

04-3138

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PUBLIC



UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT

FILED JUN 29 2007

CLERK

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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In re: Special Counsel Investigation	:	Case No. 04-MS-407 (D.D.C.)
	:	Case No. 04-MS-406 (D.D.C.)
(Grand Jury Subpoena to Judith Miller)	:	(Chief Judge Thomas F. Hogan)
(Grand Jury Subpoena to Walter Pincus	:	
and the Washington Post)	:	<u>UNDER SEAL</u>

.....

PATRICK J. FITZGERALD, being duly sworn, deposes and says:

Introduction

1. I am the United States Attorney for the Northern District of Illinois, having been appointed by the President and confirmed by the Senate in October 2001. For purposes of the instant matter, I serve in the capacity as "Special Counsel," in that I have been delegated all the relevant powers vested in the Attorney General of the United States, including the power to issue subpoenas generally, to authorize subpoenas to the media and to appear in Court on behalf of the United States. I submit this affidavit in opposition to the motions by: (i) *New York Times* reporter Judith Miller; and (ii) the *Washington Post* and reporter Walter Pincus to quash grand jury subpoenas.

2. In this affidavit, I set forth below: the basis for my authority to conduct this investigation (paragraph 5); the general subject matter of the investigation (paragraphs 6 through 8); general factual background on the investigation (paragraphs 9 through 16); the factual background giving rise to the subpoenas issued to Miller (paragraphs 18 through 48); the factual background giving rise to the subpoenas issued to the *Washington Post* and Pincus (paragraphs 49 through 80); the need for the reporters' testimony (paragraphs 81 through 83); the extent to which alternative remedies have been exhausted (paragraphs 84 through 88); and that the subpoenas were validly issued after a careful balancing of appropriate interests in free speech (paragraphs 89 through 100).

3. As discussed in greater detail below, reporter Miller has been subpoenaed because her testimony is essential to determining whether or not Lewis Libby, the Vice President's Chief of Staff, has committed crimes involving the improper disclosure of national defense information and perjury. Libby has admitted speaking to reporter Miller in July 2003 and discussing the purported employment of former Ambassador Joseph Wilson's wife by the

[REDACTED]

Central Intelligence Agency ("CIA"). However, Libby has testified under oath that he only advised Miller that other reporters were saying that Wilson's wife worked at the CIA and that Libby himself did not know if that were true. There is substantial reason to question Libby's account. First, Libby testified that he merely relayed to Miller on July 12 or 13 what Libby had learned from Tim Russert on July 10. However, Russert has testified under oath that he did not discuss Wilson's wife with Libby on that date and indeed did not know then about Wilson's wife. Thus, Russert could not have then imparted that information to Libby. Moreover, Libby has given accounts of conversation with two other reporters - Glenn Kessler of the *Washington Post* and Matt Cooper of *Time* magazine - that are contradicted in many respects by the testimony of Kessler and Cooper. And investigation to date has determined that Libby had spoken with as many as seven (7) different government officials about Wilson's wife employment prior to the date of the Russert conversation when he claimed to have heard the information from Russert as if it were new. One of those officials, Ari Fleischer, was told the information by Libby three days before the purported Russert conversation and advised by Libby that the information was "hush hush." The grand jury needs to hear the testimony of Miller before making any determination whether Libby should be charged. Libby has expressly waived any claim of confidentiality as to conversations with Miller regarding the subject matter of the investigation.

4. Moreover, Walter Pincus has conceded that he was advised by a government official on July 12, 2003, that Wilson's wife worked at the CIA as an analyst in the area of weapons of mass destruction. By enforcing the subpoenas directed to Pincus and the *Washington Post*, we seek to identify the government official who made that disclosure. As discussed below, the investigation to date indicates that Pincus most likely learned the information from [REDACTED]

[REDACTED] Ari Fleischer [REDACTED] or from Libby.

Authority to Conduct Investigation

5. In this particular matter, Attorney General John Ashcroft has recused himself from participation and delegated his full authority to Deputy Attorney General James B. Comey as Acting Attorney General. The Deputy Attorney General is not recused from this matter but has delegated all the power he has concerning this matter to me in letters dated December 30, 2003, and February 6, 2004, copies of which are annexed as Exhibits A and B. The Deputy Attorney General has exercised his discretion not to participate in the conduct of the investigation so as to allow him to participate fully in efforts to coordinate national security matters with other members of the administration. Thus, as Special Counsel I serve as the

[REDACTED]

functional equivalent of the Attorney General on this matter.<sup>1</sup>

### The General Subject Matter of the Investigation

6. This investigation concerns the disclosure by government officials to the press in July 2003 of then classified information concerning the employment of Valerie Wilson Plame by the Central Intelligence Agency ("CIA"). In particular, the investigation seeks to determine which administration officials disseminated information concerning Ms. Plame to members of the media in spring 2003, the motive for the dissemination, and whether any violations of law were committed in the process. While the initial reporting regarding Ms. Plame's employment was in a column by syndicated columnist Robert Novak,<sup>2</sup> the investigation of unauthorized disclosures is not limited to disclosures to Novak.<sup>3</sup> Moreover, the investigation seeks to determine whether any witnesses interviewed to date have made false statements, committed perjury in the grand jury or otherwise obstructed justice.

7. In particular, this affidavit is submitted *ex parte* to apprise the Court why it is necessary that reporter Judith Miller of the *New York Times* be compelled to testify in compliance with a validly authorized grand jury subpoena as to conversations she had with I. Lewis Libby, a/k/a "Scooter Libby." Mr. Libby has signed a written waiver of confidentiality concerning his conversations with the media and, upon information and belief, has also expressly

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<sup>1</sup> I have not been appointed pursuant to Title 28, United States Code, Part 600, which is the provision allowing the Attorney General to appoint an attorney outside the Department of Justice to investigate and prosecute certain matters. In fact, the authority delegated in this case is in many respects broader than the authority conferred by the latter provision as I need not seek approvals prior to significant investigative or prosecutive steps.

<sup>2</sup> Novak authored a July 14, 2003, *Chicago Sun Times* column revealing Plame's purported association with the CIA. (A copy of that column is annexed as Exhibit C.)

<sup>3</sup> The investigation has also sought to determine whether any laws were broken by the sources who provided information which was published in the July 22, 2003, *Newsday* article concerning Plame, a copy of which is attached as Exhibit D. As discussed below, I have exercised my discretion not to seek to compel testimony from the *Newsday* reporters at this time.

In seeking to determine the sources for these disclosures, and the motives for the disclosures, the investigation also necessarily has sought to determine whether, as was reported in *The Washington Post* in September 2003, administration officials called a number of other members of the media in order to reveal information about Ms. Plame.

The investigation has focused primarily on disclosures pre-dating July 14, 2003, the date of Novak's column.

[REDACTED]

released at least one other reporter (Matt Cooper from *Time*) from any agreement of confidentiality.

8. This affidavit is also submitted *ex parte* to apprise the Court why it is necessary that reporter Walter Pincus of the *Washington Post* be compelled to testify in compliance with a validly authorized grand jury subpoena as to conversations he had with the government official who advised him on July 12 that Wilson's wife worked at the CIA as an analyst in the area of weapons of mass destruction, as well as to any conversation he may have had with Mr. Libby, if Mr. Libby is not the July 12 source. This affidavit is submitted under seal because it concerns a grand jury matter and is filed *ex parte* because it describes in detail various sensitive aspects of the grand jury investigation.

