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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, May 5, 2006

06

1:30 p.m.

07 Lewis Libby

08 Defendant

09 Transcript of Motion Hearing

10 Before the Honorable Reggie B. Walton

11 United States District Judge

12 APPEARANCES:

13 For the Plaintiff:

Patrick Fitzgerald, Esq.

14

Peter Zeidenberg, Esq.

15

Debra R. Bonamici, Esq.

16 For the Defendant:

Theodore Wells, Esq.

17

Jonathan Jeffress, Esq.

18 Reporter:

WILLIAM D. MC ALLISTER, CVR-CM

19

Official Court Reporter

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24 Reported by Voice Writing and transcribed using SpeechCAT

25 Pages 1 through 82

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P R O C E E D I N G S

01

(Defendant present.)

02

03 THE CLERK: This is the case in the matter of
04 Criminal Action 05-394. United States of America versus Lewis
05 Libby.

06

Counsel, will you please identify yourselves for the
07 record.

08

09 MR. FITZGERALD: Good afternoon, Your Honor. Pat
10 Fitzgerald for the government, joined by Peter Zeidenberg and
11 Debra R. Bonamici.

12

13 MR. WELLS: Peter Wells for Mr. Libby, and Bill

14

15 Jeffress.

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17 THE COURT: Good afternoon. I have reviewed the
18 papers that have been submitted in reference to the third
19 motion for Rule 16 and Brady discovery. I tried to assess how
20 I could try and group as much as I can together so we don't
21 have to address each individual item. I am going to address
22 some issues that I think are the easiest to resolve and then we
23 can move on to some other issues.

24

25 One of the requests that was made is a request for
all of documents and information generated or received by the
State Department, the CIA, the executive office of the
president and/or the National Security Council concerning Mr.
Wilson's trip to Niger.

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I have read the submissions as to why somehow that

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01 would conceivably be discoverable. I'm having some difficulty

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03 I guess concluding that it is discoverable but for the
04 government deciding that they would be seeking to introduce

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06 that information as the predicate for the alleged motive to

05 indicate the information about Ms. Plame was in retaliation for
06 what Ambassador Wilson said when he returned from the trip.

07 I don't know if the government intends to seek to
08 introduce that evidence by way of seeking to show a motive.

09 MR. FITZGERALD: No, judge. The government's motive
10 will be what Mr. Wilson said in July 6, 2003, caused a
11 controversy and it is the responses to the controversy in 2003.
12 I believe all our witnesses are people who learned of Mr.
13 Wilson's trip in May of 2003 or thereafter. We're not calling
14 Mr. Wilson or anyone who was on the trip itself.

15 So the discussion of the trip will be in the context
16 post July 6, 2003, people saying who sent him on the trip,
17 what's going on here, who is Mr. Wilson but not the substance
18 of the trip.

19 THE COURT: I am having a real problem assessing how
20 the substance of the trip would be relevant considering the
21 nature of the charges that we have in this case.

22 MR. WELLS: Certainly, Your Honor. One on the
23 government's key witnesses will be Mr. Grossman, who at that
24 time was the Under Secretary of State.

25 In paragraph 4 of the indictments, it states that on
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01 or about May 29, 2003, in the White House Libby asked an Under
02 Secretary of State for information concerning the unnamed
03 ambassadors travel to Niger to investigate claims about Iraqi
04 efforts to acquire uranium yellow cake.

05 The under secretary thereafter directed the State
06 Department's Bureau of Intelligence and Research to prepare a
07 report concerning the Ambassador and his trip. The under
08 secretary provided Libby with interim oral reports in late May
09 and early June of 2003 and advised Libby that Wilson was the
10 former ambassador who took the trip.

11 Then in paragraph 6, also with respect to Mr.
12 Grossman, it states that on or about June 11 or 12 the under
13 secretary of state orally advised Libby and the White House in
14 sum and substance that Wilson's wife worked at the CIA and that
15 State Department personnel were saying that Wilson's wife was
16 involved in the planning of this trip.

17 What I would like to do, Your Honor, is first talk
18 about Mr. Grossman, using him as an example of one witness
19 where there will be significant examination based on what his
20 testimony is going to be and what the indictment alleges about
21 what Mr. Grossman had been told about the trip, what took place
22 on the trip and what he communicated to Mr. Libby.

23 I will try to establish that, in fact, that the
24 dates, in fact, may be wrong. But the indictment itself has,
25 as one of the key witnesses, him telling Mr. Libby about what
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01 he has learned about the trip.

02 Now, the documents --

03 THE COURT: I don't know if I'd let that in. Even
04 though it may be set forth the indictment, I'm not sure I would
05 be inclined to let that in. I don't see how that has anything
06 to do with this case.

07 MR. WELLS: To quote the government --

08 THE COURT: I could see the relevance of the request
09 allegedly having been made by Mr. Libby to Mr. Grossman to find

10 out information about who allegedly went on the trip and who
11 planned it but the substance of what happened on that trip and
12 what was reported once the Ambassador comes back, I don't see
13 how that is pertinent to the charges.

14 MR. WELLS: Let me step back rather than doing it by
15 a particular witness. I'll come back to this in a second. Let
16 me give you a big picture answer that hopefully will clarify
17 this point.

18 What this entire case is about is how Mr. Libby and
19 others in the government responded to the controversy that
20 erupted after Mr. Christoph writes this article of May 6 and
21 then Mr. Wilson writes his article about what took place on the
22 trip.

23 What the testimony will show is that it was Mr.
24 Libby's position and a position of the Bush administration, I
25 submit, to respond to the allegations made in the Christoph
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01 article and made by Mr. Wilson by telling the American public
02 and the press that what Mr. Wilson was saying was wrong and
03 that what says since he did on his trip was false in many
04 respects.

05 For example, the suggestion that Mr. Wilson had
06 discovered that there were forged documents or that Mr. Wilson
07 had reported to the office of the vice president about what
08 happened on the trip or that Mr. Wilson had been sent on the
09 trip by the vice president.

10 Those are the facts of what Mr. Libby is doing. So
11 in terms of my saying to the jury let me tell you what actually
12 happened, the trip is what the whole controversy is about in
13 many respects. Whether you characterize it as the 16 words or
14 the Wilson controversy, the administration's response is all
15 grounded in responding to what happened on that trip in part
16 and also to the general issue of whether the Bush
17 administration had lied to the American public about issues of
18 weapons of mass destruction.

19 We have 400 pages of grand jury transcript and much
20 of the transcript involves Mr. Fitzgerald questioning Mr. Libby
21 about the administration's response. But it all revolves
22 around the trip and what started this controversy. The state
23 of the union given back in January --

24 THE COURT: How does that have anything to do with
25 whether Mr. Libby made the statements to these various people
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01 about the relationship of Ms. Plame and Ambassador Wilson?

02 MR. WELLS: Your Honor, the case is really in two
03 parts. You have the reporters piece of a case. That's a
04 separate piece. Put the comments to the three reporters for a
05 moment to the side.

06 Then you have the piece of the case that deals with
07 what Mr. Libby was told by government officials about Ms.
08 Plame. That's a whole separate piece. They ultimately become
09 interconnected.

10 And I am concerned because when we started -- because
11 we filed the reporters' piece first because we were concerned
12 about the Rule 17 issues and we didn't file it jointly, I have
13 always been concerned that we might have created some
14 misimpression on the court's part that the case was just about

15 the reporters.

16 The best way to look at it is put the perjury count
17 and the false statement count to the side. Just look at the
18 obstruction count. The obstruction says that the way the grand
19 jury was obstructed was Mr. Libby did not disclose to the grand
20 jurors how he learned about Ms. Plame and then what he said to
21 reporters.

22 So the first part is how he learned it. The
23 government's brief at page 11, this is their brief. They
24 write, the central issue at trial will be whether the defendant
25 lied when he testified that he was not aware that Mr. Wilson's
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01 wife worked at the CIA prior to his purported conversation with
02 Tim Russert about Mr. Wilson's wife on or about July 10.

03 So there is the reporters half of the case and then
04 there are six or seven government witnesses who are at the
05 heart of the obstruction case and at the heart of the argument
06 that Mr. Libby was told certain things about what happened on
07 the trip --

08 THE COURT: So are you suggesting that a part of the
09 defense is going to be I didn't talk about the relationship
10 between Ms. Plame and Ambassador Wilson because that was not
11 the objective of the administration in disputing what the
12 ambassador had said. I was talking about the inaccuracies of
13 what Wilson was saying and that's what I talked to the
14 reporters about and they're off the wall when they say I talked
15 to them about the relationship of the two.

16 MR. WELLS: In some respects that is correct.
17 Another is not 100 percent. But there is no question that what
18 he testified to in the grand jury was that he was concerned
19 about responding to the merits of the allegations in the
20 Christoph article and in the Wilson article about what Wilson
21 had learned and what he told the people.

22 That is why I say in the brief when I wrote it that
23 the indictment really distorts what was going on because it
24 makes the wife look like she was central to what Mr. Libby was
25 doing or what the administration was doing because when you
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01 read the indictment, you really think a lot is revolving around
02 Mrs. Wilson. It was not and I'll be able to show that because
03 the response was on the merits.

04 That's why the NIE was declassified and disclosed.
05 That's why people put together information to show that the
06 forgeries, that Mr. Wilson didn't know anything about the
07 forgeries, that Mr. Wilson had not been sent by the vice
08 president.

09 All of the effort is being directed at showing that
10 what Mr. Wilson is saying is wrong with respect to the trip.
11 You have to start with what blows everything up is the
12 Christoph article which is about the trip. It doesn't mention
13 the wife.

14 What starts everything is May 6 Mr. Christoph writes
15 the article talking about an unnamed ambassador who goes on a
16 trip. That is what the response is to. Then Mr. Wilson adds
17 fuel to the fire when he writes his op-ed piece talking about
18 what he did on the trip. So what the prosecutor has done in
19 the indictment is set forth his version of the facts.

20 THE COURT: As I said, I may not be inclined to
21 permit all that information to come out. Just because it's in
22 the indictment doesn't mean it is going to be heard by the
23 jury.

24 MR. WELLS: Your Honor, our core defense, whether it
25 is in the indictment or not is that what Mr. Libby was doing
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01 during this period of time when the government says he was
02 given information by Mr. Grossman and others about Mr. Wilson's
03 wife that whether he was given that information or not, it
04 didn't stick because it wasn't important because he was doing
05 something else and that is responding on the merits.

06 It wasn't just him. He was involved in what was a
07 multi-agency response. It was office of the vice president.
08 It was the office of the president.

09 THE COURT: Assuming -- your theory is that he was
10 focusing on the merits and not the nature of the relationship
11 between Plame and Wilson. I mean I guess that would be
12 relevant for you to bring in to show what he was focusing on
13 and why the relationship would not be relevant.

14 If you do that, I don't think the government then
15 would be able to bring in something to undermine the substance
16 of what he says he was focusing on. My suggest is that in
17 actuality something other had in substance occurred as compared
18 to what the administration was saying took place.

19 I don't think I would be inclined to let that in
20 because it seems to me that is another total issue separate and
21 apart from the issues involved in this case. So I don't know.
22 So even if you do go down that path, I don't know if the
23 government has information on how that would tend be material
24 to the development of the defense.

25 MR. WELLS: Your Honor, I'm not sure about what the
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01 government --

02 THE COURT: Let me ask. If Mr. Wells on behalf of
03 his client introduces evidence and says that, well, these are
04 the things that, in reference to this situation, Mr. Libby was
05 concerned about and it wasn't the relationship. It was the
06 substance of what Wilson was saying allegedly was the situation
07 in reference to Niger, would you then be seeking thereafter to
08 bring in evidence in rebuttal to try to show what actually,
09 that what Wilson was saying was truthful as compared to what
10 the administration was saying?

11 MR. FITZGERALD: No, judge. In fact, I think when,
12 for example, Mr. Wells points out that it was the point of view
13 of Mr. Libby that, for example, the vice president hadn't sent
14 Mr. Wilson on the trip, we agree. That's what we framed in the
15 indictment. There's no dispute about that.

