

04-3138

PUBLIC

[REDACTED]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED JUN 29 2007
CLERK

.....
: In re: Special Counsel Investigation :
: (Grand Jury Subpoenas to Matthew Cooper :
: and Time, Inc.) :
:

Case No. 04-MS-460 (D.D.C.)
Case No. 04-MS-461 (D.D.C.)
(Chief Judge Thomas F. Hogan)
EX PARTE
UNDER SEAL

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 *Time* and reporter Matthew Cooper to quash grand jury subpoenas.

2. In this affidavit, I set forth below: the basis for my authority to conduct this investigation (paragraph 4); the general subject matter of the investigation (paragraphs 5 and 6); general factual background on the investigation (paragraphs 7 through 15); the factual background giving rise to the subpoenas issued to *Time* and Cooper, including a discussion of the persons most likely to be the sources for Cooper (paragraphs 16 through 61); the need for the reporter's further testimony and documents (paragraphs 62 and 63); the extent to which alternative remedies have been exhausted (paragraphs 64 through 68); that the subpoenas were validly issued after a careful balancing of appropriate interests in free speech (paragraphs 69 through 80); and a discussion of the circumstances which led to the issuance of these successive subpoenas (paragraphs 81 through 85).

3. As discussed in greater detail below, reporter Cooper has been subpoenaed because his testimony, and any relevant documents in the possession of Cooper or *Time*, are essential to determining whether or not certain government officials have committed crimes involving the improper disclosure of national defense information and perjury. At an earlier deposition, reporter Cooper testified that he was advised by two sources (including at least one government official other than I. Lewis "Scooter" Libby) prior to July 12, 2003, that Wilson's

[REDACTED]

wife purportedly worked at the Central Intelligence Agency ("CIA") as an analyst in the area of weapons of mass destruction. By enforcing the subpoenas directed to Cooper and *Time*, we seek to identify the government official(s) who made those disclosures and the circumstances in which they were made.

[REDACTED]

REDACTED

[REDACTED]

REDACTED

[REDACTED]

REDACTED

Authority to Conduct Investigation


4. 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 functional equivalent of the Attorney General on this matter.¹

The General Subject Matter of the Investigation

5. 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 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,² the investigation of unauthorized disclosures is not limited to

¹ 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.

² 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.)



disclosures to Novak.³ 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.

6. In particular, this affidavit is submitted *ex parte* to apprise the Court why it is necessary that reporter Matthew Cooper of *Time* be compelled to testify in compliance with a validly authorized grand jury subpoena as to conversations he had with government official(s) (other than Lewis Libby) who evidently advised him prior to July 12 that Wilson's wife worked at the CIA as an analyst in the area of weapons of mass destruction. The affidavit is also submitted to set forth why *Time* and Cooper should turn over appropriate responsive documents. 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

7. 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

³The investigation 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. 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 July 2003 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]

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.

The Wilson Op Ed Piece

8. 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 White House 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 e-mail.)

9. 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 failing to vet the "16 words" properly 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.

Administration Officials React

10. As discussed further below, Deputy Secretary of State Richard Armitage advised columnist Robert Novak about Wilson's wife's employment during a July 8 meeting. Karl Rove later confirmed that information to Novak during a July 9 telephone conversation. And then Press Secretary Ari Fleischer passed on information about Wilson's wife to several American reporters in Uganda on July 11, including John Dickerson, Cooper's colleague with

[REDACTED]

Time, as well as *NBC* correspondent David Gregory: On Saturday, July 12, at the direction of the Vice President, his Chief of Staff, I. Lewis "Scooter" Libby, gave a rare "on the record" comment to Cooper concerning the "16 words" controversy and confirmed what Cooper had already learned from at least one other government official: that Wilson's wife purportedly was responsible for sending Wilson on the trip to Niger.⁴ That same day, Wilson received a call at home from Walter Pincus of the *Washington Post* who advised Wilson: "Watch out, they are coming after you." Pincus later reported that a *Washington Post* reporter was told on July 12, 2003, that the White House did not pay attention to Wilson's trip because the trip was viewed as a "boondoggle" set up by Wilson's wife who worked as an analyst on weapons of mass destruction.⁵ The investigation has determined that Pincus' July 12 source was Ari Fleischer. The identity of Cooper's sources prior to July 12 remain undetermined.

