

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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In re SPECIAL COUNSEL INVESTIGATION, : Case No. 04-MS-296 (D.D.C.)
In re GRAND JURY SUBPOENA OF : (Chief Judge Thomas F. Hogan)
MATTHEW COOPER :

FILED

UNDER SEAL

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NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

RESPONSE OF MATTHEW COOPER TO MOTION OF GOVERNMENT
FOR ENTRY OF ORDER TO SHOW CAUSE

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**UNITED STATES DISTRICT COURT
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**RESPONSE OF MATTHEW COOPER TO MOTION OF GOVERNMENT
FOR ENTRY OF ORDER TO SHOW CAUSE**

Time magazine reporter Matthew Cooper respectfully submits this brief in response to the Government’s motion for entry of an Order to Show Cause as to why he should not be held in contempt of court for violating this Court’s July 20, 2004 Order by declining to reveal the substance of what the government describes as “confidential and off-the-record” communications with an identified source in response to the Government’s grand jury subpoena. In its motion, the Special Counsel urges the Court to imprison Mr. Cooper “until such time as he agrees to answer such questions.” Mr. Cooper urges this Court to deny the Special Counsel’s request and to proceed as follows:

- In light of the fact that Mr. Cooper has proceeded in good faith in a principled effort to protect his confidential sources, this Court should elect, as it is empowered to do, not to hold Mr. Cooper in contempt for his actions.
- In the event that the Court concludes that it is necessary to find Mr. Cooper in contempt, it should impose a nominal fine rather than imprisonment as the penalty. Numerous cases in the reporter’s privilege context have imposed nominal fines in situations similar to this one and we urge the Court to follow the same course here.
- Any penalty — be it a fine or imprisonment — should be stayed pending appeal, as is routinely done in reporter’s privilege cases. Given that being held in contempt is the only way for a reporter to appeal an adverse ruling on a privilege is-

sue, a stay is warranted in order to avoid forcing Mr. Cooper to choose between surrendering confidential information (and mooting his legal claims) or facing severe penalties.

The Government's motion for entry of an Order to Show Cause — and its request for imprisonment — should be denied.

BACKGROUND

The Government subpoenaed Mr. Cooper for testimony and the production of documents in connection with his contributions to two articles, one published on Time.com on July 17, 2003 entitled "A War on Wilson?" and the other published in *Time* magazine on July 21, 2003 entitled "A Question of Trust." Shortly after serving the subpoena, the Special Counsel informed Mr. Cooper's counsel that he intended only to ask Mr. Cooper about certain conversations he had with an identified individual. Mr. Cooper moved to quash the subpoena on the grounds that it violated the reporter's privilege under the First Amendment, federal common law, the D.C. Shield Law, and the DOJ Guidelines. On July 20, 2004, this Court denied Mr. Cooper's motion to quash the subpoena and directed Mr. Cooper to comply with the subpoena.

Subsequent to the entry of the Court's Order, Mr. Cooper, through his counsel, advised the Special Counsel by letter dated August 2, 2004, attached hereto as Exhibit A, that for the reasons set forth in Mr. Cooper's June 3, 2004 Affidavit — which was submitted along with his motion to quash — Mr. Cooper could not in good faith comply with the subpoena insofar as it required testimony and production of documents that would identify confidential sources used by him in connection with the two articles. At the same time, Mr. Cooper advised the Special Counsel that if called upon to testify with respect to discussions he may have had with the specific individual identified by the Special Counsel to

counsel for Mr. Cooper with respect to these two articles, Mr. Cooper would respond in full to questions relating to on-the-record discussions he had with that individual but would respectfully decline to respond to questions relating to any off-the-record or otherwise confidential communication, if any such discussions did occur, with him or to questions asking Mr. Cooper to reveal confidential sources or other information that Mr. Cooper agreed not to disclose.

Immediately following receipt of this August 2, 2004 letter, the Special Counsel moved for entry of an Order to Show Cause as to why Mr. Cooper should not be held in contempt of court. In its motion, the Special Counsel argued that because the Court ruled that Mr. Cooper must answer questions before the grand jury concerning confidential conversations with that identified individual, and Mr. Cooper, through his August 2, 2004 letter, refused to do so, Mr. Cooper should be held in contempt. Although the Special Counsel acknowledged, in an affidavit filed with its motion, that Mr. Cooper did agree to testify about “on the record” conversations, the Special Counsel stated that it believed that “the conversations about which the Special Counsel seeks to question Cooper are regarded by him as ‘confidential’ and ‘off the record.’” The Special Counsel also urged the Court, without providing any basis for its request, to imprison Mr. Cooper “until such time as he agrees to answer such questions.”

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION NOT TO HOLD MR. COOPER IN CONTEMPT

Courts enjoy broad discretion in determining whether or not to hold a party in civil contempt, but may not make a finding of contempt “if there are any grounds for doubt as to the wrongfulness of the defendants’ conduct.” *SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 11 (D.D.C. 1996); *see also*

Cobell v. Norton, 231 F. Supp. 2d 315, 320 (D.D.C. 2002) (“[A] court is not required to impose a contempt sanction every time a violation of a court order is proved.”). We respectfully urge the Court not to find Mr. Cooper in contempt here.