16 We're not contending that the vice president or Mr.
17 Libby knew about the trip before May of 2003. To the extent
18 that Mr. Libby was telling reporters look, the vice president
19 didn't send him on this trip, we will be agreeing with the
20 jury. The vice president didn't send him on the trip. Mr.
21 Libby didn't send him on the trip. The vice president and Mr.
22 Libby didn't know about the trip until --

23 THE COURT: Are you going to be seeking to introduce
24 any evidence about what Wilson discovered on the trip and what

25 he reported back?

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01 MR. FITZGERALD: No, Your Honor. There will be
02 controversies. But when Mr. Libby says, for example, he didn't
03 approve forgeries, we won't disagree. We won't disagree that
04 Mr. Wilson was not sent by the vice president.

05 What will come up are the conversations were Mr.
06 Libby says to someone did the vice president send him on the
07 trip and he said no. The vice president asked a question. In
08 response to the question, the CIA sent him on a trip by
09 themselves. He came back. He reported to the CIA and then in
10 May of '03 this controversy breaks out.

11 We are not going to dispute the substance. We will
12 dispute that he did talk to people about Wilson's wife and the
13 relevance will be the conversations, for example, the best one
14 is Mr. Grossman when Mr. Libby asks him what he knows about the
15 trip.

16 Mr. Grossman didn't know about the trip either. He
17 found out and came back and said, my understanding is that his
18 wife works at the CIA and people are saying she was involved in
19 sending him on the trip which is what he tells Mr. Libby which
20 goes directly to the relevance of whether or not Mr. Libby's
21 testimony is true.

22 Mr. Grossman separately has a report prepared all
23 about the trip and the substance of it the so-called INR report
24 which Mr. Libby never sees. We don't intend to offer the INR
25 report. We produce it in discovery. But we are not going down

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01 the road of trying the case of whether or not Mr. Wilson is
02 right or Mr. Libby is right or whose view of this. It is
03 simply whether or not Mr. Libby told the truth.

04 MR. WELLS: Now let's return to Mr. Grossman. Mr.
05 Grossman is going to take the stand and he's going to say this
06 is what I did. I asked for a report to be prepared. I met
07 with Mr. Libby and I told him certain things.

08 Now let's assume I want to show this jury that Mr.
09 Grossman is not being totally truthful, that I want to show,
10 for example, that Mr. Grossman went to college with Mr. Wilson
11 and they were classmates and throughout their careers they
12 traveled together through the State Department and the
13 diplomatic arena from college right on through.

14 I want to give you a sample of just two emails that
15 are classified so you will see the importance of these
16 documents for purposes of discovery and how they may permit me
17 to materially advance my examination of Mr. Grossman and to try
18 to show that he is not being totally candid and that there are
19 relationships that should cause the jurors to doubt what he
20 said to Mr. Libby, when he said it.

21 THE COURT: These documents that the government may
22 have regarding the Wilson trip, I don't see how that would
23 advance that theory.

24 MR. WELLS: Let me just show you the documents.
25 These are documents that I will assume --

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01 THE COURT: These are classified documents?

02 MR. WELLS: Yes, sir.

03 (Pause.)

04 MR. WELLS: I will have to let Your Honor read them
05 because I can't talk about them.

06 THE COURT: Let me take a short break so that I can
07 take a look at them.

08 (Recess from 1:50 p.m. to 1:53 p.m.)

09 THE COURT: Mr. Wells.

10 MR. WELLS: Your Honor, maybe there is a disconnect
11 between how you are interpreting the request about the
12 relevancy of the trip. If you break it up into two parts, to
13 the extent Your Honor is saying I don't think it's relevant
14 exactly what happened on the trip when he was in Africa.

15 THE COURT: Or what he reported back.

16 MR. WELLS: When he reported back, it may go to how
17 we cross-examine Mr. Grossman and other witnesses in terms of
18 what Mr. Libby was told by Mr. Grossman and when he was told it
19 because I may try to show that it is impossible that he told
20 Mr. Libby certain things or that he shouldn't be believed and
21 that he has a relationship with Mr. Wilson.

22 THE COURT: It seems to me you could satisfy your
23 ability to develop your defense along those lines by making
24 specific Brady demands of the government in reference to the
25 information that would seek to establish that relationship or
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01 information which honestly I think the government already is on
02 notice of that, based upon what you just said, that if the
03 government has information inconsistent with what Grossman is
04 going to say, then obviously under Brady or Giglio they would
05 have an obligation to produce that.

06 MR. WELLS: I know. But it's not a question of just
07 inconsistent with what Mr. Grossman is going to say. The
08 administration's entire response is based on the fact that Mr.
09 Wilson has told certain inaccuracies.

10 If the government is going to stipulate, not just say
11 won't challenge, they're going to stipulate that there is no
12 dispute that Mr. Wilson at the onset stated a number of items
13 that we can work out a stipulation that are just plain wrong --

14 THE COURT: I don't think they're going to agree to
15 that. I think what they said they would agree to is that they
16 are not going to seek to refute Mr. Libby's representation if
17 he so represents that he was focusing on trying to discredit
18 what Wilson was saying as compared to trying to out his wife.
19 I think that's what they said.

20 If he says, I was focused on trying to correct
21 inaccuracies that Wilson had come back from Niger and related,
22 you said you're not going to seek to try and suggest that
23 Wilson was correct.

24 MR. FITZGERALD: On the points that Mr. Wells cited
25 yes. For example, we put in the indictment that the vice
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01 president didn't send him on the trip because that's one of the
02 talking points that Mr. Libby was saying out there. So I am
03 not going to stipulate that Mr. Wilson was inaccurate on
04 everything.

05 THE COURT: Right.

06 MR. FITZGERALD: I'm not going to stipulate that
07 anything Mr. Libby might have said about Mr. Wilson was
08 inaccurate. What I'm saying is if he is trying to establish

09 that the vice president didn't send Mr. Wilson on the trip, he
10 can look at the indictment. It says so. If he's trying to
11 establish, the witnesses will say that Mr. Libby was asking in
12 May '03, what about this trip, and they didn't know about it.

13 So my point being the substantive facts that they may
14 dispute about Mr. Wilson aren't in controversy, the relevance
15 of the report. What is in controversy is what happened
16 thereafter and that's why when we see things, for example, the
17 reason Your Honor has these documents from Mr. Wells is the
18 fact that we turned them over.

19 We know when if there is something inconsistent or
20 something that may be Brady or Giglio, we turn it over, and we
21 are holding back Jencks material.

22 But if there are contemporaneous documents written by
23 witnesses or persons to the event about conversations they had
24 around this, we have been turning them over. We will not be
25 disputing who sent him on the trip at trial.

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01 THE COURT: I mean I just don't intend to have this
02 case become a forum for debating the issue of whether Wilson
03 was right or whether the administration was right. I just
04 don't intend to have this case be that.

05 MR. WELLS: Your Honor, a key issue in the case from
06 government witnesses, let's take Mr. Cooper. What Mr. Cooper
07 has written -- he is a key government witness. He is on record
08 as saying that there was a plot by persons in the White House
09 to punish Mr. Wilson by outing his wife.

10 Implicit in that is that they had to punish him by
11 outing his wife because they couldn't meet it on the merits.
12 That is part of the motive why they are supposedly outing the
13 wife because they had nothing to say on the merits so let's
14 dump of the guy's wife. That is what Mr. Cooper, a key
15 government witness, is going to say.

16 Similarly, Mr. Wilson is going to be a witness in
17 this case, Your Honor. The government is not going to call
18 him. But I'm either going to call him or they are going to
19 call him in rebuttal because the government knows I have about
20 five witnesses who will say under oath that Mr. Wilson himself
21 told them about his wife working for the CIA. Once they say
22 that, the government is going to call Mr. Wilson on rebuttal to
23 say it didn't happen.

24 That's why I probably will just go ahead and call him
25 as a hostile witness because I would rather just call him in my
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01 case and let's get it and get it over with rather than end it
02 with rebuttal.

03 THE COURT: But even if you can establish that he is
04 a habitual, blatant liar, how would that bear on the issue of
05 whether your client allegedly made these false statements?

06 MR. WELLS: Because the jury has a right to determine
07 with respect to Mr. Wilson. If the government stays with this
08 argument that his wife was classified and nobody knew about her
09 outside of the intelligence community, and I want to take that
10 allegation on, and I put Mr. Wilson on the stand.

11 First I put five people on the stand who say he told
12 me about his wife working for the CIA. I'm not involved in the
13 intelligent in any way. That was no secret. He's then going

14 to get on the stand and he is going to say they're not telling
15 the truth, it didn't happen.

16 At that point I have the right to try to show that he
17 is a habitual liar. One of the things I can use to show that
18 is that he lied on the trip and one of the things I can use are
19 government documents --

20 THE COURT: It is somewhat collateral to the issue,
21 isn't it?

22 MR. WELLS: No. It goes right to the question of
23 whether he's telling the truth or not.

24 THE COURT: Not on this issue as to whether he
25 revealed information to other people prior to that about his
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01 wife's status. I don't see how the fact that he purportedly --
02 because that ends up being a debate on, because I assume he's
03 going to say no. These are, in fact, the truth, and you would
04 be seeking to show something different based upon the
05 administration's position so we're back in the same boat.

06 We are seeking to try to address the issue of whether
07 or not this information was true or not which I don't think
08 really has any bearing on whether your client falsely made
09 representations to the grand jury and the FBI.

10 MR. WELLS: Your Honor, if you step back and focus --

11 THE COURT: I don't mean to cut you off. I could be
12 wrong about tactics but I mean I don't know if that's a battle
13 you want to fight before a District of Columbia jury.

14 MR. WELLS: Your Honor, right now I am requesting
15 discovery so I can make tactical decisions based on what
16 documents I have because there is one thing I do believe in.
17 If I don't have the paper, I'm not going to be able just to do
18 it by force of personality or advocacy. I need the paper.

19 What I'm really asking Your Honor to do is to really
20 take the approach Judge Lamberth did in the George case because
21 the prosecutor's core argument really has been, Your Honor,
22 this case is just about perjury and obstruction of justice and,
23 therefore, all we need to have is just what Mr. Libby saw and
24 that's all they need, and so we can give very restrictive
25 discovery.

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01 But in every obstruction case, in every perjury case,
02 the key issue is motive and the underlying offense. Even
03 though the underlying offense is not charged, in every perjury
04 case the real question is did the person have a reason to lie.
05 So the underlying offense is always in play.

06 What took place in George was that George was only
07 charged with false statements and perjury. Judge Lamberth
08 ordered that Mr. George's lawyer, Mr. Hibey, get all of the
09 documents, all of the documents from the North production and
10 from the Poindexter production.

11 Mr. Hibey got 2 million pages of documents based on
12 Judge Lamberth's order because Judge Lamberth recognized that
13 the underlying offense is really what's going to be in play
14 even though it is not formally charged.

15 In my case I've gotten a total of 13,000 documents of
16 which 10,000 are from the office of the vice president so I've
17 gotten 3000 documents --

18 THE COURT: If I understand, George was accused of

19 having made false representations about the substance of the
20 information that was ultimately disclosed. That is somewhat
21 different than what we have here. He is not being accused of
22 having lied about the substance of the information you're
23 trying to acquire. He is accused of having lied about
24 something collateral to that, i.e., the alleged relationship
25 between Plame and Wilson.

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01 MR. WELLS: What he is accused of lying about goes
02 right to what Mr. Fitzgerald was investigating from day one,
03 whether somebody outed Ms. Wilson by improperly disclosing
04 classified information and that goes right to the heart of what
05 was taking place.

06 That's what I mean when I say the underlying offense
07 is always in play and that is what Judge Lamberth recognized.
08 What the government is trying to do by having the court take
09 this extraordinarily narrow view of the case is not to give me
10 the documents where I can show to the jury with documents the
11 full picture of what was going on because I concur with you 100
12 percent.

