



Office of Special Counsel

Patrick J. Fitzgerald
Special Counsel

Chicago Office: Dirksen Federal Building
219 South Dearborn Street, Fifth Floor
Chicago, Illinois 60604
(312) 353-3300

Washington Office: Rand Federal Building
1400 New York Avenue, Ninth Floor
Washington, DC NW 20530
(202) 514-1187

Please address all correspondence to the Washington Office

September 12, 2005

CONFIDENTIAL

Joseph A. Tate, Esq.
Dechert LLP
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, Pennsylvania 19103-2793

Re: Special Counsel Investigation

Dear Mr. Tate:

I am writing you because, after reading several recent media accounts relating to the confinement of Judith Miller for civil contempt in connection with this matter, I wish to make sure that Ms. Miller does not remain in jail because of any misunderstanding regarding the nature or extent of Mr. Libby's waiver of confidentiality. In particular, I wish to make certain that you, as counsel for Mr. Libby, are not laboring under the incorrect impression that communication of a waiver between Mr. Libby and Ms. Miller would be viewed as obstructive conduct. I can assure you that it would not be so viewed.

As you know, Mr. Libby voluntarily agreed to be interviewed by agents of the Federal Bureau of Investigation ("FBI") in October 2003 and November 2003 and thereafter voluntarily testified before the grand jury on two occasions in 2004. Moreover, on January 5, 2004, your client voluntarily signed an express waiver of confidentiality regarding any conversations he had with members of the media regarding Ambassador Joseph Wilson, his trip to Niger in February 2002 and matters relating thereto. As you are aware, the waiver form was presented to your client by FBI agents conducting this investigation and not by White House personnel.

Moreover, in addition to signing a waiver form, Mr. Libby testified as to his memory of his conversations with reporters relevant to this investigation, including relevant conversations with Judith Miller. Mr. Libby has discussed a meeting with Ms. Miller on July 8, 2003, at the St. Regis Hotel and a later conversation between Mr. Libby and Ms. Miller by telephone in the late afternoon on July 12, 2003. Mr. Libby has described his recollection of the substance of those two conversations, without limitation. Thus, Mr. Libby has waived any claim of confidentiality by his actions, separate and apart from signing the written waiver. In addition, on a later date, I understand that reporter Matthew Cooper contacted Mr. Libby and verified that there was indeed a valid waiver

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of confidentiality, a conversation which I believe preceded a conversation between then counsel for Mr. Cooper and you concerning the validity of that waiver. After that conversation, Mr. Cooper and counsel both publicly confirmed the validity of that waiver by Mr. Libby to Mr. Cooper and Time Inc. I also understand that counsel for the *Washington Post* and counsel for NBC each verified the validity of the waiver executed by Mr. Libby with you.

As you are also aware, litigation ensued between Special Counsel and Ms. Miller concerning a subpoena which sought testimony concerning Ms. Miller's conversations with Mr. Libby, though your client was referred to in the subpoena (and publicly filed court documents) as an "identified government official." Ms. Miller and the New York Times maintained in that litigation that there had been no valid waiver by the "identified government official" (Mr. Libby), argued that the waiver form was not valid, and asserted that the waiver was coerced by the official's employer. Special Counsel represented that the waiver was not coerced. Chief Judge Thomas Hogan and the D.C. Circuit Court of Appeals issued rulings enforcing the subpoena and holding Ms. Miller in contempt.

At the time of the argument concerning Ms. Miller's contempt, I was obviously aware of Mr. Libby's waiver and Ms. Miller's refusal to testify in the face of that proffered waiver. Indeed, during the argument on the issue of contempt, after Judge Hogan noted that Ms. Miller held the proverbial key to her jail cell in her pocket, I stated that two people held the key to her jail cell: Ms. Miller and her source, who might proffer a waiver to Ms. Miller in the manner akin to the waiver Mr. Cooper received. In the three months that have passed, I have assumed that Ms. Miller chose to remain in contempt either in spite of her awareness of Mr. Libby's waiver or because Mr. Libby had decided that encouraging Ms. Miller to testify to the grand jury was not in his best interest. Indeed, there was press reporting to the same effect:

Sources close to the investigation, and private attorneys representing clients embroiled in the federal probe, said that Libby's failure to produce a personal waiver may have played a significant role in Miller's decision not to testify about her conversations with Libby, including the one on July 8, 2003.