Mr. Cooper has acted at all times in good faith in this case. His refusal to answer certain questions in response to the grand jury subpoena was based entirely on his good faith belief that he is obligated — as a matter of law, professional ethics and conscience — to protect his confidential sources. He has certainly meant no disrespect to this Court by his decision not to reveal his confidential sources. Mr. Cooper has obeyed the law his entire life and intends to in the future. He has the utmost respect for the law and this Court. He believes strongly that if he is to continue practicing journalism, if he is to preserve *Time* magazine's nearly century old reputation for protecting sources, and if he is to protect his profession as a whole, he must vigorously pursue the appeals process.

In such an instance, holding Mr. Cooper in contempt will not achieve the Government's goal in its investigation. It will only cast a chill on all reporters working on matters of public importance, such as the matter on which Mr. Cooper reported that is at issue in this investigation. Indeed, Mr. Cooper has done nothing more than to write an article exposing the Administration for leaking information revealing Ms. Plame's identity as a CIA operative, while still protecting his confidential sources. This Court should exercise its discretion and not hold Mr. Cooper in contempt.

II. SHOULD THE COURT FIND MR. COOPER IN CONTEMPT, IT SHOULD IMPOSE A NOMINAL FINE RATHER THAN IMPRISONMENT

Should this Court find him in contempt, Mr. Cooper respectfully urges that it should impose a monetary fine rather than imprisonment. Other courts faced with the choice of imposing impris-

onment or a fine for a contempt citation have resolved the issue by imposing a fine rather than imprisoning the contemnor. *See, e.g., In re Grand Jury Witness*, 835 F.2d 437, 440 (2d Cir. 1987) (fining contemnor who disobeyed grand jury subpoena by refusing to testify and holding that “[f]ines are an additional or alternative sanction that may be imposed”). Indeed, in the very area of law implicated in this case — the tension and occasional conflict between the First Amendment rights of journalists and the authority of the courts to compel testimony from all — the imposition of a nominal fine on the journalist has been common. *See, e.g., United States v. Cutler*, 6 F.3d 67, 70 (2d Cir. 1993) (upholding contempt fine of \$1.00 per day imposed on reporters and television stations for refusing, on reporter’s privilege grounds, to provide unpublished notes, outtakes and testimony in criminal contempt proceeding); *United States v. Cuthbertson*, 630 F.2d 139, 143 (3d Cir. 1980) (upholding contempt fine of \$1.00 per day imposed on CBS for refusing, on reporter’s privilege grounds, to produce for *in camera* review by the court, statements of potential government witnesses in a criminal trial), *cert. denied*, 449 U.S. 1126 (1981).

In *Cutler* and *Cuthbertson*, the courts entered *de minimis* fines pending appeal in light of the seriousness of the constitutional questions involved, implicitly recognizing that the weighty First Amendment issues needed to be resolved by the court of appeals. Here, a nominal fine is particularly appropriate in light of the serious constitutional questions at the heart of this case, Mr. Cooper’s good faith effort to protect the confidentiality of his sources while attempting to comply with the Court’s Order to some extent, and his good faith, generally, throughout these proceedings. Subjecting Mr. Cooper to heavy penalties — let alone imprisonment — for asserting and defending, in good faith, the First Amendment rights of journalists to report effectively on issues of national importance is both unnecessary and unwarranted. This is especially true in light of the fact that a contempt citation is the only pro-

cedural means for Mr. Cooper to appeal this Court's ruling and obtain a final judicial resolution concerning the scope of their First Amendment rights. As the courts in *Cutler* and *Cuthbertson* concluded, a heavy fine is not warranted under such circumstances. Imprisonment is even less justified.

III. ANY PENALTY IMPOSED BY THIS COURT SHOULD BE STAYED PENDING APPEAL

If this Court finds Mr. Cooper in contempt, imposition of any fines or sanctions should be stayed pending an appeal. This is consistent with established law in the reporter's privilege context. "Without such a stay, [the reporter] must either surrender his secrets (and moot his claim of right to protect them) or face" harsh sanctions, an "unpalatable choice." *In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J.) (granting stay of state court's finding of reporter in civil contempt pending petition for writ of certiorari and disposition thereof). A stay would ensure that Mr. Cooper receives appellate review of the important First Amendment issues raised in this case before he suffers any penalty for non-compliance with the Court's Order.

Courts routinely stay the imposition of contempt sanctions pending appeal. *See, e.g., Tinsley v. Mitchell*, 804 F.2d 1254 (D.C. Cir. 1986) (trial court stayed civil contempt fine of \$50 per day after attorney refused to pay his share of attorneys' fees); *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 921 (D.C. Cir. 1982). This is particularly true with respect to reporter's privilege cases. *See, e.g., United States v. Cutler*, 6 F.3d at 70 (upholding contempt fine of \$1.00 per day imposed on reporters and television stations for refusing, on reporter's privilege grounds, to provide certain unpublished notes and testimony in criminal contempt proceeding, and staying fine pending expedited appeal); *United States v. Cuthbertson*, 630 F.2d at 143 (upholding, in part, contempt fine of \$1.00 per day imposed on CBS for refusing, on reporter's privilege grounds, to produce for *in camera* review by the

court, statements of potential government witnesses in a criminal trial, and staying fine pending appeal); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1177 (1st Cir. 1988) (staying civil contempt fine against NBC pending appeal regarding order compelling NBC to produce non-broadcast material).

