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01 UNITED STATES DISTRICT COURT
02 FOR THE DISTRICT OF COLUMBIA
03 United States of America Docket No. CR 05-0394 RBW
04 Washington, D.C.
05 vs. Friday, February 24, 2006
06 2:30 p.m.

07 Lewis Libby
08 Defendant
09 Transcript of Status Conference
10 Before the Honorable Reggie B. Walton
11 United States District Judge

12 APPEARANCES:

13 For the Plaintiff: Mr. Patrick Fitzgerald, Esq.
14 Mr. Peter Zeidenberg, Esq.
15 For the Defendant: Theodore Wells, Esq.
16 Jonathan Jeffress, Esq.
17 John Cline, Esq.
18 Joseph A. Tate, Esq.

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25 Reported by Voice Writing and transcribed using SpeechCAT
26 Pages 1 through 91

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P R O C E E D I N G S

01 (Defendant present.)

02 THE CLERK: This is the case in the matter of
03 Criminal Action Number 05-0394. United States of America
04 versus Lewis Libby.

05 Counsel, can you please identify yourself for the
06 record.
07

08 MR. FITZGERALD: Pat Fitzgerald and colleagues for
09 the United States. Thank you.

10 MR. WELLS: Ted Wells and colleagues on behalf of
11 Lewis Libby.

12 THE COURT: Good afternoon. There are some
13 housekeeping matters we need to deal with before we actually
14 proceed with the motions. There have been a number of matters
15 that have been filed under seal. Whenever matters are filed
16 under seal, I would ask counsel to specifically articulate why
17 it is appropriate to do so since I believe in an open
18 proceeding unless there is good course for the matter to be
19 under seal. I wouldn't do that. But we now have your redacted
20 affidavit from Mr. Fitzgerald.

21 Should that remain under seal?

22 MR. FITZGERALD: Yes, Your Honor. That disclosures,
23 in my view, grand jury material that a limited amount of which
24 has been shared with the defense pursuant to protective order
25 but it is material that would be governed by the protective

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01 order.

02 THE COURT: Any objection to that?

03 MR. WELLS: Yes, Your Honor. We have a different

04 perspective. There was a protective order entered into in this
05 case. That is fairly common type protective order.

06 What it states is that, to the extent the defense is
07 given grand jury materials, it will not use those materials
08 except in connection with preparing the defense. That is
09 fairly the standard.

10 It is also standard in my experience, Your Honor,
11 that when grand jury materials are referred to as part of the
12 normal court proceedings during the pretrial phase of an
13 indicted case or during the trial phase of an indicted case
14 that those materials become public. If that was not the case,
15 every time we referred in an open court proceeding to a piece
16 of discovered that Mr. Fitzgerald had given us that was, in
17 essence, covered by 6(e), we would have to clear the courtroom
18 and have a private closed-court session.

19 That is not normal I would submit. Just as the fact
20 that when I go out, let's say, talk to a reporter who is a
21 potential witness about grand jury materials I have been given
22 and show that to the reporter, just as that is appropriate,
23 once the grand jury materials are used as part of the normal
24 give and take in the public courtroom, in a discovery motion,
25 and the most classic example would be once the trial begins,
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01 we're not going to clear the courtroom because something is
02 grand jury material. Once it is used, it becomes part of the
03 public record.

04 It is our position than the redacted affidavit should
05 not a sealed because it is now, in essence, in play. It is out
06 in the public arena and it should not be sealed. Similarly,
07 Your Honor, I had to file a sealed affidavit in this case
08 because Mr. Fitzgerald had marked his February 2 discovery
09 letter as confidential.

10 If we continue to have the practice that we can't
11 talk in open court about discovery materials that we have
12 gotten, then we are going to continually be going to closed
13 session which I submit is not normal and I don't think 6(e) is
14 interpreted in general in that fashion.

15 So, for example, when we argue the reporters issued
16 today, in theory we could not refer in open court to my sealed
17 indictment. We would have to clear the courtroom and when you
18 talk about that aspect, it would have to be under seal. I
19 don't think again that that is the normal process.

20 THE COURT: Mr. Fitzgerald, what about this document,
21 now that it is in redacted form, necessitates it remaining
22 under seal? If you need to address that to me at the bench, we
23 can do that.

24 MR. FITZGERALD: No. I can refer the court and
25 counsel, for example, to page 9 and paragraph 22. There is a
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01 sentence indicating some documents we disclosed to the defense.
02 That frankly, if I knew that I would be revealing it to the
03 public, concerns about people not charged in a crime, I
04 wouldn't have shared it with the defense in the first place.
05 What we're trying to do and I appreciate --

06 THE COURT: I would agree that in reference to that
07 particular paragraph where someone who may be totally innocent
08 is referenced that it would be unfair to that person to have

09 their name and the information about them disseminated in
10 public. I would agree with that.

11 MR. FITZGERALD: My concern being I've learned more
12 about open and closed courtrooms than I cared to know in the
13 last year and half and we're trying to do it the right way. At
14 the same time while we will disagree with the defense and, Your
15 Honor, will decide who is right and who is wrong on the
16 discovery obligation, we have in our mind given more than we
17 believe we're required to do so at times in an effort to move
18 things along.

19 But if we do that and every time we do that, it may
20 be attached to our letters, to a public filing, and it gets out
21 into the public domain, we will start battenning down the
22 hatches and saying if we're not sure we're not going to turn it
23 over which I think is not my desire and not my interest and I
24 don't think it will aid the defense or the court. So I think
25 that we have to be careful that every time we discuss something
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01 or share it with counsel, if we are liberal in doing that, that
02 it doesn't then impinge upon the grand jury secrecy interest.

03 THE COURT: I mean obviously I don't disagree with,
04 you know, the essence of what you said but I'm sure you would
05 also agreed that the need for an open proceeding is also very
06 important, and the public and the press have a right to know
07 what's going within its court system, and to the extent that
08 information can be made public, I think it should be.

09 I would agree with you in reference to that paragraph
10 that that would be problematic and unfair to potentially
11 tarnish someone in the public by disseminating this
12 information.

13 But I think we probably need to rethink the entire
14 document. Maybe that portion ends up remaining under seal.
15 But clearly are there other portions of a similar nature that
16 have to be under seal?

17 MR. FITZGERALD: May I make a suggestion which I
18 think, Your Honor, is headed there any way but perhaps we could
19 submit next week a proposed redacted version that would become
20 public, that we tried to draw the line where the public could
21 see what's left of the redacted affidavit that doesn't
22 compromise grand jury interests the way we did in the appellate
23 opinion. We would serve a copy obviously with counsel for the
24 defense and the court. They could weigh in on whether they
25 thought there was anything else that needed to be removed or
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01 put back in. And we'll try to draw the lines the way we did
02 otherwise.

03 THE COURT: I think that would be acceptable. I
04 assume, Mr. Wells, as government counsel says, we don't want to
05 shut down the flow of information which conceivably happens if
06 we start to make everything public although I do agree that we
07 need to scrutinize very carefully exactly what remains under
08 seal.

09 MR. WELLS: Your Honor, under no event do I want to
10 shut down the flow of information, but at the same time, let's
11 take that paragraph 22. I am permitted now under the
12 protective order to take that information and use it to prepare
13 the defense.

14 That means since this case involves reporters, for
15 example, in theory I could go and have a conversation, attempt
16 to have a conversation with somebody say from NBC -- were you
17 aware of this information -- to try to forward my case.

18 I mean it seems to me that we are acting like there's
19 going to be a magical moment when the trial begins, that
20 suddenly okay none of this matters. I believe the magical
21 moment occurs when the indictment is returned. Once a
22 prosecutor returns an indict, it is implicit, inherent in the
23 system that the materials in the grand jury are going to come
24 our during the normal phases of the case and to the public.

25 THE COURT: I would agree with you if this was a
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01 closed investigation. My concern is that there is an open
02 investigation. We don't know exactly what's going to happen to
03 reference to that investigation.

04 It seems to me fundamentally unfair to start to
05 reveal the information about people who may be subject to a
06 case and their name is tarnished in the public for no good
07 reason.

08 So I would agree with you, if this were a closed
09 investigation and we knew that the case wasn't going anywhere
10 other than Mr. Libby, I would agree. But I guess I have a
11 problem because of the nature and the status of the
12 investigation at this point in buying full-heartedly on what
13 you suggest.

14 What I'm going to do at this point, because I want
15 there to be an open proceeding, is to require that an
16 additional redacted version for public dissemination be
17 proposed. To the extent that the government believes that the
18 information in the current redacted affidavit still needs to be
19 maintained under seal, counsel will need to articulate, as you
20 just did, why you believe that this true. Then I'll make the
21 call.

22 MR. WELLS: Fair enough.

23 THE COURT: Okay. I think we can start to proceed,
24 oh, yes, we have the other matter regarding some changed dates
25 that I understand counsel is requesting. The date we have now
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01 for an additional motion to compel is due on March 3rd. I
02 understand counsel wants to change that to March 20 and that
03 the reply would then be due on March 27. I hate to change
04 dates but if there's good reason for it.

05 MR. FITZGERALD: And the reason is on the
06 government's behalf. We learned in comparing notes with
07 defense counsel, when they asked about a particular document,
08 that one set of 260 pages but an important set of 260 pages had
09 not been produced that we thought had been produced.
10 Therefore, we are producing them today.

11 They are notes of Mr. Libby. So they are not just
12 260 pages out of a large number. They are very important. So
13 that in setting the dates for the Section 5 notice we had lead
14 the court to believe because we understand that the defense had
15 all those relevant notes and they don't and so we want the
16 court to be aware that it is something we inadvertently did not
17 produce initially and that's the cause for the delay.

18 MR. JEFFRESS: Actually Your Honor's question was not

19 about that. Your Honor's question was about the discovery
20 motion.

21 THE COURT: Right.

22 MR. JEFFRESS: And the reason that we are not in a
23 position to file that discovery motion at the moment is we did
24 make our further specific request to the government by letter
25 on the 15th. They, and there has been a lot to do and I'm not
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01 criticizing the government for this but they have not responded
02 to that letter as yet. I am told by Mr. Fitzgerald today that
03 they hope to have that early next week and we would ask for an
04 additional two weeks to file that.

05 That is certainly not going to affect the trial date.
06 We don't think that will affect things generally but it is
07 simply a matter that there's been a lot to do.

08 THE COURT: Very well. I will change that date and
09 the additional motion to compel can be filed on March 3rd, and
10 the response then would be due on March 20 with a reply due on
11 March 27.

12 MR. JEFFRESS: I'm sorry, Your Honor.

13 THE COURT: I'm sorry. I'm looking at the wrong
14 dates. The motion will be filed on March 17. The response
15 would be due on April 5th and the reply due on April 12th.

16 MR. JEFFRESS: That is fine.

17 THE COURT: We also have -- yes.

18 MR. JEFFRESS: I'm sorry. The other date, is that
19 what, Your Honor, was turning to?

20 THE COURT: Yes.

21 MR. JEFFRESS: The other date is the date on which at
22 the last hearing, Your Honor, had set March 8 as the date for
23 filing an additional CIPA notice. As Mr. Fitzgerald alluded
24 to, what happened is that apparently there were 250 pages of
25 Mr. Libby's notes which were stored in a different place from
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01 the other document, and when the special counsel produced to us
02 the documents from the OBP and told us that we had them all,
03 they had forgotten about documents.

04 These were located about two weeks ago. They have not
05 been produced us yet. I think we are expecting to get them
06 this afternoon. What's going to happen is because these are
07 Mr. Libby's notes, they are going to have to be read. They are
08 going to be translated. They are going to be analyzed. And we
09 anticipate some of them obviously would be included in a
10 further CIPA notice.

11 Experience teaches that when it comes to Mr. Libby's
12 notes that transliteration and review process takes a long
13 time. For that reason, we would ask that our further CIPA
14 notice be postponed three weeks, that is, until March 29 so
15 that we can incorporate this newly-produced material on that.

16 I may say we are also told that there are an
17 additional approximately 250 pages of documents that are emails
18 from the office of the vice president. Your Honor, may recall
19 that in earlier filings it was represented or alluded to that
20 certain e-mails had not been preserved in the White House.
21 That turns out not to be true. There were some e-mails that
22 weren't archived in the normal process but the office of the
23 vice president or the office of administration I guess it is

24 has been able to recover those e-mails. Gave those to special
25 counsel I think only on February 6 and those again are going to
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01 be produced to us.

02 We don't know what's in there. We've been led to
03 believe it's probably not anything startling in those e-mails
04 but again we need to review those and that also may be the
05 subject of a motion.

06 THE COURT: Based upon what you have indicated, I
07 think that's also good cause to change that date so that the
08 CIPA Section 5 notice would have to be filed by March 29.

09 MR. JEFFRESS: Very well, Your Honor.

10 THE COURT: I think that then is an appropriate
11 topic, to start with, although that wasn't the first matter on
12 my list, that is, Mr. Libby's notes.

13 Do you now have all of the notes for the relevant
14 time period that you have requested or are there still other
15 notes that you still haven't received? I think you've made a
16 request for notes from May 6, 2003, through March 24, 2004.