The Background Facts:

The Controversy About Niger and Uranium

9. The "leaks" under investigation must be viewed in the context of a controversy concerning the content of the State of the Union address delivered by President George W. Bush on January 28, 2003. In that speech, President Bush stated: "The British government has learned that Saddam Hussein sought significant quantities of uranium from Africa." Those remarks, since referred to colloquially as the "16 words," were called into question by a series of articles in the spring of 2003, including several ultimately sourced in part to Ambassador Joseph Wilson. Wilson, a retired career State Department official who had been posted to a number of different African countries, had taken a trip to Niger at the request of the CIA in February 2002 to investigate allegations that yellowcake uranium had been sought or obtained by Iraq from Niger. (The CIA commissioned Wilson to take this trip after the CIA received inquiries from the Vice President about the allegation that uranium had been sought from Niger, but the Vice President himself did not request such a trip.) Wilson reported to the CIA that he doubted Iraq had obtained uranium from Niger recently, for a number of reasons. After the State of the Union speech, the International Atomic Energy Association revealed in March 2003 that documents apparently evidencing efforts to obtain yellowcake uranium from Niger were demonstrable forgeries. Thereafter, over the course of spring 2003, the "16 words" controversy attracted greater media attention. Wilson, who was not a government employee at the time of the trip and did not sign a confidentiality agreement in connection with the trip, spoke to several reporters, including Nicholas Kristof of the *New York Times* and Walter Pincus of the *Washington Post*, who wrote articles on May 6 and June 12 respectively concerning Wilson's trip to Niger, without naming Wilson. The articles called into question the accuracy of the "16 words." Those news stories generated significant conversation within and between the Office of the Vice President, the CIA, the State Department and the White House as to the circumstances under which Wilson's trip was undertaken.

[REDACTED]

*The Wilson Op Ed Piece*

10. On July 6, 2003, Wilson authored an Op-Ed piece in the *New York Times* entitled "What I Did Not Find in Africa," and was interviewed for an article in the *Washington Post* about his trip. Both items appeared in the July 6 editions of the respective newspapers. Also on July 6, Wilson appeared as a guest on "Meet the Press," hosted that day by Andrea Mitchell. Those media appearances by Wilson generated heightened media interest and increased frustration in the Office of Vice President that the Vice President was being identified incorrectly as the person sending Wilson on his trip. As a result of press inquiries at the White House the day following these articles and Wilson's television appearance, White House Press Secretary Ari Fleischer stated at a July 7, 2003, press "gaggle" that the Vice President had not requested Wilson's trip, had not been aware of it and had not been briefed on the results. (The Office of Vice President had suggested those talking points by email.)

11. Thereafter, the issue of how the "16 words" came to be in the State of the Union was a very prominent issue during the week of July 7 to July 12, while the President and several cabinet members were on a trip to Africa. The attention was increased in part by remarks by National Security Adviser Dr. Condoleezza Rice on Air Force One on July 10, 2003, which appeared to attribute blame for the "16 words" to the CIA. On Friday, July 11, 2003, CIA Director Tenet issued a written statement accepting responsibility for the inclusion of the "16 words" in the State of the Union address.

*The Vice President and His Staff React*

12. Nonetheless, the Vice President and his staff were not fully satisfied with Tenet's July 11 statement, which they felt did not go far enough. On Saturday, July 12, at the direction of the Vice President, Libby gave a rare "on the record comment" to *Time* magazine reporter Matthew Cooper, among others, concerning the "16 words" controversy. Following a conversation aboard Air Force Two (discussed more fully below), Mr. Libby also made comments to other reporters, including Miller, "on background" and "deep background" concerning the intelligence about Iraq's involvement with weapons of mass destruction and discussed Wilson's wife during some of those conversations.<sup>4</sup>

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<sup>4</sup> As understood by various officials interviewed, "on the record" comments are statements made for attribution to a government official by name. "Background" comments are comments that are attributed to a generic description of the government official. "Deep background" comments can be reported as part of the story but not specifically attributed to a government official. "Off the record" comments cannot be reported in the story but can be used to inform the reporter's understanding of the facts.



[REDACTED]

administration official on July 12, two days before Novak's column was published. (Exhibit E.) And Novak himself described the circumstances of his contact with his two administration sources in his October 1, 2003, *Chicago Sun Times* column. (Copy annexed as Exhibit H.)

#### The Instant Subpoenas

17. The instant subpoenas to *New York Times* reporter Miller concern conversations between I. Lewis Libby, a/k/a "Scooter Libby," and reporter Miller in July 2003 and related documents. Libby, a subject of the investigation who has testified twice before the grand jury to date, is Assistant to the President, Chief of Staff to the Vice President and Assistant to the Vice President for National Security Affairs. The instant subpoenas to the *Washington Post* and reporter Pincus concern conversations between Pincus and the yet identified government official who spoke to Pincus about Wilson's wife on July 12, 2003.

#### The Subpoena to Miller

##### Libby's Account of The July 8 Meeting Between Libby and Miller

18. Libby met with *New York Times* reporter Judith Miller on July 8, 2003. Libby testified that he met with reporter Miller on that date at the general direction of the Vice President to share with Miller portions of the National Intelligence Estimate ("NIE") which discussed Iraq's efforts to obtain uranium. Libby specifically described that he was advised by Vice President Cheney that President Bush had declassified the NIE for the purpose of allowing Libby to share portions of the NIE with the press.

19. As Libby described it: "The Vice President thought it was very important .... that the NIE come out ... And it was pretty definitive against what Ambassador Wilson was saying ... So we thought it was important that Judy Miller, or somebody, report this... And I said, that's a problem, Mr. Vice President. The NIE is a classified document. And the Vice President said that he would talk to the President and get the President's approval for us to use the document." (Transcript of March 5, 2004, Grand Jury Testimony of Libby, annexed as Exhibit I, at 115-116.) Libby then indicated that he checked with David Addington, Counsel to the Vice President, whom Libby asked if the President could "take any document and say it's declassified, go talk about it?" (*Id.* at 116.) Libby testified that Addington responded that "if the President says to talk about a document to the press, or publicly, it is declassified as of that moment, he has that power to do that, and he cited a case to that effect." (*Id.* at 117.)

20. Libby acknowledged that the NIE was not formally declassified until July 18 but that "this was in advance while they were still working on that process. The President came back to the Vice President and said, yes, it would be okay, or I should go talk to somebody, and I

[REDACTED]

selected Judy Miller ..." (Exhibit I at 117)<sup>5</sup> Libby testified that Vice President Cheney then told him to hold off speaking with the reporters and then "He then came back again from meeting with the President and said, go ahead and talk about it. And so I called Judy Miller up and went and had a discussion with her." (*Id.*)

21. Libby conceded that he usually meets with people at the White House but that he met with Miller outside the White House, in part because he was sharing information with her exclusively. (Transcript of March 24, 2004, Grand Jury testimony of Libby, annexed as Exhibit J, at p. 44-45.). Libby further testified that he assumed he discussed Wilson's trip with Miller because it fit into the general topic of Iraq and uranium which they were discussing. Libby believed that he shared with Miller a written document consisting of several portions taken from the NIE and may have even given the document to Miller. Libby did not testify that Wilson's wife was discussed at the meeting - having repeatedly staked the position that he did not discuss Wilson's wife with any one prior to July 10, the date when he thought he learned about Wilson's wife for the first time from Tim Russert. As discussed elsewhere, however, there appears to have been no such conversation with Russert about Wilson's wife on July 10 and Libby was discussing Wilson's wife with others prior to July 10. Thus, it is plausible that Libby may have discussed with Miller Wilson's wife on July 8, given that he discussed Wilson's wife with Ari Fleischer on July 7 and he admits discussing Wilson's wife with Miller at least on July 12.

*Libby's Account of The July 12 Telephone Call Between Libby and Miller*

22 Libby testified that he spoke to Judith Miller on July 12 or July 13 about Wilson's wife by telephone from his home, believing that the call occurred on July 12. The call to Miller would have followed conversations described below with reporters Matt Cooper (*Time*

<sup>5</sup> Handwritten notes of Libby and others from that time period reflect that various cabinet members - including CIA Director George Tenet, National Security Adviser Dr. Rice, Deputy National Security Adviser Stephen Hadley, Chief of Staff Andrew Card and others - were discussing whether the NIE should be declassified in the days after Libby said that the President had declassified the relevant portions of the document for Libby to use with the press. The notes of Libby, Hadley and others appears to indicate that other cabinet members were unaware that the material had already been ordered declassified. Indeed, Libby testified that he understood that only the President, the Vice President and Libby were aware of the declassification and that he did not tell others such as Hadley because the Vice President was present for the declassification discussion and did not so advise Hadley.

