UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: Special Counsel Investigation	:	**Case No.: 04-MS-407 (D.D.C.)**
	:	**(Chief Judge Thomas F. Hogan)**

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO JUDITH MILLER'S MOTION FOR RECONSIDERATION OR A SUPPLEMENTAL ORDER DESIGNATING A PARTICULAR PLACE OF CONFINEMENT

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, respectfully submits this Memorandum in Opposition to the "Motion of Judith Miller for Reconsideration of the Court's October 7, 2004 Order Requiring Confinement 'At A Suitable Place' Or, In The Alternative, For A Supplemental Order Designating A Particular 'Suitable Place' Of Confinement" (hereinafter, "Motion").

As set forth below, Special Counsel opposes the motion for reconsideration because it is based upon the flawed assertion that there is no realistic possibility that confinement would be effective in obtaining Miller's compliance with this Court's lawful order to provide testimony and documents to the grand jury. Special Counsel further opposes the request that Miller, unlike other contemnors, either be confined at home or at a residential prison camp for her convenience while she defies this Court's order.

I. THE MOTION FOR RECONSIDERATION OF THE ORDER THAT MILLER BE CONFINED PURSUANT TO 18 U.S.C. § 1826 SHOULD BE DENIED.

Upon finding Judith Miller in contempt for refusing to comply with a lawful order to provide evidence to a grand jury, this Court ordered that, pursuant to 18 U.S.C. § 1826, Miller should be confined until she agrees to comply with the Court's order. Miller now asks this Court to "reconsider" that order before being confined for even one minute, on the ground that confinement has no realistic possibility of coercing compliance with the Court's order. Miller argues that her refusal to obey the law is based on a "moral and principled stance" and "beliefs that go to the core of her being" which, she contends, are commonly shared journalistic principles.[1] Motion at 7-8. Coming as it does before she has served any period of confinement, Miller's motion fails to carry her burden of establishing that the confinement provision of Section 1826 will be ineffective in achieving compliance with this Court's order.

A. Legal Background

The inherent power of courts to enforce compliance through civil contempt is essential to the ability of the courts to compel the appearance of witnesses and the production of evidence to grand juries. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Orders that impose "conditional punishment for the obvious purpose of compelling witnesses to obey the orders to testify" are civil and remedial in nature rather than criminal and punitive. *Id.* at

[1] Given the flawed factual basis for the claim, we will not dwell further on the legal argument set forth in our June 28 filing that the time for a motion for reconsideration has passed other than to note that this motion for reconsideration is based in part upon comments the Court made contemporaneous with the decision that was unsuccessfully appealed.

369-69. As civil contempt has often been described, the contemnor carries "the keys of the prison in his own pockets" because she can purge the contempt by deciding to comply with the court's order. *In re Nevitt,* 117 F. 448, 461 (8th Cir. 1902). When a recalcitrant witness is jailed to coerce compliance with a subpoena, "it has been held that at some point in what otherwise would be an indefinite period of confinement due process considerations oblige a court to release a contemnor from civil contempt if the contemnor has then shown that there is no substantial likelihood that continued confinement will accomplish its coercive purpose." *Simkin v. United States*, 715 F.2d 43, 37 (2d Cir. 1983) (citations omitted).

In passing 18 U.S.C. § 1826, the Recalcitrant Witness Statute, which limits civil confinement to the "term of the grand jury" but in no event in excess of 18 months,[2] Congress made "a deliberate . . . attempt to resolve the problem of drawing a line between coercion and punishment." *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 425-27 (3d Cir. 1979). Thus, in Section 1826, Congress laid down an 18 month "benchmark." *Id.* at 427.[3] "Given the legislative determination that a balance is to be struck between these competing values by

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[2] The 18-month maximum period of confinement may include a period of confinement for refusal to give evidence to a successor grand jury that continues an investigation upon expiration of the original grand jury. *See, e.g., United States v. Jones*, 880 F.2d 987, 988 (7th Cir. 1989). *See also Shillitani,* 384 U.S. at 371 n.8 ("the sentences of imprisonment may be continued or reimposed if the witnesses adhere to their refusal to testify before a successor grand jury").