17 MR. WELLS: That is correct, Your Honor. We do not
18 have all those notes. The government objects to our request.
19 What the government produced to us is the following. Mr.
20 Libby's notes from May 6 through May 10, from June 1 through
21 July 25, July 28 and 29, September 27 through October 13. The
22 250 pages that we are going to get sometime today in the skiff
23 were part of that original, covering those dates. The
24 government just made a mistake and so we didn't get them
25 before.

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01 So nothing has changed. That 250 you heard about
02 today is just what they have promised to give us before we ever
03 had any discovery on this issue.

04 THE COURT: May 6th, 2003, as I understand, is the
05 date on which Ambassador Wilson's findings were first reported
06 in the press, is that right?

07 MR. WELLS: Yes.

08 THE COURT: Why is it felt that as of that date you
09 need his notes?

10 MR. WELLS: Because it is during that period, we do
11 have his notes as of that date for what it's worth.

12 THE COURT: Oh, you have them?

13 MR. WELLS: Yes. What the government did was they
14 made a cut of what the government thought might be relevant
15 during the grand jury investigation having no interaction with
16 us. This was a year ago.

17 THE COURT: Are there notes that you don't have that
18 would have covered the period between when Mr. Libby is first
19 to have spoken I guess it was to Mr. Russert until such time as
20 he last appeared before the grand jury?

21 MR. WELLS: Correct. Because what the government
22 did, if you see these are disjointed dates and we are asking
23 for them to fill in the notes. That is what is on the table
24 today.

25 THE COURT: Mr. Fitzgerald, it seems to me that, from
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01 what's been submitted to me at least in part, the defense
02 believes that they need those notes in order to help Mr. Libby

03 refresh his collection of what was occurring during that period
04 of time. I know you may take a different position as to what
05 part of that time is relevant.

06 But it seems to me arguably a position could be taken
07 that his activity during that entire period of time would be
08 relevant in assessing what his memory bank would have been
09 relating back to the time when he alleged had these discussions
10 with the reporters and also when he appear before the grand
11 jury and when he spoke to the FBI and even during that integral
12 period there would be, intervening period I mean, there would
13 be a question as to whether his activity at the time would have
14 conceivably had an affect on his ability to remember things
15 that had taken place earlier.

16 MR. FITZGERALD: Your Honor, the period including the
17 notes we're turning over today, all the notes we have from Mr.
18 Libby are being given to him. We are not sitting on any notes
19 in counsel's office. They cover the period June 1 to July 25.
20 The conversations in issue that Mr. Christoff published on May
21 6. We have the notes from May 6 through the 10th.

22 THE COURT: So the other notes that you haven't
23 turned over, you are saying you don't have those in your
24 office.

25 MR. FITZGERALD: Right. Never had, never looked at
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01 them, never sought them.

02 THE COURT: I assume you can acquire them since you
03 were able to acquire the ones that you turned over.

04 MR. FITZGERALD: Yes, Your Honor. They obviously
05 involve classified information issues and involve issues of
06 executive privilege and confidentiality. But June 1 to July
07 25 --

08 THE COURT: But no different than the ones that you
09 already have?

10 MR. FITZGERALD: But we would argue are much less
11 relevant in the sense that the period June and July when the
12 relevant conversations between Mr. Libby are June 23, July 8
13 and July 11. His conversation with Mr. Fleischer is the
14 morning of July 7. The conversation with Mr. Russert is July
15 10. The conversation with Mr. Cooper is July 12 I believe.
16 There's a compact week from July 6 to July 14 when most of it
17 takes place.

18 The focus of the charges is his conversation with Mr.
19 Russert and Mr. Cooper and Ms. Miller. We have blanketed June
20 1 until July 25 and then July 28 and 29. His first
21 conversations which are consistent with his later grand jury
22 testimony. His first statements to the FBI are I believe
23 October 10 or 13. We have covered September 27 when the
24 investigation is announced until October 13.

25 All that other time periods which is a vast amount of
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01 material, we say is not relevant since it concerns other
02 matters like the George case, a preoccupation issue, and to
03 know what he's working on to get it to the level of detail
04 that's required, I don't know that that is material because you
05 can know you are working on a nuclear bomb without getting into
06 the details of what you are doing on a particular day and
07 implicating both issues of privilege, classified information

08 and a lot of work to go through hundreds of pages and
09 transliterate and triggered those issues.

10 So our position is --

11 THE COURT: Your position is that events that he
12 would have been engaged in after his last conversation with the
13 reporter until such time as he spoke to the FBI, that that
14 would not conceivably have an effect on his memory bank as it
15 relates to what he allegedly said to the reporters?

16 MR. FITZGERALD: If the word is "conceivably",
17 anything could conceivably have it. I am arguing that under
18 the law, where the materiality under even the case Marshal they
19 cite talks about a strong indication and making an important
20 difference. We were looking at classified information in the
21 case. Rezaq and Yunis talk about material that's helpful to
22 the defense. I think a rule of reason has to apply where if
23 you are blanketing the period when the relevant conversations
24 happened and the interview with the FBI, I don't think we
25 should go to an 11-months span.

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01 THE COURT: But as I understand the George opinion,
02 there were requests made in that case that encompassed times
03 beyond the time period that would have been covered related to
04 the alleged criminal activity.

05 I understand that that intervening time you are
06 saying that there was nothing taking place of an alleged
07 criminal nature but still it seems to me a question of what
08 would have occurred during that period of time could have an
09 affect on his ability to remember what he had done or what was
10 said to him on an early date.

11 MR. FITZGERALD: If I might suggest an alternative
12 which is we covered the period during which he had the
13 conversation with the reporters with weeks on either side and
14 we have covered the period of the interview. There are two
15 grand jury dates. We could cover a week around, my suggestion
16 would be to cover a 10-day period blanketing both grand jury
17 appearances but between then you know November, Thanksgiving
18 Day 2003, six weeks after the interview and three months before
19 the grand jury appearance it seems to me we are getting pretty
20 far a field when we are triggering issues of classified
21 information and privilege that may we suggest those two grand
22 jury dates I believe and we could blanket ten days around each
23 date. We would have the days around the interview and we would
24 have the days around the interaction with reporters.

25 THE COURT: Mr. Wells.

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01 MR. WELLS: I strongly object, Your Honor. I have
02 made, on behalf of Mr. Libby, a very targeted and focused
03 request. I have asked for his personal notes from May 6 which
04 is a date the government even agrees with as the start date,
05 through his last grand jury appearance which is March 24.

06 What the government is saying, well, let's just give
07 you a week here and a week there and cut it off and that ought
08 to be enough. Neither myself nor Mr. Fitzgerald are memory
09 experts. Unlike George, these are very focused requests.
10 There's no burden on the government's part.

11 THE COURT: Do we know, based upon what your client
12 has told you, how many documents we may be talking about?

13 MR. WELLS: I do not, Your Honor. But I don't
14 believe it's a burden for the government to acquire them. I
15 just haven't run the numbers based on what the government
16 already collected. What the government kind of did was like
17 basically an arbitrary cut. They went, said let's look a week
18 here and a week there.

19 All we have asked for is from the time both sides
20 agree is the right starting date until his last grand jury
21 appearance. It is about a nine-month period.

22 The notes I understand are readily available. All of
23 these notes from day one have been designated as classified.
24 We can only read the notes in the skiff. I would ask, Your
25 Honor, what I would suggest has been a very reasonable request.
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01 We didn't ask for all his notes while he worked as national
02 security adviser to the vice president. All we asked for is
03 for a very tight and understandable time period.

04 THE COURT: I am kind of convinced that, I mean I
05 know it is to some degree a burden but we are talking about a
06 man being charged with a criminal offense and I kind of feel
07 that even though the time period we are talking about there
08 allegedly was no activity of a criminal nature taking place
09 that nonetheless that what would occur would have occurred
10 during that period of time could have an affect on his ability
11 to recall what had taken place earlier especially based upon
12 what is being suggested that he was dealing with issues of such
13 a magnitude that he would have put all of his focus on that
14 that conceivably it would have an affect on memory and recall
15 as it relates back to an earlier date. And since they are his
16 own notes, I guess I'm having some difficulty with saying that
17 those would not be provided to him.

18 MR. FITZGERALD: I'll make just two comments and
19 then I'll let, Your Honor, rule. The first is, if it is
20 something that so distracted Mr. Libby that it would affect his
21 memory, it seems hard to believe that something would be that
22 important that it so preoccupied him that he can't remember it
23 happen now.

24 If you look at the burden here, I think we probably
25 had about a portion of close to three months of notes that
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01 we've given because we have most of June and July. We have
02 September. Maybe it is two and a half months. Going to 11
03 months, maybe four times that amount. It sounds like the notes
04 from the portion we had were 500 pages and these are the
05 hieroglyphics.

06 THE COURT: Let me just ask. If he decides to
07 testify, are you saying that he would not be permitted to
08 testify about what he was doing during that period?

09 MR. FITZGERALD: I'm saying he should be able to
10 testify about that but at a level of detail that doesn't
11 implicate massive classified information issues.

12 THE COURT: I might agree with that. But in order to
13 be able, even given a general sense of what he was doing during
14 that period of time, it seems to me access to his notes and the
15 opportunity to review them would assist him in that regard.

16 MR. FITZGERALD: The only thing I will point out,
17 Judge, is, yes, I mean he has filed a preliminary Section 5

18 notice indicating the things he wants to discuss. Recognizing
19 that we're probably talking about now probably another 2000
20 pages, if it is four times the amount of what's been given over
21 so far, and the weeks it takes to transliterate and then it
22 goes to the agencies for classification review, and I think
23 five agencies. And then there are issues of privilege, and
24 particularly on the executive privilege and confidentiality
25 since these notes were focused on things other than the Wilson
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01 controversy, and the perjury case is focused on that, it gets
02 into issues where there are serious privilege issues. We may
03 be talking about matters of state that are extraneous to this
04 matter.

05 THE COURT: And we may have to deal with that as it
06 relates to what he's going to be able to testify to if he
07 decides to testify, what he is permitted to testify about. But
08 I do think that since they are his notes and since the issue of
09 his memory is going to be at issue, it would seem to me that
10 his ability to refresh his memory as to what was taking place
11 not only when he allegedly spoke to reporters but also what
12 took place between that point and when he ultimately spoke to
13 the FBI and went before the grand jury is, in fact, material
14 under Rule 16 and I would require that that information be made
15 available to him.

16 MR. FITZGERALD: Your Honor, my only suggestion since
17 we will already be moving to move Section 5 dates way back by
18 months to allow is, that we focus on whether there is any way
19 we can narrow the eleven months.

20 I do want to say that I am aware that there was a
21 second interview of Mr. Libby which the FBI agent pointed out
22 so that I think it was in late November or early December so I
23 said before Thanksgiving would not be relevant. I think there
24 were two interviews and two grand jury appearances. But every
25 month we add --

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01 THE COURT: Why don't we make an assessment as to how
02 many documents we were talking about. I mean I do consider the
03 7th of January to be a drop-dead date and I don't want to have
04 that date changed. But to the extent there is going to a need
05 for more time because of my order in this regard, you will just
06 have to work it out somehow. Okay.

07 Let's go back to the first request that was made by
08 the defense in the first motion to compel. And we are talking
09 about the reporters notes. Is there something else?

10 MR. WELLS: I was going to make a suggestion how we
11 thought we might proceed. Mr. Jeffress is going to address the
12 reporters issue. I am going to address the issue relating to
13 the morning intelligence reports. What I think might make it
14 more focused for, Your Honor, is if Mr. Jeffress addressed the
15 reporters issue. Let Mr. Fitzgerald respond to that and then I
16 will return to the podium.

17 THE COURT: That is fine. I understand that a lot of
18 what was requested or at least some of what was requested when
19 the motion to compel was filed has now been satisfied. So
20 what's outstanding at this point?

21 MR. JEFFRESS: That is right, Your Honor. As we
22 understand it, there are two categories, two types of

23 information, and this is not voluminous information but it is
24 important information. The two categories are this.

25 First, there is the identify of a particular

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01 government official, obviously not in the White House, who told
02 two reporters as early as mid-June of 2003 about Mrs. Wilson.
03 I don't feel, because a lot of these revelations are made in
04 letters that are marked confidential and are covered in an
05 affidavit filed under seal, I don't feel comfortable going
06 beyond I guess that description publicly.

07 THE COURT: I understand what you're telling me.

08 MR. JEFFRESS: But Your Honor understands what I'm
09 talking about. That's one thing that has, explicitly I guess
10 the government has advised us that it is not disclosing.

11 THE COURT: Let's deal with that. Why do you believe
12 that's material to the preparation of your defense?

13 MR. JEFFRESS: Your Honor, the indictment in this
14 case alleges that Mr. Libby lied about a conversation with Mr.
15 Tim Russert in which Mr. Libby recalled that Tim Russert told
16 him, mentioned the wife to him and said all the reporters know
17 it.

18 Mr. Libby also testified that he was hearing that
19 reporters were mentioning to the White House as opposed to vice
20 versa that Ms. Wilson worked at the CIA. Mr. Libby in the
21 grand jury identified two particular people from the press who
22 he recalled had given that information either to him from
23 someone else in the White House who had passed it on to him.

24 The government says that he is wrong about Mr.
25 Russert, who was one of those two people, and indeed that he

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01 lied about the conversation. But the indictment also alleges
02 that there is someone who did tell Mr. Libby about this who Mr.
03 Libby didn't remember when did testify at the grand jury, and
04 that is Mr. Cooper and that's alleged in the indictment.