The Novak Column

11. On Monday, July 14, 2003, Robert Novak published his syndicated column revealing that Wilson's wife was an "agency operative on weapons of mass destruction." Novak also reported, "[t]wo senior administration officials told me his [Wilson's] wife suggested sending Wilson to Niger to investigate the Italian report." (Exhibit C.)

The July Time.com Piece

12. A *Time* magazine piece authored by Mr. Cooper (together with John Dickerson and Massimo Calabresi) entitled "*A War on Wilson?*" appeared on the Internet later that week (July 17). The article quoted then CIA Director George Tenet, then White House Press Secretary Ari Fleischer and Libby (Chief of Staff to the Vice President) for attribution and stated that the administration was taking "public and private whacks" at Wilson and then stated:

And some government officials have noted to *Time* in interviews (as well as to syndicated columnist Robert Novak) that Wilson's wife, Valerie Plame, is a CIA official who

⁴ As understood by various officials and reporters 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.

⁵ See the October 12, 2003, *Washington Post* article by Walter Pincus and Mike Allen, a copy of which is attached as Exhibit D. Pincus now concedes that he was the *Washington Post* reporter contacted on July 12.

[REDACTED]

monitors the proliferation of weapons of mass destruction. These officials have suggested that she was involved in her husband's being dispatched to Niger to investigate reports ...

(Copy annexed as Exhibit E.)

13. A *Newsday* article the following week quoted an intelligence official as confirming Valerie Plame's purported status as a CIA employee. (Copy annexed as Exhibit F.)

[REDACTED]

REDACTED

14. The media published more information in the fall of 2003 confirming that Novak was not the only reporter contacted during the relevant period. The September 28, 2003, *Washington Post* reported that one unidentified source had advised that two top White House officials had contacted at least six reporters prior to the time that Novak published his July 14 story. (Copy annexed as Exhibit G.) The October 12 *Washington Post* story by Pincus and Allen revealed that a *Washington Post* reporter (now known to be Pincus) had been told about Wilson's wife's employment by an administration official (now believed to be Fleischer) on July 12, two days before Novak's column was published. (Exhibit D.) 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 October 2003 Time Piece

15. *Time* magazine published an article in October 2003 titled "*Leaking With a Vengeance*." (Copy Annexed as Exhibit I) Cooper, Dickerson and Calabresi were listed among the contributors. The article described the allegations that the "White House" leaked and described "Bush aides" as hiding behind journalists and averred that it was no surprise that "hard liners" tried to "flatten" Wilson, describing the hardliners as person working for Vice President Cheney, Defense Secretary Donald Rumsfeld and Deputy Defense Secretary Paul Wolfowitz. In relevant part, that article stated:

In the days after Wilson's essay appeared, government officials began to steer reporters away from Wilson's conclusions, raising questions about his veracity and the agency's reasons for sending him in the first place. They told reporters that Wilson's evidence was thin, said his homework was shoddy and suggested that he had been sent to Niger by the CIA only because his wife had nominated him for the job.

The double-barreled leak had two targets. One was to tag Wilson as a tired, second-rate diplomat who couldn't get a job without his wife's help. The leakers also wanted to drop

[REDACTED]

the hint that the CIA had purposefully chosen someone it believed would come back with a skeptical finding

(Exhibit I)(emphasis added)

The Instant Subpoenas

16. The instant subpoenas to *Time* and reporter Cooper concern conversations between Cooper and his unidentified sources on or before July 14, 2003, and related documents.

