoting *Stewart*, 770 F.2d at 1271). To satisfy the plain-error standard, Manning must show "(1) that the district court erred, (2) that the error was plain, and (3) that the error affected [her] substantial rights." *United States v. Cohen*, 888 F.3d 667, 685 (4th Cir. 2018). Even if she made this three-part showing, the Court should "recognize the error" only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *United States v. Hargrove*, 625 F.3d 170, 184 (4th Cir. 2010)) (internal quotation marks omitted).

I. THE DISTRICT COURT CORRECTLY DENIED MANNING'S MOTION TO REQUIRE THE GOVERNMENT TO CANVAS ALL RELEVANT FEDERAL AGENCIES AND AFFIRM OR DENY WHETHER SHE WAS SUBJECTED TO ELECTRONIC SURVEILLANCE.

Manning's first assignment of error challenges the district court's denial of her motion to require the Government to perform "a thorough canvass of relevant agencies to determine whether there has been any electronic surveillance, lawful or otherwise," and affirm or deny the existence of electronic surveillance. Appx32. As explained below, the district court properly denied Manning's motion.[2]

[2] Throughout her brief, Manning takes issue that the district court did not explicitly provide its reasoning for denying her request. *See* Opening Br. 7-8, 16-19. Manning's criticism is unjustified. As described, Manning raised the issue in an omnibus motion to quash that she filed a few days before her scheduled grand jury appearance. *See supra* pp. 7-11. Her delay provided little time for the parties and the district court to address the issues. While the district court did not explicitly reference the electronic-surveillance issue at the hearing, the court heard argument

A. Statutory Scheme

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211-225, imposes a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Apple*, 915 F.2d at 904. Subject to exceptions, Title III generally "forbids the warrantless interception of wire, oral, and electronic communications." *Askin*, 47 F.3d at 102. As an enforcement mechanism, Title III forbids the use of unlawfully obtained intercepts of wire or oral communications, or "evidence derived therefrom," including in a grand-jury proceeding. 18 U.S.C. § 2515. As this Court has recognized, "a showing by a witness that his interrogation was based on illegal government surveillance is sufficient to constitute just cause for refusing to testify." *Askin*, 47 F.3d at 102.

Congress subsequently added § 3504 to "address[] 'litigation concerning sources of evidence.'" *Apple*, 915 F.2d at 904 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. VII, § 702(a), 84 Stat. 922, 935 (codified at 18 U.S.C. § 3504)). Specifically, the statute provides, in relevant part, as follows:

> (a) In any trial, hearing, or other proceeding in or before any court [or] grand jury . . . of the United States—

---

on it and unambiguously denied her motion to quash in its entirety. *See* Appx319. [redacted] t is well settled that this Court may affirm the district court on any ground apparent from the record, *McHan*, 386 F.3d at 623, and the record here supports the district court's denial.

> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.

18 U.S.C. § 3504(a)(1). An "unlawful act" involves the use of electronic surveillance, as defined in Title III, in violation of the Constitution or the laws of the United States. *Id.* § 3504(b).

The text of § 3504 reflects that the moving party must satisfy three criteria to trigger the opposing party's obligation to affirm or deny.[3] First, the moving party must make a "claim" of unlawful electronic surveillance. *See* § 3504(a)(1); *Apple*, 915 F.2d at 905. Second, the moving party must show that she was a "party aggrieved." *See* § 3504(a)(1); *Apple*, 915 F.2d at 905. Third, in the context of grand-jury proceedings, the moving party must show a connection between the alleged electronic surveillance and the questions asked or evidence used at the grand jury (i.e., that the questioning or evidence was the "primary product" or "obtained by the exploitation of" unlawful electronic surveillance). *See* § 3504(a)(1); *United States v. Shelton*, 30 F.3d 702, 707-08 (6th Cir. 1994); *United States v. Robins*, 978 F.2d

[3] In her brief, Manning emphasizes the principle that "[t]he government must only provide a response that is as concrete and specific as the allegations raised by the witness." Opening Br. 14. However, the obligation of the government to respond at all hinges on the moving party satisfying the threshold requirements of § 3504(a)(1). *See Apple*, 915 F.2d at 905. Only then must the Government submit a response that is commensurate with the specificity of the allegations. *See id.*

881, 887 (5th Cir. 1992); *United States v. Nabors*, 707 F.2d 1294, 1302 (9th Cir. 1983); *In re Baker*, 680 F.2d 721, 722 (11th Cir. 1982). Manning failed to satisfy any of these three requirements.