05 The defense, in order to prepare the defense, to show
06 that Mr. Libby was correct even if he may not have been correct
07 about exactly who or exactly when but that Mr. Libby was
08 correct that he was hearing from reporters either directly or
09 through other people at the White House that they knew that Ms.
10 Wilson worked at the CIA, the defense needs to investigate, to
11 ascertain, to prove what reporters knew that or had heard that
12 Ms. Wilson worked at the CIA.

13 THE COURT: Even if there's no indication that these
14 other purported reporters had any contact whatsoever with Mr.
15 Libby?

16 MR. JEFFRESS: Absolutely. Number one, Mr. Libby,
17 even if one of the sources he says -- I know the government is
18 telling, Your Honor, that unless somebody personally told it to
19 Mr. Libby, it wouldn't be anything Mr. Libby could rely on.
20 But that is just not so.

21 Mr. Libby himself told the grand jury about another
22 reporter who had told somebody in the White House who had told
23 Mr. Libby. And when Mr. Libby said, we are hearing or I've
24 heard that or we've heard that, he wasn't necessarily limiting
25 himself to conversation directly between himself and other

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01 reporters.

02 THE COURT: What if there's nothing that would
03 indicate that this other government official that you reference
04 had no contact whatsoever with Mr. Libby in regard to this
05 information?

06 MR. JEFFRESS: But here's the thing, Your Honor, what
07 Mr. Libby -- a central issue in this case is whether it is so,
08 as Mr. Libby recalls, that reporters were, number one, all the
09 reporters knew. Now obviously not all of them knew. But when
10 he's saying that, he means many of them knew that Mr. Wilson's
11 wife worked at the CIA.

12 And when he is saying we are hearing that from
13 reporters, that at the very minimum the defense is entitled to
14 the information that would enable us to determine whether that
15 is so, whether there were many reporters who knew.

16 Now let's focus on official one as we will call him
17 just for purposes of this argument, that we are talking about
18 his identity. Now we know, Your Honor, if that person -- well,
19 let me start back.

20 All we can ask for at this stage is what the
21 government has. The government represents to Your Honor that
22 it has told us the identities on each reporter that the
23 government knows received this information. But, Your Honor,
24 it is obvious from the representations made by the government
25 to us that the government did not fully investigate that

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01 question.

02 There are many reporters that they didn't talk to at
03 all, including reporters who have made public claims that they
04 or that they had heard others knew. There are people, for
05 example, Mr. Russert, as to whom the government made an
06 agreement that it would only ask him narrow questions about his
07 side of the --

08 THE COURT: Are you suggesting with reference to Mr.
09 Russert that if other reporters, in fact, knew about this and
10 were, in fact, talking about it, and let's assume that Mr.
11 Russert may, in fact, have heard those conversations, that you
12 would be able to present that to a jury in support of the
13 proposition that because Mr. Russert had heard it and because
14 people were saying it that that would prove that Mr. Russert,
15 in fact, made the statement as Mr. Libby suggests?

16 THE COURT: It would certainly make it more likely
17 than not which is a test of relevance that he did, in fact, say
18 it, if it's true. Now Mr. Russert, you know he's going to
19 testify. I don't know what he's going to testify. I haven't
20 talked to Mr. Russert. But presumably it will testify that he
21 didn't say anything about the wife to Mr. Libby. Mr. Libby
22 recalls that he said that, mentioned that the wife worked at
23 the CIA and that other reporters know it.

24 What would make it more likely than not that Mr.
25 Libby's account is correct and Mr. Russert's account is

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01 incorrect? What would make it more likely than not is if we
02 were able to show that other reporters -- Mr. Russert, as you
03 recall, is head of NBC news bureau in Washington.

04 THE COURT: And maybe if we had some folks who were
05 news reporters in that bureau under his guidance, maybe that
06 may make it less attenuated. But if we're talking about

07 somebody who is in a totally different news agency and there's
08 no indication whatsoever that that person had any contact with
09 Mr. Russert, I don't see how that would be relevant in proving
10 whether Mr. Russert, in fact, made that statement.

11 MR. JEFFRESS: Your Honor, number one, its
12 materiality under Rule 16(a)(1)(E) is information that may
13 assist the defense in finding evidence. As a matter of fact,
14 under the Marshall and the Lloyd case, it will play an
15 important role in uncovering evidence as well as aiding witness
16 preparation, corroborating testimony or assisting impeachment.

17 How is the defense, and as Your Honor may imagine,
18 the reporters, although one has voluntarily come forward since
19 the indictment with information that was not known to the
20 prosecutor at the time, the reporters generally speaking are,
21 should I say, reluctant to discuss questions about their
22 sources with anybody including the defense.

23 So we anticipate this is going to be a hard job. But
24 we are, at least, entitled to the information in the possession
25 of the government that would enable us to do that.

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01 If you take official one, for example. Official one
02 -- we know of two reporters that official one talked to. And
03 you know, and I don't mean, and by the way we talked about
04 innocent accused. And certainly I'm not here to tell you that
05 official one did anything wrong whatsoever. But we do know
06 that he did discuss Ms. Wilson with at least two reporters.

07 How many others did he discussed it with? How many
08 others discussed it with him? We don't have a single piece of
09 information from the government as to what official one said
10 about that. We presume that they have interviewed official one
11 and we presume that he has testified . But we don't know that
12 and we don't know a single thing that he has said about that.

13 How would we investigate? We would go talk to
14 official one. If official one won't talk to us, we would serve
15 him with a trial subpoena. Right now since we don't even know
16 who he is, we can't even serve him with a trial subpoena.

17 We would have other means of investigating if he
18 wouldn't talk to us. We would be able to get phone records,
19 call logs. We would be able to ask other reporters who talked
20 to this particular official.

21 Your Honor, simply it is a fact that is key to this
22 case to know what reporters out there knew or had heard about
23 Wilson's wife, what they were saying to each other, what they
24 were saying to government officials.

25 And here is a key person, the first person that we

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01 know of, according to the evidence, actually discussed Mr.
02 Wilson's wife's employment with a reporter and not only did it
03 then but did it again with a separate reporter later. This is
04 some person not in the White House. And, Your Honor, this is
05 information that is, of all the information, it is key.

06 THE COURT: This other aspect of the issue you said
07 in reference to Mr. Libby saying that he had heard this
08 information, is that what you indicated?

09 MR. JEFFRESS: Mr. Libby said that he had heard this.
10 One of the reporters told Mr. Libby official one discussed Ms. Wilson.
11 The government says one of those didn't tell him that. However,

12 the government in the indictment has revealed another person
13 who did tell him that. So you know we have two people but the
14 government specifically alleges in the indictment that when Mr.
15 Libby said that he was hearing this from other reporters that
16 was part of the lie that's charged in this case.

17 THE COURT: Do we know in what form it was where Mr.
18 Libby says he heard? Was it at the White House?

19 MR. JEFFRESS: He heard it, well, what he testified
20 that is public in the indictment but I can tell you, Your
21 Honor, yes, he heard from another official at the White House
22 who reported to him that a reporter told me today that he knew
23 that Ambassador Wilson's wife worked at the CIA. That's one
24 source from which he got it. Knew that it came from a
25 reporter. That's one. Mr. Libby was told it came from official one.

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01 THE COURT: You have the ability obviously to
02 investigate that.

03 Mr. Jeffress: Yes. The second is that Mr. Libby said
04 that Tim Russert said that to him. Now the government says
05 that's a lie. Tim Russert didn't say that. The government
06 also says, however, that, well, Mr. Cooper did say words to
07 that effect that when he talked to Mr. Libby, Mr. Cooper, not
08 Mr. Libby, was the one who said I heard that Mr. Wilson's wife
09 worked at the CIA. Now he says that Mr. Libby confirmed that
10 by saying, "I've heard that too." But that is the sum and
11 substance of Mr. Cooper's, the allegations as to Mr. Cooper.

12 And, Your Honor, Mr. Libby didn't recall it in the
13 grand jury but that is another person from whom he did, in
14 fact, hear it. Who else has talked to Mr. Libby that he has
15 forgotten? Who else discussed it with him that he just can't
16 name today? But we are entitled to investigate those things.

17 Let me say as to official one, there is no desire
18 here to embarrass somebody publicly. This information, if it's
19 given to us, presumably would be given to us like everything
20 else, under a protective order. There is a limit to what we
21 can do with that.

22 But it is inevitable. Your Honor, I submit that this
23 person will be subpoenaed at trial. And I think, and Your
24 Honor will, if the prosecution objects, Your Honor will have to
25 rule on the admissibility of that testimony. It is not like

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01 this is somebody accused of some serious crime. As far as we
02 can tell from what he did, he did not commit a crime.

03 THE COURT: I understand you have additional
04 presentations to make. Let me get from Mr. Fitzgerald a
05 response to this particular issue.

06 MR. FITZGERALD: Your Honor, the one thing that is
07 clear is we should focus on what the allegations are. It is
08 not just the single statement of whether, it's whether Mr.
09 Russert said all the reporters knew, not even the truth of
10 that.

11 But the indictment alleges that on Monday Mr. Libby
12 told Mr. Fleischer this information about Mr. Wilson's wife and
13 indicated that it wasn't widely known, on a Monday.

14 On Wednesday he claims to have learned it as if it
15 were new for the first time from Mr. Russert in his
16 conversation even though we've alleged six different

17 conversations, more than six conversations in the month before
18 he discussed it with everyone from the vice president to people
19 at the CIA, to ranking officials at the State Department.

20 If he's giving the information out on Monday and yet
21 on Wednesday he says he was struck by this information as if it
22 were something new, when, in fact, Mr. Russert has publicly
23 stated on TV he didn't know the information until it came out
24 in Mr. Novak's column. At the same time he is testifying under
25 oath that he has a specific recollection that he was telling
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01 the reporters, Ms. Miller, Mr. Cooper, that he didn't know if
02 it were true. He didn't know if Mr. Wilson had a wife.

03 If you focus on July 7 through July 12, he's giving
04 out specific information indicating it is not widely known and
05 yet then later that week he is claiming to have heard it as if
06 it were known for the first time and specifically characterized
07 it as something he did not know if were true.

08 The bottom line being, if he's trying to find out
09 what reporters knew before July 14th, every reporter that we
10 are aware of, which isn't many, that knew before July 14 we
11 have disclosed that to him.

12 So to adopt an investigation of official one with no
13 showing how that's going to relate to anything, to cite
14 reporters, one reporter who said it was common knowledge, and
15 then the network withdrew it and said it is a mistake, the
16 bottom-line is the pool of reporters that we know, we have
17 identified to Mr. Libby. And there must be some logical
18 relevance to go there.

19 If Mr. Russert didn't even know it, he couldn't have
20 passed it on. I think we have to focus that it is not just one
21 part of the statement but he's claiming to have truthfully said
22 to these people, he didn't even know if the man had a wife but
23 he had been discussing it multiple times, and I think we go far
24 a field and jeopardize the rights of innocent people if we
25 start turning over an investigation of somebody else.

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01 THE COURT: Okay. Any brief rebuttal to that?

02 MR. JEFFRESS: Your Honor, there is one thing that I
03 neglected to mention and again this is subject to filings that
04 have been made under seal but there is, in fact, a transcript
05 of a tape recording that involves official one.

06 And I remind you, Your Honor, that's exactly who
07 we're talking about. In the particular transcript there is,
08 and the government filed something else yesterday, there is a
09 factual dispute as to what is said or what is meant by a
10 portion of the transcript wherein it appears the official
11 saying, "everyone knows it," referring to the wife's employment
12 at the CIA.

13 We have not heard that tape. We did to hear that
14 tape. If, in fact, as the transcript suggests that one
15 official said, "Everyone knows it," who did he mean by
16 "everyone knows it."

17 It's vitally important to us, Your Honor, number one,
18 to investigate what other reporters knew and may have mentioned
19 it. And number two, to confront Mr. Russert with what other
20 reporters knew it.

21 And remember there is another ABC reporter, Andrea

22 Mitchell, who once publicly stated the identity of Ambassador
23 Wilson's wife, the fact that she worked for the CIA was well
24 known to reporters who were covering the intelligence
25 community.

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01 There are many, many leads to this, Your Honor, but
02 without key information such as the identity of this person,
03 the defense simply cannot fully understand it.

04 THE COURT: Let me ask government counsel. Is there
05 anything in that transcript or tape recording whereby this
06 government official number one says something to the effect
07 that everybody in the media corps knows about this?

08 MR. FITZGERALD: Your Honor, now that we have sort of
09 burned what was sealed, my understanding of that conversation,
10 there are people talking over each other, my understanding is
11 that was a reference that everyone knows it, that Mr. Wilson is
12 the unnamed ambassador.

13 THE COURT: Right.

14 MR. FITZGERALD: Mr. Wilson didn't reveal himself as
15 the unnamed ambassador until July 6. This was prior to that
16 time. We turned it over in an abundance of caution but I don't
17 believe that says it, and frankly there is a very limited
18 number of reporters that we found out who had known it. I
19 can't represent we know every reporter because we took
20 seriously the attorney general guidelines. But any reporter we
21 knew about we give over. If the point is to find out the
22 extent of knowledge of the reporters, we can't do more than
23 tell them every reporter we know about.