13 I've got a tough haul in front of this jury and I
14 need paper. I just can't have my client say it. I need to be
15 able to corroborate it. I need to show it through other
16 witnesses. I need the paper. He doesn't want to give me the
17 paper.

18 THE COURT: If he was accused of having lied about
19 what Wilson reports allegedly had occurred, then I think I
20 would totally agree with you. Everything about the Wilson trip
21 would be fair game and would be material to the development of
22 the defense. But that is not what he is accused of lying
23 about.

24 MR. WELLS: He is accused of lying about in part what
25 he was being told by government officials about what occurred
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01 in connection with the Wilson trip, including the wife. The
02 key thing is the wife. That's what he's accused of.

03 THE COURT: Anything that the government would have
04 that related to information that would have been related to him
05 about the wife I would agree. That is fair game.

06 MR. WELLS: What I'm saying is you can't slice it
07 that thin because what was going on in reality were discussions
08 about the trip of which the wife was this piece and what the
09 government is arguing is that I can't show the jury the whole
10 picture. That's what you are depriving me of, being able --

11 THE COURT: If he wants to take the witness stand and
12 he wants to say, this is what the administration's tactic was,
13 the tactic was not to out Mr. Wilson's wife; the tactic was to
14 show that this is, in fact, the reality of what occurred as
15 compared to what Wilson was saying occurred. As I understand
16 Mr. Fitzgerald's position, if he does that, the government
17 would not be seeking to establish that what the
18 administration's position was was correct as compared to what
19 Mr. Wilson had said.

20 MR. WELLS: But, Your Honor, not only could he say
21 it, I've got the right to get documents, as Your Honor wrote,
22 to corroborate his testimony.

23 THE COURT: I don't see how that shows whether your

24 client lied about the outing because if you can totally
25 established that Wilson was an habitual liar and lied about
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01 everything about what he saw in Niger and what he found out in
02 Niger, I don't see how that sheds any light on whether or not
03 your client lied about the outing.

04 MR. WELLS: Mr. Wilson would be relevant, if called,
05 to the question of whether his wife's identity was known
06 outside the intelligence committee. So it is a different
07 issue. But one way for me to attack --

08 THE COURT: I think you would have a hard time
09 convincing me that if Wilson gets on the stand and he says, no,
10 I've never told anybody about what my wife's situation was with
11 the CIA, that you then would seek to try to undermine his
12 credibility by showing that what he said regarding Niger was
13 false.

14 MR. WELLS: I wouldn't be trying to undermine his
15 credibility. I would be undermining the allegation in the
16 indictment that Mrs. Wilson's identity or her occupation at the
17 CIA was not known outside of the intelligence community.

18 He has made the allegation. I can put five witnesses
19 on the stand, without Wilson, to say, I knew about it, the
20 husband told me, and then I can stand in front of the jury and
21 say that allegation is just plain wrong. What he would do
22 then, he'll call Mr. Wilson on rebuttal. Okay. But I have a
23 right to attack that allegation.

24 We kind of drifted into another lane, to a different
25 issue, but I have a right to attack that allegation. He made
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01 it. I don't have to accept it and I could call the five people
02 to challenge that allegation.

03 I'm sticking with the indictment. The indictment
04 says, on a particular date Libby had conversations with Mr.
05 Grossman about the trip. He has put it in play.

06 THE COURT: Not the substance of the trip as I
07 understand it.

08 MR. WELLS: Yes, yes, the substance.

09 THE COURT: Again I don't know how you get into that.

10 MR. WELLS: Mr. Grossman can't testify because that's
11 what the conversations were about. They were talking about the
12 substance of trip. That's what they were talking about.

13 THE COURT: The government, as I understand it, is
14 only going to be seeking to introduce evidence that he made a
15 request about the relationship between Plame and Wilson or made
16 a request as to who was responsible for having Wilson having
17 gone on the trip.

18 MR. WELLS: Your Honor, I have a right no matter how
19 narrow the statement is. My first question will be tell me
20 what you told him, how did you learn it, who told you. I can
21 ask those basic questions. You can stick me with the answer.
22 But it's like making me stipulate that it happened.

23 THE COURT: I never understood the law to say that
24 just because people may have talked about something in the
25 context of something that is relevant to a case, that that
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01 makes everything that was said during the course of the
02 conversation relevant regardless of how immaterial it may be to

03 the substance of what the case is about.

04 MR. WELLS: Well, if I'm trying to show that Mr.
05 Grossman should not be believed and I can show that what Mr.
06 Grossman says he told Mr. Libby that either he could not have
07 learned it by that particular date or it was wrong --

08 THE COURT: If the government has any information
09 that would support that position, I will order that they turn
10 it over because I think that would qualify as Brady.

11 MR. WELLS: But I have the right, Your Honor, not
12 just as Brady, I have the right to get the information in --
13 let's just stick with Mr. Grossman's files for a minute.
14 Information in Mr. Grossman's files about the trip that he
15 would rely on in any way for purposes of his communication with
16 my client for purposes of cross-examining him. I can't see how
17 it could be denied, the documents that he had or emails showing
18 his discussion --

19 THE COURT: You know they try some cases in some
20 jurisdictions, why it takes them a year to try a case that it
21 would take two weeks to try here but I'm not going to go in
22 that direction. That's just not the way I'm not going to
23 permit this case to be tried.

24 Otherwise I'll never get to any other business. I'll
25 be trying this case for the next year and I don't plan on doing
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01 that. It's not that I would do anything to deny Mr. Libby a
02 fair trial. I'm going to do all I can. I'm just having a hard
03 time understanding how, if you are able to establish that
04 everything that Wilson said was false how in the context of any
05 issue related to this case that would be relevant on the issue
06 of whether your client lied about allegedly outing his wife.

07 MR. WELLS: Because, Your Honor, they're going to put
08 newspaper articles into evidence. That's what I wanted.
09 That's what they intend to do. You can ask the government --

10 THE COURT: About what newspaper articles?

11 MR. WELLS: They are going to put the Christoph
12 article in. They are going to put the op-ed article in. I
13 suspect they going to put about five or six articles in because
14 people are responding to these articles. Your Honor, we've got
15 to be able to tell --

16 THE COURT: Not for the truth I assume. They might
17 seek to try and put it in to show what the motive for the
18 outing would have been but that truth of it, what is in those
19 articles it seems to be would not be relevant.

20 MR. WELLS: Your Honor, if he stands up and says I'm
21 going to put the six articles in but they are not being put in
22 for the truth, they are just for background and the six
23 articles suggest that my client is engaged in a conspiracy to
24 out somebody --

25 THE COURT: I may not let that in. They may have to
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01 redact those in some way so that only certain portions come in
02 that would support their theory of what the motive is. I don't
03 think I'd be inclined to let them bring in an entire article if
04 parts of those articles don't really relate to what the motive
05 was, i.e., the outing, and somehow would be prejudicial to Mr.
06 Libby.

07 MR. WELLS: The articles he wants to put in on the

08 front end of the case are not going to be about any outing.
09 They're going to be about the Bush administration lying to the
10 public of which my client is a part, and you're saying or the
11 government is saying, well, it's just not for the truth and
12 it's just going to float around there. I've got to be able to
13 respond to that stuff.

14 THE COURT: This is the first I'm hearing about these
15 articles that you say the government is going to seek to
16 introduce that would have all of this information I guess you
17 are saying about what Wilson said he discovered in Niger.

18 MR. WELLS: Your Honor, the articles are cited in the
19 indictment. The indictment walks you right through the
20 articles.

21 THE COURT: I know it's in the indictment.

22 Does the government intend to introduce articles that
23 would, in fact, be supporting or at least relating what Wilson
24 says he discovered on this trip?

25 MR. FITZGERALD: Yes, Your Honor, the one would be
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01 but not for the truth. The Wilson op-ed itself which started
02 this sort of lift-off was achieved on July 6 where Wilson wrote
03 what I found in Niger we will offer, and we can talk about one,
04 redactions, and two, instructions to the jury that they're not
05 offered for the truth.

06 But it is precisely what that article is that causes
07 the events of June 14. On July 6 the article is printed. On
08 July 7 in response to that, the office of vice president sends
09 some talking points to Mr. Fleischer about the vice president
10 didn't know about this trip before.

11 In response to that, Mr. Libby and Mr. Fleischer have
12 lunch and that's when we allege the discussion about Wilson's
13 wife was. It is responding to the criticism that resulted from
14 the Wilson article that led to the events of July 6 to July 14
15 when most of the relevant events in this indictment took place.

16 In fact, we will offer an article that was sort of
17 annotated by people who read it. And so my point being but it
18 is not offered to prove the truth of the matter asserted. We
19 can talk about redactions or instructions but that's what Mr.
20 Libby discusses. He says his article implies that we would
21 have known about it but he didn't. And we're not going to
22 dispute the fact in 2002 neither Mr. Libby nor the vice
23 president knew about it.

24 That's my point. That's why we plead in the
25 indictment that the trip was done at the CIA's behest and they
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01 reported to the CIA. So when Mr. Wilson's says, I assume the
02 vice president heard about it back then, we disagree. We agree
03 with Mr. Wells he didn't.

04 THE COURT: The only concern I have is obviously it
05 seems to me if information comes before the jury about what
06 Wilson said he discovered during this trip which is
07 inconsistent with the administration's position, obviously the
08 administration's position in that regard was a significant
09 reason for why we ended up going to war in Iraq and that
10 obviously is a very, you know, hotly contentious issue in
11 American society today, that I could see how conceivably he
12 ends up being prejudiced because the jury starts to focus on

13 the issue of whether or not we appropriately went to war as
14 compared to the issue of whether or not he lied.

15 MR. FITZGERALD: The only thing I'll say to that,
16 Judge, is we agree that we don't want to try the war. We don't
17 want to spend nine months here, and a courtroom is not the
18 appropriate place to try the war. We will open and we'll close
19 and we'll stipulate and Your Honor can instruct the jury that
20 they are not doing their duty if they sit here and try to
21 decide whether the war was appropriate or the reasons for the
22 war was appropriate. That is not their job.

23 They are here to decide whether a man on trial is
24 proven to have lied beyond a reasonable doubt or not. But the
25 controversy to understand the importance of this particularly
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01 where the defense is going to be seeking to offer as much as
02 they can about how important Mr. Libby's job was, it is
03 important to know that an allegation was made that went to the
04 credibility of the administration, that Mr. Libby took
05 seriously and some people took very personally and he said that
06 in a grand jury and understandably anyone would if they're
07 accused of lying about something important.

08 That may shed the context for motive but we're not
09 going to get in and try, you know, what did Mr. Wilson say,
10 what did someone else say, who's right or wrong. But people
11 will understand that an allegation was made by Mr. Wilson or
12 Mr. Wilson asserted facts. People were debating it.

13 In that context there was discussion about Mr.
14 Wilson's wife in that month where he learned material. He
15 passed on material. And then he gave statements to the grand
16 jury and they will decide whether they were true or false.

17 MR. WELLS: Two points. First, as Mr. Fitzgerald
18 said he is going to start his case with an article that says
19 what I found in Niger. That's what the article is about.
20 That's what starts the whole thing. That's the title of it.

21 The notion that he can say I can't get discovery on
22 what underlies the article when he's going to put the article
23 in, that's what the case is about, is about what happened on
24 that trip, what he wrote.

25 My response, Your Honor, is the real problem with the
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01 government's indictment and how they want to try the case is
02 they want to do and what I will call a quick and dirty way with
03 the big stuff and focus on the wife because that makes the wife
04 really important.

05 THE COURT: If the government introduces this
06 article, are you saying that you then would be able to
07 introduce evidence that would undermine the accuracy of the
08 information in the article?