Cooper's Prior Testimony

17. On August 23, 2004, Cooper testified at a deposition with the assistance of counsel that he spoke to I. Lewis "Scooter" Libby, the Vice President's Chief of Staff, by telephone on the afternoon of July 12, 2004. (Transcript of Deposition of Matt Cooper, annexed as Exhibit J.) (Cooper conceded that on August 5, 2004, he called Libby to verify Libby's consent to Cooper's testimony and conceded that he told Libby that his testimony would be largely "exculpatory." *Id.* at 75-76.) Cooper testified that on July 12, Libby read Cooper a quote for attribution that later appeared in *Time* magazine and that they had an additional conversation which Cooper believes that Cooper, not Libby, suggested be off the record. Exhibit J at 20. Cooper believed that he raised the issue of Wilson's wife at the end of the conversation, asking in sum and substance "what do you know about Wilson's wife being involved in, you know, sending him on this mission?" *Id.* at 27. Cooper believed that Libby "said something to the effect of, 'yeah, I've heard that too'. 'Yeah, I heard that too.'" *Id.* at 28. 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 obtaining more information. *Id.* at 56-57. Cooper testified that he did not follow up as Libby seemed to want to end the conversation. *Id.* Cooper took Libby's statement as confirmation of what Cooper said he already knew from two other sources. *Id.* at 31. 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. *Id.* at 36-38. 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. *Id.* 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, adding that the writing was a "little tortured here." *Id.* at 58-61.

[REDACTED]

Cooper testified that he believed he had two sources for the information about Wilson's wife before Cooper spoke to Libby on the afternoon of July 12, but was certain that at least one predated the Libby conversation. *Id.* at 79-80. Cooper testified that he recalled that he learned the information about Wilson's wife's employment both from another reporter and directly from another source. *Id.* at 30. Cooper testified both that he specifically recalled learning the information prior to his conversation with Libby and that he was also relying upon documents which showed that the conversation was prior to his conversation with Libby. *Id.* at 31. Cooper also testified that he learned the information on a day other than July 12. *Id.* at 29. Given that Ari Fleischer has admitted discussing Wilson's wife with *Time* reporter Dickerson in Uganda on July 11,

[REDACTED]

[REDACTED] it appears likely that Cooper's "reporter" source is Dickerson. However, Cooper's direct "official" source remains unidentified.

[REDACTED]

18. [REDACTED]

[REDACTED]

[REDACTED] Given the possibility that Rove and Cooper spoke that day about Wilson's wife's employment, a more detailed discussion of the part of the investigation that concerns Karl Rove is set forth herein.

[REDACTED]

19. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20.

[REDACTED]

[REDACTED]

[REDACTED]

The July 2003 Rove-Novak Telephone Call

[REDACTED]

21.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Novak expressed to Rove his surprise that somebody like Wilson (whom he viewed as a partisan Democrat) had been sent on the mission. Novak then brought up to Rove the fact that Novak had heard that Wilson's wife had worked at the CIA, and had suggested her husband for the mission. Novak testified that he may have mentioned Wilson's wife's first name, Valerie, to Rove but Novak did not believe he mentioned her last name "Plame" when he spoke with Rove because Novak does not believe he knew it at that time. In response to Novak's statement about Wilson's wife, Novak recalls Rove saying "oh, you know about that too." Novak took that comment as a confirmation of the information, and so Rove became his second source.

22. Novak also recalled that he spoke to Rove before he spoke to Bill Harlow, the then press officer at the CIA. Novak testified to that recollection in the grand jury before his telephone records had been analyzed. When his telephone records were later analyzed, they corroborated Novak's recollection.

[REDACTED]

23.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REDACTED

24.

[REDACTED] REDACTED

[REDACTED]

REDACTED

[REDACTED] REDACTED

25.

[REDACTED] REDACTED

[REDACTED]

REDACTED

The Libby-Rove Conversation

26. Libby, the Vice President's Chief of Staff, testified, moreover, 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 Rove was "animated" that Novak planned to publish a story about Wilson and his wife.