24 THE COURT: I can appreciate I guess to some degree
25 why the defense would want this. Obviously the defense wants

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01 everything. But whether we should have open file discovery is
02 the issue that I guess will always be debated until maybe one
03 day we reach that point but we are not at that point now.

04 Obviously there has to be a showing of materiality in
05 order to warrant under Rule 16 this information being provided
06 clearly based upon what's been submitted to me and what was
07 submitted to me ex parte.

08 There is no indication that this information would in
09 anyway amount to Brady and I don't conclude that it satisfies
10 the materiality requirement. I just think it is too attenuated
11 to conclude that the revelation of this information would, in
12 fact, lead to information that would assist Mr. Libby in his
13 defense. So in reference to that particular request, it will
14 be denied.

15 The second matter, I don't know to what extent what is
16 left regarding that request regarding reporters. I know again
17 I think some of that has been satisfied by information that may
18 have been provided since the motion was filed, and I am talking
19 about all documents and other information reflecting any
20 mention of Valorie Plame Wilson in any communication between a
21 news reporter and a government official, another news reporter,
22 an employee of an organization, of a news organization or any
23 other person prior to July 14, 2003.

24 I don't know if what we have already discussed has
25 addressed that or not. Is that still an open issue? That was

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01 the second matter listed in --

02 MR. JEFFRESS: What has happened, Your Honor, as we
03 interpret, and again we have this redacted affidavit. We don't
04 know what's in it. 16 pages or something.

05 But trying to discern what it says, it appears that
06 paragraph 45 of that affidavit lists some documents that the
07 government is withholding from the defense. The government has
08 given us some information as to reporters. It has not
09 represented that it was given to us, all information that is
10 requested paragraphs one and two of our request in our motion.

11 It seems from the redacted affidavit that there are
12 some specific items that have been identified to Your Honor but
13 not to us. We would respectfully ask that Your Honor enter an
14 order that compels the government to give us all the
15 information that's described in paragraphs one and two of our
16 request which is at pages 4 and 5 of our motion so that we know
17 that we have everything responsive.

18 THE COURT: Mr. Fitzgerald, is there anything else
19 based upon that second request that would not be encompassed in
20 my ruling regarding the first request?

21 MR. FITZGERALD: I want to look at that. There are
22 some that are not encompassed by the ruling with regard to
23 official one. But by the logic of it, I think what we tried to
24 do is we didn't think they were responsive. But if I'm going
25 to tell Your Honor that we're not giving documents to the
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01 defense that are in the ambit, I wanted to spell out what they
02 were. I think there were four tick marks in our ex parte
03 affidavit.

04 THE COURT: Okay. I have it.

05 MR. FITZGERALD: I think I can cite that paragraph 45
06 to which Mr. Jeffress refers to. I believe items one and four
07 would be encompassed by Your Honor's ruling.

08 THE COURT: Let me look at those real quick. I would
09 agree.

10 MR. FITZGERALD: I believe number 1, 2, and 4 are in
11 reference to official one.

12 THE COURT: I would agree in reference to number 2
13 also.

14 MR. FITZGERALD: With regard to number three, that
15 refers to a different matter about which we made some
16 disclosure to the defense and the only point being that this
17 refers to conversations way later, and as a general matter, I
18 recognize the defense was trying to say any knowledge before
19 July 14 but which it has created later. But people are having
20 conversations about the investigation, anything about the so-
21 called Novak leak, as it is referred to by laymen, triggers all
22 sorts of conversations that aren't relevant to the events of
23 what reporters knew back in July when people discuss it later.

24 So that's why it might arguably be technically
25 responsive but I don't see the logical relevance of what
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01 happens much later in time when the relevant communications
02 between persons in July 2003 have been disclosed. That was the
03 reasoning behind three. Those conversations in no way could
04 have, it's not as if those conversations at that time much
05 later could have informed reporters retroactively.

06 If the issue is to find out what reporters knew when
07 --

08 THE COURT: I guess it depends upon whether an
09 inference could be drawn that this individual may have known
10 about the information earlier.

11 MR. FITZGERALD: And we have turned over documents
12 showing that that person did. What I could suggest, Your
13 Honor, is I could, there is a discreet amount of documents. I
14 could produced to you what we produced to the defense involving
15 that topic by timeframe and then produced to you what we
16 haven't produced so you could just look at them yourselves.

17 THE COURT: I think I would because I kind of feel
18 that maybe this might be producible but I think I would need to
19 look at that and make that assessment but my inclination is
20 that that may have to be produced.

21 MR. FITZGERALD: And it is a handful of items. My
22 only point, I don't think it refers to conversations about the
23 spring as much as it refers to events in the fall about the
24 investigation.

25 THE COURT: I will reserve ruling on that particular
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01 item of evidence.

02 MR. JEFFRESS: May I say one thing, Your Honor?

03 THE COURT: Yes.

04 MR. JEFFRESS: I gather that Mr. Fitzgerald is
05 talking about submitting something to Your Honor in camera.

06 THE COURT: Yes.

07 MR. JEFFRESS: It is perfectly obvious that the last
08 time that he was given the opportunity to do that, he made
09 extensive arguments ex parte that we still don't know about,
10 obviously having to do with official one.

11 You know I don't know what representations were made
12 to Your Honor. The defense is seriously hampered by that.
13 Today we have filed a motion to attempt to prevent the
14 prosecutor, we're not a grand jury proceeding anymore. We're
15 in a criminal case. An adversary proceeding.

16 We would like an order that the government not, no
17 longer file with Your Honor these ex parte communications. If
18 it wants to submit, just like in a civil case somebody gives
19 you a document to determine whether that is privileged, that is
20 one thing. But for the government to submit communications
21 about the case, and we don't know what's been said and can't
22 reply to it, we think is inconsistent with due process,
23 inconsistent with the rules. We object to it.

24 THE COURT: I mean I am always troubled by having to
25 consider information ex parte. However, if the government is
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01 of a view that something is not discoverable which is what I
02 understand their position is in reference to what they
03 submitted that you are challenging, the only other option then
04 is to, because it is a government obligation, is to again shut
05 down the flow to me. Tell them not to do it. You make the
06 call. Don't give it to me and, therefore, the decision that
07 you make is final because Rule 16 is their obligation. If
08 they're not going to give it to me and they make it one of
09 their own, I mean I'm happy to get it out of the picture. I've
10 got enough work on my desk.

11 MR. JEFFRESS: I think we made clear in our motion,
12 Your Honor, and I neglected to make clear in my oral statement
13 today that we are not objecting to the government's submitting
14 to Your Honor for in-camera review a document to determine
15 whether that is material or whether that is privileged or
16 whatever the decision may be.

17 We are certainly objecting to the government
18 submitting argument to Your Honor. And this 19-page affidavit
19 had 16 pages that obviously went way beyond what the purpose of
20 the affidavit was supposed to be and we feel prejudiced quite
21 frankly.

22 THE COURT: Mr. Fitzgerald, do you want to respond to
23 that?

24 MR. FITZGERALD: Yes, Your Honor. I'm going to tell
25 Your Honor that I'm not producing certain things and making
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01 assumptions, I want to be careful that I don't make a mistake
02 and mislead the court. When I tell Your Honor there is a
03 continuing investigation, I want to make it clear where it's
04 at.

05 My intention with these documents was to send you the
06 documents with a note indicating exhibit A is the document from
07 Mr. X or Ms. Y, whatever it is that we produced to the defense.
08 Exhibit B are the pages that weren't produced.

09 Going forward, you know, first of all, CIPA, the
10 Classified Information Procedure Act, and they may disagree but
11 it provides for some ex parte filings, and sometimes you say,
12 judge, here is the reason why we can't produce his document.
13 Here is why a substitution is appropriate. We will go ex parte
14 when we think that is appropriate. We will do it in Section 6
15 on notice to defense with them having the documents where
16 appropriate.

17 Rule 16, ordinary discovery provides under Rule 16(b)
18 for protective orders. Sometimes judges are told there is a
19 wiretap related to a drug case that is ongoing and can't be
20 taken down for three weeks. So in limited circumstances, it is
21 appropriate to do so. I think it was appropriate to do so in
22 response to when we are telling you that we are not producing
23 certain information and they asked for information, not just
24 documents.

25 So we ought to be telling you what the information we
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01 are not producing is. I think in this case to show the
02 document.

03 Going forward, we will try to follow the same rule
04 but a blanket order that would overrule 16(d) and the
05 Classified Information Procedures Act Section 4, I don't think
06 would be appropriate.

07 THE COURT: I think you know counsel obviously have
08 to be circumspect in what is submitted to the court ex parte.
09 But on the other hand, it seems to me that if I'm going to play
10 a role in making judgment calls where the government has
11 questions about whether information is discoverable or not and
12 they want to submit that to me for my evaluations and when we
13 are talking about something that's foreign to the court and
14 that the government obviously is in a better position to
15 explain what it is, that it seems to me it is appropriate for

16 the government to do that, mindful of the obligation of trying
17 to have an open proceeding where by defense counsel and the
18 defendant knows exactly what is taking place.

19 But I just don't know how else we can effectively
20 address the discovery issues other than the way it's been done.
21 Obviously everything that is submitted to me will be
22 maintained. And if there alternatively is a need for appellate
23 review, that information would be available for the circuit to
24 consider in deciding whether the information that was not
25 produced was appropriately withheld.

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01 So I would obviously caution counsel to make sure
02 that when things are submitted to me ex parte, that there is a
03 good cause to do that but I am not prepared to rule that the
04 government can't in the future make such submissions to me.
05 Otherwise, it seems to me I do put the case in the posture
06 where the government is independently making its decision as to
07 whether it has an obligation under Rule 16 or otherwise to
08 produce and then I guess that becomes final until the case
09 ultimately would be reviewed on appeal and I don't want to
10 proceed in that manner. So I understand your concerns but I
11 would deny that request.

12 So I think that resolves the first two requests. We
13 have already dealt with Mr. Libby's notes. So I think that
14 takes care of the three requests, as I see it, that were made
15 in the first defense motion to compel. Anything else on that?
16 I think that's it and I need to give the court reporter about a
17 five-minute recess and then we'll start back and deal with the
18 other issues.

19 (Recess from 3:31 p.m. to 3:39 p.m.)

20 THE COURT: Before we move to the next issues, I
21 would assume, based upon from what the government said and
22 based upon my ruling, that the information regarding the media
23 and reporters all that is going to be provided as been and I
24 assume the defense wants to proceed in reference to its
25 investigation of the case by seeking to require information

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01 from the reporters. I assume that is where we may be at this
02 point.

03 MR. WELLS: That is correct.

04 THE COURT: How do you all recommend where we proceed
05 at this time in this regard so we can start that process
06 moving?

07 MR. WELLS: What we intend to do is to submit Rule
08 17(c) subpoenas that we will serve on various news
09 organizations and perhaps others. We suspect that the news
10 organizations may oppose and an issue will be joined. We want
11 issue to be joined as quickly as possible so that if there has
12 to be any appellate litigation, it can take place.

13 THE COURT: So are you requesting that I set some
14 early return dates or how do you want to proceed in that
15 regard?

16 MR. WELLS: Excuse me for one second.

17 (Pause.)

18 THE COURT: I guess there are a couple ways we could
19 proceed. Obviously one would be that you issue your subpoenas.
20 We could I guess either now or at that time we could set a date

21 for the return of those subpoenas. I assume at least in
22 reference to some of the reporters that there is going to be
23 some objections raised and I would have to obviously give them
24 an opportunity to do that. But if you all have any suggestions
25 as to how we could most efficiently accomplish this, I'd like
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01 to hear from you.

02 MR. JEFFRESS: I think it would be good, Your Honor.
03 We will begin to prepare our subpoenas, and if you could set a
04 return date now, we could make those subpoenas returnable here
05 in this court.

06 THE COURT: When?

07 MR. JEFFRESS: Say the middle of April. I am sorry
08 that I don't have my calendar here.

09 THE COURT: April 14 is the mid point I guess.

10 MR. JEFFRESS: That is a Friday.

11 THE COURT: It is a Friday, yes.

12 MR. JEFFRESS: We'll make our subpoenas returnable to
13 April 14.

14 THE CLERK: That is Good Friday.

15 MR. JEFFRESS: Could we make it April 21?

16 THE COURT: That is good. What is your proposal as
17 to how we proceed at that point?

18 MR. JEFFRESS: Well, I think you know there may well
19 be news organizations or reporters as to whom they will comply
20 or as to whom we are able to work things out with and I hope
21 that's the more the better. But those who do want to file
22 their motions to quash, the motion to quash would be argued
23 that day would be my anticipation.

24 THE COURT: We could try and do it that way. But I
25 obviously would want to give the reporters and their attorneys
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01 some opportunity to submit something in writing to the court.
02 So I don't know if that really works. I guess we could make it
03 returnable on that date and then set a hearing date subsequent
04 to that that would give the media reporters an opportunity, if
05 they choose to file objections or motion to quash, an
06 opportunity to do that.