Both the gravity of the legal issues raised here as well as the equities favor a stay. In *Center for International Environmental Law v. Office of the United States Trade Representative*, 240 F. Supp. 2d 21 (D.D.C. 2003), even in the absence of a defendant's showing a high probability of success on the merits, the court granted a stay pending appeal because they had demonstrated a "substantial case on the merits" and "made a strong showing of irreparable harm." *Id.* at 22. See also *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977) (holding that a stay "is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant"); *McGregor Printing Corp. v. Kemp*, 811 F. Supp. 10, 12 (D.D.C. 1993) ("Even where the moving party has not established a likelihood that it will prevail on the merits, a court may decide to stay enforcement of its ruling if it finds that plaintiff has presented a 'serious legal question' and that the other three factors weigh heavily in plaintiff's favor.") (quoting *Holiday Tours*, 559 F.2d at 844); *American Cetacean Society v. Baldrige*, 604 F. Supp. 1411, 1414 (D.D.C. 1985) (trial court "must weigh the probability of success on appeal in a 'balance of equities' with the other three factors") (quoting *Holiday Tours*, 559 F.2d at 844).

Mr. Cooper respectfully submits that, at the very least, the Court's basis for ordering him to reveal his confidential sources raises serious First Amendment questions. See *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974). Under prevailing case law, Mr. Cooper had to decline to comply with the Court's Order in order to obtain immediate review of that

Order. *See In re Ryan*, 538 F.2d 435, 437 (D.C. Cir. 1976) (non-party compelled to give testimony not entitled to immediate review unless first disobeys and is held in contempt). If Mr. Cooper is punished for pursuing his right to appellate review, he will suffer irreparable injury — either in the form of the Court’s punishment or in his loss of First Amendment rights.

By contrast, the Special Counsel will not be substantially harmed by waiting for the appeal’s conclusion, as such determination by the Court of Appeals will likely expedite the conclusion of this matter. And the public interest will be served by entry of a stay. Given the serious First Amendment issues in this case, and the potential chilling effect a contempt sanction will have on all reporters working on matters of great public import, *see* Affidavits of Scott Armstrong, Jack Nelson, and Anna Nelson, attached hereto as Exhibits B-D, the public will be well-served by having the legal issues in this case conclusively resolved before any contempt sanction is imposed upon Mr. Cooper.

Finally, we urge the Court to make its July 20, 2004 ruling public at this time, along with all papers filed in connection with this motion and any oral argument with respect to this motion. Given the seriousness of the charges — and the potential penalties — against Mr. Cooper, and the fact that the papers filed in connection with this motion do not disclose any details of the grand jury investigation, there is no longer any reason for these papers to remain under seal.

CONCLUSION

For the reasons set forth above, the Government’s motion for an Order to Show Cause should be denied. Should this Court hold Mr. Cooper in contempt, any penalty imposed by the Court should be in the form of a nominal monetary fine and should be stayed pending determination of the significant First Amendment issues raised in this case.

Dated: August 5, 2004

Respectfully submitted,

CAHILL GORDON & REINDEL LLP

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August 2, 2004

Re: In re Special Counsel Investigation

Dear Pat:

I enclose an executed copy of my submission to you with respect to Matt Cooper.

Sincerely,


Floyd Abrams

Hon. Patrick Fitzgerald, Esq.
Special Counsel
U.S. Department of Justice
219 South Dearborn, Fifth Floor
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[Enclosure]

VIA FACSIMILE
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NANCY MAVER WHITTINGTON, CLERK
U.S. DISTRICT COURT

In re Special Counsel Investigation
In re Grand Jury Subpoena of Matthew Cooper
Case No. 04-MS-296 (D.D.C.) (Chief Judge Thomas F. Hogan)

On May 21, 2004, Matthew Cooper was subpoenaed to testify before the Grand Jury in *In re Special Counsel Investigation* in relation to his contributions to two articles, one published on Time.com on July 17, 2003 entitled "A War on Wilson?" and the other published in *Time* magazine on July 21, 2003 entitled "A Question of Trust." On July 20, 2004, the United States District Court for the District of Columbia (Hogan, C.J.) rendered its opinion denying Mr. Cooper's motion to quash the subpoena.