B. Manning's Equivocal Allegations Failed to State a Sufficient Claim of Electronic Surveillance.

Section 3504(a)(1) requires that the moving party make a "claim" of unlawful electronic surveillance. In *United States v. Apple*, this Court interpreted a "claim" to require "no more than a 'mere assertion.'" 915 F.2d at 905 (quoting *United States v. Tucker*, 526 F.2d 279, 282 (5th Cir. 1976)). But the Court made clear that the assertion must at least include "a positive statement that illegal surveillance has taken place." *Id.*

Equivocal statements are insufficient to satisfy this requirement. *See Nabors*, 707 F.2d at 1302. The "mere allegation that [electronic] surveillance 'may' have occurred does not warrant any response from the government." *In re Grand Jury Proceedings*, 831 F.2d 228, 230 (11th Cir. 1987). Similarly, "a motion alleging only a 'suspicion' of such surveillance, or that the movant has 'reason to believe' that someone has eavesdropped on his conversations, does not constitute a positive representation giving rise to the government's obligation to respond." *Robins*, 978 F.2d at 886.

The Eleventh Circuit's decision in *In re Baker* is instructive. There, the moving party submitted an affidavit that stated the following: "I believe that phone

conversations of mine have been unlawfully and surreptitiously recorded. I base this belief on the fact that I heard the clicks and echoes during conversations which I had during said period of time." 680 F.2d at 722 n.1. The Eleventh Circuit held that this representation did not satisfy "the requirement that the assertion of surveillance be a positive statement that unlawful surveillance has taken place." *Id.* at 722 (quoting *United States v. Rubin*, 559 F.2d 975, 989 (5th Cir. 1977), *vacated on other grounds*, 439 U.S. 810 (1978)) (internal quotation marks omitted). As the Eleventh Circuit explained, "[a] witness must say more than he believes that an unlawful electronic surveillance by a government agency led to his interrogation." *Id.*

Manning's allegations fail for the same reason. She never made a simple, positive statement that unlawful electronic surveillance occurred (e.g., "I have been the subject of illegal electronic surveillance"). Instead, she made only equivocal assertions, qualifying her allegations with language that she "believed" or had "reason to believe" that illegal surveillance occurred. *See* Appx8, 23-24, 388. Even after the Government raised this issue below, Manning continues to hedge her allegations in the same manner on appeal. *See* Opening Br. 6, 12-13. As noted above, such equivocal statements do not amount to "a positive statement that illegal surveillance has taken place." *Apple*, 915 F.2d at 905. For that reason alone, the Court should affirm the district court's denial of her motion.

C. Manning Failed to Provide a Colorable Basis to Believe She Was an Aggrieved Party.

Section 3504(a)(1) also requires that the moving party be a "party aggrieved" by the alleged electronic surveillance. To satisfy this requirement, the moving party must "make a prima facie showing that . . . he was a party to an intercepted communication, that the government's efforts were directed at him, or that the intercepted communications took place on his premises."[4] *Apple*, 915 F.2d at 905. "This critical showing may not be based on mere suspicion; it must have at least a 'colorable basis.'" *Id.* (quoting *United States v. Pacella*, 622 F.2d 640, 643 (2d Cir. 1980)). As the Second Circuit has explained, "[u]nsupported suspicion and patently frivolous assertions of government misconduct do not . . . trigger the government's obligation to disrupt grand jury proceedings and check thoroughly the applicable agency records." *In re Millow*, 529 F.2d 770, 775 (2d Cir. 1976).

Manning has failed to provide a colorable basis to believe that she was subjected to electronic surveillance. On appeal, Manning recognizes that the [redacted] She argues, "There is no doubt that she is subject to physical surveillance, and it

[4] Title III defines an "aggrieved person" as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11).

frankly strains credulity to imagine that she is not being surveilled electronically." Opening Br. 13 (emphasis omitted)). But that argument suffers from a logical disconnect. Speculative allegations of lawful physical surveillance do not suggest (much less amount to a prima facie showing) that government actors engaged in unlawful electronic surveillance.

Manning relies (at 12) heavily on the allegation that the government attorney told her lawyer that she had made statements inconsistent with her providence inquiry. But that does not indicate the use of electronic surveillance either. There are innumerable ways in which investigators can obtain prior statements without using electronic surveillance, notably in this case including from Internet chats that Manning participated in and that were introduced as evidence in her court-martial. Manning's claim that any prior statements must be the product of unlawful electronic surveillance is premised on mere suspicion, which is insufficient.

