

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

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In re: Special Counsel Investigation : **Case No.: 04-MS-461 (D.D.C.)**
: **(Chief Judge Thomas F. Hogan)**
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**GOVERNMENT’S MEMORANDUM IN OPPOSITION TO
MATTHEW COOPER’S MEMORANDUM REGARDING THE CONTEMPT
SANCTION**

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, respectfully submits this Memorandum in Opposition to “Civil Contemnor Matthew Cooper’s Memorandum Regarding the Contempt Sanction.”

Cooper’s Memorandum Regarding the Contempt Sanction asserts that Time, Inc.’s decision last week to comply with this Court’s order “should obviate the need to enforce the subpoena served on Cooper and the contempt citation against him.” Special Counsel represents to the Court that after reviewing the documents provided by Time, Inc., Cooper’s testimony remains necessary for the Special Counsel’s investigation.

Special Counsel further requests that this Court reject Cooper’s requests for home confinement or confinement at a specified federal prison camp for the reasons set forth in the Government’s Memorandum in Opposition to Judith Miller’s Motion for Reconsideration or a Supplemental Order Designating a Particular Place of Confinement, Case No. 04-MS-407. Special treatment for journalistic contemnors may negate the coercive effect contemplated by

28 U.S.C. § 1826, and enable, rather than deter, defiance of the court's authority. Although confinement in a federal detention facility would separate Cooper from his family, Special Counsel reiterates that all Cooper need do to avoid this result is to follow the law as all American citizens are required to. As with Miller, Special Counsel defers to the Court's judgment and experience in whether Mr. Cooper should be confined to the D.C. Jail or some other nearby federal facility.

Cooper argues that there is no prospect that he will testify because he is ethically bound to honor a promise made to a source, even where the source committed misconduct. Cooper Motion at 2 and Exhibit B. Journalist Margaret Carlson argues in a letter submitted on his behalf that: "Journalists must honor their promises which protect the bad along with the good. We can't separate them like the darks and the whites in the laundry." Cooper Motion, Exhibit B, Letter 1.

Cooper and Carlson should not underestimate either the press' ability or responsibility to separate the good from the bad. First, Cooper's own article noted that the conduct of the officials involved an attack on an administration critic, not whistleblowing. Second, at a time when journalists seek a reporter's privilege akin to the attorney-client privilege, they ought recognize that an attorney can be compelled to testify if his client communicates to the attorney for the purpose of committing a crime or fraud (or where the client waives the privilege). Third, journalists are not entitled to promise complete confidentiality – no one in America is. Because juries are entitled to hear every man's evidence, promises cannot be

made by law enforcement officers that a source will never have to testify, even if the source offers important information about Usama Bin Laden. For that reason, FBI agents (including the Director of the FBI), United States Attorneys, even the Attorney General of the United States cannot make an unqualified, unconditional and binding promise that a witness will never have to testify.¹ Given that there are estimated to be 54,000 newspaper journalists in the United States – and the number gets much larger if you include “bloggers” and other persons not part of the newspaper media – Cooper would be going to jail to claim a power for 54,000 journalists to honor a commitment that no member of the Executive Branch can make to a source acting in good faith. Fourth, Cooper seeks to honor this promise he had no power to make in a case where his source waived his promise of confidentiality and Cooper has previously honored such a waiver. Finally, by Cooper’s own account, his source’s confidentiality has been mooted by the production of relevant documents by Time Inc. Given the above, Cooper fails to meet his burden to show that there is no reasonable possibility that confinement will coerce him to testify since Cooper going to jail would be entirely pointless.

CONCLUSION

The government respectfully asks that Matthew Cooper’s request for an order for supervised home confinement at his primary residence, or alternatively for an order designating a particular place of confinement, be denied.

¹ Even if such a promise could be made, if the person then committed a crime during the conversation (by lying to a federal investigator or by making an illegal threat or bribe offer) then the promise would be undone.

Respectfully submitted,

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