[REDACTED] REDACTED

[REDACTED]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

27. [REDACTED] [REDACTED] It is presently unknown whether Cooper and Rove spoke on that occasion. Cooper has testified that he had been told by a government official that Wilson's wife worked at the CIA on some day prior to July 12, 2003.

[REDACTED]

28. [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

29. [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30. [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

31.

[REDACTED]

[REDACTED]

[REDACTED]

32.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

33.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REDACTED

34.

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[REDACTED]

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[REDACTED]

REDACTED

35.

REDACTED

[REDACTED]

REDACTED

[REDACTED]

REDACTED

36.

REDACTED

[REDACTED]

REDACTED

37.

REDACTED

[REDACTED]

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[REDACTED]

[REDACTED]

REDACTED

[REDACTED]

REDACTED

[REDACTED]

REDACTED

[REDACTED]

REDACTED

38. 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. Fleischer specifically recalled Dan Bartlett venting about the perceived 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 did not recall discussing Wilson's wife in that conversation, though it appears from other evidence, taken together with Pincus' testimony, that Fleischer did. 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]

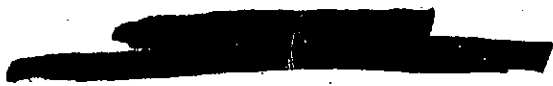
REDACTED

39. [REDACTED]

REDACTED

[REDACTED]

REDACTED



40 It is possible that in citing his two "sources," Cooper may be relying upon any information provided by Fleischer through his fellow *Time* reporter Dickerson. In that case, there would still remain one direct government source for Cooper unaccounted for. Moreover, it would be highly relevant to any putative prosecution of Libby to establish that while Libby may have been only a third source for Cooper's article who only confirmed what Cooper already knew, one of the earlier more direct sources was a press officer with whom Libby chose to share the information later disclosed.

REDACTED

41. REDACTED
REDACTED

42. REDACTED
REDACTED

43. REDACTED
REDACTED

[REDACTED]

[REDACTED]

REDACTED

44.

REDACTED

REDACTED

45.

REDACTED

REDACTED

46.

REDACTED

REDACTED

REDACTED

47.

REDACTED

REDACTED

The investigation to date has conclusively established that columnist Robert Novak spoke to Deputy Secretary of State Richard Armitage in person 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.

REDACTED

REDACTED

REDACTED

Armitage has been interviewed and has testified in the grand jury twice as to his account of the conversation. (See Transcript of Grand Jury Testimony of Richard Armitage, copy annexed as exhibit Q.) Novak has been interviewed several times and, when presented with a waiver form executed by Armitage, testified before the grand jury as to his conversation with Armitage and later provided a further deposition to the grand jury as to certain additional questions.

REDACTED

REDACTED

[REDACTED]

[REDACTED]

[REDACTED] Armitage maintained that he was not aware of any continuing effort to "push back" against Wilson or discredit him.

48. The investigation of Armitage's conduct is near complete and, indeed, Armitage testified for the second (and final) time before the grand jury on September 22, 2004. Armitage testified that he did not recall discussing Wilson's wife's employment with any reporter other than Novak prior to July 14, 2003, and specifically denied any recollection of discussing the matter with Cooper or any of his *Time* colleagues.

The Earlier *Time* Document Production re: "White House"

49. [REDACTED]

[REDACTED]

[REDACTED]

Relevant Waivers of Confidentiality

50. To the extent that a "reporter's privilege" is claimed to exist under the law, all but one of the likely sources have waived its protections by executing 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

7 [REDACTED]

[REDACTED]

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.

(Exhibit S)

[REDACTED] REDACTED

[REDACTED] REDACTED

The Consequences of Identification of Cooper's Source(s)

51. It would not be an overstatement to assert that Cooper's testimony as to his source(s) is necessary to make final prosecutive decisions as to several present and former government officials,

[REDACTED] REDACTED

[REDACTED] REDACTED

[REDACTED] REDACTED

52.