This Court's precedent in *United States v. Apple* demonstrates how far Manning's allegations fall short. There, one of the defendants claimed that "he was a party to telephone conversations intercepted by . . . authorities through the tap of" a third party's telephone. *Apple*, 915 F.2d at 906. It was undisputed that the third party's phone was tapped. *See id.* at 907. The defendant specified where he called the third party—in Fluvanna County, Virginia. *See id.* at 906. The defendant approximated when he called the third party—in May, June, or July 1985. *See id.*

And the defendant stated that he "spoke 'regularly' on the telephone" with the third party. *Id.*

Nevertheless, the Court held that the defendant "failed to make the necessary prima facie showing that he was a 'party aggrieved' under § 3504(a)(1)." *Id.* at 907. The Court emphasized that the defendant "never averred that he completed telephone calls to the number known to have been tapped during the period that surveillance took place." *Id.* The Court further reasoned that, although the defendant emphasized regular phone conversations with the third party, he "presented no phone company records to substantiate his claim." *Id.* Thus, the Court concluded that his "failure to aver that he was involved in telephone conversations on the tapped line [was] fatal to his claim." *Id.*

Manning's allegations below were even less compelling. Unlike the *Apple* defendant, Manning could not clarify when, where, and on what medium her communications were allegedly intercepted. Whereas the *Apple* defendant specified that the intercepts involved telephone communications with a particular party, [redacted] *See* Appx388, ¶ 18. Whereas the *Apple* defendant pinpointed the area in which the wiretap occurred, [redacted] *See id.* ¶ 20. Whereas the *Apple* defendant specified that the intercepts occurred during a three-month timeframe, [redacted]

[redacted]

See id. ¶¶ 19, 21. Whereas in *Apple* there was no dispute that a wiretap had been used, there is no indication of such a device being used here. Like the *Apple* defendant, however, Manning has not shown that she was involved in any intercepted communications. As a result, her claim must be denied as well.

Manning instead relies on *United States v. Vielghth*, 502 F.2d 1257 (9th Cir. 1974), but that case is inconsistent with this Court's precedent. There, the Ninth Circuit suggested that the Government must affirm or deny based upon "no more than a demand by persons who would be aggrieved by such surveillance if it had occurred." *Id.* at 1259. The Ninth Circuit rejected the requirement that an aggrieved party must establish a "prima facie case" of electronic surveillance, holding that requirement "applies only to a claim by the person under interrogation that questions put to him are tainted by unlawful surveillance of conversations in which he did not participate." *Id.*

Vielghth cannot be squared with this Court's precedent in *Apple*. This Court has made clear that the moving party's "claim" must consist of more than a demand. It requires, at minimum, "a positive statement that illegal surveillance has taken place." *Apple*, 915 F.2d at 905. And, this Court requires that the moving party "make a prima facie showing" and provide a "colorable basis" of electronic surveillance even when she claims that she "was a party to an intercepted

communication." *Id.* Because it is inconsistent with this Court's precedent, *Vielghth* has no work to do here.

Manning also cites this Court's decision in *In re Grand Jury Subpoena (T-112)*, 597 F.3d 189 (4th Cir. 2010), but that case does not help her either. There, the Court did not resolve issues relating to the threshold requirements in § 3504(a)(1). In fact, it expressly declined to address the Government's argument that the moving party was not an "aggrieved party" under § 3504(a)(1). *See id.* at 195-96. Instead, the Court assumed for purposes of argument that the moving party was an aggrieved party, *see id.* at 196, and affirmed on the basis that the Government's denial of electronic surveillance was sufficient, *see id.* at 201.

D. Manning Failed to Show Any Connection Between the Alleged Electronic Surveillance and the Grand-Jury Proceeding.

Section 3504 further requires a connection between the alleged electronic surveillance and the questions asked or evidence used in the grand-jury proceeding. Specifically, under the statute, the aggrieved party's claim must be that "evidence is inadmissible because *it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act*." § 3504(a)(1) (emphasis added). As the text reflects, there must be a causal link between the alleged unlawful surveillance and the proceeding. *See Shelton*, 30 F.3d at 707-08; *Robins*, 978 F.2d at 887; *Nabors*, 707 F.2d at 1302; *Baker*, 680 F.2d at 722. In fact, Manning recognized below that "it is well-settled that electronic surveillance is relevant to a

grand jury proceeding only where it is unlawful, and directly connected to [the] subpoena or questions." Appx26. As the Third Circuit has explained, "section 3504 is not a discovery tool to be used to determine the existence or validity of wiretaps completely unrelated in time or substance to the on-going proceeding." *In re Grand Jury Matter*, 906 F.2d 78, 93 (3d Cir. 1990).

The Eleventh Circuit's decision in *Baker* is again instructive on this issue. There, a grand-jury witness refused to answer the following questions:

1. Prior to being incarcerated, what was your occupation?
2. Were you-are you a pilot?
3. Have you ever been a crop duster?
4. What is your date of birth?

680 F.2d at 722. The Eleventh Circuit rejected the witness's argument that he was excused from answering these questions based on § 3504. *See id.* In addition to holding that the witness failed to state a sufficient claim, the Eleventh Circuit noted that the questions he "refused to answer were hardly the fruits of an illegal wire tap." *Id.* Citing the text of the statute, the Eleventh Circuit explained that the "questions and answers to them could not be said to be . . . 'the primary product of an unlawful act or . . . obtained by the exploitation of an unlawful act.'" *Id.* (quoting § 3504(a)(1)).