[3] Thus confinement under Section 1826 "differs from the indeterminate period of confinement for civil contempt imposed pursuant to state law and practice that marked the cases in which courts have held that at some point the confinement ceases to be coercive and becomes punitive, thereby raising due process concerns." *Braun,* 600 F.2d at 425; *id.* at 425 n. 15 (citing state cases).

placing an eighteen-month limit upon confinement for civil contempt," courts have been "reluctant to conclude, in the absence of unusual circumstances, that, as a matter cognizable under due process, confinement for civil contempt that has not yet reached the eighteen-month limit has nonetheless lost its coercive impact and become punitive." *Id. See also Simkin*, 715 F.2d at 37; *Sanchez v. United States*, 725 F.2d 29, 31 (2d Cir. 1984); *In the Matter of John Credidio*, 759 F.2d 589, 591 (7th Cir. 1985).

After confinement has been imposed under Section 1826, the district court ordering the confinement retains "broad discretion" to determine whether the civil contempt sanction has lost its coercive effect at some point short of 18 months. *Simkin*, 715 F.2d at 37. The district court is required to make an individualized determination as to the likelihood of a coercive effect on a particular recalcitrant witness. *Simkin*, 715 F.2d at 38; *In re Lionel Jean-Baptiste*, 1985 WL 1863 *2 (S.D.N.Y.)("the central and irreducible requirement is that the Court make an individualized finding as to whether the particular contemnor is likely to be coerced by continued incarceration"); *In re Grand Jury Proceedings of the Special April 2002 Grand Jury*, 347 F.3d 197, 207 (7th Cir. 2003)("court must make an individualized determination of whether continued confinement retains any realistic possibility of achieving its intended purpose"). Because of the predictive nature of the decision about the effect of confinement on the contemnor's actions, appellate courts have held that the district court judge "has virtually unreviewable discretion both as to the procedure he will use to reach his conclusion and as to the merits of his conclusion." *Simkin,* 715 F.2d at 38.

In exercising its discretion, the district court need not "accept as conclusive a contemnor's avowed intention never to testify." *Simkin*, 715 F.2d at 37; *United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1979). Indeed, "[e]ven if the judge concludes that it is the contemnor's present intention never to testify, that conclusion does not preclude the possibility that continued confinement will cause the witness to change his mind." *Simkin*, 715 F.2d at 37. The district court is required to make a "conscientious effort to determine whether there remains a realistic *possibility* that continued confinement *might* cause the contemnor to testify." *Simkin*, 715 F.2d at 37 (emphasis added). In deciding the issue, the burden of proof is placed on the contemnor to show that no realistic possibility exists. *Simkin*, 715 F.2d at 37; *Braun*, 600 F.2d at 425; *In re Pantojas*, 496 F. Supp. 344, 347 (D.C.P.R. 1980)(there must be a "strong and adequate showing" to satisfy "the stringent burden"). "As long as the judge is satisfied that the coercive sanction might yet produce its intended result, the confinement may continue." *Simkin*, 715 F.2d at 37.

Contemnors have been held to have failed to satisfy their burden even in cases involving past defiance of subpoenas and lengthy confinement without compliance. *See e.g.*, *In re Grand Jury Proceedings*, 347 F.3d at 199-201 (affirming district court's finding that confinement might cause contemnor, who was then engaged in a hunger strike citing "long held and unshakeable religious, political and personal beliefs," to testify even where contemnor had previously been released after 180 days' confinement in another jurisdiction, also while engaged in a hunger strike, on finding in other jurisdiction that further confinement

would not coerce him to testify); *In the Matter of John Crededio*, 759 F.2d at 590-93 (order of confinement affirmed after more than seven months without compliance); *In the Matter of the Grand Jury Subpoena Served Upon Pedro Archuleta*, 446 F. Supp. 68, 69 (S.D.N.Y. 1978)(motion for release denied after six months confinement); *In re Matter of Robert Cantazaro,* 663 F. Supp 1 (D.D.C. 1985)(same); *Braun*, 600 F.2d at 427-28 (3 months). Reported cases involving a district court's finding that confinement has no realistic possibility of success are almost all cases in which the finding was made after a substantial period of confinement failed to achieve its intended objective. *See, e.g., In the Matter of Dr. Jean Ford*, 615 F. Supp. 259 (S.D.N.Y. 1985)(6 months); *In the Matter of Michelle Thomas,* 614 F. Supp. 983 (S.D.N.Y. 1985)(six months); *In re Lionel Jean-Baptiste*, 1985 WL 1863 (S.D.N.Y.)(seven months); *In the Matter of the subpoena Served Upon Bernardine Dorhn*, 560 F. Supp 179 (S.D.N.Y. 1983)(seven months); *In re Maria T. Cuerto*, 443 F. Supp 857 (S.D.N.Y. 1978)(ten months). Research revealed few reported cases in which a district court found in advance of any period confinement that there was no reasonable possibility that confinement might achieve compliance by the contemnor. *See*, *e.g.*, *United States v. Buck*, 1987 WL 15520 (S.D.N.Y.).