Mr. Cooper, by his counsel, has advised the Special Counsel that for reasons set forth by him in his Affidavit dated June 3, 2004, he cannot comply with the subpoena insofar as it requires testimony and production of documents that would identify any confidential source and that he intends to appeal from any determination by the Court compelling him to reveal any such confidential source. Mr. Cooper has further advised the Special Counsel that if called upon to testify with respect to discussions Mr. Cooper may have had with an individual identified by the Special Counsel to counsel for Mr. Cooper with respect to these two articles, Mr. Cooper would respond in full to questions relating to on-the-record discussions he had with that individual but would respectfully decline to respond to questions relating to any off-the-record or otherwise confidential communication, if any such discussions did occur, with him or to questions asking Mr. Cooper to reveal confidential sources or other information, if any such information exists, that Messrs. Cooper and that individual agreed would not be disclosed.

SUBMITTED BY:



Floyd Abrams, Esq.
Cahill Gordon & Reindel LLP
Attorneys for Matthew Cooper

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION
Before J. Thomas Hogan
[Docket No. Under Seal]

AFFIDAVIT OF SCOTT ARMSTRONG

(Russell) Scott Armstrong, being duly sworn, deposes and says:

1. I have been a professional journalist for 30 years. I am the executive director of the Information Trust, a Washington, DC-based, not-for-profit organization devoted to improving the quality of journalism. I worked for *The Washington Post* as a reporter covering national security matters from 1976 through 1985. I have worked for many national newspapers, television and radio networks in the course of my career. Along with Bob Woodward, I wrote *The Brethren*, a narrative account of the Supreme Court from 1969 through 1976 describing the Court's inner workings. I assisted Bob Woodward and Carl Bernstein in the research and writing of *The Final Days*. I taught journalism as a visiting scholar at the American University School of Communication and have lectured on journalism and/or investigative techniques at various other institutions including: Brown University, Columbia University Graduate School of Journalism, Harvard University, George Mason University, George Washington University, Georgetown University, Pennsylvania State University, Princeton University, University of Scranton, Syracuse University, the Universities of California (Berkeley, Davis, UCLA, USC), University of Illinois, Indiana University, University of Maryland, University of Pennsylvania, University of Texas, University of Virginia, as well as law schools at Columbia, Duke, Georgetown, Harvard,

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Washington School of Law, University of Virginia, and Yale.

2. I make this affidavit in support of Matthew Cooper in connection with his filing concerning whether he should be compelled to disclose the identity of certain confidential sources with whom he spoke while engaged in newsgathering.

3. In addition to my extensive reporting on national security matters, I am the co-convener with former CIA general counsel Jeffrey Smith of the ongoing "Dialogue between the Media and the Intelligence Community on Unauthorized Disclosures." In the Dialogue, representatives of the media and senior government officials have met periodically to discuss issues surrounding the media's relationship with confidential sources employed by the government.

4. In 1985, I founded the National Security Archive, a private, non-profit research institute, which makes available to journalists, historians, scholars, congressional staffs, present and former public officials, other public interest organizations and the general public comprehensive government documentation pertaining to important issues relating to foreign and national security policy.

5. In addition, I have been invited to address issues relating to government secrecy and the unauthorized disclosures (leaks) by such official organizations as The First Judicial Circuit Court Conference, the National Security Agency's Senior Seminar, the Defense Investigative Service and the Defense Security Service, the National Defense University, the National War College, the Naval War College, the Foreign Service Institute, the National Industrial Security Program, the National Archive and Record Administration, the U.S. Security Policy Board, the General Accounting Office, the Congressional Research Service and the Commission on Protecting and Reducing Government Secrecy. I have testified or consulted with committee staff

on related issues for such congressional committees as the Senate Select Committee on Intelligence, the Senate Judiciary Committee, the House Permanent Select Committee on Intelligence; the House Armed Services Committee, the House Appropriations Committee and such unofficial organizations as the American Bar Association's Committee on National Security, American Society for Industrial Security and the American Society of Access Professionals. I have also lectured on myriad occasions to groups of professional journalists on matters relating to leaks and national security information including: the American Society of Newspaper Editors, the Society of Professional Journalists, the Investigative Reporters and Editors, the Radio and Television News Directors Association, the Associated Press Managing Editors, the National Newspaper Association, the Newspaper Association of America, the Freedom of Information coalitions in Illinois, Indiana, New York ,Oklahoma, as well as the full gamut of library associations including national and regional groups affiliated with the American Library Association, the Association of Research Libraries, the American Association of Law Librarians and the Society of Archivists. I have also been a board member and consultant to the Government Accountability Project, a whistleblower protection organization, which often assists government employees who have become confidential sources to other branches of government or the media on matters involving fraud, waste, abuse and government improprieties.