More recently, the Ninth Circuit reached a similar conclusion in *In re Grand Jury Investigation, 2003R01576*, 437 F.3d 855 (9th Cir. 2006). There, a district court held a grand-jury witness in contempt after he refused to answer questions posed to him. *Id.* at 857. In that case, the government chose to make a denial of electronic surveillance. *See id.* The witness asserted § 3504 as a defense, claiming that "the government did not meet its burden of proof in responding to his allegations that he ha[d] been the subject of illegal surveillance." *Id.* The Ninth Circuit likewise expressed doubts as to the sufficiency of the government's denial. *See id.* at 857-58.

Nevertheless, the Ninth Circuit concluded that the witness could not "invoke 18 U.S.C. § 3504 as a defense" because he did not demonstrate "that the government's questions were the 'primary product' of unlawful surveillance or were 'obtained by the exploitation' of any unlawful surveillance." *Id.* at 858 (quoting § 3504(a)(1)). The Ninth Circuit emphasized that there must be at least "an arguable causal connection between the questions being posed to the grand jury witness and the alleged unlawful surveillance." *Id.* The court noted that "[t]he nature of the questions posed to [the witness] before the grand jury [was] so generic that the questions d[id] not suggest any reliance on surveillance of any sort." *Id.* It also recognized that "information already known to the government independent of any

unlawful surveillance" provided a "legitimate independent basis to consider [the witness] a person of interest in the investigation." *Id.*

Manning's § 3504 allegations fail for the same reasons. Given Manning's high-profile conviction for leaking information, the Government had ample independent reasons—reasons having nothing to do with surveillance—to subpoena her for testimony.

As a threshold matter, Manning did not raise this argument at the district court. [redacted] Because Manning failed to raise this argument to the district court, she has forfeited it on appeal. *See Under Seal*, 749 F.3d at 285-86. As a result, this Court's review of the argument is only for plain or fundamental error. *See supra* pp. 19-20.

Manning cannot show that the district court committed an error, much less an error that was plain or fundamental. [redacted] On the contrary, it is well established that the grand jury can draw on a wide array of information in discharging its duties. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 344-45 (1974) (emphasizing that "[t]he grand jury's sources of information are widely drawn").

Finally, Manning's brief is internally inconsistent on this point. [redacted]

[redacted]

Manning cannot have it both ways.

E. Manning's Conduct Directly Implicated the Purposes that the Threshold Requirements in § 3504(a)(1) Serve.

The threshold requirements in § 3504(a)(1) serve important purposes. They prevent the Government from being put to the "awesome burden" of responding to frivolous claims of unlawful electronic surveillance. *United States v. See*, 505 F.2d 845, 856 (9th Cir. 1974). They also ensure that recalcitrant witnesses cannot use § 3504 as a way to delay and hinder grand-jury proceedings, *see Grand Jury Matter*, 906 F.2d at 91, and "thwart the progress of a grand jury investigation," *id.* at 93.

Manning's motion directly implicated these concerns. As previously described, she waited until the eve of her grand jury appearance to raise the § 3504 issue, and she included it in an omnibus motion to quash that raised at least six other nonmeritorious issues. *See supra* pp. 7-11. In the motion, Manning sought to compel the Government to canvas all relevant federal agencies—an undertaking that would have delayed and hindered the grand-jury proceeding, which had already been

postponed by a month. Under those circumstances, the district court appropriately held her strictly to the requirements of § 3504(a)(1) and denied her motion.

II. THE DISTRICT COURT CORRECTLY HELD THAT MANNING FAILED TO REBUT THE PRESUMPTION OF REGULARITY THAT ATTACHES TO GRAND-JURY PROCEEDINGS.

Manning's second assignment of error contends that the district court erred by not requiring the Government to prove the grand-jury subpoena was issued for a proper purpose. She alleges essentially three grounds of grand-jury abuse. First, she claims (at 19, 22) that the Government used the grand-jury process to harass and retaliate against her. Second, she maintains (at 19, 21) that [redacted] Third, for the first time on appeal, she claims (at 23) that the Government improperly used the grand jury to obtain post-indictment discovery related to a charged defendant.

A "presumption of regularity" attaches to the grand jury's proceedings. *In re Grand Jury Subpoena*, 646 F.3d 159, 164 (4th Cir. 2011). "[T]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority." *United States v. R. Enters., Inc.*, 498 U.S. 292, 300-01 (1991). The "recipient [of a grand-jury subpoena] who seeks to avoid compliance" bears the burden of showing otherwise. *Id.* at 301. While the grand jury must use its powers only for legitimate investigative purposes, *United States v. (Under Seal)*, 714 F.2d 347, 349-50 (4th Cir. 1983), this Court "has repeatedly recognized that

district courts should refrain from intervening in the grand jury process absent compelling evidence of grand jury abuse," *United States v. Alvarado*, 840 F.3d 184, 189 (4th Cir. 2016).