(*American Prospect*, August 8, 2005.)

At about that same time, Rep. John Conyers wrote (and publicly released) a letter cosigned by several Congressmen asserting: "[Mr. Libby's] failure to grant such a waiver to Ms. Miller has apparently led her to refuse to testify ... and, in turn, led to her recent incarceration for civil contempt. ... We urge you to immediately and publicly rectify this by issuing a personal waiver to Ms. Miller." When asked about the letter and whether Ms. Miller would testify if provided an additional waiver, counsel for Ms. Miller is quoted as saying: "I have no comment about what she might do in circumstances that do not now exist." Given that there is no public response to the Congressmen's letter, and in light of the comments of counsel for Ms. Miller, I had assumed that Mr. Libby had simply decided that encouraging Ms. Miller to testify was not in his best interest.

In the last two weeks, however, I have read two articles which cause me to question whether there might be a failure of communication regarding the waiver. First, an account in the

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Los Angeles Times of August 25, 2005, indicates that reporter Matt Cooper agreed to testify in July only after he confirmed that Mr. Rove's waiver was valid. I particularly noted the statement in the article that "Rove's attorney, meantime, took the view that contacting Cooper would have amounted to interfering with the ongoing court battle between reporter and prosecutor." Reading that account gave me some concern that, however unlikely given the prior waiver by Mr. Libby to Mr. Cooper and others (and given that one of Ms. Miller's attorneys confirmed that same waiver between Mr. Libby and Mr. Cooper), Mr. Libby may not have contacted Ms. Miller to confirm his waiver for fear that such a communication would somehow be viewed as obstructive conduct.

Thereafter, on Friday of last week, there appeared a Reuters article dated September 8, 2005, which quoted one of Ms. Miller's attorneys as stating:

"She is there (in jail) for a reason. At this time, the reason is still there. She made a promise and, unless properly released from her promise by her source, she has no choice but to continue to take the position that she's taking," Abrams said.

He declined comment when asked if Miller, who was sent to jail on July 6 though she never wrote an article about the Plame matter, had reached out anew to her source for a clear release from confidentiality that would allow her to testify.

Thus, counsel for Ms. Miller appears to be operating on the assumption that there has been no "proper" or "clear" release from any promise of confidentiality. If this is so, it may be that Ms. Miller remains in jail because of a misunderstanding.

Given the statement by counsel for Mr. Rove that he felt inhibited from communications between counsel, I wish to make certain that you understand that if Mr. Libby maintains that his waiver is valid and he wishes to communicate that fact either through you or directly to Ms. Miller or her counsel (without discussing the substance of what her testimony might be), I would not view such a communication as obstruction. In fact, I would welcome such a communication reaffirming Mr. Libby's waiver as it might assist the investigation and lead to Ms. Miller's release. (Indeed, Mr. Libby's similar communication with Mr. Cooper and his counsel, as well as with the *Washington Post* and NBC, were not viewed as obstruction and those communications avoided the prospect of several other reporters being jailed for contempt.) Mr. Libby, of course, retains the right not to so reaffirm his waiver in a manner specific to Ms. Miller if he would prefer that the *status quo* continue and Ms. Miller remain in jail rather than testify about their conversations.

In closing, let me be clear that I cannot, and am not, seeking to compel a communication from either Ms. Miller or Mr. Libby or their respective counsel, nor do I wish to be copied on any such correspondence or to participate in any such conversation. I am simply making plain that

FROM :

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any communication reaffirming Mr. Libby's waiver would not be viewed as obstructive conduct. Rather, it would be viewed as cooperation with the investigation.

Very truly yours,


PATRICK J. FITZGERALD
Special Counsel