6. I have been qualified as an expert witness in the use of secret or classified documents in daily journalism by federal District Judge Joseph Young in the case of *U.S. v. Morison*, 655 (D.Md. 1985). I was qualified as an expert witness in media coverage, use of confidential sources and libel by Federal District Court Judge Ewing Werlein, Jr. in *MMAR Group, Inc. v. Dow Jones & Co., Inc.*, 987 F.Supp. 535 (S.D. Texas, Houston Division, 1997), by Judge Geoffrey Alprin in *Prentice v. McPhilemy*, 27 Med. L. Rptr. 2377 (D.C. Sup. Ct. 1999) and by Texas District Court

Judge Joseph H Hart in *Jack Taylor, et al. v. Barry Switzer, et al.*, (No. 4-91-001; 126th District Travis County) and in numerous other federal and state cases involving issues of confidential sources. I was qualified as an expert witness in the analysis of media coverage and editorial decision-making in regard to venue issues by Chief Judge Richard P. Matsch in *U.S.A v. Timothy James McVeigh and Terry Lynn Nichols* (No. CR-95-110 MH MEMORANDUM OPINION AND ORDER ON MOTIONS FOR CHANGE OF VENUE; US District Court of Colorado sitting in US Western District of Oklahoma by designation) and have prepared and submitted testimony for introduction in other federal court cases on media coverage and editorial decision making as they relate to venue issues.

7. I have been the plaintiff in a number of federal cases designed to preserve and to increase access to classified and sensitive government information and to contest the failure to declassify government information. My involvement has included the selection of special masters with high level government clearances and the preparation of expert testimony.

8. In the course of my experience as a reporter, I have maintained confidential source relationships with thousands of present and former US government and private sector employees. The purpose of these relationships is to get and verify accurate information. In order to promote a free and candid relationship with confidential sources, I have frequently found it necessary to guarantee them anonymity in regard to information provided about classified or otherwise confidential and sensitive information. Much of the verification process could not be done without the guarantee of anonymity. Over the course of three decades, such guarantees of confidentiality, when used to confirm information with multiple confidential sources, have proven to my satisfaction that this process yields more candid and accurate information than to rely solely or predominantly on public or official comments or documentation. In order to secure

and sustain cooperation of a series of sources on an issue or topic, the sources must be confident that the full extent of their cooperation and role will remain anonymous and that they will not be subjected to professional recriminations, chastisement or in very rare cases, even prosecution.

9. Many sources require such guarantees of confidentiality before any extensive exchange of information is permitted. In my experience, even in public and private institutions that are known for their transparency and openness, officials and staff often require such guarantees of confidentiality before discussing sensitive matters such as major policy debates, personnel matters, investigations of improprieties and financial and budget matters.

10. Many types of reporting require the use of confidential sources. Prominent among these uses are three types of investigative or “enterprise” journalism: (a) original investigative reporting, which involves reporters developing factual accounts and documentation unknown to the public; (b) interpretive investigative reporting, which takes a mix of known facts and new information and produces an interpretation previously unavailable to the public; and (c) reporting on investigations, which publicizes information developed in government investigations that has not been known to the public and might well be suppressed.¹ These different types of investigative reporting are often mixed in the reporting of a single story. They share one key feature: to verify information, the journalist applies enterprise and initiative to examine information from as many knowledgeable and often confidential sources as can be developed.

11. Some information communicated under confidentiality arrangements will include significant “details” or “secrets.” At other times the information communicated simply amounts to candid, relevant background information, context and detailed leads, which in turn allow other

¹For a coherent description of these types of reporting see pp. 116-129, The Elements of Journalism: What Newspeople Should and the Public Should Expect by Bill Kovach and Tom Rosenstiel, Three Rivers Press, 2001.

information to be sought from yet other sources. Each confidential relationship with a source may provide one or more individual details which eventually are distilled and woven into a comprehensive news story. It would be rare for there not to be multiple sources – including confidential sources – for news stories on highly sensitive topics. The important “enterprise” stories tend to be built on information elicited from and verified with multiple confidential sources.

12. Daily reporting most often does not enjoy the same amount of reporting time and flexibility as the investigative enterprise methods outlined above. Journalists on daily deadlines therefore often make use of confidential sources to report on daily developments in government and other institutions. These confidential relationships are necessary for reporters because even official government pronouncements must be verified before they are published. Official news conferences, daily news briefings, government reports and studies require further checking by reporters. Traditionally, journalists will talk with other knowledgeable officials who are not authorized to speak to the subject but are individuals with whom they have developed a track record of candor and confidence. In some instances, this additional briefing goes beyond corroboration to add perspective that can be helpful to the reporter in writing a story but which the individual (or even the government) will not permit to be attributed by name or even position or sometimes even quoted directly in any way. Publicly available or acknowledged information may in turn prompt more detailed or relevant information from a confidential source, which may in turn lead back to additional on-the-record acknowledgments, which increase the pool of accurate and verifiable public information and/or may lead to yet more information from other confidential sources. Thus in daily journalism, as in investigative enterprise journalism, information essential to the verification of facts within a story may come from confidential

sources in the form of unique and relevant, contextual comments, which become part of the process of expanding, correcting, confirming or contradicting what other public and confidential sources have said. Thus, a relationship with the confidential source permits the authentication of the public information. The maintenance of confidential sources is therefore essential to daily journalism.