As explained below, Manning has failed to provide any evidence of grand-jury abuse to rebut the presumption of regularity. Instead, she relies on mere speculation and conjecture, which are insufficient to carry her burden. *See, e.g.*, *United States v. Leung*, 40 F.3d 577, 582 (2d Cir. 1994) (holding that "speculations about possible irregularities in the grand jury investigation were insufficient to overcome the presumption that this investigation was for a proper purpose"); *United States v. Canino*, 949 F.2d 928, 943 (7th Cir. 1991) (holding that "[m]ere unsupported speculation of possible prosecutorial abuse does not meet the particularized need standard" to obtain grand jury transcripts). In the absence of any evidence of abuse, the district court properly refrained from intervening in the grand-jury process.

A. Manning Has Failed to Provide Any Evidence that the Grand-Jury Subpoena Was Intended to Harass Her.

Manning contends that the grand-jury subpoena was intended to harass and retaliate against her. To support her claim, she has proffered (at 19) two tweets by public officials. The first is a January 2017 tweet by the President expressing an opinion that Manning should not have been released. *See* Appx5. The second is a

September 2017 tweet by the CIA Director with a letter that, according to Manning, "effectively convinced Harvard University to withdraw a fellowship" for her. *Id.*

This argument merits little discussion. Suffice it to say, Manning offers no evidence that connects the tweets to the grand-jury proceeding. By her own description, the tweets do not mention the grand jury or its investigation. Both tweets predated the grand-jury subpoena issued to Manning by more than a year. In the absence of any nexus to the grand-jury proceeding, the tweets are not indicative of grand-jury abuse. Manning's argument to the contrary is pure conjecture.

[redacted] It is well established that the grand jury enjoys "wide latitude to inquire into violations of criminal law." *United States v. Calandra*, 414

U.S. 338, 343 (1974). Its function "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." *R. Enters.*, 498 U.S. at 297. The grand jury enjoys "broad investigative powers to determine whether a crime has been committed and who has committed it." *United States v. Dionisio*, 410 U.S. 1, 15 (1973). [redacted] A witness, such as Manning, "may not interfere with the course of the grand jury's inquiry." *Calandra*, 414 U.S. at 345. She "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of [hers]." *Id.* (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)). Nor may she "set limits to the investigation that the grand jury may conduct." *Blair*, 250 U.S. at 282. It is simply her duty to appear before the grand jury and testify. *See id.* at 281.

[redacted] In

any event, "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Id.* at 282. Until that point, the grand jury has wide latitude in considering evidence to determine whether a crime was committed and who committed it.

[redacted] The grand jury's purpose, after all, is to investigate whether a criminal offense has been committed and, if so, to identify who committed it. *See R. Enters.*, 498 U.S. at 297.

Manning's primary argument (at 19) is that she had nothing to "add . . . to the grand jury's investigation" in light of the statement that she made at her providence inquiry. But that again is based on speculation about the direction of the questioning and the scope of the grand jury's investigation. [redacted]

Manning's argument, moreover, is based on a misleading factual premise. [redacted]

[redacted]

[redacted] As explained above, however, Manning's "testimony" was really just a plea colloquy. *See supra* pp. 5-6. In her statement to the military court, she chose what facts to admit to support her pleas to lesser-included offenses. The questioning was confined to a limited inquiry by the military judge to ensure the factual basis for the pleas. To suggest that she has been questioned exhaustively is simply not true.

[redacted]

[redacted]

C. Manning Has Forfeited Any Claim that the Government Is Improperly Using the Grand Jury Post-Indictment.

Manning claims (at 23) that the Government improperly used the grand jury to obtain criminal discovery on an indicted defendant. At the district court, however, Manning never argued that she was improperly subpoenaed to obtain criminal discovery on an already indicted defendant. By failing to raise the issue below, Manning prevented the parties and district court from engaging in any necessary fact-finding. Based on the record on appeal, Manning cannot demonstrate that the district court erred, much less plainly erred, on this ground.

D. The District Court Properly Rejected Manning's Arguments Without Requiring a Preliminary Showing by the Government.

Manning contends (at 25) that the district court should have required the Government to make a preliminary showing that the subpoena was issued for proper purposes and that her testimony was "able to add something of value to the grand jury's investigation." According to Manning (at 24), "the burden on the witness to trigger the government's obligation [to make such a preliminary showing] is fairly low."