REDACTED

REDACTED

REDACTED



[REDACTED]

magazine) and Glenn Kessler (*Washington Post*). (Telephone records confirm that a telephone call was made from Libby's home to Miller for three minutes at 4:03 p.m. on July 12, 2003.) Libby testified: "I know I discussed it with Judith Miller." (Exhibit I at 186.) Libby described what he said as follows:

I said to her that, that I didn't know if it was true, but that reporters had told us that the ambassador's wife works at the CIA, that I didn't know anything about it. But if that were true, that may explain how he got this unofficial – I went through the same officially/unofficially sort of breakdown ...

(Exh I at 186-88; Exh. J at 56)(emphasis added)

The latter part of Libby's statement is a reference to his earlier grand jury testimony that the reason he mentioned to reporter Cooper of *Time* that he had heard Wilson's wife worked at the CIA was to explain how it was that Wilson might have access to unofficial – and inaccurate – information indicating that the Vice President had sent him on the Niger trip.

#### Libby's Claimed Basis for Knowledge About Wilson's Wife

23. Libby testified in the grand jury that Tim Russert of *NBC* advised him by telephone on or about July 10 or July 11, 2003, that Wilson's wife worked for the CIA. Libby testified that he believed he was learning this information for the first time from Russert. Libby further testified that he thereafter spoke to reporters Glenn Kessler of the *Washington Post*, Matt Cooper of *Time* magazine and Judith Miller of the *New York Times* and discussed with them the fact that Wilson's wife worked at the CIA relaying what he heard from Russert (and what Karl Rove also told him that Rove had learned from Robert Novak). Libby acknowledged that his own notes indicated that he had been advised by the Vice President in early June 2003 that Wilson's wife worked at the CIA. Libby maintained, however, that while he had learned that fact from the Vice President in June, he had forgotten about it by the time he spoke to Russert in early July. Further, according to Libby, he did not recall his conversation with the Vice President even when Russert allegedly told him about Wilson's wife's employment. Rather, Libby testified, it was not until he found his notes in the fall of 2003 that he remembered that the Vice President had told him about Wilson's wife before Libby spoke to Russert. Because Libby's account is substantially at odds with essentially every material witness questioned to date, Libby's account is set forth in detail below and compared with the accounts of other witnesses.

#### Libby's Account Of His July 10 Conversation With Tim Russert

24. More specifically, Libby has testified that he spoke with Tim Russert on July 10 or 11, 2003, when Libby called to complain to Russert in Russert's capacity as *NBC* Washington Bureau chief about what Libby perceived to be unfair coverage by Chris Matthews

[REDACTED]

of MSNBC. (Matthews was reporting that the Vice President and/or his staff knew about Wilson's trip to Niger and thus, in Matthews' view, knowingly allowed the President to mislead the public in the State of the Union.) During that conversation, Libby claims that Russert advised Libby that Wilson's wife worked at the CIA and that "all" the reporters knew that information. As noted above, Libby specifically recalls believing that he was learning that fact for the first time, even though by his own admission Libby's notes show that he had been told this fact by the Vice President the month before. (Exhibit I at pages 84-87.) When confronted on whether he had discussed Wilson's wife with other government officials earlier that week -- including White House press secretary Ari Fleischer, Director of Communications for the Vice President Cathie Martin and others -- Libby's repeated refrain was that he could not have discussed the matter earlier in the week because he specifically recalled that he learned about Wilson's wife from Russert that week as if it were new information. (Exh I. at 156-60).

25. Libby explained in detail how he was certain he said nothing to confirm that what Russert said was true and that in fact that he did not recall what he knew about Wilson and his wife at the time of the conversation:

[Russert asked] "did you know that Wilson's wife works at the CIA?" And I was a little taken aback by that. I remember being taken aback by it. And I said -- he may have said a little more but that was -- he said that. And I said, no, I don't know that. And I said no, I don't know that intentionally because I didn't want him to take anything I was saying as in any way confirming what he said, because at that point in time I did not recall that I had ever known, and I thought that this was something that he was telling me that I was first learning. And so I said, no, I don't know that because I want to be very careful not to confirm it for him, so that he didn't take my statement as confirmation for him.

... [Libby then clarifies that he had made clear that the Russert conversation had been off the record]

So then he said -- I said -- he said, sorry -- he, Mr. Russert said to me, did you know that Ambassador Wilson's wife, or his wife, works at the CIA? And I said, no, I don't know that. And then he said, yeah -- yes, all of the reporters know it. And I said again, I don't know that. . . I just wanted to be clear that I wasn't confirming anything for him on this. And you know, I was struck by what he was saying in that he thought it was an important fact, but I didn't ask him any more about it because I didn't want to be digging in on him, and he then moved on and finished the conversation ...

(Exh. I at 143)

[REDACTED]

Russert's Account of His Conversation With Libby

26. Russert testified under oath that he had no recollection that he and Libby discussed Wilson's wife during that week. Russert recalled neither being advised by Libby that Wilson's wife worked at the CIA nor advising Libby of the same. Russert recalled that Libby did call to complain to him about Chris Matthews' coverage. Russert recalled that when he first read Novak's column on July 14, 2003, that he had a reaction of "wow" because reading the article was the first time he had heard of Wilson's wife's purported affiliation with the CIA. (Transcript of Russert Deposition annexed as Exhibit K). In addition, Russert had not heard any reporters talking about Wilson's wife working at the CIA before the Novak column appeared. Having not heard that Wilson's wife worked at the CIA, and not having heard that any reporters were saying that prior to Novak's July 14 column, it thus appears impossible that Russert advised Libby on July 10 or 11 that "all" the reporters were saying Wilson's wife worked at the CIA. Indeed, Russert advised that had he known that Wilson's wife was purported to be a CIA employee prior to reading Novak's column, he would have taken steps to have NBC investigate that story, which he has no recollection of doing.

Other Information Inconsistent with Libby's Account

27. Moreover, the record developed in the course of this investigation suggests that as many as seven government officials discussed Wilson's wife's employment at the CIA with Libby prior to the date when Libby claims to have learned this information (for what he claims to have then believed was the first time) from Russert:

- (1) As indicated above, Libby now admits being told by the Vice President about Wilson's wife's employment in early June 2003;<sup>6</sup>
- (2) Under Secretary of State Marc Grossman recalls telling Libby in early June 2003 that "Joe Wilson's wife works for the CIA" and that "our people say that she was involved in the organization of the trip."

6 [REDACTED] REDACTED

[REDACTED] REDACTED

[REDACTED] REDACTED

Libby's notes from June 2003 and his grand jury testimony about those notes indicate that the Vice President told Libby those facts. Moreover, Cathie Martin, the former communications officer for the Office of Vice President, has undated handwritten notes (which appear to date to June 2003) indicating that the CIA's public information officer told her that the Director of Central Intelligence had briefed the Vice President on the matter.

[REDACTED]

(3) Cathie Martin, a former member of the communications staff for the Office of Vice President, recalls advising Libby and the Vice President together in June or early July 2003 (at a time that appears to be prior to the date of the purported Russert conversation) that she had heard that Wilson's wife worked at the CIA.

(4) David Addington, Counsel for the Office of the Vice President, recalls being asked privately by Libby in the week of July 7 what kind of paperwork the CIA would maintain if an employee's spouse were sent on a trip by the CIA. Addington testified that from the context of the question he understood Libby to be discussing Wilson and Wilson's trip to Niger.

(5) A CIA employee assigned to provide daily intelligence briefs to the Vice President and Libby has handwritten notes indicating that Libby referred to "Joe Wilson" and "Valerie Wilson" by those names in conversation with the briefer on June 14, 2003 - a month before the Russert conversation.

(6) Ambassador Eric Edelman, currently the United States Ambassador to Turkey, testified before the grand jury that he was told in June 2003 (when he was serving as principal deputy to Libby) that Wilson's wife played a role in having Wilson sent to Niger. Ambassador Edelman believed that he would have been told that information either by Libby or by Libby's CIA briefer. After a June 2003 article about Iraq and the uranium issues that caused concern to Edelman and Libby, Edelman asked Libby whether information about how the Wilson trip came about could be shared with the press to rebut allegations that the Vice president sent Wilson. Edelman testified that Libby responded by indicating that there would be "complications" at the CIA in disclosing that information publicly. Ambassador Edelman indicated that he understood that he and Libby could not further discuss the matter because they were speaking on an open telephone line and Edelman understood that this might involve classified information.