07 MR. JEFFRESS: I understand, Your Honor. That's
08 probably more practical.

09 THE COURT: So I guess I would need to give them at
10 least a couple of weeks. That would take us to the 5th of May.
11 We would probably have to do it again in the afternoon like we
12 are doing now because I have a heavy schedule in the morning.
13 Is that a good day for everybody? If there are going to be any
14 motions filed to quash or objections to the subpoenas, then we
15 could address them at that time.

16 MR. JEFFRESS: What is that date, Your Honor?

17 THE COURT: May 5.

18 MR. JEFFRESS: That is agreeable to us, Your Honor.

19 THE COURT: My only concern, and I don't know if we
20 can move it any faster, is that if there are challenges and if
21 there are subsequent challenges to my ruling and the case has
22 to go on to the circuit, query as to whether the circuit would
23 be able to resolve those issues before they go out of session
24 at the end of June and then they are basically out of session
25 until after Labor Day.

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01 I mean they do emergency matters I think but I think
02 by and large they are not sitting during that period and I
03 don't know if we would be able to get the matter before them
04 and have a resolution.

05 Obviously if there's a resolution sometime in the
06 early fall that would not create a problem for us but I just
07 have some concerns I guess in that regard. But maybe with the
08 trial date being set for January maybe that gives them enough
09 time, and I can always obviously make a request for expedited
10 resolution.

11 MR. FITZGERALD: My suggestion, judge, is maybe we
12 should have the return date earlier but still allow anyone who
13 is objecting more time to file motions because since 17(c)
14 subpoenas can only go to documents, there may be people who
15 have nothing responsive.

16 THE COURT: That is what I was thinking. I
17 understand the difficulty. But I think I would like to move
18 that up to the 7th of April and then set the 21st of April for
19 the date when we could have a hearing on any objections that
20 would be raised. Again we would have to set an afternoon at
21 2:30. Is that good?

22 MR. JEFFRESS: That would be 2:30 on the seventh as
23 the time and date for the return?

24 THE COURT: Yes. That is good.

25 MR. FITZGERALD: Judge, I assume if documents are

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01 returned pursuant to the subpoena they are given to both
02 parties just like a trial subpoena.

03 THE COURT: Yes. If there are going to be
04 objections, then they would be held on the afternoon at 2:30 on
05 the 21st. Anything else? Let's move on to the next matters
06 then. I guess that is the PDBs.

07 MR. WELLS: Yes, Your Honor. I will be addressing
08 two separate issues. One is the PDBs and the second one
09 relates to documents concerning the classified nature of Ms.
10 Wilson's employment and any possible damage assessment issue.

11 THE COURT: Let me just ask in that regard. Should
12 we not conceivably wait until Mr. Libby has a chance to review
13 his notes to see if that's going to be adequate to refresh his
14 recollections?

15 In that regard also, and I don't think I'm jumping
16 the gun in raising this, it seems to me that I'm going to have
17 to make some assessment as to exactly what he's going to be
18 able to testify about regarding his activity during this period
19 of time in order to assist what is really relevant because, as
20 Mr. Fitzgerald suggests, for him to have to go into the gory
21 details of all the various things he was doing is not really
22 necessary to give the jury a flavor of the demands on his time,
23 i.e., he can present evidence of his time sheets to show how
24 long he was at work. He can present information about who he
25 had to meet with during those periods of time. The number of

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01 people. He could present information in general about the
02 topic areas he was dealing with.

03 But is it really going to be necessary for him to go
04 into the details on what he was doing with, and if that is not

05 necessary, because I have to strike a balance between obviously
06 the government's concern about national security and on the
07 other hand his right to a fair trial, and if he is not going to
08 be able to go into the details, does that have any affect on
09 your need to have these documents?

10 MR. WELLS: Your Honor, the extent of the deal he
11 will be able to go into, and actually how it will work at
12 trial, what is the script that he has developed based on our
13 CIPA discussions will result from CIPA hearings.

14 But in the first instance what we have to do as to
15 defense lawyers is be able to sit with the client, not only his
16 recollection as to what is going on in what periods but to
17 identify with precision what is the relationship, for example,
18 between what he's being told on a particular day in connection
19 with the PDBs and what information does the government say he
20 got, should have remembered, didn't remember.

21 THE COURT: Isn't it virtually certain, though, that
22 if I ordered this, it's going to sabotage the ability of this
23 case to go forward because I would suspect that the White House
24 is never going to agree to permit these documents to be
25 released.

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01 As I recall, there was a big debate with Congress
02 over the submission of the same documents. And ultimately
03 Congress decided not to seek to pursue the matter by way of a
04 subpoena and the issue is dropped. I would assume that if I
05 order this, it sabotages this prosecution because, as I recall,
06 the vice president, his boss, said these are the family jewels.

07 MR. WELLS: I would say very strongly that the way
08 our system is built where the courts are the ultimate arbiter
09 of what information should be produced, that it should never
10 sabotage this case. There is a case, United States versus
11 Nixon, which covers the issue of when the executive branch can
12 claim a privilege appropriately and what kind of showing we
13 have to make in order to overcome it.

14 I believe we can make that showing and I believe Your
15 Honor will overrule any objections, or should, under the Nixon
16 case as put forth by the executive branch. If they take an
17 appeal, we have enough appeals lined up so we may as well get
18 everything done at once.

19 But I do not believe this administration or any
20 administration has the right to disobey a court order. And if
21 we make the showing, then there is no reason for it to be
22 sabotaged. This is not a government by -- it is a government
23 based on laws.

24 In other words, Your Honor, there would be no reason
25 for the U.S. Supreme Court to have cases like the U.S. versus

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01 Nixon if, at the end of the day, the executive brings could
02 just ignore what the judicial branch does.

03 THE COURT: We are talking about actual criminal
04 activity on the part of government officials who were in the
05 White House itself. That creates a somewhat different
06 situation than here. I mean here the end result is not that
07 criminal behavior on the part of White House officials is not
08 discovered. The end result is that if the executive branch
09 says that this is just too important to the welfare of the

10 nation that we're not going to comply, the criminal prosecution
11 goes away.

12 MR. WELLS: If Your Honor finds that the test is met
13 under Nixon, that they don't have a right to claim a privilege,
14 that's all they can do, a valid subpoena or request is made,
15 they will at a point impose privilege. Your Honor will hear
16 argument on whether the footage is valid.

17 If Your Honor as an Article 3 judge decides that
18 their assertion is invalid, they will have the right to take it
19 to the Court of Appeals. If the Court of Appeals of the
20 circuit decides it has to be produced, I submit that it will be
21 produced as it would be in any case. I do not believe that the
22 executive branch under an order from this Court of Appeals, or
23 if necessary from the U.S. Supreme Court, is not going to
24 comply.

25 I don't understand that notion that because the
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01 executive branch may impose a privilege claim which this
02 Court's job is to decide and if the court decides against them,
03 that in some way sabotages the case any more than if some news
04 organization says they refused to comply and we go to the Court
05 Of Appeals. But ultimately our government is based on the rule
06 of law. There can't be some notion, I would submit, that this
07 court should ignore all our discovery rights and that's all
08 we're talking about at this juncture whether we can work with
09 those documents over in the skiff. It's the only issue at this
10 juncture.

11 THE COURT: Let me ask you this. Are you convinced
12 that there's nothing else that's available, i.e., his notes,
13 his daily schedule, any other information that may exist that
14 would not be adequate to provide him with what he needs in
15 order to put himself in a position to recall exactly what was
16 occurring around that time?

17 MR. WELLS: Yes, I am so convinced, and I have
18 submitted so there's no issue of a sworn affidavit that sets
19 forth a good faith proffer.

20 Your Honor, let's start with what you said a minute
21 ago. We are talking about the family jewels, and my client's
22 defense is not based a la the George case on preoccupation.

23 My client's defense is based on the fact that he was
24 either confused, mistaken, or his memory was bad because he was
25 focused on the family jewels. That is different. That is

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01 radically different. The very heart of our defenses is about
02 the family jewels. And that's what I hope to make a jury
03 understand. I'm not saying Lewis Libby was just busy that day.
04 He was busy with the family jewels.

05 THE COURT: That gets to the second issue I raised.
06 To what extent does he need to present to the jury the details
07 regarding those family jewels rather than just an overview of
08 the subject matters he was dealing with on those given days?

09 MR. WELLS: And what we need to do, point one, we
10 can't do it from the notes. When the PDBs, when he got the
11 morning briefing, and we call it the PDBs, but as I said in my
12 brief, it is somewhat of a misnomer. What I am asking for is
13 Mr. Libby's morning briefing which was in three parts.

14 Part one, one book, part one was the presidential

15 daily brief, which the president of the United States gets.
16 But in Mr. Libby's book that was only part one of his book.
17 Then in his book was part two which the vice president gets.
18 So the vice president gets more than the president. Part three
19 of the book was there for Mr. Libby. Mr. Libby got more than
20 the president and vice president. So the book was in three
21 parts.

22 Now six days a week, every week no matter whether he
23 was in Arizona or Europe, he got a daily brief. The briefer
24 travel with him. As a normal course, his morning began every
25 day at 7 a.m. at the home of the vice president of the United
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01 States where Mr. Libby and Vice President Cheney would sit and
02 the briefer from the CIA would come and brief them and they did
03 not take notes.

04 And when you look at Mr. Libby's notes, there are not
05 many references to the PDBs. We need the notes and the PDBs to
06 put together the picture to present to Your Honor the story we
07 want to tell to this jury that will make the jury believe that
08 his defense is valid, that it is not something concocted, that
09 it is something that's worthy of belief. And then we have to
10 work out during the CIPA hearing how we say it and to talk now
11 about it in the level of detail that is necessary is premature
12 because I understand we can't go into all the detail.

13 I understand that the court has the power under Rule
14 403 to deal with issues of whether things are cumulative. I
15 believe I have a constitutional right to have a fair
16 opportunity to have him testify in such a way so that this jury
17 understands just the urgency and the enormous pressures but I
18 understand I can't do it for three days.

19 THE COURT: And I don't take exception with that.
20 What do we do to put them in a position where he's able to do
21 that?

22 MR. WELLS: What I'm saying, Your Honor, is that at
23 the heart, I would submit I believe he has a constitutional
24 right to tell his story to the jury because it is a story about
25 the family jewels, and because it is about the family jewels, I
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01 believe the jury may, in fact, be more likely to give him
02 credit that he would not have remembered certain information at
03 the day he was being interviewed or the day of the grand jury
04 about Ms. Wilson.

05 I'm not saying he forgot the issue of Mr. Wilson and
06 the 16 words and what have you. But in terms of her role, that
07 that was a relatively minor role. I have given, Your Honor, a
08 very targeted request, and it is our understanding in terms of
09 burden that is probably pushing a button and they could
10 probably have the PDBs collected probably in a matter of hours
11 if not a matter of days. So this is not about burden.

12 But I submit he can't be penalized, he can't be
13 penalized because that was his job. He's got to be able, under
14 the Constitution, to tell his story. And because his job was
15 involved with the family jewels, he can't be penalized and not
16 tell the story and you can't do it from the notes. We worked
17 with those notes. You can't do it.

18 THE COURT: Did he keep a daily calendar?

19 MR. WELLS: I assume he did but not about PDBs. I

20 want you, Your Honor, to understand I am not doing what George
21 is about. George is something about the pre-occupation that I
22 don't totally understand. In the George case --

23 THE COURT: I understand. As I understand what you
24 are suggesting is that these were weighty issues of the most
25 important matters that this country deals with and that he had
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01 to on a daily basis confront those and that, therefore, because
02 of the magnitude of those things he was dealing with, he
03 wouldn't remember something that, at least from his
04 perspective, would have been an insignificant event.

05 MR. WELLS: In terms of the life, not the event.

06 THE COURT: Right.

07 MR. WELLS: I do draw a distinction. And this is not
08 a burden issue in terms of the acquisition. These documents,
09 in terms of the daily books, these are not voluminous. We are
10 not asking a la George for millions of pages.

11 What we are asking for at this juncture is for the
12 documents to be produced in the skiff so we can go through
13 them, refresh his recollection, prepare him for his testimony
14 so that we can then sit down in the CIPA proceeding and have a
15 gave and take about how do you recognize his rights to tell his
16 story fairly, because it can't be done -- Your Honor, if it is
17 done in a quick and dirty way, he's going to be convicted. If
18 it's done quick and dirty, he's going to viewed, oh, he was
19 just trying to say he was busy.

20 It can't be done quick and dirty, but it can't be
21 done in a way that ignores or violates the national security
22 interests on the other side. Everybody understands that.

23 The motion can't be denied based on the fact that the
24 White House might impose a privilege that would be invalid
25 because I think it would be invalid. That can't be. This
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01 court, the U.S. Court of Appeals, the Supreme Court has the
02 power to command that these documents be produced.

03 I mean look ultimately, Mr. Fitzgerald on behalf of
04 the government, he made a decision to bring an indictment.
05 That's within his power, although we filed a brief objecting to
06 his appointment, but at least until his appointment is declared
07 invalid, he had the power to do what he did. But the
08 consequences of that is that Mr. Libby now has some
09 constitutional rights that just can't be ignored.

10 THE COURT: Let me hear from the government and then
11 I will give you a chance to respond to what Mr. Fitzgerald
12 says.