That is not the proper legal standard. As already noted, this Court "has repeatedly recognized that district courts should refrain from intervening in the grand jury process *absent compelling evidence* of grand jury abuse." *Alvarado*, 840 F.3d at 189 (emphasis added). And the Supreme Court has long cautioned courts

against requiring such preliminary showings. *See R. Enters.*, 498 U.S. at 298-99 ("Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." (quoting *Dionisio*, 410 U.S. at 17)); *Blair*, 250 U.S. at 282 (recognizing that the grand jury is "a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime"). Because Manning has failed to offer any evidence of grand-jury abuse, the district court correctly refrained from requiring a preliminary showing by the Government.

III. THE DISTRICT COURT CORRECTLY CLOSED PORTIONS OF THE PROCEEDINGS THAT ADDRESSED MATTERS OCCURRING BEFORE THE GRAND JURY.

Manning's final contention is that the district court erred in closing the courtroom during the motion to quash and contempt proceedings. Specifically, she claims (at 26) the closing of the courtroom violated Rule 6(e)(5) of the Federal Rules of Criminal Procedure and her Fifth and Sixth Amendment rights. As explained below, the district court properly balanced Manning's rights with the need for grand-jury secrecy by closing the courtroom when matters before the grand jury were discussed and then opening the courtroom for the final contempt adjudication.

A. The District Court Followed Rule 6(e)(5) When Closing the Courtroom.

As the Supreme Court has recognized, "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979). "Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye. The rule of grand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system." *Id.* at 218 n.9. Rule 6(e) of the Federal Rules of Criminal Procedure now "codifies the requirement that grand jury activities generally be kept secret." *Id.*

Rule 6(e)(5) in particular governs when a district court should close the courtroom to protect grand-jury secrecy. The rule states, "Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(5). Under this rule, "hearings which would reveal matters which have previously occurred before a grand jury or are likely to occur before a grand jury with respect to a pending or ongoing investigation must be conducted in camera in whole or in part . . . to prevent public disclosure of . . . secret information." *Id.* advisory committee's notes to 1983 amendments. Based on Rule 6(e)(5), the district court correctly closed the courtroom during the hearing on the motion to quash and

portions of the contempt proceeding because they addressed matters occurring before the grand jury.

1. The hearing on the motion to quash involved matters occurring before the grand jury.

As the D.C. Circuit has recognized, "[a] proceeding in the district court to quash a subpoena . . . almost invariably reveal[s] matters occurring before the grand jury, and thus may properly be closed to the public." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502 (D.C. Cir. 1998). Such hearings implicate a variety of grand-jury matters that should remain secret, including the identity of a grand-jury witness, the fact that the witness was subpoenaed, and offers of immunity. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1085-86 (9th Cir. 2014); *Dow Jones*, 142 F.3d at 501. Thus, hearings on motions to quash generally should be closed to protect the secrecy of such grand-jury matters. *See* Fed. R. Crim. P. 6(e)(5) advisory committee's notes to 1983 amendments; *Index Newspapers*, 766 F.3d. at 1086; *Dow Jones*, 142 F.3d at 502 & n.9; *In re Grand Jury Subpoena*, 103 F.3d 234, 238 (2d Cir. 1996).

This case was no different. The entire hearing on the motion to quash addressed a matter occurring before the grand jury—the fact that the grand jury had subpoenaed Chelsea Manning to testify. To respond to Manning's arguments, the Government had to confirm in the hearing that she had been subpoenaed to testify in an ongoing grand-jury investigation and received immunity in connection

with the subpoena. There was also the constant risk that other matters occurring before the grand jury would come up during the hearing. *See Dow Jones*, 142 F.3d at 501 (recognizing that "initially closing all ancillary proceedings makes good sense" because "there will nearly always be a danger of revealing grand jury matters"). Under Rule 6(e)(5), the district court correctly closed the courtroom to prevent the public disclosure of such matters.

The district court's subsequent unsealing of the transcript from the hearing underscores its thoughtful approach to this issue. At the public portion of the contempt hearing, the district court held that it was holding Manning in contempt because she had refused to testify before the grand jury. *See* Appx327. The public confirmation of this fact meant that her identity as a witness was no longer subject to grand-jury secrecy. *See McHan v. C.I.R.*, 558 F.3d 326, 334 (4th Cir. 2009) (holding that grand-jury materials were no longer secret when they became part of the public record in a prior criminal trial). At that point, the district court properly unsealed the transcript from the motion to quash hearing. *See* Appx334.

2. The closed portions of the contempt hearing involved matters occurring before the grand jury.

Likewise, the district court properly closed the sealed portions of the contempt proceeding. The sealed hearings on March 6 and March 8 involved extensive recitation and discussion of the questions posed to Manning in the grand jury, as well as her responses to them. These topics were quintessential "matters

occurring before the grand jury." *See Index Newspapers*, 766 F.3d at 1085 ("Rule 6(e) secrecy extends beyond grand jury transcripts and includes summaries and discussions of grand jury proceedings."); *Dow Jones*, 142 F.3d at 501 ("The witness's identity, the fact that [s]he was subpoenaed to testify, the fact that [s]he invoked the privilege in response to questions, the nature of the questions asked—all these would be . . . 'matters occurring before the grand jury.'").