09 MR. WELLS: Yes, Your Honor.

10 THE COURT: That would be relevant to this case.

11 MR. WELLS: Your Honor, all I want to tell the jury
12 is what happened, and when you see what happened, the truth,
13 not the distorted picture that I submit is told in the
14 indictment. The wife's role becomes minor when you see what
15 was really going on. But if you were to rule that I can't get
16 into that, I can't really show what the administration was
17 going, then the wife's role becomes --

18 THE COURT: No, I didn't say that because if the
19 government introduces the article, I would have no problem with
20 your client or any other witnesses who could shed light on what
21 your client's mental state was at that time, bringing out
22 information that this was the administration's position about
23 the accuracy of the situation as compared to what was in that
24 article, and that's what the administration went about the
25 process of disputing, the accuracy of what was in those
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01 articles, and that that was the focus of Mr. Libby's attention
02 and not this peripheral information that you say was minor
03 regarding the relationship between Plame and Wilson. No
04 problem with that.

05 And I would not be inclined to let the government,
06 and I think the government is saying that they would not seek
07 to come back after that to seek to try to establish the
08 accuracy of the Wilson information.

09 MR. WELLS: What I'm asking for at this stage, at
10 Rule 16 discovery stage is for the documents that the
11 government has in its possession. I modified my request. I
12 said I don't want them to go do any search, just the documents
13 they already have in their possession that relate to the trip
14 and the discussions after the trip because this, what the case
15 is about is everybody discussing the trip. Every witness is
16 going to testify on the government's side about what they were
17 discussing about the trip. It wasn't just the wife. He would
18 like to make it seem like it was just the wife.

19 THE COURT: If those discussions took place before
20 this article was written which the government says is their
21 theory of what the predicate was for the motive, I wouldn't be
22 letting that information come in about those prior discussions.

23 MR. WELLS: Then, Your Honor, at a minimum I should
24 get the materials involving discussion about the trip from May,
25 well, really from the Christoph article which is May 6. I
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01 should get discussions from the, the Christoph article really
02 starts everything. He is the one who says an unnamed
03 ambassador went to Niger and really discovered all these
04 things.

05 This shows that President Bush lied during the State
06 of the Union address in 2003. That's the article. That is the
07 point, that I should at least get all of the materials in the
08 government's possession -- I'm not asking for any additional
09 searches -- about discussions concerning the trip from the date
10 of that article forward because that's when it all starts.

11 THE COURT: Okay. I have to rule. I understand your
12 theory. I just am not prepared to buy in on the proposition
13 that the information that you are requesting would be material
14 to the development of a defense.

15 As I said, if the government has information in its
16 records that, based upon what you said, is exculpatory, then
17 obviously the government under Brady would have an obligation
18 to produce that. I'm just not going to let this case end up
19 being a judicial resolution on the legitimacy of the war or the
20 accuracy of the statements the president made at the State of
21 the Union. I just don't see how that's important.

22 What I think is important it seems to me from the

23 defense perspective is what I indicated earlier, that if the
24 government introduces that article in support of their theory
25 as to what the motive was for the outing, that Mr. Libby
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01 through his defense can present evidence to show what really
02 the administration was about in reference to that article and
03 that was disproving the accuracy of the substance of the
04 information that was in it as compared to this outing which you
05 say from your perspective was a minor consideration of Libby.

06 I just don't see how that information to support the
07 administration's view of what occurred as compared to what the
08 article or what Wilson said, I just don't see how that ends up
09 being material to the defense.

10 MR. WELLS: Your Honor, before you rule, would you
11 ask the government to tell you what articles they want to
12 introduce and read the articles because I think if you read
13 them you will see there is no way that the jury, no matter how
14 strong a cautionary instruction you give about its not for the
15 truth, that I am not going to be in a position where I've got
16 to take this stuff head on. That's what was going on.

17 THE COURT: You want to try the legitimacy of us
18 going to war. You want to come in and bring in all of this
19 evidence I assume on the theory that the administration's
20 position was correct as compared to what Wilson was saying.
21 And I just don't see that that helps us and helps the jury
22 decide whether Libby lied when he talked to the FBI and when he
23 went before the grand jury.

24 MR. WELLS: Because if the evidence shows that the
25 administration, Mr. Libby saw the allegations by Mr. Wilson as
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01 going right to the integrity of the administration, let's say
02 they saw it as a crisis of integrity, and they decided they had
03 to respond to that crisis of integrity and I want to say to the
04 jurors, let me show you how they responded. And they just
05 didn't respond with Mr. Libby because he's been indicted.

06 A lot of people don't believe what the defendant says
07 so you have to do it through other witnesses. You have to do
08 it to the extent you can do it on cross within the scope. You
09 do it through witnesses who you may call. But you don't want
10 your witness to carry the water so you want to show what was
11 going on.

12 THE COURT: If the government has anything in their
13 possession that shows that there were internal discussions
14 within the White House as to what their strategy was going to
15 be to meet the force of what Wilson was saying, I agree.

16 MR. WELLS: Well, that's all I'm asking for, Your
17 Honor. All I'm asking for is that from the time of the
18 Christoph article. That's what I'm asking for.

19 THE COURT: But only as it relates to any internal
20 discussions. Are you saying even if Libby wasn't a part of it?

21 MR. WELLS: Of course, Your Honor, because it helps
22 corroborate what Libby was doing because Libby may not have
23 been a part of a discussion on a particular day.

24 THE COURT: But what if he was a renegade?

25 MR. WELLS: But he wasn't.

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01 THE COURT: I know that's your position. But just

02 because other people may have had discussions outside of his
03 presence about what the strategy was going to be I don't see
04 how that would shed light on whether or not he kept to the
05 company line.

06 MR. WELLS: Your Honor, I have a right to try to show
07 he kept to the company line and that what he says was the
08 company line which is really the important thing, was really
09 the company line and look at what other people have. Mr. Libby
10 was part of the team, Your Honor.

11 THE COURT: And if he was involved in discussions and
12 the government has documentation of the discussions that
13 indicated that this is what the administration's tactic was
14 going to be to meet this, I would agree.

15 But if there were things that were said outside of
16 his presence by other people about what they were going to do
17 and that was a part of the administration's effort, I don't see
18 how that would help us or the jury to understand whether or not
19 he complied with something he didn't even have a part of
20 discussing.

21 MR. WELLS: Your Honor, just because you're not a
22 part of a particular discussion on a particular day does not
23 mean that someone else's document or discussion corroborates
24 just what you said was going on.

25 Part of my job, as Your Honor wrote, is to get
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01 discovery to help corroborate my position. What you just said
02 a minute ago that if they have information showing those
03 internal discussions to the effect of what the administration's
04 response was going to be, you would let me have that material.
05 That's really all I'm asking for.

06 THE COURT: I mean I think that initial statement was
07 a little too broad because I find it hard to understand that if
08 he was not a part of a discussion when a coordinated effort was
09 decided upon, how this separate discussion that he wasn't a
10 part of, how would that shed light on whether or not he kept to
11 the company line or did something totally off the reservation.
12 I just don't understand that, how that would be relevant in
13 showing what his actions were by showing what somebody else's
14 agreement to act was.

15 MR. WELLS: Your Honor, let's say I have a witness on
16 the stand and I can show through Mr. Grossman or some other
17 witness how Mr. Libby is part of the team and they are fighting
18 this coordinated front. He is part of the team though he's not
19 at every meeting.

20 To establish the factual predicate so I can tell the
21 jury truthfully the wife is a sliver, a sliver, and what the
22 government is doing is trying to create the impression that in
23 this crisis of the administration where they were figuring out
24 how to respond to these articles after articles after articles
25 saying they had lied that the role of the wife was minor.

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01 But when you keep that piece out, Your Honor, you
02 keep that piece out, it makes it look like the wife was a big
03 deal and how could Mr. Libby have forgotten what he was
04 supposedly told by Mr. Grossman. That is their case.

05 THE COURT: That may be true as it relates to any
06 discussions that have been reduced to writing that Mr. Libby

07 was a part of, any strategy sessions or anything of that nature
08 where they talk about, you know, what their strategy would be
09 counter what Wilson had said, I guess it would be appropriate
10 to have that and I guess if people were present when he was
11 present when what the strategy was going to be, maybe testimony
12 from those people would be relevant in showing what his state
13 of mind was and that may undermine the suggestion that would
14 have outed her as compared to doing what the company line was
15 going to be.

16 But if there were discussions and meetings that took
17 place that he was not a part of, I just don't see how that
18 sheds light on what his state of mind was.

19 MR. WELLS: I will try to put it --

20 THE COURT: I think I understand your position. I've
21 got to move on. I think my position has to be that, as I say,
22 while I have no problem with him proving and introducing
23 evidence as to what he was doing and what his objective was in
24 reference to refuting what Wilson was saying, it seems to me
25 that is fair game.

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01 And if the government has anything in reference to
02 that that the record relates to his situation, I would conclude
03 that that would be discoverable under Rule 16. And obviously
04 if they have information that would inculcate him in reference
05 to that that that would be admissible.

06 Other thing that, I just don't see how that other
07 information and how general information about what took place
08 in Niger and what Mr. Wilson reported when he came, I don't see
09 how that is material to the development of the defense in this
10 case.

11 MR. WELLS: Thank you, Your Honor.

12 THE COURT: The next matter we need to go to is the,
13 which I think is an easy issue, is the CIA referral to the
14 Department of Justice to conduct this investigation.

15 In reference to this, I'm also having some problems
16 with seeing how this is material to the defense. The referral.

17 MR. WELLS: I'm sorry, Your Honor.

18 THE COURT: The referral from the CIA to the DOJ for
19 investigation. I'm having some concerns about how that
20 information is going to be material to the defense and,
21 therefore, discoverable.

22 MR. WELLS: The referral may go to the issue of
23 whether she was classified, whether she was covert, also may go
24 to potential bias by CIA witnesses. We asked Your Honor to
25 review it.

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01 THE COURT: On the issue of whether she was, in fact,
02 whatever her status, covert or whatever you want to classify it
03 was with the CIA, whether she was or not is that really
04 relevant? Isn't what is relevant as to what he thought her
05 situation was?

06 MR. WELLS: No, Your Honor, because the indictment
07 that Mr. Fitzgerald drafted begins with the statement about the
08 nature of the CIA, how certain employees employment are
09 classified and they are classified for the purposes of
10 protecting them and that if there are disclosures --

11 THE COURT: Is the government going to be seeking to

12 introduce evidence of that nature to suggest that she was in
13 some type of covert or secret status?

14 MR. FITZGERALD: Putting aside covert status which I
15 won't discuss, the only thing we would seek to offer about her
16 actual status was that it was classified as of the time of 2003
17 prior to her being public.

18 THE COURT: Are you taking the position that, in
19 reference to her classified status, that you don't have an
20 obligation to produce any evidence you have in reference to
21 that?

22 MR. FITZGERALD: I think what we did was we submitted
23 a Section 4 filing in which we proposed a summary of material
24 that we would suggest we give to the defense so they can
25 examine it.

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01 THE COURT: You're not opposed to the idea of having
02 to produce information about her classified status but you
03 would want to do it in a manner that doesn't reveal information
04 that they don't necessarily need?

05 MR. FITZGERALD: Yes. When Your Honor sees the
06 proposed summary and reviews it, I just want Your Honor to
07 understand that the proposed summary of what we are telling the
08 defense is a heck of a lot more than we would tell the jury so
09 that in terms of being candid with them as to what they can
10 know about our background, it's not our intention, that's not
11 our offer of proof in front of the jury. We would simply offer
12 the fact that her status was classified.

13 THE COURT: I guess that's an issue we will have to
14 address at the Section 4 proceeding since you are conceding
15 that they have a right to have information about that but in a
16 form that is redacted or a summary. Then I think that issue is
17 resolved. We just have to decide at the Section 4 hearing
18 exactly whether the summary is, in fact, sufficient.

19 MR. WELLS: Your Honor, could you ask Mr. Fitzgerald
20 on this issue are they going to keep in the indictment and
21 argue to the jury --

22 THE COURT: Let me just make one thing clear. The
23 indictment is not going to go to the jury. They are not going
24 to have it.