13 MR. FITZGERALD: Your Honor, ordering production of
14 the PDBs could well derail the case. Let's step back to the
15 notes for a moment. In seeking the notes, the defense argued
16 that Mr. Libby's notes, quote, reflecting the matters that he
17 himself chose to memorialize constitute powerful evidence of
18 the issues and tasks that commanded his attention during the
19 overtime period.

20 Now we're seeking PDBs for stuff not captured in the
21 notes, not captured in his memory, where they haven't even
22 sought his calendars for those days. We are going to jump to
23 the third rail of the presidential daily briefs which are the
24 family jewels and which are not produced in cases involving

25 very very serious crimes.

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01 When you ask for discovery, particularly classified
02 discovery, both in invoking national security concerns which
03 triggers the Rezaq standard of helpful to defense but also
04 privilege concerns, the U.S. versus In a Sealed Case makes
05 clear that you should explore alternative means to get that
06 evidence.

07 There are serious privilege issues in the sheaf of
08 Libby notes that I understand are going to take six months to
09 review for classification purposes if there are 1500 pages as I
10 asked at the break.

11 If we are going to go through those notes and Mr.
12 Libby has his notes from everyday all for the issue of did he
13 truthfully say to somebody, I don't even know if he has a wife,
14 covering something on July 14. If he worked on war plans, if
15 he worked on serious things, the level of detail in a
16 presidential daily briefing, if it is not reflected in his
17 notes which are described as the things that he focused on
18 other than Wilson's wife which he is already getting in
19 volumes, not in his daily calendars, not otherwise reflected,
20 we're going very far a field for something very tangential all
21 for a level of detail that I think would just confuse the jury.

22 At the end of the day, he was a busy man. He did
23 work on very important stuff. And a lot of the important work
24 he worked upon can be divined from his calendars and certainly
25 more than his important work can be divined from his daily

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01 notes.

02 To reach out to the family jewels, the president's
03 daily brief and to turn them over in discovery, it seems to me
04 is to violate what In Re Sealed Case is.

05 Before you reach out to privileged materials, seek
06 alternatives. What is that he can represent that we can have a
07 solid basis to believe is so important that it might affect his
08 memory when he testified about the wife that wouldn't already
09 be in his notes, that is so important that it isn't in his
10 memory already, that isn't reflected in his daily calendar.

11 THE COURT: What other information besides his notes
12 and you said there may be a daily calendar that he hasn't
13 sought would conceivably exist that would assist him in that
14 regard?

15 MR. FITZGERALD: Besides his own memory of what was
16 so important, I mean if it's important enough -- I know this
17 about memory, and I'm not an expert, if it's important enough
18 to sort of block out what else you are doing, you should
19 remember the topic. You don't forget the broad strokes. And
20 if we're getting down to the level of detail at PDBs, I'm very
21 worried. One thing that should be clear --

22 THE COURT: And I assume from what you indicated
23 earlier that your position would be that he would not be
24 permitted to testify about the gory details. He could only get
25 an overview of the topics and issues he was dealing with.

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01 MR. FITZGERALD: Exactly, Your Honor. And so to get
02 into these issues which would derail the case for something
03 like that, I also want to make clear that the burden, I asked

04 before court, Your Honor issued an order and I tried to get as
05 up-to-date as I could on what the burden would be involved.

06 THE COURT: Right. I was going to ask you about
07 that.

08 MR. FITZGERALD: Yes. Just on the questions that Mr.
09 Libby asked of his briefer and the responses he gave, we would
10 agree with the defense that they could be determined. In
11 asking the relevant agency as to what would be involved my
12 understanding is --

13 THE COURT: Do you oppose providing him with that
14 information also?

15 MR. FITZGERALD: Yes, Your Honor. They fall into
16 the same privilege category. But let me just lay out what the
17 burden would be just physically. My understanding is that the
18 best estimate from the people involved is that if you assumed
19 that their understanding is he might have asked a question
20 every other day that it would trigger two to three hundred
21 items during the relevant period and that the defense estimate
22 of 30 to 500 pages we believe to be accurate.

23 But the amount of man hours it would take would be in
24 the months and here's the reason because I didn't understand it
25 at first. The daily briefs that are shown to Mr. Libby are a
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01 variation on the presidential daily brief. To reconstruct what
02 questions he asked and what responses he gave requires them to
03 basically do a research project on each debrief, and I'll give
04 an example.

05 If he's had a daily brief and someone asks him,
06 whether it's from the newspaper or from the daily brief, what
07 is the status of the health of a foreign leader, that will go
08 back and it will be in a file and can be retrieved. They can
09 go find that there was a question asked by Mr. Libby, but the
10 answer has to be researched afterward.

11 It might be a simple question. It might have an oral
12 answer the next day which might be reflected. It might require
13 further research which may come up later and often the answer I
14 understand it isn't really apparent what question was responded
15 to. They may have asked about the health of a leader. They
16 may decide that he should be given more information what the
17 succession plan is.

18 And often times if he asks a question, if they think
19 it is sufficiently important to brief it to others, it may show
20 up in an intelligence product that takes more time, and come
21 back. They basically have to go back, find out what's in his
22 particular brief, what was left out and do research, and
23 basically do a forensic process backwards just to find out for
24 each day, was a question asked, trace out the following
25 briefings, how was it answered.

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01 Then when they get that material, they have to do a
02 classification review because these daily briefs are unusual in
03 that they expose sources in ways that other documents don't.
04 Then they have to realize where did the information come from,
05 how many different agencies are involved before they can do a
06 classification review, and then you have to get into issues of
07 privilege review.

08 So just his taskings back-and-forth would take people

09 I understood man-months. And unlike, as I understand it, if
10 you told me it took six weeks to paint the house, you might
11 say, well, get six painters and you can do it in a week and
12 you're done.

13 The number of people who can do this is limited
14 because they have to be people who understand the process and
15 the number of briefer is limited, and their primary function is
16 to brief the president.

17 So the assumption that we just push buttons and that
18 this just sort of turns out is not true. It would be
19 incredibly burdensome, just Mr. Libby's notes, doing the
20 classification review for one agency, I was told, might take
21 six months if it is about 1500 pages which I was doing
22 guesstimates at the side.

23 Going through this is another huge project which
24 sidelines us all for what? I don't believe at the end of the
25 day a jury needs to be told about a detail of national security
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01 of the utmost sensitivity from the family jewels that doesn't
02 reflect itself in Mr. Libby's memory today or his notes or his
03 calendars that he worked on something.

04 We all read the papers every day and see important
05 things that we don't work on. That doesn't affect our memory,
06 and certainly when you are dealing with things of privilege and
07 confidentiality, you want to do everything you can do to find
08 it from alternative sources, and that is from In Re: Sealed
09 Case.

10 I think it would be a terrible mistake to sort of
11 derail the case by ordering presidential daily brief material
12 when we're going, and by respecting your Honor's rulings, we're
13 giving a lot of Libby's notes that should reflect by his own
14 account in his own brief what it is that imprinted on his mind
15 and told him what to work on particularly since the ultimate
16 issue is that none of these notes reflect his conversations
17 about Wilson's wife. They reflect other things that he may say
18 he's not talking about preoccupation but he's talking about
19 immersion and inundation. And I'm lost as to how it is not
20 preoccupation.

21 THE COURT: Let me just ask this question, and I
22 don't know if you know the response to it. But hypothetically
23 if I order the production of this information, what happens?

24 MR. FITZGERALD: The CIA is the one agency that has
25 the complete set. They would not give them to me. They would
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01 defer the question to the White House. And my understanding is
02 production of the daily briefs is an extraordinary matter.

03 So the CIA, they automatically call the White House
04 on presidential daily brief material. My point being why do we
05 address that precipice for something where there is going to be
06 a mass of material that will be going through Section 5 hearing
07 or Section 5 procedures for months already on the notes that
08 already by our understanding since they are not responsive to
09 questions about Wilson's wife, we're going to have thousands of
10 pages of some of the nation's most sensitive secrets for Mr.
11 Libby to review, none of which shed light on the direct
12 question of what he heard about Mr. Wilson's wife when he can
13 tell the jury I worked on this war effort. I worked on this

14 plan. I worked on a lot of things without getting to the third
15 rail.

16 THE COURT: Thank you.

17 MR. WELLS: Your Honor, first, in this area we have
18 two different requests. Request number one is for the PDB
19 morning briefing that Mr. Libby got six out of seven days a
20 week. That is in one book and I believe that is pushing a
21 button.

22 There is a second request that relates to Mr. Libby's
23 inquiries and the answers that came back. I want to hand up,
24 because we have a couple of them over in the skiff just to show
25 you what at least we have, and it looks like there is a file
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01 that says Libby requests, and you can see the answers.

02 Again I want to make clear, I have not asked for the
03 underlying material. But I believe that, in terms of the
04 questions he posed and the answers that came back, I think that
05 is in a file and I do think it is pushing a button, and I'm not
06 asking for whatever Mr. Fitzgerald was describing that would
07 take weeks or months. I'm just asking for those documents but
08 I want to hand up to Your Honor. Here are the keys.

09 THE COURT: He is the security office there.

10 MR. WELLS: I have no problem if Mr. Fitzgerald wants
11 to look over your shoulder if that's okay with Your Honor.

12 (Pause.)

13 THE COURT: I can review them but obviously there
14 can't be any discussions about the substance of what's on the
15 documents.

16 MR. WELLS: It is more to see the form, Your Honor.

17 (Pause.)

18 (At the bench.)

19 THE COURT: I wouldn't be a good safe breaker.

20 (No discussion at the bench.)

21 (In open court.)

22 MR. WELLS: Your Honor, so at least in terms of the
23 process, the form, it is my understanding, just based on my
24 limited review, that there is a file with his inquiries.

25 In fact, Your Honor, to the extent the government is
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01 saying that matching up a response with the inquiry that that's
02 what's going to take time, I'm perfectly willing to discuss
03 that with the government and cut back on anything that's going
04 to take time.

05 Your Honor, I need the PDBs in order to join issue,
06 to get my client prepared and that way we can have whatever
07 claims of privilege are going to be done. I don't want to wait
08 six months. I would like to put this in play with the White
09 House or CIA or whoever the right person is is going to say
10 privilege. We can believe that now and move on.

11 But in terms of the notes, the notes are inadequate.
12 I have spent weeks with the notes. Mr. Cline has been weeks
13 with the notes. The notes are different. The notes do not
14 permit us to tell a truthful valid story about the national
15 security issues that he was focused on. They do not. The
16 calendar is not even classified. You don't put down I'm
17 concerned about a terrorist threat from Iraq in the calendar.
18 The calendar is worthless. It's not even classified. It does

19 nothing for us. In our defense --

20 THE COURT: I guess what Mr. Fitzgerald is suggesting
21 is that what would really reflect was the focus of his
22 attention were the things that he jotted down.

23 MR. WELLS: Most of the notes are taken from various
24 meetings. The family jewels were such you did not take notes
25 during the meeting. That's the point. I'm concerned it is
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01 kind of a disconnect --

02 THE COURT: I mean I --

03 MR. WELLS: -- because that's not how it worked.

04 THE COURT: I had some experience with this when I
05 worked in the drug office and I know when I looked at those
06 same type of document that I did not make notes and that was
07 our policy not to take notes.

08 MR. WELLS: Right, and that's how it worked. What
09 would happen at the end of the session so if you can picture
10 just what the jury might be told. He is sitting in a room
11 every morning 7 a.m. The vice president sitting next to him.
12 They finish with the PDB. The PDB itself is taken out and
13 given back to the briefer. It doesn't even go back to his
14 office. He hands it back. He doesn't take notes. He hands it
15 back.

16 But those are things that in terms of his job, his
17 focus was these urgent national security matters. He had three
18 titles. He was assistant to the president of the United
19 States. He was chief of staff to the vice president of the
20 United States, and he was national security adviser to the vice
21 president.

22 But in terms of what he will testify his focus was it
23 was not on making sure the vice president's office ran on time.
24 That was not his focus. His focus was on the national security
25 aspects. And he has a right to put that picture together and
00068

01 that we cannot do it with the notes.

02 THE COURT: I think I understand the parties'
03 positions. This is obviously a weighty issue that I have to
04 look very closely at before I decide how I'm going to rule and
05 I will take this particular issue under advisement. It won't
06 be a long time. We will work vigorously on trying to get this
07 done within a week or two but I will issue something in writing
08 in reference to this.

09 MR. WELLS: But I want to make clear for Your Honor,
10 though, that to the extent that second request, the inquiries
11 and responses is what concerns Your Honor about time, I'm
12 willing to cut back on that request. Just give me the
13 inquiries which I think are in a file because that shows what
14 he was questioning about.

15 So I don't want to do anything that is going to take
16 manpower hours. I don't have to. It is all in that book.
17 That is what I need. I would like his inquiries. I don't
18 think that's anything but a push of the button. I want the
19 record crystal clear. I don't want anything in terms of
20 significant man-hours with respect to collection issues.

21 THE COURT: It wouldn't be determinative but maybe it
22 would be helpful to at least complete the record if you
23 submitted something to us indicating to what extent you are

24 willing to scale back that request.