It makes no difference, as Manning argues (at 30), [redacted] The point is that the disclosure could have revealed the strategy or direction of the grand jury, and provided the public with information about its investigation. The district court properly sealed the hearing to protect against public disclosure of that information.

Nor does it matter that Manning, as the witness, was not bound by the grand-jury secrecy rules. *See Index Newspapers*, 766 F.3d at 1087 (holding that the witness's "personal decision to disclose what he may have learned about the grand jury investigation does not compel disclosure or unsealing of the court's filings or hearing transcripts related to the grand jury"). It is one thing for Manning to divulge her version of events to the public. It is quite another for the Government or the court to put the weight of their offices behind confirming or denying what occurred.

B. The District Court's Closure of the Courtroom Did Not Violate the Sixth Amendment.

Manning incorrectly suggests that the Sixth Amendment right to a public trial applied to her civil-contempt proceedings. By its terms, the Sixth Amendment applies only to "criminal prosecutions." U.S. Const. amend. VI. There is no dispute that this case involves a civil-contempt proceeding—not criminal contempt. As a result, the Sixth Amendment does not apply. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (recognizing in the context of a civil-contempt proceeding that "the Sixth Amendment does not govern civil cases"); *United States v. Bucci*, 525 F.3d 116, 130 (1st Cir. 2008) ("Civil contempt proceedings are not governed by the Sixth Amendment and require fewer procedural protections.").

C. The District Court's Closure of the Courtroom Did Not Violate Due Process.

While the Sixth Amendment is inapplicable, the Due Process Clause of the Fifth Amendment does apply to civil-contempt proceedings. *See Shillitani v. United States*, 384 U.S. 364, 370-71 (1966). The Supreme Court, however, has emphasized that the Due Process Clause offers "fewer procedural protections" than those enjoyed by a defendant in a criminal-contempt proceeding. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994). That is because "civil contempt sanctions are viewed as nonpunitive and avoidable." *Id.*

The Supreme Court addressed whether procedural due process requires an open contempt hearing in *In re Oliver*, 333 U.S. 257 (1948). There, a person "was called as a witness to testify in secret before a one-man grand jury." *Id.* at 272. The one-man grand jury was also a judge—a so-called "judge-grand jury." *Id.* at 258-59; *see also id.* at 261-62 (explaining the concept of a "judge-grand jury"). As the witness testified, the judge-grand jury concluded that his testimony "did not 'jell.'" *Id.* at 259. The judge-grand jury immediately charged, summarily convicted, and sentenced the defendant in secret. *See id.* at 259, 272-73. The Supreme Court held that this secret procedure violated due process in light "of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public." *Id.* at 273.

Subsequently, in *Levine v. United States*, 362 U.S. 610 (1960), the Supreme Court addressed the extent to which a trial court may close the courtroom to protect grand-jury secrecy. The defendant was charged with criminal contempt. *See id.* at 611. His "contemptuous conduct, the adjudication of guilt, and the imposition of sentence all took place after the public had been excluded from the courtroom." *Id.* The Court recognized that due process generally entitles a contemnor to a public proceeding but clarified that its application "must turn on the particular circumstances of the case." *Id.* at 616-17.

The *Levine* Court specifically recognized that the due process right to a public proceeding must be balanced with the need for grand-jury secrecy. The Court repeatedly emphasized that, consistent with due process, a trial court may close a portion of the contempt hearing when the questions posed in the grand jury are being discussed. *See id.* at 614-15, 617-18. As the Court reasoned, "[u]nlike an ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret." *Id.* at 617. The Court further explained that, after the grand-jury questions are discussed, there is "no further cause for enforcing secrecy in the sense of excluding the general public" and the courtroom should be opened. *Id.* at 618. The Court expressly distinguished *Oliver*, suggesting it involved a situation in which "the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny." *Id.* at 619.

While the *Levine* Court ultimately disposed of the case on the ground that the defendant had forfeited the issue by not raising it below, *see id.* at 619-20, its reasoning still provides the framework that governs contempt proceedings today, *see* Fed. R. Crim. P. 6(e)(5) advisory committee's notes to 1983 amendments (citing *Levine* for the proposition that there is no constitutional requirement that "the entire contempt proceedings, including recitation of the substance of the questions [the contemnor] has refused to answer, be public"). Since *Levine*, courts have adopted its bifurcated approach in addressing when contempt proceedings,

civil or criminal, should be open to the public. *See, e.g.*, *In re Grand Jury Subpoena*, 97 F.3d 1090, 1094-95 (8th Cir. 1996); *In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3d Cir. 1990); *In re Rosahn*, 671 F.2d 690, 697 (2d Cir. 1982). Under this approach, the district court may close the courtroom when matters occurring before the grand jury are discussed, but it must open the courtroom, "upon the contemnor's request, [for] the 'final stage' of [the] contempt proceedings." *United States v. Smith*, 123 F.3d 140, 149 n.13 (3d Cir. 1997).