13. The broad use of secrecy in government and in the corporate and institutional world creates a need for journalists to rely on confidential sources. In the national security community, the compulsory addition of security clearances, information classification, safeguards, non-disclosure agreements, security monitoring, polygraphs, special-access programs and compartments all inhibit the disclosure of information – even non-sensitive details – through routine means. Since virtually everything is classified, the verification of something as mundane as a press briefing involves talking to scores of sources who are not authorized to add further detail and could be subject to sanctions for doing so. In journalism, stories about major national security or diplomatic policy or military activities warrant confirmation, contextual perspective and detailed elaboration. In order to provide readers with information as accurate and verified as possible, reporters often find it only available from confidential sources. At one time or another, the vast majority of high level government officials become confidential sources. In my experience, they understand that the efficient operation of government and minimal standards of accountability to the public require that they provide confidential briefings to journalists covering daily stories. Moreover, important events about government that are embarrassing to senior officials, to important government agencies and/or a presidential administration are almost always cloaked in multiple layers of secrecy, more often than not for political rather than national security reasons.

14. For example, illegal or unauthorized intelligence activities, fraud, waste and abuse within military budgets and operations that are diplomatically or politically sensitive are similarly kept from public view behind a national security rationale. The highest ranking government official may prefer to be a confidential source in order to communicate candidly to an oversight committee of Congress, through the press, a difference of opinion within the same department or administration. On a daily basis, official secrecy's overly broad use excludes not only the public, but also other agencies and even whole branches of government, from an accurate perception of policy and practice. Confidential sources often are the only manner in which this hodge-podge of sensitive and non-sensitive national security information can be conveyed to the public.

15. In cases involving classified or officially-restricted federal government information, journalists customarily seek to develop confidential sources among officials and their staffs in multiple executive branch agencies and in multiple offices of congressional members, among the members, their personal staff and their committee staff members. Stories often develop as a result of the alternative flow of information to the reporter from congressional and executive branch offices. Congressional oversight responsibilities enable congressional officials and their staffs to request information and entitle them to receive briefings on most details. Since congressional investigators often conduct their own field research, the intellectual process that develops information often includes a symbiotic relationship between journalists and congressional investigators. Some information that would not normally be available to journalists can be secured by congressional investigators. Other information that congressional investigators cannot get candidly reported by executive branch officials can be secured by reporters in confidential interviews. A similar interaction between reporters and executive branch investigators can also exploit the ability of executive branch investigators to get information from

suspects or from documents not available to reporters and, in turn, the ability of reporters to get more complete and candid information from other officials on confidential interviews. The symbiotic interaction between journalists, congressional and executive officials has become the norm in the daily exercise of the First Amendment in dealing with the government at many levels.

16. Executive agencies of the federal government regularly require journalists, who report on national security, to conduct much of their work by interviewing officials and former officials on background (without direct attribution) or deep background (with guarantees of anonymity). In my experience, these agencies include the Department of Defense, the Central Intelligence Agency, the Defense Intelligence Agency, the military services, the Department of Homeland Security, the Department of Commerce, the Department of Energy, the Department of Justice, the Department of State, the Department of the Treasury, the National Security Council, the Homeland Security Council and the White House. Officials from these organizations typically say far more on background, deep-background or off-the-record (a category which had traditionally meant the information could not be pursued for a news story, but which has come to mean the equivalent of deep background) than is ever said on the record. These are “authorized” disclosures, which agencies insist be conducted on background or deep background precisely to avoid specific accountability for any government official. Professional journalists find it necessary to obtain verification, perspective, correction and commentary on these official leaks by others not authorized to comment on the officially authorized disclosure. This system is largely of the government’s making, but requires the media to comply with the requests for anonymity or be excluded from essential information.

17. Ideally every statement and assertion in news articles would be ascribed to a specific

source either by naming the individual or by providing an explicit indication of the individual's position, affiliations, and an indication of the source's knowledge or perspective about the events or policy reported upon. But because it is necessary to protect the identity and the identifying characteristics of the employment of a source, in some instances, a confidential source may be quoted publicly and officially by name and position in a story, while the story does not disclose that the source provided additional material anonymously. In such a case, reporters will normally attempt to guide the reader as candidly as possible to a conclusion about the degree of confidence that is warranted in the source for any specific statement.

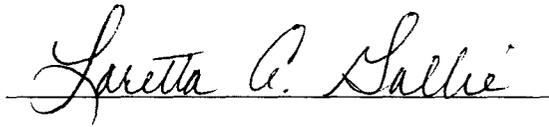
18. Once a decision has been made to protect the identity of a confidential source, it is extremely unusual for journalists to reveal their own confidential sources. I know of no instances where journalists or editors have cooperated with a leak investigation and revealed the identity of a source. Most journalists operate on the assumption that they will not reveal sources even under the possibility of being held in contempt for refusing to comply with an order to reveal their sources. Journalists customarily take precautions to prevent intentional or inadvertent disclosures by their colleagues or their editors.

19. In my professional opinion, were an order to compel disclosure of sources to be issued and were it to be obeyed, it would do catastrophic damage to the quality of information available on national security issues. It would also unsettle an untidy but well-established accommodation between government institutions and the media that allows critically important information to surface publicly in an era when secrecy classification and other governmental controls technically cover almost everything and are often used to shape or limit public debate and understanding.