25 MR. WELLS: What I'm going to do, Your Honor, is my
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01 request I will limit to the PDBs, the book he got, and I would
02 like the inquiries that I believe is in one file. If my
03 understanding is wrong and Mr. Fitzgerald says to that, there
04 is no Libby inquiry file, I'd be willing to even scale that
05 back. I believe there is. But if he says that it doesn't
06 exist and you are wrong, Mr. Wells, then I'll cut back because
07 I know the book itself is in one place and that is a push of a
08 button.

09 THE COURT: Do you want to say something briefly?

10 MR. FITZGERALD: Might I suggest, if he submits any
11 sort of scaling back, I would ask the CIA to prepare an
12 affidavit to be shared with counsel as to their understanding
13 of how this is stored. I think some of those documents were
14 stored differently. It may have been from the file of the
15 briefer as opposed to the other study.

16 So we can lay out and be concrete because my other
17 understanding is that people are allowed to take notes, people
18 have taken notes during a briefing.

19 My only point being at the end of the day we're
20 talking about someone who spent a lot of time during the week
21 of July 7 to July 14 focused on the issue of Wilson and
22 Wilson's wife. I think we get lost in that. I don't at all
23 take lightly that they had important jobs.

24 But on July 7 he had a lunch where he imparted that
25 information in what was described as a weird situation. He had
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01 a private meeting with a reporter outside the White House with
02 this meeting. He was quoted in a very rare interview on a
03 Saturday on the record in an interview with Time magazine, a
04 very weird circumstance.

05 There are a lot of markers I won't get into that show
06 that this was a very important focus, the Wilson controversy
07 from July 7 to 14 because it was a direct attack on the
08 credibility of the administration, whether accurate or not, and
09 upon the vice president and people were attacking Mr. Libby.
10 So it was a focus.

11 And now to turn around and say on March 2003 or
12 December 1, 2004, we have to get into what the president is
13 briefed on in world affairs that isn't reflected in his notes,
14 that isn't worked on, without even looking at his calendars
15 which shows how he spent his day, all to show whether or not
16 what he said about a conversation on Monday, an conversation on
17 Wednesday, and a conversation on Friday where he said I didn't
18 know the man had a wife, when I think the evidence will show he
19 knew he had a wife and he told a number of people he had a
20 wife, and for that week, whether it should have been important
21 or not, it was, and to take that and go off into 11 months of
22 PDBs, when the notes are going to take a tremendous amount of
23 time, trigger many privilege issue, I think we're going to get
24 very far astray and shut down.

25 THE COURT: Are you suggesting that you should submit
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01 something to me from the CIA?

02 MR. FITZGERALD: Yes. And to counsel, to share just

03 outlining, and if it can be unclassified, it will be public.
04 THE COURT: How long will it take to do that, because
05 I want to get this matter resolved? And I would like to decide
06 this at the outside within two weeks.
07 MR. FITZGERALD: If we got it in next Thursday, would
08 that do it?
09 THE COURT: I guess so. Yes. Then I guess Mr. Wells
10 would submit something right after that.
11 MR. WELLS: Right, Your Honor.
12 MR. FITZGERALD: I'm sorry, Your Honor. We would
13 need sometime, if Mr. Wells is going to do a scaled back
14 request, then we would tell you the resources that would be
15 required from what he's asking.
16 THE COURT: So you are saying you would need his --
17 MR. WELLS: This is easy. Look, Your Honor, I
18 understand. I don't think there is any dispute that the PDB
19 itself is in one place. Is there a dispute about that, that
20 the PDB is in one place?
21 MR. FITZGERALD: That would be disputed.
22 MR. WELLS: Is it disputed that it would take more
23 than three days to select the PDBs --
24 THE COURT: Counsel, talk to me.
25 MR. WELLS: I'm sorry, Your Honor.
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01 THE COURT: I mean, unless you request that you can
02 talk to him.
03 MR. WELLS: Okay. Could I ask first, who is that
04 guy?
05 THE COURT: If you need to talk to him --
06 MR. WELLS: Okay. I don't even know him, to be
07 honest with you, and I apologize, Your Honor.
08 THE COURT: I am from the old school even though I
09 still look young I think, you know, when I was trying cases
10 from over there, it was a long time ago and judges would kill
11 you if you talked to somebody else.
12 MR. WELLS: I apologize, Your Honor. It came from
13 the back and I was surprised.
14 THE COURT: Are you able to state what your agreement
15 would be?
16 MR. WELLS: Yes, Your Honor. Well, yes and no. My
17 agreement is I would like the PDB, the book that Mr. Libby was
18 briefed on six out of seven days a week along with the vice
19 president.
20 I would also like the inquiries if it turns out that
21 they are kept in one place. If the government comes -- when I
22 say "in one place," I mean if it would not be overly burdensome
23 in terms of people-hours to collect them.
24 If the government comes back and says it is going to
25 take three months just to find them, I'll take that off the
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01 table. I want to move this case as much as anybody. I believe
02 there cannot be any serious dispute that they can, in a
03 reasonable time, collect the PDBs for that period. I believe
04 that they are computerized and it can be done. If they came
05 back in and said, well, we can collect the PDBs which is the
06 first part --
07 THE COURT: Why don't we do this? The government can

08 submit to us information from the CIA in reference to what it
09 would entail to acquire that documentation and I guess once he
10 does not, then that would give you a better idea as to what you
11 would be willing to concede on as far as your request.

12 MR. WELLS: That is fine, Your Honor. And as I said,
13 I am perfectly willing to try and be reasonable. Your Honor, I
14 would like to make one more point on this.

15 I think Mr. Fitzgerald in his last comment really
16 showed why the PDBs are so important to Mr. Libby. Mr.
17 Fitzgerald is going to stand up in this courtroom in front of
18 that jury and he's going to talk about the Wilson matter being
19 the most urgent or one of the most urgent matters confronting
20 President Bush's administration. He is going to make it seem
21 and he's going to say this was so important that how could he
22 have forgotten it. And I've got the right to respond back.

23 What he's trying to do, based on some argument about
24 time, well, in my business time kills. I will tell you. I
25 think we need time to make sure that my client gets the

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01 materials. And the fact that it may take an extra six months,
02 then so be it I would argue, Your Honor, because my request is
03 reasonable. It is right. None of this is made up.

04 THE COURT: So does that, based upon what you said,
05 then restrict your request or should it restrict your request,
06 just those days during which these conversations allegedly
07 occurred?

08 MR. WELLS: No, Your Honor, I don't think so because
09 I think we should be able to have the whole. If Your Honor
10 decides based on ruling and balancing that you're going to
11 restrict it to the days when he got the notes that would be
12 Your Honor's ruling based on the balancing of the interests.
13 But I think, I don't think he should be again, as basic as I
14 can say, I don't think he should be penalized because of his
15 job.

16 THE COURT: I understand. Can you do it a little
17 faster than that because I want to get this ruling made within
18 the next several weeks?

19 MR. FITZGERALD: Your Honor, here is my concern. The
20 most important thing is the privilege issue is not the burden.
21 The burden issue is, Your Honor, ask us to collect and review.

22 THE COURT: I understand.

23 MR. FITZGERALD: Given that we are talking still now
24 about 275 PDBs and looking through them and what sources are
25 involved, what classification issues, who it comes from and

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01 going to the White House and saying, are you willing to do
02 something 275 times that may not have been done before and took
03 heaven and earth to move for the 9/11 commission for matters
04 not relevant. And you know U.S. versus Nixon and the Sealed
05 Case talk about matters relevant. Matters away from the issue
06 of Wilson's wife to collect and review, and it's not as if you
07 push a button and you turn these over and worry about it later.

08 THE COURT: As I call regarding the 9/11 commission
09 or at least regarding a Senate investigation regarding the
10 invasion of Iraq, there was an issue that came up about the
11 production of these presidential briefs, right?

12 MR. FITZGERALD: Yes.

13 THE COURT: And the White House never turned those
14 over, as I understand.

15 MR. FITZGERALD: I believe one PDB was redacted and
16 made publicly available and maybe two for the 9/11 commission
17 and I think that was it.

18 I might also point out. One thing I forgot to stress
19 is that the taskers, often the taskers are considered more
20 sensitive about the PDBs because they show what people are
21 focusing on.

22 But my point being, I'm not going to argue it was the
23 most important issue consuming the Bush administration. I will
24 argue during that week Mr. Libby was consumed with it to an
25 extent more than he should have been but he was and you can
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01 look at the time he spent with people.

02 When talking about Mr. Wilson for the first time, he
03 described himself as a former Hill staffer. He meets with
04 people off premises. There were some unusual things I won't
05 get into about that week.

06 My only point being, we will agree he was important
07 and he was a busy person. But to take 275 PDBs about matters
08 presumably not reflected in his notes about matters not having
09 to do with Wilson's wife, to throw that in front of the jury,
10 to go through all that effort and all the third rail of
11 privilege concerns --

12 THE COURT: So your position would be that you would
13 not take exception with his position that he had a very weighty
14 job and with significant responsibilities and have those
15 responsibilities at the time when this was occurring but at
16 least at the time he was also consumed with this.

17 MR. FITZGERALD: Absolutely.

18 THE COURT: Thank you.

19 MR. WELLS: Your Honor, just one quick point.
20 Assuming the PDBs can be collected in a week, the only issue at
21 that juncture, Your Honor, is what privileges will the White
22 House assert. We can believe the issue and join issue because
23 all we are requesting at this time, and I think Mr. Fitzgerald
24 is mixing issues

25 THE COURT: I mean I'm not going to be concerned
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01 with, at least initially, the issue of the burden if I conclude
02 that they are material because, as I understand the law, I have
03 to make that materiality determination first. Once I make that
04 determination, then we address all these other issues at some
05 point after that.

06 MR. WELLS: Right.

07 THE COURT: I have to make that determination as to
08 whether he is entitled to it in the first instance. If he is,
09 then we have to work --

10 MR. WELLS: Correct. But all I'm saying is that Mr.
11 Fitzgerald spent a lot of time talking about man-hours to
12 declassify things. For purposes of discovery all we're asking,
13 let's assume there were no privilege issues, all we're asking
14 for is for the documents to be put over in the skiff so we can
15 then talk about how would we do it.

16 Then at the end of the day you might decide, well,
17 Mr. Wells, based on everything, I'm going to let you have some

18 testimony from ten of them. And then they would have to some
19 way declassified those ten.

20 But at this juncture, all we're asking for is Mr.
21 Libby, who has already been cleared, has seen the documents,
22 for the defense team who has been clear to see the documents.
23 So there is no declassification issue because we haven't
24 determined if it is going to be used.

25 THE COURT: I understand. Your submission, Mr.
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01 Fitzgerald, that you think would help me in this regard, how
02 long do you think it would take? You said Thursday. Can it be
03 done sooner than that?

04 MR. FITZGERALD: When I said Thursday -- I keep being
05 told a week and I cheating on people by saying Thursday. Part
06 of it is I want to give Your Honor an accurate estimate and I
07 think the point isn't about the declassification review. It is
08 about seeing --

09 THE COURT: Okay. You need until Thursday?

10 MR. FITZGERALD: Yes.

11 THE COURT: Mr. Wells, how long would you need after
12 that to submit whatever you want to submit based upon their
13 submissions?

14 MR. WELLS: Tuesday.

15 THE COURT: Okay. Then I will try to get you a
16 ruling within a week or two after that.

17 Okay. We need to move on to the final two matters I
18 guess. They're sort of similar. The damage issue I guess it
19 is. We are at that point.

20 MR. WELLS: Correct. And also the question of her
21 classified status. I would agree, Your Honor, that I think
22 they are both very related. Our core position -- THE
23 COURT: I don't want to cut you off but it may help. Does the
24 government intend to introduce any evidence that would relate
25 to either damage or potential damage that the alleged

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01 revelations by Mr. Libby caused or do you intend to introduce
02 any evidence related to Ms. Wilson's status and whether it was
03 classified or she was in a covert status or anything of that
04 nature? I think that will help us move this along.

05 MR. FITZGERALD: We don't intend to offer any proof
06 of actual damage. We're not going to get into whether that
07 would occur or not. It's not part of the perjury statute.
08 It's not part of the underlying statutes.

09 Just so I'm totally clear, we are not going to argue
10 that this is a trifling you know crime to lie about something;
11 and if someone was discussing this, this is an important
12 matter. So if someone were to argue we have been shown
13 materiality, it is important whether someone was discussing a
14 classified CIA employee's status. We are not going to get
15 into, and one of the things about --

16 THE COURT: You will be seeking, however, to
17 establish the potential harm that these types of discussions
18 could have?

19 MR. FITZGERALD: No. But I don't know if the defense
20 is. If they're going to challenge materiality, I don't want to
21 act like it's no big deal he talked about her. Could I offer
22 one thing, though, judge?

23 Next week we have our Section 4 filing due. With
24 regard to her classified status, we were intending to make a
25 filing to Your Honor ex parte which I believe includes a
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01 proposed substitution of some information to give to the
02 defense. And part of dealing with this in the Rule 16 motion
03 ahead of that it seems to me to be putting the cart before the
04 horse because when we lay out to Your Honor what the situation
05 is and propose what we would disclose to the defense, we may be
06 on a better footing.

07 THE COURT: So you are only talking about
08 declassification.

09 MR. FITZGERALD: Declassification status, not the
10 damage assessment.

11 THE COURT: Do you disagree with that, Mr. Wells,
12 that that probably may help us in that regard?

13 MR. WELLS: If Your Honor would want to hold it off,
14 that piece, I'm perfectly -- we've been here a long time and
15 I'm perfectly happy.