The district court correctly followed this approach in handling the contempt proceedings below. As noted above, it sealed the hearings on March 6 and March 8 because they involved discussions of the questions posed to Manning in the grand jury. Then, [redacted] the district court opened the courtroom to hear arguments on the appropriate coercive sanction. After that argument, with the courtroom opened, the district court announced it had found Manning in contempt and ordered her incarceration.[5] This two-step approach was consistent with the guidance provided by *Levine* and its progeny, and therefore did not violate due process.

---

[5] [redacted] It is undisputed that the district court repeated its finding of contempt and imposed the coercive sanction in the open proceeding.

For the same reason, the district court's sealing of the courtroom during the hearing on the motion to quash did not violate due process. Sealing the hearing was necessary to protect matters occurring before the grand jury. Under the reasoning of *Levine*, and consistent with the decisions of this Court's sister circuits, the district court may "seal . . . hearings and records . . . when access to those hearings and records would jeopardize grand jury secrecy." *Smith*, 123 F.3d at 149; *see supra* p. 45.

D. The District Court's Closure of the Courtroom to Protect Grand-Jury Secrecy Did Not Violate Any First Amendment or Common Law Right of Access.

While Manning's issue on appeal is premised on violations of Rule 6(e)(5) and the Fifth and Sixth Amendments, *see* Opening Br. 3, she nevertheless suggests (at 29) that the district court's closure of the courtroom violated the First Amendment and common-law rights of access. That argument fails for at least three reasons.

First, as multiple courts have recognized, there is no First Amendment or common-law right to attend proceedings that address matters occurring before the grand jury. *See Index Newspapers*, 766 F.3d at 1086-90; *Dow Jones*, 142 F.3d at 52-56; *Smith*, 123 F.3d at 148-56. Grand-jury proceedings have historically been conducted in secret, *see Douglas Oil*, 441 U.S. at 218 n.9, and are the "classic example" of the "kinds of government operations that would be totally frustrated if

conducted openly," *Press-Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1, 8-9 (1986). Based on this historic rule of secrecy, the *Levine* Court made clear that trial courts may exclude the public from proceedings in which matters occurring before the grand jury are discussed. *See* 362 U.S. at 617-18. As that ruling reflects, such proceedings have not historically been open to the public—a necessary element to establish a First Amendment right of access—or otherwise been accessible at the common law. *See In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 707 F.3d 283, 291 (4th Cir. 2013) ("*WikiLeaks Sealing Litig.*") (describing requirements of First Amendment right of access).

Second, the compelling governmental interest in preserving grand-jury secrecy justified excluding the public from the proceedings that addressed matters occurring before the grand jury. *See Index Newspapers*, 766 F.3d at 1085; *Grand Jury Subpoena*, 103 F.3d at 242. As noted, grand-jury secrecy ensures the "proper functioning of our grand jury system." *Douglas Oil*, 441 U.S. at 218. Any First Amendment or common-law presumption in favor of public proceedings was outweighed by the compelling governmental interest in grand-jury secrecy. *See WikiLeaks Sealing Litig.*, 707 F.3d 290. The district court's rulings were narrowly tailored to serve those interests because they excluded the public only from the hearings that addressed grand-jury matters.

Third, "even if there were once a common law right of access to materials of the sort at issue here, the common law has been supplanted by Rule 6(e)(5)." *Dow Jones*, 142 F.3d at 504. As described above, the district court complied with Rule 6(e)(5) in closing the courtroom. *See* Fed. R. Crim. P. 6(e)(5) advisory committee's notes to 1983 amendments ("The provisions of rule 6(e)(5) do not violate any constitutional right of the public or media to attend such pretrial hearings.").

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court.

Respectfully submitted,

G. Zachary Terwilliger
United States Attorney

/s/
Thomas W. Traxler
Assistant United States Attorney

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues are not novel, and oral argument likely would not aid the Court in reaching its decision.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that this brief has been prepared using Microsoft Word 2010 and 14-point Times New Roman typeface.

I further certify that this brief does not exceed 13,000 words (specifically 12,891 words) as counted by Microsoft Word's word count, exclusive of table of contents; table of authorities; statement with respect to oral argument; this certificate; and the certificate of service.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and a copy of the word or line print-out.

/s/
Thomas W. Traxler
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2019, the foregoing Response Brief of the United States was electronically filed with the Clerk of Court using the CM/ECF system, which will send notice of such filing to counsel of record.

/s/
Thomas W. Traxler
Assistant United States Attorney