[REDACTED] REDACTED

[REDACTED] REDACTED

53.

[REDACTED] REDACTED

[REDACTED] REDACTED

[REDACTED]

[REDACTED]

54.

[REDACTED]

[REDACTED]

[REDACTED]

8

[REDACTED]

[REDACTED]

[REDACTED]

9

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

55.

REDACTED

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[REDACTED]

REDACTED

61.

[REDACTED]

REDACTED

[REDACTED]

REDACTED

62.

[REDACTED]

REDACTED

[REDACTED]

REDACTED

The Need for the Reporters' Testimony

63. The further testimony of reporter Cooper, and the production of relevant

11

[REDACTED]

REDACTED

REDACTED

[REDACTED]

documents by *Time*, is central to the resolution of that part of the criminal investigation concerning the disclosures about Wilson's wife to reporter Cooper prior to July 12 – and may well be dispositive of whether [REDACTED] can and should be charged with a crime. Cooper's testimony, and production of the documents, is essential to determining whether his two sources are guilty of crimes, including perjury, false statements and the improper disclosure of national defense information.

Exhaustion of Alternative Remedies

64. 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.

65. 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]

66. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REDACTED

67. The President has not asserted executive privilege to date.

REDACTED

[REDACTED]

REDACTED

68. 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

69. It is important to bear in mind that the applicable Attorney General 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 T, at paragraph (n)). Nonetheless, issuance of the subpoenas at issue was consistent with the principles set forth in

[REDACTED]

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. They will likely never be subpoenaed.

70. 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. Novak complied with the subpoena. Novak participated in a follow-up deposition on September 14, 2004, regarding some additional details about his conversation with Deputy Secretary Armitage and other matters.

71. A subpoena was not issued to Glenn Kessler of the *Washington Post*, in light of negotiations with his counsel which resulted in a deposition. Subpoenas were issued to Walter Pincus and the *Washington Post*. Prior to argument on the motions to quash by Pincus and the *Washington Post*, the *Washington Post* agreed to produce documents and Pincus agreed to provide a deposition and did so.

72. Subpoenas were also issued to Matt Cooper and *Time* magazine, as well as to 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. 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.

73. Subpoenas were also issued to Judith Miller and the *New York Times*. An application to hold Miller in civil contempt for refusal to testify and produce documents is currently pending before the Court.

74. 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 14, 2003.);

Andrea Mitchell of *NBC*, whom Libby testified he might have told about Wilson's wife but was not certain. (Similarly, we have contacted *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. *NBC* has refused and we are considering how next to proceed.);

[REDACTED]

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 so¹²;

Massimo Calabresi, Michael Duffy, James Carney, Timothy Burger, Viveca Novack, Elaine Shannon, Karen Tumulty, Douglas Waller and Michael Weisskopf of *Time*: co-authors of Cooper who (at least as of now) 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.

75. 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 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

12

[REDACTED]

REDACTED

[REDACTED]

REDACTED

[REDACTED]

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).

76. 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.

REDACTED

REDACTED

77. 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.

78. 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 reporter Cooper and the production of relevant documents is essential to a successful investigation and may directly establish the guilt or innocence of those suspected of being one of Cooper's two sources other than Libby – [REDACTED] The subpoenas are not issued to obtain peripheral, nonessential or speculative information.

79. There are no alternative nonmedia sources left to explore to identify Cooper's sources. All likely government sources for Cooper have been questioned and none have admitted advising him about Wilson's wife on or before 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 *Time* both in July 2003 and October 2003 that *Time* was told about Wilson's wife's employment. And the subpoenas are directed at material information regarding

[REDACTED]

a limited subject matter. Cooper's subpoena focuses principally on the conversations he had with sources about Wilson's wife on or before July 14.

80. The only manner in which to rationally assess the credibility and culpability of the suspected sources for Cooper – [REDACTED] – is to identify the sources and establish what was told to Cooper by whom and then compare that person's account against the account given by Cooper.