(7) Former White House press secretary Ari Fleischer, after receiving a grant of immunity, testified that he went to lunch with Libby on Monday, July 7, 2003, and in a conversation Fleischer described as "weird," Libby told Fleischer that Wilson's wife worked at the CIA. Libby told Fleischer the information about Wilson's wife was "hush hush" or "on the QT." Thus, according to Fleischer, Libby imparted what Libby appeared to have considered sensitive information about Wilson's wife's employment three days prior to when he claims to have received it as "new" information during the Russert conversation.

28. Libby has explicitly denied any memory of having such conversations with Cathie Martin, Under Secretary Grossman, and Fleischer.<sup>7</sup> (Exhibit J at pages 181-82)

<sup>7</sup> Libby was not asked specifically about his conversation with the CIA briefer but insisted several times in the grand jury that he did not know Wilson's wife's name until it was published in Novak's column on July 14, 2003. The briefer, however, advises that he did not know

[REDACTED]

[REDACTED]

Libby's Account of The Background to His July 12 Conversations With The Press

Context: The Discussion Aboard Air Force Two

29. On July 12, the Vice President commissioned the *USS Ronald Reagan* at a ceremony in Norfolk, Virginia. Vice President Cheney was accompanied to the ceremony on Air Force Two by his family, as well as Libby, Libby's family and others. The Vice President's then assistant for communications, Cathie Martin, was also in attendance. Evidence obtained during the investigation indicates that, as of July 12, the Vice President and Libby were both disappointed with the content of a statement issued the night before (Friday evening, July 11) by Director Tenet, which they thought did not go far enough in putting to rest the issues concerning the President's 2003 State of the Union address and the reference to Iraqi efforts to obtain uranium from Niger. Earlier that morning, the Vice President received a classified document which had been prepared by the CIA and referred to the trip by Wilson though it did not discuss him by name. The Vice President retained that document that day.

30. Meanwhile, there were reporters who had questions outstanding with the Vice President's press personnel. On the return flight from Norfolk in the early afternoon, Libby reviewed the outstanding questions with Cathie Martin in the aft section of Air Force Two. Libby then went to the forward section of Air Force Two to discuss the questions with the Vice President, without Cathie Martin. Libby testified that he discussed with the Vice President what should be said to the press. Libby testified that the Vice President instructed Libby to make an on the record statement to the press, i.e. to make a statement which would be a quote attributable to Libby by name. (Libby and Martin both testified that it was extremely rare for Libby to be quoted on the record.) Libby wrote down the statement dictated by the Vice President which indicated things to state "on the record", "on background" and on "deep background." The notes do not indicate any reference to Wilson's wife and Libby does not recall discussing Wilson's wife at the time, though he conceded it was "possible" that the Vice President instructed him to tell the press about Wilson's wife.<sup>8</sup> (Exh. I at 178-82). [REDACTED]

"Valerie Wilson" at the time that name appears in his notes from a briefing he gave Libby on June 14, 2003. In addition, although Libby was not asked specifically whether he referenced a CIA employee's "spouse" in his conversation with counsel Addington concerning Wilson's trip, Libby also insisted several times in the grand jury that he was unaware of Wilson's wife's employment prior to hearing that information from Tim Russert later in the week.

<sup>8</sup> "And is it fair to say you had, in a prior FBI interview, you indicated it was possible that you may have talked to the Vice President on Air Force Two coming back from the ceremony involving the USS Reagan about whether you should share the information with the press about Wilson's wife?"

REDACTED

REDACTED

31. According to Libby, he then returned to Cathie Martin and indicated that the Vice President instructed that Libby should contact the press directly and make a statement for direct attribution on the record. While Libby wished to return home to celebrate his son's birthday, Libby indicated that the Vice President wished for Libby to make the calls personally, as opposed to Cathie Martin.

*The July 12 Call to Matthew Cooper After Air Force Two Lands*

32. Upon landing at Andrews Air Force base, Libby, Martin and an assistant made use of a small room at the airport to make telephone calls from Libby to Cooper of *Time*, as well as Kessler of the *Washington Post* and Evan Thomas of *Newsweek*. Libby contacted Matt Cooper from that small room and testified that he read the prepared statement to Cooper as directed by the Vice President.

33. Libby testified that Cooper then asked why Wilson was claiming that the Vice President had sent him to Niger if the Vice President had not. Libby testified that he then explained to Cooper that Wilson might have heard something unofficial (and inaccurate) about the Vice President sending Wilson and "in that context" and "off the record" Libby told Cooper that "reporters are telling us" that Wilson's wife worked at the CIA "and I don't know if it's true." (Exh. J at 182-86.) Libby testified several times that he told Cooper (and the other relevant reporters discussed below, including Miller) that he did not know if the information was

A: "It's possible that could have been one of the times I could have talked to him about what I had learned from Russert and what Karl Rove had told me about Novak, Mr. Novak." (Exh. J at 69-70.)

"And so you told the FBI in your first interview, or one of your two interviews, that it's possible that the Vice President could have told you on Air Force Two that you should tell the press about Wilson's wife, but you do not recall that happened. Correct?"

A: Correct.

Q: And does that remain true?

A: It remains true that it was possible, I don't remember it happening."

(Exh. J at 170)

[REDACTED]

true or even if Wilson had a wife.<sup>9</sup>

34. However, Cathie Martin testified in the grand jury that she recalled no discussion of Wilson's wife from overhearing Libby's end of the conversation. Martin was listening to Libby speak but was not listening in on the telephone itself. Martin also indicated that she made some telephone calls during this time to try to obtain numbers of other reporters and thus was absent for part of the conversation. Martin does not recall hearing Libby advise reporters Cooper or Kessler (discussed below) that Wilson's wife worked at the CIA nor that other reporters were saying so. Moreover, neither Cathie Martin nor [REDACTED]

[REDACTED] recalled any reporter indicating at that time that reporters knew that Wilson's wife worked at the CIA.<sup>10</sup>

#### Cooper's Account of That Conversation

35. Cooper testified that he in fact spoke to Libby by telephone on the afternoon of July 12, 2004.<sup>11</sup> Libby read Cooper a quote for attribution that later appeared in *Time* magazine and they had additional conversation which Cooper believes that Cooper, not Libby, suggested be off the record. Cooper believed that he raised the issue of Wilson's wife at the end of the conversation, asking in sum and substance "What have you heard [or what do you know] about Wilson's wife being involved in sending him?" Cooper believed that Libby's response

<sup>9</sup> "And when I talked to the reporters about it, I explicitly said, you know, I don't know if this is true, I don't know the man, I don't know if he has a wife, but reporters are telling us that." (Exhibit J at 177.)

"And you're certain as you sit here today that every reporter you told that Wilson's wife worked at the CIA, you sourced it back to other reporters?"

A: "Yes, sir ..."  
(Exhibit J at 181.)

<sup>10</sup> Fleischer, however, does admit telling two to three reporters about Wilson's wife while chatting at the side of a road in Uganda on or about July 11. Moreover, Cooper has testified that he heard about Wilson's wife from two sources prior to his July 12 conversation with Libby. We intend to negotiate with *Time* and Cooper in an effort to ascertain who those other sources were, particularly whether those sources included Fleischer or fellow reporters advised by Fleischer.

<sup>11</sup> The transcript is not yet available for this deposition so that the summary provided is based upon my memory of the deposition which took place on Monday, July 23, 2004.

[REDACTED]

was "Yeah, I heard that too." Cooper believes they had no further conversation about the topic, notwithstanding that the answer does not appear directly responsive to the question and that, as a reporter, he was interested in getting more information. Cooper testified that he did not follow up as Libby seemed to want to end the conversation. Cooper took Libby's statement as confirmation of what Cooper said he already knew from two other sources. Cooper claimed that he did not reference the fact that he believed Wilson's wife worked at the CIA in his question, though he conceded he had no design to avoid mentioning the CIA at the time of the conversation. When asked why he would recall that there was no reference to the CIA in a conversation for which he had no relevant notes and which occurred at a time when he had no reason not to mention the CIA, Cooper simply stated that he recalls that the phrasing he used did not refer to Wilson's wife's purported employment at the CIA, though that was not by design. Even though Cooper testified that he used Libby as a source for the statement in his article that "government officials have noted to *Time* in interviews ... that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction," Cooper maintained that Libby and he did not discuss the name or employment of Wilson's wife — in essence, that Libby provided none of the information cited in that sentence, which he described as a "conflation" or "melange" of multiple sources.