25 MR. WELLS: Okay. Thank you.

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01 Is the government going to argue that there was
02 potential damage to the national security by virtue of
03 disclosing the identity of somebody with classified status?
04 That's what the indictment says. I would like to know is that
05 going to be part of the case or not?

06 (Pause.)

07 THE COURT: My clerk is reminding me that we have a
08 Section 4 filing of reference to that issue too, and we may
09 have to resolve that at that time but I don't know. Is the
10 government going to seek to try to establish that there was
11 damage? I'm not asking you to go into what the damage was.

12 MR. FITZGERALD: I will say this. We will not offer
13 any proof of actual damage specific to Valorie Plame Wilson.
14 We are not getting into the fact specifics of her. The issue
15 of potential damage, the harm that causes from people being
16 outed will come up indirectly several times and I can point,

17 for example, one of the things that Mr. Wells actually looked
18 to was the articles.

19 One of the articles that came out in the New Republic
20 in June of 2003. There was some discussion in there. After
21 that article a witness spoke to Mr. Libby by telephone who was
22 describing what it is that some of the problems were about Mr.
23 Wilson's trip and the person said, can you make some
24 information public, and Mr. Libby said, we can't because there
25 are complications at the CIA which he didn't further explain,
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01 and he said, we can't talk about it on an open telephone line.

02 So the issue of potential damage from discussing it
03 may come up. In a different conversation that Mr. Libby was
04 present for, a witness did describe to Mr. Libby and another
05 person the damage that can be caused specifically by the outing
06 of Ms. Wilson. It was before the grand jury. It was back in
07 July of 2003.

08 So it goes directly to his state of mind as to being
09 is there a motive to lie. But we're not going to call specific
10 witnesses about her. We're not going to call a specific
11 witness to be an expert or an institutional witness from the
12 CIA to say here's how it all works. We do have state of mind
13 evidence of the conversations he had with witnesses that
14 averted to the issue of what happens when a person is outed.

15 THE COURT: How would his state of mind in that
16 regard be relevant to the charges in this case?

17 MR. FITZGERALD: The motive to lie. What I think
18 when you see the grand jury testimony saying that he learned
19 information that, in his mind, he was attributing to a reporter
20 and didn't know if it were true and passing it on makes it a
21 non-crime or looks much more innocent than passing on what you
22 know to be classified, and that goes to his motive to lie.

23 THE COURT: I've got you.

24 MR. WELLS: Your Honor, that article he referred to
25 is discussed in paragraph 13 and it doesn't discuss the wife at
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01 all.

02 THE COURT: I think we are going to have to address
03 this in the Section 4 hearing that we're going to have because,
04 as I say, the government is agreeing that they will turn over
05 something in reference to her classified status but they want
06 to turn it over in an altered form and I will have to assess
07 whether or not that is adequate for your purposes.

08 MR. WELLS: Your Honor, could I ask that, and maybe
09 you already said, it but I'm not sure now since you ruled if it
10 is still going to be done.

11 Could I ask that Mr. Fitzgerald submit to the court
12 and the defense the newspaper articles that he intends to offer
13 in evidence so that Your Honor can see these articles because,
14 Your Honor, some of the statements today are almost in the
15 context of admissibility as opposed to discovery, do I have a
16 right to get discovery. I would only ask if you look at these
17 articles and you see what he intends to put in front of the
18 jury and what's in the articles and they are about, I think
19 Your Honor might have a totally different view.

20 THE COURT: He can submit them to me and I will
21 review those.

22 MR. FITZGERALD: Could I make one suggestion in that
23 regard, judge? The bottom-line is we are talking about
24 discovery and not admissibility today. To some articles I
25 would say that I would fight very hard to put the article
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01 itself in even with an instruction. As to others it maybe the
02 fact of the article.

03 I agree with Mr. Wells the New Republic article does
04 not discuss the wife. There is an ambiguity about what Mr.
05 Libby and this person are discussing on the phone afterward as
06 to what the complication is.

07 My point being if, at the time of motions in limine
08 when we have a better sense of where we're going and what
09 classified information is coming in, we can tee up the articles
10 and Your Honor can rule that they are all coming in or nones
11 coming in or somes coming in and redacted and instructions.

12 But if there's a problem with something in an
13 article, let's fix it by redaction or an instruction or, worse
14 yet for me, an exclusion, not changing discovery to put the war
15 on trial because I think, for example, depending on where we go
16 with the classified information, the more we focus on Mr.
17 Libby's focus, there are articles that we otherwise would not
18 put in that show that they were annotated and show how closely
19 Mr. Libby followed it at times.

20 So I won't know which precise articles I'll be
21 putting in until we get closer to trial but I think that's a
22 motion in limine that can be addressed by redaction or an
23 instruction but not one that I think should swing the gates
24 open to discovery about the war.

25 THE COURT: I haven't lost my way in the assessment
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01 of what is discovery. Maybe I've used the term relevance but
02 only in the context of whether that relevancy issue has some
03 impact on the materiality issue.

04 I understand that materiality is the issue I've got
05 to focus on in deciding whether information is discoverable,
06 whether it ultimately ends up being admissible or not. I fully
07 appreciate that. And I don't think that the articles, I'll
08 look at them, and the government should submit them to me.
09 Obviously they not in a position to say which ones they are
10 going to use but it might put into context the position that
11 you are taking.

12 But again I didn't see how the articles themselves
13 are going to have bearing on my determination as to whether the
14 information you are seeking is material because it seems to me
15 that the only way that that information ends up being material,
16 and it does relate to, it seems to me, to the issue of
17 relevancy is whether if you were able to discover information
18 that would tend to undermine what Wilson was saying, whether
19 that would end up being relevant in a trial where we are
20 concerned with the issue of whether Mr. Libby allegedly lied
21 about something that was really collateral to the substance of
22 what was allegedly discovered in this year.

23 MR. WELLS: Your Honor, Mr. Fitzgerald said he knows
24 right now some articles that he would, quote, fight very hard.

25 THE COURT: He can let me know which ones those are.
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01 MR. WELLS: If he could give you, and not wait until
02 September --

03 THE COURT: No. He is going to submit that to me. I
04 will require it be submitted and I will issue a final ruling in
05 reference to my rulings here today. It's not going to be an
06 extensive opinion but just a synopsis of what my rulings were
07 but I will require within a week he submit those to me along
08 with submissions to counsel indicating which ones he
09 definitively will fight in favor of admitting and the other
10 ones that he sort of is ambivalent at this point.

11 MR. WELLS: If he could just put them in two piles.
12 Here are the ones I definitely want and here are the ones maybe
13 I want, and if Your Honor reads them then perhaps --

14 THE COURT: I'll read those before I make my ruling
15 final.

16 MR. WELLS: Thank you.

17 THE COURT: In reference to, and I have tried to map
18 this out in my mind as to how we deal with this issue regarding
19 the various witnesses. It would seem to me, and I think from
20 my point of view is the easiest.

21 If there are individuals who the government has
22 documentation on and those individuals had discussions with Mr.
23 Libby or Mr. Libby had discussions with them about the issue of
24 Mr. Wilson's trip and, in specific, Mr. Wilson's wife, and
25 those individuals also spoke to the press about this issue and
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01 the government intends to call as a witness, is the government
02 taking the position that if we have somebody who fits in that
03 category that the government would not have an obligation to
04 produce documentation related to such individual?

05 This is an individual who talked to Mr. Libby about
06 this whole issue, also made a statement to the press about this
07 issue, and the government intends to call as a witness to
08 testify during this trial.

09 MR. FITZGERALD: I think we have produced that. I
10 think the only thing we haven't produced is, putting aside the
11 Jencks/Giglio, like the grand jury or 302s. But if there are
12 documents or emails or things, showing, you know documents
13 showing that Mr. or Ms. Ex spoke to Mr. Libby during the
14 relevant time about the relevant topic and they are calling as
15 a witness, we have produced that.

16 THE COURT: Do you believe you have all of that, Mr.
17 Wells? I know it is hard to say. He says he's given you that,
18 anybody who would fit in that category, and it would be my view
19 that obviously you have a right to have that.

20 MR. WELLS: One second, Your Honor.

21 (Pause.)

22 MR. WELLS: Your Honor, could you ask Mr. Fitzgerald
23 if he is saying with respect to a particular individual who is
24 the subject of a sealed affidavit by me, is he saying he's
25 given us everything concerning that individual's conversations
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01 with the press?

02 THE COURT: I don't know what individual you are
03 talking about and I'm not asking counsel to reveal that since
04 it is under seal but --

05 MR. FITZGERALD: I'm not revealing Jencks Act

06 material or Giglio material so let me take a case removed from
07 this case so I could just be vaguer. If there were a person
08 with a cooperation agreement or impeachment material and had a
09 long rap sheet with six arrests and they gave a 302 for an FBI
10 interview and they went in the grand jury, I wouldn't turn that
11 material over now.

12 But if that same person was someone who had spoken to
13 Mr. Libby, spoken to the press and was being a witness and at
14 the time they wrote down an email that said, just had a meeting
15 with Mr. Libby, sent it off to someone and we looked for the
16 email and we found it and we had it or they wrote a memo to
17 file at a time which was not an FBI interview after the
18 investigation started but a memo to file at the time or
19 handwritten notes and we have that, we've given that over.

20 We are not sitting on documents or emails or other
21 things calling it Jencks because it was created at the time of
22 the events. We would only sit on Jencks/Giglio.

23 THE COURT: Mr. Wells, is that --

24 MR. WELLS: He qualified it by emails that
25 specifically mention Mr. Libby. But we would take the

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01 position, Your Honor, that if that particular individual has
02 emails concerning Mrs. Wilson, whether they are sent to Mr.
03 Libby, and if that individual also had discussions with the
04 press as part of how you described the situation, we are to get
05 all of the emails or memos or notes or whatever that that
06 individual has concerning Mrs. Wilson regardless of whether
07 they went to Mr. Libby because it is highly relevant.

08 THE COURT: You are saying that that would be Giglio,
09 right?

10 MR. WELLS: No, not necessarily, Your Honor.

11 THE COURT: It seems to me that would go to the issue
12 of whether they would have some motive to curry favor with the
13 government because they also had revealed information that
14 conceivably they could be charged with.

15 MR. WELLS: It also could lead to discoverable
16 evidence and for purposes of cross-examination. It wouldn't
17 necessarily mean just Giglio. That's all I'm saying. Perhaps
18 Mr. Fitzgerald didn't mean to carve out that piece.

19 MR. FITZGERALD: It is moot. I agree with Your Honor
20 it would be Giglio. But if we don't have it, where we had it
21 we've given it over. We haven't held back if it's not
22 testimony or not impeachment by a rap sheet or something else.
23 It's not like we took the emails and said the ones that
24 discussed topics X and Y from July 2003 he gets. The other
25 ones we sit on until later. So it is moot.

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01 THE COURT: Okay. If there are individuals, and
02 again I don't know if anybody fits in this category, who also
03 had discussions with Mr. Libby and had discussions to the press
04 but who will not testify, where do those individuals fall?

05 I assume the discovery request would encompass
06 individuals who would fit within that category also. Again I
07 don't know if anybody fits in that category. But if so, what
08 is the government's position about documentation regarding
09 those individuals?

10 MR. FITZGERALD: Your Honor, let me be general here

11 and I will rethink the remarks. If I need to clarify it, I'll
12 clarify it to you with a copy to counsel. My understanding is
13 in those situations, not saying whether they are singular or
14 plural. I don't want too much read into my words. But we
15 would give over documents reflecting the conversations with Mr.
16 Libby.

17 We would not be turning over materials if the person
18 is an innocent accused or a subject of an ongoing
19 investigation. We would not be turning over a conversation if
20 there was a document about a conversation with a reporter
21 necessarily as to what they said to the report.

22 But if there is a document that would be relevant to
23 the conversation with Mr. Libby such as an email saying I just
24 spoke to Libby or even a calendar entry saying that they meet
25 with Libby, that sort of thing was turned over.