16 THE COURT: I think that makes more sense so I would
17 defer ruling in reference to that until we get that submission.
18 Once we get it, if I think I need further argument, we'll let
19 you know. Otherwise, we'll just try and rule on the papers.
20 But if you want to state something in reference --

21 MR. WELLS: Yes. If this might be my last chance to
22 argue it, I would like to argue it. Your Honor, Mr. Fitzgerald
23 has indicated correctly that under the perjury or obstruction
24 statutes that showing actual damage is not an essential element
25 of the offense. We both agree with that.

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01 But there's no question, he is going to stand up in
02 front of that jury and he's going to convey to that jury that
03 Mr. Libby has engaged in a very serious crime involving
04 disclosing the identity of a CIA agent. It's in the
05 indictment. I don't even understand how the government can
06 draft the indictment, put these issues in play and then act
07 like it's not an issue at trial.

08 Now the indictment reads --

09 THE COURT: But would I let that in? I mean I assume
10 there might be an objection to it and I would have to make a
11 balancing determination conceivably in the context of this type
12 of case and the charges that we are dealing with. There may be
13 some level of probative value. Obviously you're talking not
14 significant prejudice on the other hand.

15 MR. WELLS: Sure.

16 THE COURT: So I mean I'm not sure. I might you
17 know, assuming the government sought to introduce that
18 evidence, I'm not so sure I would necessarily let it in based
19 upon the charges before the court.

20 MR. WELLS: Right. Right. But for Rule 16 purposes,
21 as a defense, I can't live in the world of, well, maybe Judge
22 Walton will rule my way in January. I have to take the
23 indictment. That's where you have to start I submit. Start
24 with the indictment. The indictment says on page 2 --

25 THE COURT: There would be nothing to preclude me

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01 from making a ruling at that time if it helped facilitate the

02 discovery issue, would there?

03 MR. WELLS: You mean make a ruling right now?

04 Because if you don't, in other words, I have to prepare --

05 THE COURT: I understand.

06 MR. WELLS: See, as you know, Your Honor, I have to
07 prepare for motions I win and motions I lose. If I am on
08 notice, as I am, with this indictment, I have to prepare to
09 meet the allegation.

10 The indictment reads page 2, subparagraph (d), the
11 responsibilities of certain CIA employees required that their
12 association with the CIA be kept secret.

13 So what he has done in that first clause, he has
14 connected the responsibilities of what they're doing is what
15 drives the secrecy. He then goes on to say. As a result the
16 fact that these individuals were employed by the CIA was
17 classified. Disclosure of the fact that such individuals were
18 employed by the CIA had the potential to damage the national
19 security in ways that range from preventing the future use of
20 those individuals in a covert capacity to compromising
21 intelligence gathering methods and endangering the safety of
22 CIA employees and those who dealt with them.

23 I am on notice, Your Honor. He is saying that
24 whatever Mr. Libby did, it could put people in danger.

25 THE COURT: But just because it's alleged in the

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01 indictment does not make it necessarily admissible? I would
02 say obviously no.

03 MR. WELLS: It does not but, Your Honor, if I as a
04 defense lawyer when confronted with an indictment by any
05 prosecutor and there's an allegation there that I know could
06 be, as you said, extraordinarily prejudicial, if I didn't ask
07 for the Rule 16 discovery on that point that would be
08 malpractice.

09 THE COURT: I appreciate that.

10 Does the government intend to introduce that evidence
11 to support what he just read?

12 MR. FITZGERALD: Your Honor, we may well argue
13 potential damage but what we're talking about here is actual
14 damage. The argument they are making is Mr. Libby had no
15 motive to lie to the grand jury. Since nothing bad happened,
16 there is no actual damage. There is no showing, not even an
17 attempt or proffer that Mr. Libby had any idea what the damage
18 was. If somebody took that filing that you had in the blue bag
19 locked and it says classified which means there is potential to
20 cause national security and I handed it out and lied about it
21 later --

22 THE COURT: Is that evidence that you would be
23 introducing in your case-in-chief or is that evidence you would
24 seek to introduce in rebuttal if Mr. Libby, in fact, takes the
25 position?

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01 MR. FITZGERALD: We would never intend to put in
02 actual damage. Our only view would be the materiality of the
03 perjury is that, you know, it's a serious matter if he lied
04 about whether or not he talked about a CIA employee's
05 association and we believe that there will be evidence at the
06 trial that at times he talked about it with other people as if

07 he couldn't talk about it on an open telephone line or told
08 someone else it was hush hush or QT.

09 So we will argue that he knew or should have known it
10 was classified and that he was being investigated for
11 disclosing classified information. We will argue that he
12 committed the crime of lying. But we are not going to argue
13 and say, tell us Valorie Wilson's life history. Tell us what
14 actually happened.

15 THE COURT: I understand.

16 MR. FITZGERALD: Your Honor, there will be a filing
17 of a Section 4 notice setting forth issues about damage
18 assessment so that's another issue that was flagged for the
19 CIPA filing. But in terms of Rule 16, actual damage is not
20 relevant in our view.

21 MR. WELLS: Your Honor, I fully accept his
22 representation that he will qualify whatever he says that is
23 not actually damage. But for 12 jurors sitting in that box
24 that distinction is for lawyers. Actual, comfortable
25 potential. What they're hearing is that, as Mr. Fitzgerald
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01 said in his press conference, Mr. Libby outted a CIA agent, and
02 they are going to be sitting in the box thinking 007's identity
03 has been disclosed and that my client is a terrible person.

04 Maybe if he would give me the discovery showing
05 whether she was classified, whether she was covert, I would be
06 in a position to make some educated judgments about how to try
07 this case. Ms. Wilson may be a witness.

08 THE COURT: Wouldn't it only become, as far as actual
09 damage, wouldn't it only become relevant if he actually knew
10 what her status was?

11 MR. WELLS: It might in terms of a actual damage. I
12 don't know. See, I might call Ms. Wilson. One of the
13 questions is, the indictment also says that outside of the
14 intelligence agency or community no one knew about her. I may
15 decide to call her. I may call her husband. There are going
16 to be CIA employees, operatives who are witnesses in this
17 trial. They may have a bias against Mr. Libby because they
18 think he outted somebody.

19 I need to understand is she covert or not. If she's
20 classified, is she really classified or is just classified
21 because some bureaucracy didn't unclassify her five years ago
22 when they should have. I just want to know the facts.

23 Rule 16 is not only about learning good stuff. It's
24 about me learning bad stuff that tells me as a defense lawyer
25 stay away, don't touch, it is dangerous. So you talk about the
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01 third rail, I want to know if that third rail on this issue is
02 on and can I get shocked by it. Or I want to know when he
03 stands up is there nothing to it because maybe she, even if she
04 was classified based on a piece of paper, it was some
05 bureaucracy. And I have a right to know those facts because it
06 is going to be an issue.

07 He has told you, Your Honor, he's going to say it in
08 opening, he's going to say it in summation. And then when I
09 sit down and can't talk anymore, he's going to get up there in
10 rebuttal and wind up and he's going to hit Mr. Libby and again
11 it's going to be like we have turned over the crown jewels

12 because we outted a classified CIA agent. I've got a right to
13 basic discovery on this issue, Your Honor, and that's all I'm
14 asking.

15 THE COURT: Anything else?

16 MR. FITZGERALD: I'll just say one thing. We are
17 trying a perjury case. What I am going to say to the jury in
18 opening and closing and rebuttal is that Mr. Libby knowingly
19 lied about what he did. And the issue is whether he knowingly
20 lied or not. And if there is information about actual damage,
21 whatever was caused or not caused that isn't in his mind, it is
22 not a defense.

23 If she turned out to be a postal driver mistaken for
24 a CIA employee, it's not a defense if you lie in a grand jury
25 under oath about what you said and you told people I didn't

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01 know he had a wife. I didn't know this. I learned it if it
02 was new. I just passed it on from one reporter to another
03 things I didn't hear anywhere else. That is what this case is
04 about. It is about perjury, if he knowingly lied or not. This
05 has no relevance to that.

06 THE COURT: Okay.

07 MR. WELLS: There is just one other point. As Your
08 Honor knows, on this particular issue, Mr. Fitzgerald has taken
09 a position that he didn't have the documents, that the
10 documents are housed at the CIA. We briefed the issues that,
11 because the CIA was the referring agency, that the CIA is
12 aligned with Mr. Fitzgerald.

13 Now I have asked Mr. Fitzgerald to give me the
14 referral. He responded in a letter that came I think two days
15 ago. I think it was February 21. I submitted it this morning,
16 where he refuses to give me the referral. I am going to brief
17 that on the next round. But in that letter, he asserts an
18 attorney-client relationship between the CIA and the Justice
19 Department. He says it is an attorney-client privileged
20 relationship so it is clear at least in terms of alignment that
21 they are aligned and I would refer to that letter.

22 THE COURT: Do you disagree with that, counsel? I
23 mean I think it seems to me there is a lot here that suggests
24 that there is a fairly close alliance between the prosecution
25 of this case and the CIA.

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01 MR. FITZGERALD: Your Honor, alignment is a strange
02 word. We don't need to reach it in this case. Our argument
03 about not producing her file is not where is it located. It is
04 that it is not relevant and that there are security concerns,
05 not because it's in Langley's possession and not all ours, and
06 we will be addressing that in the Section 4 filing. We have
07 access to it. It's not one that we can't find. It's a
08 question of not being relevant, much less material and having
09 issues of national security that are implicated.

10 THE COURT: Obviously I'll await the filing that
11 you're going to make regarding the classification issue, and
12 once we get it, we'll get you out a written ruling. I think
13 these issues are close enough that I probably should just
14 reserve ruling on both of them and issue my ruling in writing
15 which I will do. It won't be long. I mean I'll get these out
16 fairly quickly.

17 MR. WELLS: We're going to have some more discussion
18 after he makes his filing?

19 THE COURT: If we feel that there is a need for
20 further argument, yes.

21 MR. WELLS: Okay. Thank you, Your Honor.

22 THE COURT: One moment.

23 (Pause.)

24 MR. WELLS: Your Honor, one thing Mr. Jeffress remind
25 me of that we will be filing by the end of the day an objection
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01 to any ex parte filings with respect to this issue. I don't
02 want you to be surprised. It is written, and as soon as we get
03 back to the office, we're going to proofread it and I'll be
04 filing it.

05 THE COURT: Okay. The only other issue I have and I
06 wasn't able to discern whether it was being at least suggested
07 that the defense was going to possibly call, and I know we are
08 far out from the trial but I want to get the heads-up on it,
09 expert testimony on memory and recall.

10 MR. WELLS: The answer to that is I don't know.

11 THE COURT: That would be a tough one for me to bite
12 on because it seems to me if we go down that path and we start
13 to conclude that memory and recall is a relevant issue in
14 criminal proceedings for experts to testify about, every case
15 involving people who have money to pay for experts turns into
16 an issue of who can win on the experts, and I have real issues
17 with that because it seems to me, you know, we live everyday
18 lives as the juries do making assessments on memory and it
19 seems to me we can't start to substitute as evidence expert
20 testimony on this type of issue.

21 MR. WELLS: Sure. Your Honor, as I said I don't
22 know. And I'll take your comments to heart. But could I just
23 say one thing on --

24 THE COURT: Just let me know as far out as you can if
25 that's going to be an issue.

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01 MR. WELLS: Look, Your Honor, the honest answer is
02 you really couldn't make that decision until you knew what your
03 package looked like and then you have to sit with the expert
04 and you got to make a judgment, does it raise Daubert issues,
05 does it advance the ball. So right now I'm flying blind.

06 But I would say one point. It goes go right to what
07 Mr. Fitzgerald was saying. Some of the memory literature shows
08 that if Mr. Libby was focused on a certain issue let's say in
09 this period where he says he was obsessed with the Wilson
10 matter, whatever the word was that he used, and then he was
11 asked nine months later about it, that intervening events can
12 interfere with how the brain retrieves certain information even
13 though you had it back then.

14 The real question is what did he remember when he was
15 interviewed by the FBI and when he was in the grand jury. And
16 so the research shows that even if you have encoded something
17 the day you heard it, if by the time you asked about it, it is
18 very possible you can't get it back, and if you get it back,
19 you get it back wrong even if you believe you got it back
20 right. That type of research exists but I'll take Your Honor's
21 comments to heart.

22 THE COURT: Okay. Get me that information I've
23 requested and we'll get your rulings expeditiously because I
24 know we want to move this matter along.
25 Anything else?

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01 MR. WELLS: No, Your Honor.

02 MR. FITZGERALD: Your Honor, we had talked about
03 having a Section 2 conference, a closed one. I would suggest
04 in the interest of brevity and open proceeding, talking to Mr.
05 Cline, I think there's nothing to discuss at that conference
06 that we haven't discussed already.

07 THE COURT: Do you agree?

08 MR. WELLS: I do.

09 THE COURT: Thank you. Have a good weekend.

10 (Proceedings adjourned at 4:49 p.m.)

11 CERTIFICATE OF REPORTER

12 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
13 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

14 WILLIAM D. MCALLISTER

15 OFFICIAL COURT REPORTER

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