36. Cooper stated that Libby did not explain how he knew about Wilson's wife and whether Libby heard it from a person or saw it in a document. Cooper testified that Libby did not say he had heard the information from reporters. Cooper further stated that Libby neither vouched for the accuracy of the information nor expressed doubts. Libby did not indicate that he did not know if Wilson had a wife. Moreover, Cooper does not recall he and Libby discussing why it was that Wilson was claiming that the Vice President sent him on a trip if that were not true.

37. Cooper recalled that they had what he considered to be a single conversation, although the telephone call may have been interrupted and then resumed. Cooper made notes of the conversation and then almost immediately sent a memo to *Time* outlining what was said for use in an article. (Telephone records show two calls from Andrews Air Force base to Cooper. The first proceeded from 2:24 to 2:37 p.m.. The second telephone call took place from 2:40 to 2:44 p.m.. The date and time on Cooper's electronic report shows that it was received by *Time* at 2:44 p.m. on July 12, 2003.) None of the notes involving Libby reflect any reference to Wilson's wife. Cooper also wrote down the telephone number used by Libby in his notes, (301) 981-7358, which corresponds to a number at Andrews Air Force base, where Libby was making his calls.

38. It should be noted that Cooper stated that he spoke to Libby on August 5, 2004, and told Libby that Cooper's recollection of his conversation with Libby was basically exculpatory and asked Libby if Libby objected to Cooper testifying. Libby indicated that he had no objection and suggested that their attorneys should talk.



[REDACTED]

[REDACTED]

Libby's July 12 Conversation with Glenn Kessler of the Washington Post

39. Libby also testified that after speaking with Cooper, Libby had a conversation with Glenn Kessler of the *Washington Post* in which Libby testified that he advised Kessler that Libby had heard that other reporters were saying that Wilson's wife worked at the CIA and that Kessler asked Libby whether he considered Wilson's trip a "boondoggle."<sup>12</sup> However, Glenn Kessler testified under oath that he was certain that he never discussed Wilson, Wilson's wife, Wilson's trip with Libby or a putative "boondoggle" at any time prior to the investigation beginning. Kessler, like Russert, recalled being struck by the content of Novak's article when he read it, testifying that prior to reading the July 14 article he had not heard any indication that Wilson's wife worked for the CIA.

Libby's July 12 Conversation with Evan Thomas of Newsweek

40. Libby also testified regarding his conversation with Evan Thomas of *Newsweek* that day. Libby testified that he spoke with Evan Thomas on July 12, but that he did not discuss Wilson's wife's employment with Thomas. (Exh. I at 188-89) However, in an earlier interview with the FBI on October 14, 2003, Libby indicated that he could not recall whether he had discussed Wilson's wife with Thomas. Neither Thomas nor *Newsweek* published a story about Wilson's wife.

The Timing of the July 12 Telephone Conversation with Judith Miller

41. Libby testified that after his conversations with Cooper and Kessler, he returned home and telephoned Judith Miller on July 12 or 13. As discussed above, telephone records of Libby's home telephone reflect a telephone call to Judith Miller on July 12 at 4:03 p.m., lasting approximately three minutes.

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<sup>12</sup> Libby testified that he was traveling in a White House van on July 12 from Andrews Air Force base to his home with his family, together with Cathie Martin and another assistant, when he spoke to Glenn Kessler by telephone. Libby recalls discussing Wilson's wife with Kessler, though he also testified that he was not sure if that conversation took place on July 12 or in a later conversation the following week, for which Martin was also present. Kessler also testified that he did not recall discussing Wilson's wife, Wilson's trip or a purported boondoggle in their conversation later that week. Cathie Martin did not recall any discussion about Wilson's wife on either July 12 or the later conversation.

[REDACTED]

The Link to Novak's Column

42. A brief discussion is in order to place the Libby conversation with Miller — and the evidence of a broader effort to disseminate information discrediting Wilson — in context with the Novak column and to address the assertion by Miller that Miller's interview may not be necessary "if the government has already interviewed or otherwise queried Mr. Novak." (Brief at p. 39-40) The investigation to date has conclusively established that columnist Robert Novak spoke to Deputy Secretary of State Richard Armitage on July 8, 2003, in the afternoon. In the course of that conversation, Armitage revealed to Novak that the wife of Ambassador Joseph Wilson worked at the CIA. The investigation is still trying to determine precisely what was said during the conversation and Armitage's intent in informing Novak of Wilson's wife's employment. Armitage has been interviewed and has testified in the grand jury as to his account of the conversation. Novak has been interviewed several times and, when presented with a waiver form executed by Armitage (a form identical to the one signed by Libby), testified before the grand jury as to his conversation with Armitage. Novak and Armitage agree on several important facts, such as the time, date and place of the meeting during which the conversation took place, and the fact that Wilson's wife and employment by the CIA was disclosed to Novak by Armitage in response to a question by Novak as to why the CIA had sent Wilson on the trip. Their testimony diverges as to whether Armitage provided the first name of Ms. Plame, though both agree the last name "Plame" was not provided. Novak recalls being told by Armitage that Wilson's wife worked in the area of weapons of mass destruction — [REDACTED]

[REDACTED]<sup>13</sup> Armitage does not recall discussing the area in which Wilson's wife worked. Novak and Armitage give differing accounts on other material matters not germane to the instant motion. The investigation of Armitage's conduct is ongoing.

43. Investigation to date has further established that following the conversation with Armitage [REDACTED] Novak returned to his office and immediately called Karl Rove for confirmation. When Rove returned Novak's call the following day (July 9), Novak advised Rove that he had learned that Wilson's wife worked at the CIA in the area of weapons of mass destruction. Novak, after being presented with a waiver form signed by Rove (identical to the form signed by Libby), testified in the grand jury that Rove stated "Oh you know about that

13

[REDACTED]

[REDACTED]

too.”

REDACTED

REDACTED

REDACTED

Novak's Contact with Libby

44. Novak's testimony did not shed light on whether Libby committed crimes when he spoke to reporters Cooper, Kessler or Miller or whether Libby testified truthfully in the grand jury regarding those conversations. However, after being presented with a waiver form signed by Libby (a copy of which is annexed as Exhibit L), Novak testified that he also recalled speaking to Libby during this week in July 2003, but indicated that the sources for his column on Wilson were Armitage and Rove. Novak believed he was trying to get information from Libby as a source concerning the process by which the President's 2003 State of the Union address was prepared. Libby, however, testified that he does not recall speaking to Novak that week. Novak's account is corroborated by telephone records obtained from Novak by consent.

45. Libby did testify, however, that he learned from Rove on July 10 or July 11 that Novak was aware of Wilson's wife's employment at the CIA and that Novak planned to publish a story about Wilson and his wife.

REDACTED

REDACTED

Indeed, Libby stated that when he talked to reporters Cooper, Kessler and Miller about Wilson's wife's employment he understood that "reporters" - namely Russert and Novak - were saying that Wilson's wife worked at the CIA.

REDACTED

REDACTED

REDACTED

The Miller Affidavit

46. Reporter Miller submitted an affidavit in connection with the motion to quash

[REDACTED]

which states that she cannot testify or produce documents requested in paragraph one of the document subpoena, which "include my reporter's notes." Paragraph one of the subpoena requested documents concerning conversations between July 6 and July 13 between Judith Miller and a "government official with whom she met in Washington, D.C., on July 8, 2003, concerning Valerie Plame ... or concerning Iraqi efforts to obtain uranium." Thus, it appears that Ms. Miller has notes of the conversation with Libby, who admits to having met with her that day. (The meeting between Miller and Libby is also reflected on his calendar for that day.) Miller states that she does not have documents responsive to paragraph two of the subpoena, thus indicating that she does not have any documents provided to her by Libby on that date. (Libby testified that he showed a document about the contents of the NIE to Miller and indicated that he might have given it to her.)