Russell Scott Armstrong

Witnessed this 4 day of August, 2004



(notary public)

LORETTA A. GALLIE
Notary Public, Mason County, MI
My Commission Expires Feb. 22, 2006

My commission expires _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: SPECIAL COUNSEL INVESTIGATION
Before J. Thomas Hogan
[Docket No. Under Seal]

AFFIDAVIT OF JACK NELSON

Jack Nelson, being duly sworn, deposes and says:

1. Prior to my retirement at the end of 2001, I spent 36 years as a journalist with the *Los Angeles Times*, including 22 years as the *Times*' Washington Bureau Chief. Before I began working for the *Los Angeles Times*, I worked as a reporter for *The Atlanta Journal-Constitution* and *The Biloxi Daily Herald*. In 1960, I was awarded a Pulitzer Prize for reporting that involved confidential sources and exposed widespread financial corruption and medical malpractice at the Milledgeville (Ga.) State Hospital, then the world's largest mental institution. Much of my career has been spent either doing investigative reporting or overseeing investigative reporting. I have used confidential sources at all levels of government to report on financial corruption, vote fraud, medical malpractice, and other wrongdoing. I am, through these experiences, personally familiar with news reporting in general, and with the importance of confidential sources in newsgathering, in particular.

2. I make this affidavit in support of the memorandum of Matthew Cooper in connection with his filing concerning whether he should be compelled to disclose the identity of certain

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confidential sources with whom he spoke while engaged in newsgathering.

3. *The Los Angeles Times* has been publishing a daily newspaper since 1881. Its daily circulation is approximately 1 million and its Sunday circulation is approximately 1.39 million.

4. I have utilized and protected confidential sources throughout a career of more than 50 years as a journalist. During that time, I have found it essential to use confidential sources to adequately report and keep the public informed of government at the local, state and national level. In order to fully report stories on many subjects, especially in order to learn of government activities that otherwise would have been shielded from the public, I often found it necessary to rely on confidential sources.

5. I have covered the activities of six different presidential administrations -- four Republican and two Democratic -- and have directed the Washington bureau's coverage of five of them. And in all of the administrations we had to rely on confidential sources in reporting on government developments that were of great public interest but that government officials tried to keep concealed.

6. In Washington, my own reporting and the reporting of staffers I've directed routinely disclosed governmental abuses of one kind or another based on solid sources who insisted on confidentiality for fear of reprisal if their identities became known. Without those sources the *Los Angeles Times* would have been unable to report numerous such stories involving corruption or governmental abuses in at least six administrations. Examples include: disclosures aspects of the Watergate scandal and abuses of power of the FBI and other federal agencies in the Nixon Administration; questions surrounding President Ford's pardon of Nixon; scandals in the Carter Administration involving OMB Director Bert Lance and President Carter's brother Billy Carter's

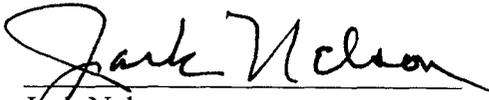
representing Libya; illegal and inappropriate payments and cover-up attempts in the Iran/Contras scandal in the Ronald Reagan Administration; President George H. W. Bush's role in the Iran/Contras scandal and other wrongdoing in his Administration; and lies told by President Clinton in the Monica Lewinsky scandal.

7. A reporter who obeys a court order to disclose a source to whom he has promised confidentiality would seriously damage his ability to cover government in the future. Other government sources who insist on confidentiality and hear news about a reporter outing a confidential source obviously would consider that reporter and perhaps other reporters as untrustworthy and refuse to deal with them in the future. And it undoubtedly would have a ripple effect, silencing whistleblowers and other government employees who might otherwise cooperate with the press in exposing government wrongdoing.

8. In fact, high government officials from presidents on down routinely have leaked classified information when it has promoted their agenda or otherwise suited their purposes. Any reporter who has covered Washington for any length of time knows that officials routinely leak classified information. Some government public information officials have publicly acknowledged that they routinely use classified information in briefing reporters. Congress passed a bill cracking down on leaks in 2000, but President Clinton vetoed it after Kenneth Bacon, the Assistant Secretary of Defense for Public Affairs, and Strobe Talbot, the Deputy Secretary of State, told the President they routinely used classified information in briefing reporters and could not adequately do their jobs if the bill became law. Bacon told the *Washington Post* the measure was "disastrous for journalists . . . disastrous for any official who deals with the press in national security, whether at State, the NSC or the Pentagon." And Talbot told me, for a paper on government secrecy that I

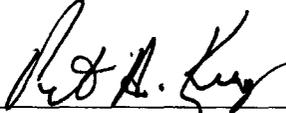
wrote while at Harvard University as a Shorenstein Fellow in 2001, that the bill was “unbelievably pernicious for all kinds of reasons.” The paper was a chapter in a 2003 book, “Terrorism, War, and the Press,” published by the Joan Shorenstein Center on the Press, Politics and Public Policy and the John F. Kennedy School of Government.