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01 MR. WELLS: I would submit that if Mr. Rove, for
02 example, who is likely to be a witness --

03 THE COURT: The government said he won't but maybe
04 you will call him. The government said he will not be a
05 witness for the government.

06 MR. WELLS: If they don't call him, we're calling
07 him. With respect to Mr. Rove, we believe there is no
08 exception in the case law that says Mr. Libby's discovery
09 rights are diluted because the government has an ongoing
10 investigation.

11 The government controls the timing of its indictment.
12 It could have waited until it finished the whole thing. Just
13 because the government says there is a continuing
14 investigation, it cannot hold back on discovery materials.

15 THE COURT: I guess it depends upon, and I assume
16 that Mr. Fitzgerald would not disagree with that but, I assume,
17 would take the position that once the investigation is complete
18 which I would assume would be sometime in the foreseeable
19 future, that then maybe the landscape changes. And we're far
20 off from the trial at this point.

21 So it seems to me as long as it is turned over
22 sufficiently an advance of the trial so that it can be used
23 that that would be adequate but I don't know if you agree with
24 what I just said.

25 MR. FITZGERALD: I would disagree in the following

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01 respect. We are not withholding evidence or discovery on the
02 grounds that we think that Rule 16 has a continuing
03 investigation exception that dilutes his rights.

04 Our point is much of what they're asking for is not
05 Rule 16 material. Rule 16, as Your Honor has found, is
06 material to the preparation of the case in chief.

07 If a witness is not being called by the government in
08 the case in chief and isn't part of the substantive case and
09 doesn't have, doesn't shed light on whether Mr. Libby lied
10 about his conversations in the grand jury, that is not material
11 to the preparation. Sometimes, often in this case, we've taken
12 material that's not discoverable in the benefit of the doubt
13 and given it to the defendant.

14 THE COURT: But what if a witness is going to be
15 called, you know ahead of time based upon what Mr. Wells just

16 said regarding Mr. Rove, you know that the defense intends to
17 call a witness.

18 The government has information about that witness and
19 there is clear case authority that says that if that witness
20 then testifies and the government is able to then catch him in
21 a lie, knowing full well that they have this information at
22 their disposal, that that is a problem as it relates to Rule
23 16.

24 For example, I mean if you had, you know that he's
25 going to call Mr. Rove to say X and you have information that
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01 would indicate that actually Mr. Rove previously said something
02 that was Y, and then if he testifies, you catch him in a trick
03 on cross-examination and discredit his credibility, the law
04 says that they have a right to know about that so that they
05 don't, you know, step in that mine field.

06 MR. FITZGERALD: Let me just be clear that whatever I
07 say in my remarks, I'm not talking about Mr. Rove one way or
08 the other.

09 THE COURT: I understand. I only use that as example
10 because he did.

11 MR. FITZGERALD: Okay. If the defense is calling a
12 witness and, with all due respect, he's not bound to call a
13 witness so at a pretrial discovery phase defendants often
14 decide to call lots of witnesses that don't appear.

15 My understanding is that under the law, 3500, Jencks
16 and Giglio, we don't have obligations to turn over materials
17 pertaining to defense witnesses and so my point is --

18 THE COURT: I have to go back and look at this case
19 but I just looked at a case before I came out on the bench I
20 think, and it is a case out of this circuit. I have to find
21 it, where Judge Sentelle said something I believe totally
22 different than that.

23 I think what he said in that case, if my memory is
24 correct, it was, in fact, a witness that the government knew
25 about, having information on, did not reveal that information
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01 to the defense. The defense called the witness and then the
02 government used that adverse information against him on cross-
03 examination, and my recollection is Judge Sentelle said that
04 was a Rule 16 violation. I've got to go back and look at the
05 case. I know it was cited in the reply.

06 Does the defense have the name of that case? I know
07 you cited it in your reply. It was not Lloyd because it was a
08 new case I think. I think it is the U.S. versus Marshall which
09 is 132 F.3rd at page 63, specifically page 67 and 68. I'm
10 going to give the reporter a break. We'll take a 10-minute
11 recess.

12 (Recess from 2:52 p.m. to 3:02 p.m.)

13 THE COURT: You are good, Mr. Wells, because you
14 actually got me to take a position that's totally incorrect.
15 The witness in Marshall was actually a government witness, not
16 a defense witness.

17 There are cases and I looked at those last night
18 where the courts have specifically held that the information
19 that you are requesting that would help you in reference to a
20 witness that you intend to call is not discoverable under Rule

21 16.

22 MR. WELLS: Your Honor, putting the Marshall case to
23 the side, as I understand Rule 16, it applies to material that
24 permits the defense to respond to the government's case-in-
25 chief including what I put on in my case.

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01 THE COURT: The United States versus Presser, which
02 is a Sixth Circuit case at 844 F.2nd page 1275, specifically at
03 1286, the court said, further the government need not disclose
04 impeaching material in its possession relating to any potential
05 defense witness where that impeaching material does not meet
06 the Brady test of being material and exculpatory.

07 MR. WELLS: That case, I'm not familiar with the
08 particular case but the concept there, Your Honor, is that with
09 respect to Jencks and Giglio, they do not have to give me in
10 advance what we would call Jencks and Giglio material on
11 witnesses who I recall.

12 But with respect to Rule 16 discovery, be it emails
13 or memos or documents, they have to give me that material.
14 There is a line of cases that says, in essence, I don't get the
15 FBI 302s. When I say Giglio, I mean impeachment. I don't get
16 impeachment material.

17 But if they have, let's take Mr. Rove, if they have
18 emails and other documents dealing with Mr. Rove's activities,
19 I have a right to get that material.

20 THE COURT: What case specifically says that? I am
21 not familiar with any cases that says that but maybe there are
22 some. If you can get me those since I'm going to reserve the
23 ruling for a week or so that would be helpful.

24 MR. WELLS: The concept, Your Honor, is cited in your
25 own opinion and in the government's case. I didn't think we

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01 were arguing about the principles. Rule 16 doesn't just apply
02 to evidence I can use, say, to cross-examine one of their
03 witnesses. Rule 16 applies to documents that may be material
04 to helping me respond to the government's case which could even
05 mean in my case-in-chief responding to there's.

06 THE COURT: Their case-in-chief though.

07 MR. WELLS: No. If I put my case on and respond,
08 that is Rule 16. Putting Giglio and Jencks to the side, that
09 is the carve out. But to the extend there are documents that
10 would be relevant to what I put on in my case or make sure I
11 don't have a pitfall.

12 In other words, if you think about the pitfall
13 argument, that is the law of this circuit, the pitfall is
14 really to make sure in great part that when I put my evidence
15 on or when I open or close, well, really open, and set forth a
16 theory that I just can't prove, I shouldn't even go down that
17 road because he has material. That's why I should get that
18 material. I'm not even sure Mr. Fitzgerald disagrees with me.

19 THE COURT: During the government's case-in-chief or
20 during your case?

21 MR. WELLS: Either one.

22 THE COURT: Do you agree with that?

23 MR. FITZGERALD: Not at all. I'm responsible for the
24 government's case and Brady and turning over my obligations. I
25 am not responsible for preparing the defense case. And the

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01 case law, and Your Honor cited it. It is material defined by
02 the indictment and the government's case-in-chief. You just
03 can't say I'm going to call 20 witnesses so give me everything
04 about them. We then would have effectively open-file discovery
05 or beyond that and I don't agree with that reading of the law.

06 THE COURT: As I say, there is going to be probably a
07 week or so before I issue because I'll wait until I get the
08 government's submission regarding those articles. But it will
09 probably be a week and a half or two weeks before I issue a
10 definitive ruling. If you have cases that specifically support
11 that, I would like to see them. I am just not familiar with
12 that.

13 MR. WELLS: Okay. Thank you.

14 THE COURT: Okay.

15 MR. WELLS: Your Honor, on a different point, with
16 respect to the classified material, you indicated that we'd
17 deal with that in a Section 4.

18 THE COURT: I made a mistake on that. There have
19 been Section 4 filings submitted to me that you all haven't
20 received; and as I understand, the government is going to be
21 getting me the entire documents and I will compare those with
22 the substitution or the redacted documents that they would
23 propose to provide to you and I will have to make a call as to
24 whether those redactions or substitutions are adequate.

25 MR. WELLS: At some point are we going to have an

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01 opportunity be it in camera or in open court to actually
02 discuss with Your Honor what is taking place on this classified
03 material and the issue of potential harm which is
04 extraordinarily important to us?

05 THE COURT: As I indicated in my supplemental ruling
06 regarding the CIPA question, I would hope that most issues
07 regarding classified documents could be done, albeit outside of
08 the presence of the public, in an adversarial setting.

09 However, as I indicated in that ruling, I can
10 understand that there may be situations where even though
11 counsel has security clearances that the government may,
12 nonetheless, have reasons that would justify that information
13 not being made available to the defense. I would have to make
14 the call independent of defense participation.

15 I don't like that. But I think that's exactly what
16 CIPA envisions under certain circumstances. I assume since the
17 government -- I may be wrong -- has submitted to me this
18 information ex parte and has not provided it to the defense,
19 that they are of the view in reference to these particular
20 items that these are items I should only see in making this
21 decision.

22 MR. WELLS: With respect to the issue potential harm,
23 Mr. Fitzgerald expressly said a few minutes ago that on that
24 issue he's not even claiming that there was actual harm
25 concerning Ms. Wilson. Potential harm is more in the abstract.

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01 So I don't understand why we would be in a position
02 where the defense could not participate in discussion of that
03 issue. Perhaps the classified issue might be different though.
04 I don't want to concede that.

05 THE COURT: I don't know if the government because I
06 just issued this supplement to the opinion and indicated that
07 if the government was going to be submitting information to me
08 for me to review ex parte without defense involvement that they
09 would have to articulate why that particular item was such that
10 its mere disclosure to the defense would not be appropriate.

11 MR. FITZGERALD: Your Honor, I think that was
12 submitted ex parte appropriately on notice to the defense. I
13 think when Your Honor rules, if Your Honor rules against us
14 they'll get more. We have a right to appeal if we wish to take
15 it.

16 When they get the materials, it may make more sense.
17 I didn't say there was no actual harm. I didn't say there was
18 actual harm. What I said is the issue at trial was we are not
19 calling a witness as to actual harm.

20 THE COURT: Are you going to provide this information
21 to them or not?

22 MR. FITZGERALD: That's Your Honor's ruling. The
23 ruling, I mean the filing we submitted is a proposed disclosure
24 to the defense. So if Your Honor approves it, Mr. Wells and
25 his team will have more information and then it seems to me we
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01 can have a further discussion.

02 THE COURT: I guess Mr. Wells' position is that since
03 they have security clearances the whole thing could be
04 presented to them and then we would debate the issue as to
05 whether what you are proposing as a substitute that would be I
06 guess then used during the trial, that we would use that
07 process. And I assume you are saying that what you submitted
08 to me you didn't think that they should be able to see.

09 MR. FITZGERALD: Yes, Your Honor, but I will say,
10 getting to the question of what comes out at trial, if Mr.
11 Wells sees this material and wants to offer some of it more
12 than we offer or impeach it or cause disclosure of classified
13 information, then they would file that in their Section 5
14 notice. Or it would come up if we indicated something, it
15 would be resolved in a CIPA hearing. I think it will be easier
16 for everyone to tackle it if Your Honor agrees with the
17 disclosure. When they have it, they'll be in a better shape to
18 assess where we are at.

19 THE COURT: I don't think I can preclude the
20 government under CIPA from submitting information to me ex
21 parte and requiring that I make a call as to whether the
22 substitution or the redactions are adequate for the defense
23 purposes.

24 I mean, as I indicated previously, I would like for
25 it to be addressed in an adversarial setting but I don't think
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01 I can demand that. I think CIPA envisions something different
02 than that under certain circumstances.