#### Libby's Waiver of Confidentiality

47. To the extent that a "reporter's privilege" is claimed to exist under the law, Libby has waived its protections. Libby has executed a signed waiver which recites in pertinent part:

I have informed the Federal Bureau of Investigation of my recollection of any communications I have had with members of the media regarding the subject matters under investigation. I hereby waive any promise of confidentiality, express or implied, made to me by any member of the media in connection with any communications that I may have had with that member of the media regarding the subject matters under investigation, including any communications made "on background," "off the record," "not for attribution," or in any other form. I request any member of the media with whom I may have communicated to fully disclose all such communications to federal law enforcement authorities. In particular, I request that no member of the media assert any privilege or refuse to answer any questions from federal law enforcement authorities on my behalf or for my benefit in connection with the subject matters under investigation.

(Exh. L)

48. Libby has also described his version of his conversations with reporter Miller under oath before the grand jury on two occasions. And, as discussed above, Libby has apparently provided express consent (through his lawyer) for Cooper to testify. Cooper testified at his deposition that he agreed to testify because he was convinced based upon his attorney's conversation with Libby's attorney that Libby voluntarily released Libby from any promise of confidentiality. Thus, to the extent that Judith Miller calls into question the voluntariness of Libby's waiver, she need look no further than to her own attorney (who represents Cooper as well) who, according to Cooper, has assessed that Libby's waiver of confidentiality has been voluntary.

[REDACTED]

[REDACTED]

The Circumstances of Walter Pincus' July 12 Conversation With A Government Official

49. As set forth below, there is no dispute that Walter Pincus admits being advised by a government official on July 12 that Wilson's wife worked as an analyst at the CIA in the area of weapons of mass destruction. The only issue is the identity of that source.

The Pincus Affidavit

50. Reporter Pincus submitted an affidavit in connection with the motion to quash which states that he thought that the official who told him about Wilson's wife was engaged in "damage control." Pincus admits that he once thought that the information about Wilson's wife may have come from one or two people, but adds without further elaboration: "I now recall who the source was and that the information came from only one conversation." As to Pincus' subjective belief that the official wished to engage in "damage control," Pincus ignores the fact that the official was likely not authorized to leak such information.

REDACTED

REDACTED

REDACTED

The Washington Post Document Production

51. The *Washington Post* has produced some documents responsive to the subpoena, withholding one document upon an assertion of a putative reporter's privilege. A copy of the documents actually produced is annexed as Exhibit M. One of the documents produced (Exhibit M at WP000002) has handwritten notes, apparently written on July 12, referring to "Wilson wife analyst WMD" which would appear to reflect a discussion of Wilson's wife as an analyst on weapons of mass destruction.

52. The documents produced in response to the subpoena also discuss a senior official calling back from Africa on July 9 to discuss the Wilson report: "With news of Wilson's allegations engulfing the airwaves on July 9, a senior administration official telephoned back to Washington from Bush's traveling party in Africa and said the objections Wilson was expressing had been unknown to the White House." (Exhibit M at WP000011)

53. The *Washington Post* has withheld one document on the ground that its production would tend to identify the confidential source who discussed Wilson's wife's employment. Obviously, for that very reason, that document is highly relevant to the grand jury investigation and should be produced.

[REDACTED]

The Likely Source(s) for Pincus

54. It appearing that Pincus had one (but perhaps two) sources who advised him about Wilson's wife, it is likely that the one or more of the following were the source(s): Ari Fleischer, [REDACTED] or Scooter Libby. The reasons indicating why each may or may not be a source is described below, followed by a discussion of some less likely possibilities and then a discussion of the significance of determining the identity of the source.

Ari Fleischer

55. Ari Fleischer, who was serving his last days as White House press secretary on the President's July 2003 trip to Africa, knew that Wilson's wife worked at the CIA, having been so informed by Scooter Libby over lunch at the White House on July 7. Fleischer also witnessed further discussion about Wilson aboard Air Force One and reviewed classified documents about Wilson's trip to Niger aboard the plane. He specifically recalled Dan Bartlett venting about the incompetency of the CIA after Bartlett learned (apparently while aboard Air Force One) that Wilson's wife worked for the CIA and was involved in sending her husband to Niger. Fleischer, under a grant of immunity, testified that he disclosed Wilson's wife's affiliation with the CIA to several reporters (John Dickerson of *Time*, David Gregory of *NBC* and perhaps Tamara Lipper of *Newsweek*) while talking to them at the side of the road in Uganda on July 11. Fleischer also indicated that he spoke to Walter Pincus on July 12 from Air Force One but does not recall discussing Wilson's wife in that conversation. The call to Pincus was one of several calls Fleischer placed to reporters that day in an effort to learn about the news stories the reporters were working on for the weekend. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

56. Thus, Fleischer had knowledge about Wilson's wife, had shared that information with other reporters the day before and spoke to Pincus on July 12 but denies that he disclosed information about Wilson's wife to Pincus in that conversation.

[REDACTED]

57. [REDACTED]

<sup>14</sup> It should also be noted that Pincus refers to discussions with a senior official on July 9 – and in the resulting article there is a quote attributed to Fleischer. Fleischer is also quoted in Pincus' July 13 piece, which is the day after Pincus claims to have had the conversation with is confidential source.

[REDACTED]

[REDACTED]

REDACTED

58.

[REDACTED]

REDACTED

REDACTED

REDACTED

59.

[REDACTED]

REDACTED

REDACTED

REDACTED

60.

[REDACTED]

REDACTED

REDACTED

REDACTED

61.

[REDACTED]

REDACTED

REDACTED

[REDACTED]

REDACTED

62.

REDACTED

[REDACTED]

REDACTED

REDACTED

63.

REDACTED

[REDACTED]

REDACTED

REDACTED



64.

REDACTED

REDACTED

REDACTED

Scooter Libby

65. While Pincus's regular beat seems to cover the intelligence agencies, it is clear that Libby and Pincus were speaking in the spring of 2003. Libby's grand jury testimony made clear that he spoke to Pincus prior to the June 12, 2003, article which discussed Wilson's trip (without naming Wilson) at the direction of the Vice President. A reading of that article is consistent with Libby being one of Pincus' confidential sources. Indeed, the notes indicating that the Vice President advised Libby that Wilson's wife worked at the CIA are on the same page where Libby made other notes of what the Vice President wished Libby to say to Pincus in June 2003.

66. Moreover, by Libby's own admission, he was talking to reporters Cooper and Miller (at least) about Wilson's wife on July 12. And Libby curiously claims to have talked to a *Washington Post* reporter about Wilson's wife and whether the trip was a "boondoggle" during that time period. His indication that the reporter was Glenn Kessler turned out not to be true. And Libby's grand jury testimony, while referring to that reporter as Kessler, was at times more general:

Now, let me be clear. It is not the first time, as you said. I'm just remembering, I'm sorry. What I've previously said, which I think is still true and maybe I've been overly clear here is that I recall a conversation with a *Washington Post* reporter where the *Washington Post* reporter talked to me about a boondoggle ...

(Exhibit J at p. 129)

67. Indeed, the focus on the word "boondoggle" is curious because that word appears in the October 12 article coauthored by Pincus but the article does not put the word in quotes. Libby contends that the word "boondoggle" was raised by the *Washington Post* reporter he spoke to. Yet the documents produced responsive to the subpoena include drafts of articles that later appeared in print in a slightly different form. It is of particular note that in one of the drafts, it states that:

On Saturday, ? July 12,? One reporter working on a story that involved the Wilson report was told by an administration official that the White House had not paid attention to the former ambassador's CIA-sponsored trip to Niger because it was set up as a "boondoggle" by his wife who was an analyst with the agency working on WMD.

[REDACTED]

Exhibit M at WP000004. (See also Exh. M at WP000004 for a similar passage.)