9. Finally, I believe a federal court order, as part of the investigation into the possible disclosure of a CIA operative’s name, that punishes reporters or their news organizations for refusing to divulge confidential sources would be closely watched by all government sources and potential sources who might be inclined to help the public know how its government is operating. And if the punishment were to compel a reporter to reveal his source, it would have a chilling effect on sources and not only damage the reporter’s ability to do his job, but the ability of all reporters covering government to do their jobs.


Jack Nelson

Date: 8-2-2004

Witnessed by me this ^{AKS} 02 day of ^{AKS} Aug., 2004,



PETER A. KONY (Public)
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires 3-1-2006

My commission expires on: _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: SPECIAL COUNSEL INVESTIGATION
Before J. Thomas Hogan
[Docket No. Under Seal]

AFFIDAVIT OF ANNA NELSON

Anna Nelson, being duly sworn, deposes and says:

1. I am Anna Kasten Nelson, the Distinguished Historian in Residence at the American University in Washington, D.C., where I teach courses related to the history of U.S. Foreign Policy. I have also taught history at George Washington University and Tulane University and was a Distinguished Visiting Professor in history at Arizona State University in 1992. I have also been a member of the staff of the Public Documents Commission which was formed after President Nixon's efforts to destroy his tapes and the United States State Department Historical Advisory Committee. I was one of five presidential appointees to the John F. Kennedy Assassination Records Review Board. Each of these was formed to release historical records to the public.

2. I make this affidavit in support of Matthew Cooper in connection with his filing concerning whether he should be compelled to disclose the identity of certain confidential sources with whom he spoke while engaged in newsgathering.

3. Since filing my first Freedom of Information Request approximately 25 years ago, I have also personally been a vocal proponent of opening historically valuable records. Nevertheless, I am supporting the subpoenaed reporters in the current grand jury investigation who have refused to

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release the names of confidential sources.

4. Historians no longer limit themselves to writing about past centuries. The position of the U.S. as a world power in the last half century has brought countless monographs to library bookshelves and articles in scholarly and public interest journals. For the most part, the traditional sources of historians such as government records are not open to researchers for 25 to 30 years and then are often censored for purported national security information or privacy. Thus it is journalism that often provides the first cut of history to researchers seeking to understand the immediate past. Newspapers are regarded as a primary source and journalists who write for them also write for history. Recently (January 2004) I published an article about a woman chosen by Secretary of Defense George Marshall to be an Assistant Secretary in the Defense Department in 1950. She was attacked by supporters of Sen. Joseph McCarthy. Among my most important sources were the three articles published in the *Washington Post* at that time by a journalist whose sources were not identified. Those articles helped me determine that masked by false accusations of communist party membership was a deep anti-Semitism among her opponents. The journalist informing his readers also was in an unique position to inform future historians.

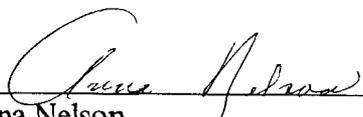
5. Requiring journalists to reveal the identities of their sources would impoverish our knowledge of contemporary history since confidential sources are often the only sources available to the journalist and thus the original source for historians seeking to unravel public policy or foreign policy. A journalist's exposure of the My-Lai incident is just such an example. The journalist did not reveal his sources and as a consequence historians have deepened their view of the way in which the war in Vietnam was fought. See, for example, David Anderson's *Facing My Lai* (1995).

6. The sources used by journalists are also important to counter the deliberate leaks from the

government that are designed to influence the public. The eminent statesman and historian, George Kennan, once told me in an interview that our government was like a volcano. It only leaked from the top. That information, amplified by the memoirs of policy makers, would be our only source if journalists were required to open all their files. Certainly historians who will one day study the war in Iraq will be grateful that they can check both the official and leaked accounts with those of Seymour Hersh, Jon Lee Anderson and others who are on the scene.

7. If the reporters in this case are required to name their sources, government officials will be alerted to the fact that journalists will no longer be able to speak out to reveal fraud, deception or just the description of controversial events. Everyone would suffer from that chilling effect: the public, journalists and historians.

8. At the very beginning of our country, James Madison wrote, "It has been a misfortune of history that a *personal knowledge* and an *impartial judgment* of things can *rarely meet* in the historian. The best history of our country therefore must be the fruit of contributions bequeathed by contemporary actors and witnesses, to successors who will make an unbiased use of them."



Anna Nelson

Date: 8/3/04

Witnessed by me this 3rd day of August, 2004,

Rebecca S. Cooper, State of Maryland, County of Montgomery
(Notary Public)

My commission expires on: July 1, 2008

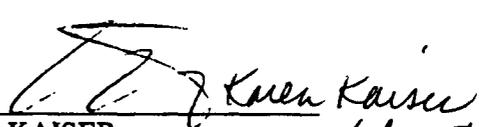
CERTIFICATE OF SERVICE

I, Karen Kaiser, certify that true and correct copies of the foregoing Response of Matthew Cooper to Motion of Government for Entry of Order to Show Cause and Affidavits of Scott Armstrong, Jack Nelson and Anna Nelson were served by facsimile and overnight mail on the 5th day of August, 2004, upon the parties listed below:

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KAREN KAISER

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