The Successive Subpoenas Are Properly Issued

81. Cooper indicates surprise and complains that he was subpoenaed again so soon after providing his first testimony. First, the fact that Cooper was subpoenaed twice is a reflection not that he is being singled out for any improper treatment but, rather, that, as a reporter, he is being treated with a procedural deference not ordinarily afforded witnesses. The fact that a witness with relevant knowledge was issued separate subpoenas concerning different sources for the same facts is a reflection of the extraordinary process by which reporters are treated not only more deferentially than lay witnesses but in this case in a manner more solicitous than of high ranking officials [REDACTED].

82. Cooper was earlier issued a subpoena concerning an article he co-wrote which cited that "some government officials" had noted to *Time* in interviews that:

Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction. These officials have suggested that she was involved in her husband's being dispatched Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore, sometimes referred to as yellow cake, which is used to build nuclear devices.

83. At the time the subpoena was issued, Special Counsel had sworn testimony (under a grant of immunity) from former White House Press Secretary Ari Fleischer stating that Fleischer had discussed Wilson's wife's purported employment with *Time* reporter John Dickerson at the side of a road in Uganda on July 11, 2003. (Nonetheless, Special Counsel elected not to subpoena Dickerson and still has declined to do so to date.) Special Counsel also had sworn testimony from Scooter Libby stating that he and Cooper had discussed Wilson's wife's employment during a phone call on July 12, 2003. Libby described a conversation of more than a passing nature and one in which Libby apprised Cooper that Wilson's wife purportedly worked at the CIA – not the other way around. Libby testified that Cooper asked Libby 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

[REDACTED]

worked at the CIA "and I don't know if it's true." (Grand Jury Testimony of Libby, 3/5/04, annexed as Exhibit U at 182-86.) Libby testified several times that he told Cooper (and other relevant reporters, including Judith Miller of the *New York Times*) that he did not know if the information about Wilson's wife was true or even if Wilson had a wife. And Special Counsel had no indication that other subjects of the investigation had spoken directly to Cooper prior to when Libby did on July 12. Indeed, from Libby's description, it appeared that Cooper learned of Wilson's wife's rumored employment for the first time from Libby. Libby testified that Cooper did not give any indication that he already had learned the information. (Exhibit U at 115-16)

[REDACTED]

REDACTED

84. At Cooper's sworn deposition, Special Counsel was quite surprised – to say the least – to learn that Cooper recalled only a very brief, passing conversation about Wilson's wife with Libby. Moreover, Cooper claimed that he told Libby about Wilson's wife's involvement in her husband's trip and Libby merely indicated that he had heard that information too. (Cooper further denied that Libby gave any indication that Libby had heard this information from other reporters or that Libby did not know if the information were true or that Libby indicated to Cooper that Libby did not know if Wilson even had a wife.) Further, Cooper claimed to have discussed Wilson's wife's employment with two sources prior to that July 12 conversation with Libby. Cooper made explicit that at least one of those sources was a government official. In the ordinary case where a witness other than a reporter is being questioned and makes plain that the witness has additional relevant information, the witness would be further examined in the grand jury spontaneously and the prosecutor would simply ask the next logical questions concerning the other persons Cooper spoke with. Nonetheless, consistent with the prior understanding with counsel for Cooper and *Time*, those questions were not posed at that time to Cooper. Special Counsel did advise Cooper and his counsel that the right to ask those questions was not being waived.

85. Thereafter, the investigators reexamined the relevant events

[REDACTED]

REDACTED

[REDACTED]

REDACTED

Given that Cooper apparently learned more information from earlier sources –

[REDACTED]

REDACTED

[REDACTED]

REDACTED

– it became imperative to learn about the identity of the prior sources and the

[REDACTED]

substance of the conversations. Accordingly, new subpoenas were properly authorized and issued.

Patrick J. Fitzgerald

PATRICK J. FITZGERALD
Special Counsel

Sworn to before me this
27th day of September 2004

Margaret R. Cusack

Notary Public