The word "boondoggle" is in quotes, appearing to indicate that a source used the term. Kessler credibly denied ever having a conversation with Libby about whether the trip was a boondoggle. Thus it may be that Libby was the source for Pincus and that the two discussed whether the trip was a "boondoggle." Even if Pincus were to identify another official as his source, we intend to inquire of Pincus whether the quoted word "boondoggle" refers to a conversation with Libby (on July 12 or any other day) as it may shed light on the discrepancy between the testimony of Libby and Kessler and indicate whether Libby transposed his conversation with Pincus onto his conversation with Kessler, intentionally or otherwise.

68. However, there are no telephone records showing contact between Libby and Pincus that day. Moreover, the article appearing on July 13 seemed to reflect no input defending the Office of Vice President and Cathie Martin recalled no press inquiries from Pincus to the Office of Vice President that day. And Libby had already spoken to one *Washington Post* reporter that day - Glenn Kessler.

Some Less Likely Possibilities

69. [REDACTED] REDACTED  
[REDACTED] REDACTED  
[REDACTED] REDACTED

70. [REDACTED] REDACTED  
[REDACTED] REDACTED

71. [REDACTED] REDACTED  
[REDACTED] REDACTED  
[REDACTED] REDACTED

REDACTED

72.

REDACTED

REDACTED

73.

REDACTED

REDACTED

### The Consequences of Identification

74. If Fleischer were a source for Pincus, Special Counsel would have to assess the likelihood that Fleischer's testimony to the contrary is knowingly false in light of the fact that Fleischer has been immunized, admitted to advising other reporters about Wilson's wife and has admitted to speaking with Pincus on July 12. Thus, it seems to make little sense that Fleischer would knowingly withhold a disclosure to Pincus.

REDACTED

REDACTED

REDACTED

In addition, Fleischer's role in advising the press about Wilson's wife's employment is relevant to that part of the investigation that concerns Libby, as Fleischer first learned of Wilson's wife's employment from Libby over a lunch that Fleischer described as "weird."

75.

REDACTED

REDACTED

REDACTED

76.

REDACTED

REDACTED

REDACTED

77. If Libby were a source, then the content of the conversation would have to be examined thoroughly to determine whether Libby told Pincus that the trip was a "boondoggle" or *vice versa* and to determine whether Libby advised Pincus that Libby had personal knowledge

[REDACTED]

that Wilson's wife worked at the CIA or, alternatively, that Libby had been so informed by other reporters. Moreover, an assessment would have to be made whether Libby deliberately transposed *Post* reporters Glen Kessler and Walter Pincus in his testimony so as to throw investigators off the trail.

78.

REDACTED

REDACTED

REDACTED

79.

REDACTED

REDACTED

REDACTED

Relevant Waivers of Confidentiality

80.

REDACTED

REDACTED

REDACTED

Fleischer has declined to sign a waiver, despite being granted immunity.

The Need for the Reporters' Testimony

81. The testimony of reporter Miller is central to the resolution of that part of the criminal investigation concerning Libby. Her testimony is essential to determining whether Libby is guilty of crimes, including perjury, false statements and the improper disclosure of national defense information.<sup>15</sup> The grand jury needs to know when Libby advised Miller about Wilson's wife - during their private meeting outside the White House on July 8 or during the three minute telephone call on July 12 - and whether Libby qualified his disclosure to Miller by

<sup>15</sup> If Libby knowingly disclosed information about Plame's status with the CIA, Libby would appear to have violated Title 18, United States Code, Section 793 if the information is considered "information respecting the national defense." In order to establish a violation of Title 50, United States Code, Section 421, it would be necessary to establish that Libby knew or believed that Plame was a person whose identity the CIA was making specific efforts to conceal and who had carried out covert work overseas within the last 5 years. To date, we have no direct evidence that Libby knew or believed that Wilson's wife was engaged in covert work.

[REDACTED]

stating that he had heard it only from a reporter and did not know if it were true. Miller's testimony is essential to determining whether Libby fabricated his claim that he only told reporters what he claimed he had heard from Russert without a belief that the information he was passing on was either true or classified.

82. In addition, Libby has maintained under oath that he thought that Wilson was qualified and did not obtain the assigned mission due to nepotism. Libby maintains that any discussion of Wilson's wife's employment was to explain why Wilson might have had access to inaccurate information about the Vice President's operational role in the matter - not to disparage Wilson's qualifications. The published newspaper accounts indicate that administration officials discussed Wilson's wife's employment to impugn Wilson's credibility, a distinctly different motive. Miller could shed light on the context in which any conversation about Wilson's wife took place.

83. Similarly, the testimony of reporter Pincus, and the production of the document withheld by the *Washington Post*, is central to the resolution of that part of the criminal investigation concerning the July 12 disclosure about Wilson's wife to reporter Pincus. Pincus' testimony, and production of the document, is essential to determining whether the source is guilty of crimes, including perjury, false statements and the improper disclosure of national defense information.

#### Exhaustion of Alternative Remedies

84. All reasonable alternatives to compelling the reporters' testimony have been explored. Indeed, the effort expended to date far exceeds what could ever be reasonably required. An experienced team of FBI agents has been working on the case since October 2003, led by Special Agent Jack Eckenrode then of the Inspection Division. At least six agents have been assigned to the case at any time and extensive forensic computer and telephone work is being done. Attorneys with significant experience have spent substantial time on the matter, including five attorneys from the Criminal Division of the Department of Justice: a Deputy Assistant Attorney General; the Chief, Deputy Chief and a Trial Attorney from the Counterespionage Section; and a Trial Attorney from the Public Integrity Section. All five attorneys are well versed in the facts and participating to varying degrees in interviews of witnesses, review of documents and examination of witnesses before the grand jury. From the United States Attorney's Office in Illinois, a number of senior attorneys have participated. Besides my own participation in the factual investigation, the First Assistant United States Attorney, the Chief of the Criminal Division, the Chief of Appeals and the Chief of Public Corruption have participated to varying degrees in the discussion of legal issues, including analyzing the relevant statutes, analyzing the First Amendment issues and determining the available means to obtain electronic evidence. An additional attorney from the appellate section has spent substantial time on legal research and briefing in recent months.

[REDACTED]

85. The Department of Justice has been investigating this matter since about October 1, 2003, and my participation as Special Counsel began in late December 2003. [REDACTED]

[REDACTED]

86. [REDACTED]

[REDACTED]

87. The President has not asserted executive privilege to date. [REDACTED]

[REDACTED]

[REDACTED]

88. In short, wherever the line should be drawn in requiring the government to explore alternative remedies, we respectfully submit that any reasonable threshold that might be set has been far exceeded.

The Subpoenas Are Issued Legitimately and Not For Purposes to Harass

89. It is important to bear in mind that the applicable regulations do not "create any legally enforceable right in any person." (See Title 28 Code of Federal Regulations, Section 50.10, a copy of which is annexed as Exhibit O, at paragraph (n)). Nonetheless, issuance of the subpoenas at issue was consistent with the principles set forth in those regulations. First, the subpoenas are narrowly drafted after a careful balancing of the First Amendment interests. Indeed, as set forth in the next section, a number of reporters, and their toll records, are not being subpoenaed at this time. Most will likely never be subpoenaed.

90. A subpoena was issued in February to reporter Robert Novak, with his consent after he agreed to be interviewed about persons who had signed waivers in a form substantially identical to the one signed by Libby. Novak complied with the subpoena. He is scheduled to participate in a follow-up deposition on September 14, 2003, regarding some additional details about his conversation with Deputy Secretary Armitage and other matters.

91. A subpoena was not issued to Glenn Kessler of the *Washington Post*, in light of negotiations with his counsel which resulted in a deposition.

92. Subpoenas were issued to Matt Cooper and *Time* magazine, as well as Tim Russert and *NBC*. After motions to quash the subpoenas were denied, Russert and *NBC* agreed to a deposition. After Cooper and *Time* were held in contempt, but prior to appeal, they agreed to a deposition. Given that Cooper answered only questions about conversations with Libby but indicated that the information in his article about Wilson's wife's employment came from two other sources and was confirmed by Libby, it is expected that we will require Cooper to testify further as to those two sources — particularly because we have reason to believe that one of those sources was Ari Fleischer, who was advised of the information about Wilson's wife by Libby at a July 7 luncheon. Thus, it appears that Libby may have "confirmed" to Cooper information that Cooper had obtained from Fleischer who in turn had been told by Libby in the first place.