03 Okay. I know we have this issue regarding Mr.
04 Libby's grand jury testimony and what documentation the
05 government may have that relates to that and whether that
06 should be produced. I think that's the only issue in reference
07 to the defense discovery request and this third request. I
08 think we've addressed everything else.

09 If not, Mr. Wells, let me know. I think the rulings

10 I've made would encompass everything other than the issue of
11 the grand jury testimony.

12 MR. WELLS: I think that is correct, Your Honor.

13 THE COURT: Okay. In reference to the grand jury
14 testimony, the government I assume from what I understand is
15 going to be seeking to introduce the entirety of Mr. Libby's
16 grand jury testimony?

17 MR. FITZGERALD: That is the intention, judge.

18 Obviously in a motion in limine if the defense comes in and
19 points out particular sections they think are irrelevant or
20 problematic, we'll go through them line by line.

21 There are two portions of days he testified and we
22 would offer the transcript so the grand jury would know what
23 the testimony was. Obviously it is subject to motions in
24 limine if there are particular attacks by the defense on things
25 that they think shouldn't be in there. We will consider them
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01 but by and large, absent a motion from the defense, we were
02 just going to offer the two transcripts.

03 THE COURT: Are you of the opinion that, if you have
04 documentation that relates to the substance of what he said
05 before the grand jury whether exculpatory or inculpatory, that
06 you don't have an obligation -- obviously I guess -- that you
07 don't have an obligation to produce that one way or the other?

08 MR. FITZGERALD: No. That's not my opinion. I think
09 we've turned over anything materially relevant to it. For
10 example, I think the dispute under that category of document,
11 we have turned over every document in the office of vice
12 president that we have from the office of vice president
13 including anything about it declassification issues of the NIE
14 during that week.

15 We've gone beyond that and given over some other
16 declassified documents in other offices. But anything Mr.
17 Libby would have come in contact or the people he spoke with,
18 we've turned it over. We turned over sort of the whole file
19 from the office of the vice president.

20 So I'm not so sure what isn't being turned over that
21 he's seeking. But we're not holding it back on the basis that
22 we're saying that it is irrelevant because it is his grand jury
23 testimony and we've given over all the exhibits referred to and
24 it discusses sort of the whole case.

25 So the documents referred to in the grand jury have
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01 been given to him and documents relating to that other material
02 have been given over.

03 THE COURT: Mr. Wells, what do you believe you don't
04 have?

05 MR. WELLS: Your Honor, with respect to the issue of
06 the NIE, as Your Honor knows, Mr. Libby testified that he had
07 discussions with Ms. Miller concerning the NIE based on
08 expressed instructions from the vice president and with the
09 understanding that President Bush had declassified the
10 document.

11 This is a case that concerns unauthorized disclosure
12 of classified material. To the extent that Mr. Fitzgerald is
13 in possession of documents or grand jury material or interviews
14 that establish that, in fact, the vice president and the

15 president were aware that those documents had been
16 declassified, he should turn them over because I do not want to
17 be in a position during this trial that there is some question
18 that Mr. Libby, in disclosing that material to Ms. Miller, did
19 anything wrong.

20 THE COURT: But the government is not alleging any
21 violation of the law regarding that.

22 MR. WELLS: Well, I asked the government specifically
23 in a letter, I said, is this coming in just for background
24 material, and they said, I don't want to commit. That was the
25 response.

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01 MR. FITZGERALD: Judge, I am not alleging that there
02 was anything illegal about giving over material in the NIE that
03 was declassified by direction of a superior.

04 But when someone says commit that it is background
05 material, I don't know what that means, background. We're not
06 alleging that he committed a crime when he talked to Ms. Miller
07 about the NIE on July 8 and was told you can tell her so much
08 and was told so much. That's not an issue.

09 THE COURT: You are not challenging whether there was
10 a declassification of that information at the time it was
11 produced?

12 MR. FITZGERALD: We're not challenging the
13 declassification authority as of July 8. What he is asking now
14 is Jencks. And that's what we kept writing in our briefs, we
15 don't turn over Jencks material before trial.

16 Now we're asking for grand jury testimony. It is not
17 an issue. The NIE is not mentioned in the indictment. We are
18 not alleging to the jury that Mr. Libby is guilty of disclosing
19 classified information and committed a crime that they should
20 vote on by discussing the NIE. So I don't see why we should
21 then turn over whatever material that might exist that would
22 fall under the category of Jencks.

23 MR. WELLS: I couched the request as Brady, and Brady
24 trumps Jencks. But if the government is representing that they
25 are not going to challenge what will be my strong

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01 representations to the jury that he was authorized by the vice
02 president with the understanding that the president also had
03 declassified the document and he did nothing wrong but
04 following instructions, if he's not going to challenge that,
05 then I don't need it. That's why I want it.

06 THE COURT: That's what you're saying. You're not
07 going to challenge that.

08 MR. WELLS: No. What he said, he put in there, he
09 slipped something in. He said as of July 8, because the
10 government knows that one might make it --

11 THE COURT: But that was the conversation that he had
12 with Ms. Miller on July 8.

13 MR. WELLS: Right. But the government knows there
14 may be, there is certainly an argument that the government
15 could make that there was an earlier conversation with somebody
16 else maybe 10 days earlier. My math may be off.

17 THE COURT: Is the government going to be seeking to
18 introduce the earlier disclosure?

19 MR. FITZGERALD: Your Honor, I'll say this and I'll

20 be very clear. I think there may have been two earlier
21 disclosures that we're not alleging or a crime that's not the
22 focus. We didn't charge it. But what I want to be clear is --

23 THE COURT: Are you going to seek to introduce any
24 type of evidence regarding that even though it's not charge?

25 MR. FITZGERALD: Yes. Let me explain how it came up.
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01 In a meeting I think six days before July 8 Mr. Libby testified
02 that he recalled that he was given the specific authority for
03 identification and that he checked, in fact, he checked with
04 the vice president because he was concerned.

05 He checked with someone else as to the lawfulness but
06 said that this was the first time that he was authorized to
07 describe particular language in the, a particular quote. It
08 didn't turn out that he had talked to a reporter I think six
09 days before and it came up and he testified and it's not going
10 to be a big focus but it is in the grand jury.

11 He said, well, either the declassification occurred
12 earlier than I recalled it because he said it was before July
13 8th or I made a mistake or it was someone else out there. That
14 was in the grand jury and he was examined about it. It wasn't
15 followed up upon. We're not charging a violation.

16 THE COURT: How is it relevant then?

17 MR. FITZGERALD: Only to the extent that if Mr. Libby
18 had an instruction to tell information to Ms. Miller on July 8
19 and he's saying the instruction reflected in his notes to tell
20 me Judith Miller refers to the NIE. He says he did not discuss
21 Mr. Wilson's wife that day. To our understand both were
22 discussed.

23 THE COURT: Both were discussed at the earlier?

24 MR. FITZGERALD: On July 8.

25 THE COURT: Oh, July 8.

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01 MR. FITZGERALD: Right. The earlier one which was
02 July 2 only the NIE was discussed, and that's not particularly
03 relevant but also in I think an earlier conversation we're not
04 getting into it may have come up once before then. It is not a
05 focus of things. I think when we go through the grand jury
06 transcript I'm sure that there maybe something that Mr. Wells
07 raises as --

08 THE COURT: I understand you're saying it's not a
09 focus. But I think I need to understand whether you are going
10 to seek to introduce evidence about it because I'm having a
11 hard time understanding how that would be relevant.

12 MR. FITZGERALD: I will come back to that. Let me
13 jump ahead. There's no other discovery we have on it so it's
14 not like we're sitting on documents or exhibits that --

15 THE COURT: It is a moot issue. You don't have
16 anything on it.

17 MR. FITZGERALD: Right. What I'm saying is that,
18 look, that is not the focus of what we are doing and I'm not
19 going to dispute that he was authorized on July 8. I don't
20 know what happened before so I am not going to stipulate that
21 he was authorized on June 23 or July 2. But that's not what
22 the trial is about. The trial is about what happened in the
23 grand jury, you know, lying about the wife.

24 THE COURT: Since the trial is not about those

25 earlier occasions, that's why I'm asking, are you going to seek
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01 to introduce evidence about those earlier events?

02 MR. FITZGERALD: I think, Your Honor, we may or may
03 not. Let me be straight. I don't know what the defense is
04 going to be asking about that conversation, whether we're going
05 to be talking about whether he had a conversation with Mr.
06 Woodward or not.

07 We are not calling Mr. Woodward. Mr. Libby had a
08 conversation with Mr. Woodward. I don't know if we're going to
09 get into that or not. And in the grand jury -- I don't know
10 how Mr. Wells is going to open or what he's going to say.

11 The earlier disclosure to NIE isn't the crux of the
12 case. I will be honest. I am a little afraid of tying my hands
13 by saying this isn't important, this isn't important. Then all
14 of a sudden at the trial I'm hearing an opening and I've given
15 away everything that might be responsive.

16 THE COURT: These conversations that took place
17 earlier, has all the information you have regarding those
18 earlier conversations been turned over?

19 MR. FITZGERALD: Yes.

20 MR. WELLS: I started out making what I characterized
21 as a Brady request to the extent that either the vice president
22 or the president have testified that they did authorize
23 disclosure.

24 THE COURT: Testified?

25 MR. WELLS: I'm making a Brady request. I believe
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01 there is testimony. I believe there is testimony or
02 interviews.

03 THE COURT: I didn't know they had testified.

04 MR. WELLS: I don't know the procedure whether they
05 talked to somebody in somebody's office. But to the extent he
06 has statements from either the vice president or the president,
07 to the extent that disclosure of the NIE was authorized and I
08 believe that maybe that the testimony does not tie it down to a
09 particular day, only that it did take place, I believe I'm
10 entitled to that.

11 All I asked Mr. Fitzgerald from the beginning is are
12 you going to put this stuff in just because of background,
13 because it happened. If you're not contending that there is
14 anything wrong with it, I don't need the Brady. I can open on
15 it with comfort.

16 But if he's laying back and going to say, ah, got
17 you, I have a right, I believe, if such testimony exists, to
18 know it.

19 THE COURT: I'm sympathetic with you on that point
20 because it does seem to me that conceivably you might want to
21 tactically decide to bring out these discussions that took
22 place earlier with Ms. Miller for the purpose of showing that
23 at that time Mr. Libby said nothing about Ms. Plame and what he
24 said earlier to Ms. Miller would be consistent with what he
25 would have said before or at least it would suggest that really
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01 was important to him and not the outing of Ms. Plame. And
02 therefore, the jury should not accept the testimony by Ms.
03 Miller that Mr. Libby did, in fact, say something about Ms.

04 Plame on this third occasion when on the two earlier occasions
05 he did not.

06 I would agree that it creates a problem for you if
07 you go that way and the government has information that they
08 then would bring out to undermine the suggestion that he would
09 have done that at a time when he had authorization to do so.

10 MR. WELLS: Correct. Your Honor, it is even further
11 because the first conversation is with Mr. Woodward before
12 either of the Miller conversations. There is no dispute that
13 during the conversation Mr. Libby did not mention Ms. Plame
14 though Ms. Plame may have been mentioned by Mr. Woodward. That
15 is why I want to know is the government contending, because
16 those facts are going to come out but I want to know --

17 THE COURT: I think it would be material to the
18 defense for the government to let you know any information they
19 have about the declassification process for this information.

20 MR. WELLS: Thank you.

21 THE COURT: So I would require that that information,
22 if the government has it, be produced pursuant to Rule 16.

23 MR. WELLS: Thank you.

24 THE COURT: Any other matters on the motion to
25 disclose? I do have some other things I need to discuss with
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01 you.

02 MR. FITZGERALD: Your Honor, one quick question. In
03 what form because I don't want to come back? In other words --

04 THE COURT: Obviously if you think that there is a
05 CIPA issue in reference to it, I guess we would have to do it
06 through a Section 4 filing but it seems to me that they do have
07 a right to know because if they decide to go down that path to
08 bring out information about those other events. Even if you
09 decide not to, they should know the mine field that they might
10 be going into.