93. A number of relevant reporters are not being subpoenaed at this time, and we do not currently plan to subpoena them. These reporters include:

Evan Thomas of *Newsweek*, whom, as discussed above, Libby once said he may have told about Wilson's wife but whom Libby testified in the grand jury that he did not tell. (We do plan to contact *Newsweek* to ask whether Thomas is willing to provide an affidavit declaring whether he received any information about Wilson's wife prior to July

[REDACTED]

14, 2003.);

Andrea Mitchell of *NBC*, whom Libby testified he might have told about Wilson's wife but was not certain. (Similarly, we plan to contact *NBC* to ask whether Mitchell is willing to provide an affidavit declaring whether she received any information about Wilson's wife prior to July 14, 2003.);

John Dickerson of *Time* magazine, who apparently discussed the topic generally with two government officials in Africa, one of whom (Ari Fleischer) has admitted to doing so<sup>16</sup>;

Massimo Calabresi, Michael Duffy, James Carney, Adam Zagoin, J.F.O. McAllister and Andrew Purvis of *Time*: co-authors of Cooper who we do not believe had direct conversations with sources about Wilson's wife;

Mike Allen, Dana Priest and Richard Leiby of the *Washington Post*: the authors of the September 28, 2003, column which appears to rely upon a "whistleblower" source who revealed that "two top White House officials" called at least six reporters prior to Novak's column;

Knut Royce and Tim Phelps of *Newsday*: reporters who wrote an article on July 22, 2003, that contained further information about Valerie Plame and confirmed that she worked at the CIA. We believe that much of the information in that article can be sourced to Bill Harlow, CIA Director of Public Affairs, who, in the process of trying to quell stories on this matter, apparently did confirm some information to reporters; and

Chris Matthews of *MSNBC*: who is reported to have engaged in a heated confrontation with Karl Rove about Wilson's wife at a time after Novak's column was published where there is a dispute as to the precise words used by each in that conversation.

94. In deciding whether to issue subpoenas to reporters, I have carefully weighed and balanced the competing interests of the First Amendment and the public interest in the free dissemination of ideas and information and the countervailing interests in effective law enforcement and the fair administration of justice: namely determining whether a crime was committed and whether someone should be prosecuted for that crime. One key factor in deciding

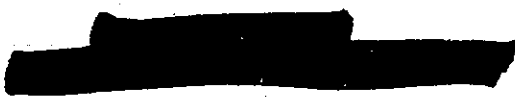
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[REDACTED]

REDACTED

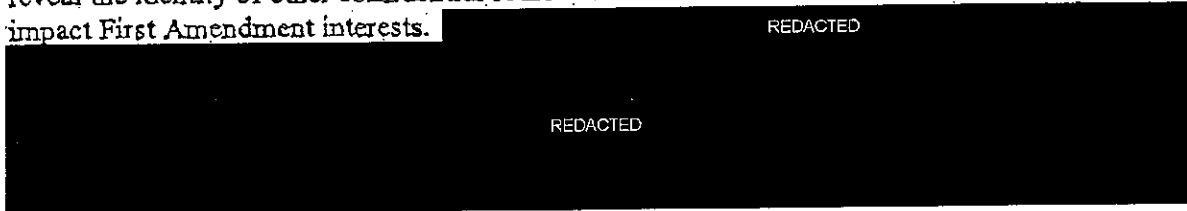
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whether to issue a subpoena has been whether the "source" to be identified appears to have leaked to discredit the earlier source (Wilson) as opposed to a leak who revealed information as a "whistleblower" (e.g. the source for the September 28 *Washington Post* column). The First Amendment interests are clearly different when the "source" being sought may have committed a crime in order to attack a person such as Wilson who, correctly or incorrectly, sought to expose what he perceived as misconduct by the White House. Indeed, failure to take effective steps to identify such sources might chill future whistleblowers such as Wilson, thus impairing "a reporter's responsibility to cover as broadly as possible controversial public issues." (28 CFR Section 50.10.) We have also not issued subpoenas to date where the reporter *may* have relevant information but it is not shown to be *likely* that the reporter does (e.g. reporters Andrea Mitchell or Evan Thomas) or where the information is not essential to determining guilt or innocence of a crime reasonably likely to be charged (e.g. Knut Royce, Tim Phelps and Chris Matthews).

95. Moreover, to date only the telephone records of Walter Pincus for July 12, 2003, have been subpoenaed. (Telephone records of Robert Novak were obtained with his consent and in a form which redacted the numbers of any persons who had not signed express waivers of confidentiality). We have recognized that a factor to be considered before deciding whether to seek the telephone records of the media is the extent to which such records might reveal the identity of other confidential sources not relevant to this investigation and adversely impact First Amendment interests.



96. The instant subpoenas were issued only after first making certain that any efforts at a negotiated resolution would be fruitless. Indeed, Special Counsel has engaged in fruitful negotiations with other members of the media.

97. There are reasonable grounds to believe based on information from nonmedia sources that a crime has occurred - both the improper disclosure of national defense information to the media and perjury before the grand jury - and that the testimony of reporters Miller and Pincus is essential to a successful investigation and may directly establish Libby's guilt or innocence, and Pincus' testimony may also directly establish the guilt or innocence of those suspected of being his July 12 government source. The subpoenas are not issued to obtain peripheral, nonessential or speculative information.

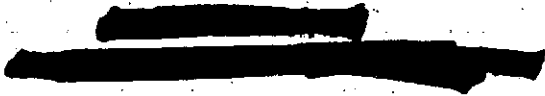
98. There are no alternative nonmedia sources to provide accounts of what Libby told Miller - all others, including Libby, have been questioned extensively. Similarly, all the likely government sources for Pincus have been questioned and none had admitted advising him

[REDACTED]

about Wilson's wife on July 12. And the subpoenas are issued to verify published information and surrounding circumstances relating to the accuracy of the published information, including information published in the *Washington Post* that "top White House officials" were contacting reporters prior to July 14, 2003, and more specific information published in the *Washington Post* that one of its reporters was told about Wilson's wife on July 12, 2003. And the subpoenas are directed at material information regarding a limited subject matter. Miller's subpoena focuses on particular conversations with a single person (Libby) on given dates. Pincus' subpoena focuses principally on the conversation he had with a source about Wilson's wife on July 12, though we also intend to inquire of Pincus as to why he may have believed he had a second source and whether he discussed Wilson's trip as a "boondoggle" with Libby.

99. Indeed, on the facts of this case, it is hard to imagine a stronger case: Libby claims that he told Miller only what he heard "reporters are telling us." Thus, we are in the remarkable position of having identified the person who spoke to Miller and having obtained that person's consent to having Miller disclose the conversation. To deprive the grand jury of the ability to hear and assess Miller's account of what Libby told her is to ask the Special Counsel and the grand jury to make a decision on prosecution partly in the blind — where it is unknown whether the information will be inculpatory or exculpatory. The possible consequences of a mistake — either the failure to charge what would otherwise be determined to involve a crime carried out to discredit a source who was a whistleblower or, worse, charging a confidential source in good faith with a crime where the claim of a "reporter's privilege" deprived the investigation of exculpatory information — could do far more to undermine both First Amendment interests and the fair administration of justice than could enforcement of the subpoenas. Indeed, the testimony of reporter Cooper was distinctly different from what Libby testified and frankly what the Special Counsel expected it to be. Given that Libby's account of conversations has been largely inconsistent with every other material witness to date — including reporters Russert, Kessler, Cooper and Novak — the only way to make an appropriate decision as to whether Libby committed a crime in his conversation with Ms. Miller — or in his sworn testimony describing the same — is to question Miller.

100. Similarly, the only manner in which to rationally assess the credibility and culpability of the suspected sources for Pincus — including Fleischer, [REDACTED] and Libby



- is to identify the source and establish what was told to Pincus and then compare that account against the account given by the source.

Patrick J. Fitzgerald  
Patrick J. Fitzgerald  
Special Counsel

Sworn to before me this  
2<sup>nd</sup> day of August 2004

Lucille Moore  
Notary Public