11 MR. FITZGERALD: Your Honor, I think they already
12 do. Let me see if I can -- in other words, if I summarize the
13 information and disclose it as to what we know about this
14 information, I mean there was an authority to declassify it.
15 We don't know when.

16 So I don't know what more there is to that in the
17 sense that I'll scrub it. But it's not as if we're sitting on
18 -- we have turned over relevant documents and items but that's
19 the way it is.

20 THE COURT: Very well.

21 MR. WELLS: Your Honor, what Mr. Fitzgerald just said
22 that he doesn't know what is important because I gathered that
23 he was saying like it happened magically on July 8th so
24 anything before was wrong.

25 THE COURT: I don't think he's saying that.

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01 MR. WELLS: If Mr. Fitzgerald is saying he's not
02 going to argue that Mr. Libby did anything wrong in discussing
03 the NIE with either Mr. Woodward or Ms. Miller before July 8,
04 then we don't have anything to argue about. That is all I want
05 to know.

06 THE COURT: Do you agree with that or you don't?

07 MR. FITZGERALD: I don't know what he's going to be
08 arguing. If he's going to say that he was always strict by the

09 book and never ever disclosed anything classified and never
10 ever strayed over the line --

11 THE COURT: I don't think he said that. I think he's
12 being precise and he's talking about this information regarding
13 the declassification of this particular information. I think
14 that's what he is talking about.

15 MR. WELLS: It is, but if he's going to say as he
16 just suggested that if I were to say that when he talked to Mr.
17 Woodward he did it with the understanding that he had been
18 authorized and he is in possession of material from either the
19 president or the vice president to the effect that it was
20 declassified and that they know they did it but they're not
21 sure of the particular date but it was in that general area, I
22 think I should have that material.

23 THE COURT: I do disagree with that because it seems
24 to me that if he, as I said before, decides to go down that
25 road and then once he does that the government brings out
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01 something during cross-examination or otherwise that would
02 suggest that he wasn't, in fact, being honest when he made that
03 representation, then I think he is entitled to know that before
04 he goes down that road.

05 MR. FITZGERALD: Your Honor, I will stipulate that
06 the declassification happened. I don't know when. The notion
07 that we're laying low in the tall grass and weeds I think is
08 unfair.

09 THE COURT: I'm not saying that.

10 MR. FITZGERALD: I know. I'm saying in the grand
11 jury transcript we asked him there. There was no focus or
12 following up on what happened on July 2 and he says maybe he
13 disclosed it before he had the authority. Maybe he had the
14 authority. And that's not a big issue.

15 THE COURT: But as I understand, Mr. Wells' concern
16 is that if you are in some way going to suggest that when these
17 earlier conversations occurred that there wasn't or potentially
18 wasn't declassification and suggest something sinister as a
19 result of that that he has a right to know that, and I agree.

20 MR. FITZGERALD: All I am saying is that's not where
21 we are going but my fear, as much as he lays awake at night
22 worrying what I'm going to say, I worry that I say, well, we're
23 not going there and then people stand up and say the government
24 agrees X, Y and Z and start tying our hands.

25 THE COURT: I understand that he might open the door
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01 in some way that would cause you to have to bring in some
02 information but it seems to me that, if you have any
03 information right now that you know would potentially undermine
04 Mr. Libby's credibility or suggest something sinister on his
05 part if he brings out information about these earlier events,
06 then it seems to me he has a right to know that.

07 MR. FITZGERALD: And he has it. It is the grand jury
08 transcript. It is not a big deal. It is his client saying I'm
09 not sure if I had the authority when I talked on July 2nd or
10 not, and he has it. But it is not a focus.

11 THE COURT: You don't have anything that would
12 definitively show that he did not have authority.

13 MR. FITZGERALD: As to the timing, no, I don't have

14 anything that sets the date other than before, my belief is it
15 is before July 8th. Besides saying July 8 it happened by, I
16 can't move the date into June or July, a specific date.

17 MR. WELLS: Just so the record is clear what the
18 grand jury testimony is. He said that the disclosure of the
19 material was a go, then it was a stop and then it was a go.
20 Then he is asked at some point was it possible that you went
21 too fast. He says I could have made a mistake but I know I was
22 supposed to go, then I was told to stop, and then I was told to
23 go.

24 THE COURT: The government is not going to make, as I
25 understand, an issue of that. They're not going to suggest
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01 that he did anything inappropriate when he revealed that.

02 MR. WELLS: Fine.

03 THE COURT: Anything else on the motions to compel or
04 disclose? Okay. There are a couple of other things. I did
05 issue an order to show cause as to why I should not issue a gag
06 order in this case.

07 As I indicated previously, in my 22 plus years on the
08 bench, I have never issued a gag order and I don't like to have
09 to do that. I think it should only be issued in the extreme
10 circumstance where counsel is making public statements that
11 will potentially undermine the ability of either side to
12 receive a fair trial. Obviously if I were of the view that we
13 had reached that point and if I do reach that conclusion at
14 some point, I would not be hesitant about issuing such an
15 order.

16 However, in light of the submissions that were made
17 to me, I would conclude that we have not reached that point yet
18 and I would obviously hope and encourage counsel not to make
19 public statements.

20 We have, in fact, put in place a process whereby when
21 information is submitted to the court that's not submitted
22 under seal that that information will be made available to the
23 public. I don't want to try this case in a manner where we're
24 trying to do so in secrecy but I do have an obligation to
25 ensure that both sides receive a fair trial, and in my view
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01 there can be circumstances where public dissemination of
02 information can be detrimental in that respect but as I say I
03 don't think we've reached that point at this time so I will
04 vacate the order to show cause and not issue a gag order.

05 This is far out but it is something that we will need
06 to think about. As I understand, it is anticipated this trial
07 will take about a month; and with a trial of that length, we do
08 have to get a special jury panel because our jury panels sit
09 for two weeks. When we sit beyond that period especially if it
10 several weeks beyond that period, we try to screen out those
11 people who clearly cannot be here for that length of time and
12 we will probably sometime in the early fall be notifying the
13 jury office and they will send out the appropriate notice so
14 that we will have a sufficient number of jurors come January
15 who can sit for the length of time it is anticipated this trial
16 will take.

17 I would anticipate only sending a questionnaire to
18 that panel or potential panel that would be addressing the

19 potential length of the trial. I have not and would not -- I
20 am always available to be convinced otherwise -- would not be
21 inclined to send out a written questionnaire in reference to
22 this case.

23 I don't find it to be, on the issue of potential
24 prejudice, any more prejudicial than the problem that I deal
25 with on a daily basis regarding guns and drugs and the
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01 destruction that guns and drugs to do this community.

02 It's very difficult especially in drug cases to
03 sometimes pick a jury especially when it is drugs and guns and
04 we're able to pick fair and impartial jurors in that case, and
05 I guess one of the concerns I have about written questionnaires
06 is that I think it disadvantages those people who do not read
07 and do that write well, and as a result of that, many times I
08 think those individuals end up being screened out of the
09 process and don't have an opportunity to sit as jurors because
10 they aren't articulate. They don't relate in a way that inures
11 to their favor, and as a result of that, it has always been my
12 experience that, and I'm very liberal when it comes to
13 permitting counsel to ask a full range of questions that would
14 seek to elicit whether someone would potentially be prejudiced
15 against one side or the other.

16 So I do ask a set of questions and I give counsel on
17 both sides a full opportunity to ask additional questions
18 outside of the presence of the other jurors to assess whether
19 jurors do, in fact, qualify.

20 But again I stand to be convinced otherwise. But my
21 inclination would be not to use a written questionnaire to seek
22 to elicit whether jurors are qualified to sit in this case.

23 Does the defense intend to issue any additional 17(c)
24 subpoenas?

25 MR. JEFFRESS: Not to reporters, if that's your
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01 question, Your Honor.

02 THE COURT: Yes.

03 MR. JEFFRESS: It may well be that we need to issue
04 additional 17(c) subpoenas to agencies that the prosecutor is
05 not responsible for for specific items. I can't tell Your
06 Honor what they are at the moment.

07 THE COURT: Okay.

08 MR. JEFFRESS: May I just point out one more thing,
09 Your Honor. There are, just to give you a heads up on this, we
10 are receiving just as late as this week new information
11 obviously from the special counsel that is marked classified.

12 A great deal of it is information that we think
13 should not be classified and I'm sure it's been provided as
14 classified in an excess of caution. But notes, for example, of
15 the public affairs person at the CIA of his conversations with
16 reporters or others are given to us as classified. We have
17 other documents where, practically from the CIA, where the
18 author of the document, the recipient of the document, is
19 redacted. I am told that's done at the request of the CIA
20 before it is given to us.

21 It very much hampers us in conducting our
22 investigation to have these kinds of things done. I think it's
23 probably better that we do a meet and confer with the

24 government on these issues and come back to Your Honor but I
25 wanted to alert Your Honor that is a discovery problem that has
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01 not yet been addressed to Your Honor.

02 THE COURT: Besides the potential motion to compel
03 that would be specific to that issue, do you anticipate
04 submitting any additional motions to compel other than what
05 we've already submitted?

06 MR. JEFFRESS: Not unless they are focused Brady
07 issues and I'm not saying we won't think of something else but
08 clearly there would be focused Brady issues later which we
09 understand can be filed at any time if the need becomes
10 apparent.

11 But we also have this Jencks problem that we have
12 discussed that with the special counsel and he has indicated
13 that Jencks would be provided, I believe I'm quoting
14 accurately, a matter of weeks not months. Am I quoting that
15 accurately? But we really don't know when we're going to get
16 that and that may cause a flurry.

17 THE COURT: Obviously the appellate courts have
18 clearly said I don't have the authority to order the government
19 to turn over Jencks prior to the direct testimony of the
20 witness, completion of the testimony. I assume we're not going
21 to be that posture. That the government will provide the
22 Jencks in some fashion sufficiently in advance of the witness's
23 testimony so that the defense will be able to review it and
24 effectively use it during cross-examination.

25 MR. FITZGERALD: Absolutely, judge, and we've already
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01 began talking about how we're going to do it and I'm actually
02 having a meeting next week about the logistics of that. But we
03 are also talking to the defense about getting reverse discovery
04 to make sure we get anything timely from the defense that we
05 need to work on because it may cause us to do things.

06 Also getting a witness list from the defense and any
07 defense 3500 material in advance. So we're having active
08 discussions in good faith and you will not be watching Jencks
09 act material being handed over to the defense after the witness
10 testifies on direct. That's not how we operate. They will
11 have it in advance.

12 THE COURT: As I understand, we had previously
13 addressed the issue of the Speedy Trial Act and I assume there
14 is no issue in reference to the Speedy Trial Act being waived
15 until such time as we are able to reach this case for trial in
16 January.

17 MR. WELLS: That is correct, Your Honor.

18 THE COURT: And I think, Mr. Libby, I addressed you
19 previously in reference to this and I am sure you understand
20 that you have a right to a speedy trial under the Speedy Trial
21 Act which means you have a right in your case to go to trial
22 within 70 days after the indictment was returned but I
23 understand that you, consistent with what your counsel has
24 indicated, you are willing to waive or give up your right to
25 that speedy trial until we are able to reach this case in
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01 January because you realize that is necessary to have that
02 amount of time to adequately prepare your defense. Am I

03 correct in that regard?

04 THE DEFENDANT: That is correct.

05 THE COURT: Very well. I would conclude that it is an
06 interest of justice, if I didn't previously do so, to permit
07 Mr. Libby to waive his right to a speedy trial so that counsel
08 can be in a position to adequately provide representation to
09 him.

10 I don't think there is anything else. Anything else?

11 MR. WELLS: No, Your Honor.

12 MR. FITZGERALD: No, Your Honor.

13 (Proceedings concluded at 3:38 p.m.)

14 CERTIFICATE OF REPORTER

15 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT

16 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

17 WILLIAM D. MCALLISTER

18 OFFICIAL COURT REPORTER

19