B. Judith Miller Has Failed to Carry Her Burden of Establishing That Confinement Has No Realistic Possibility of Causing Compliance.

Miller claims that the Court views her conduct as being carried out in "the highest traditions of the press." Motion at 1. Miller avers that her moral principles are widely shared in journalism and argues that courts have credited "steadfastness in cases where others in an

identifiable group – here journalists – share the contemnor's publicly-expressed moral convictions." Motion at 6. Thus, Miller argues that she should be treated like the contemnors in the "grand jury resisters" cases (Motion at 7) and spared confinement, which she contends would be "ineffective and therefore inappropriate." Motion at 1. Miller cites the "strong and public support of her employer, colleagues, political and opinion leaders," and argues that, in light of her "principled motive" for contempt, there is "absolutely no realistic likelihood" that confinement will be effective in coercing her testimony. Motion at 5, 6.

First, Special Counsel takes exception to the misleading assertion in Miller's Motion that this Court has determined that deliberately defying the Court's authority after all appellate review has been exhausted is conduct taken in "good faith doing her duty as a responsible and established reporter ... an effort not made except in the highest traditions of the press." Motion at 1 (quoting the Court at a proceeding on October 7, 2004). Far from it. While this Court most certainly recognized that Miller (along with Matthew Cooper and Time Inc.) was acting responsibly and in good faith by *appealing* the Court's order of October 2004, the Court has made no statement at any time condoning any putative effort by Miller to *violate* the Court's order after that order was affirmed unanimously by the Court of Appeals, and after Miller's petitions for rehearing and certiorari had been denied. Indeed, such conduct is a *crime*.[4]

[4] For this reason, it is respectfully submitted the Court should advise Miller that if she persists in defying the Court's Order that she will be committing a crime. *Cf. United States v. Monteleone*, 804 F.2d 1004 (7th Cir. 1986)(declining to adopt the due process requirement imposed by the Ninth Circuit that civil contemnors be advised that they face possible subsequent

Miller's motion presumes that "others in an identifiable group – here, journalists – share the contemnor's publicly-expressed moral convictions." Motion at 6. However, a number of journalists, First Amendment scholars and opinion leaders flatly disagree with the position Miller is taking at the behest of the *New York Times*.

The public record alone makes plain that other reporters in this case complied with court orders. After the Supreme Court denied certiorari, Norman Pearlstine, editor-in-chief of Time Inc., explained how he came to the decision that Time Inc. should comply with this Court's order as a matter of journalistic principles:

> The same constitution that protects the freedom of the press requires obedience to final decisions of the courts and respect for their rulings and judgments ... The Supreme Court made its ruling ... Once it made its ruling there was no other choice but to comply. *I feel we are not above the law.*

Pat Milton, Time Magazine Says it Will Comply with Judge in Showdown Over Reporter's Notes, Associated Press, June 30, 2005 (emphasis added)("Exhibit 1").

In fact, according to an account in the *New York Times* on July 1, 2005, Pearlstine, who has a law degree, spent months wrestling with his decision, reviewing case law and speaking to "other journalists, lawyers and academics." Pearlstine admitted that he had a "kneejerk" contrary reaction at first but studied the actions of Presidents Truman (in the steel seizure case) and Nixon (regarding the Watergate tapes) after adverse decisions by the Supreme

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prosecution for criminal contempt but commending it as an advisable practice). It is particularly important in this case where Miller and the *New York Times* appear to have confused Miller's *ability* to commit contempt with a legal *right* to do so. A clear indication that the Court views defiance of its Order as criminal behavior, as opposed to conduct which can be condoned, may have a positive effect on a contemnor who looks to the views of "opinion leaders" for support.

Court: "This was the kind of issue that began engaging me *in ways I had not predicted*." *Id.* (emphasis added). The *Times* reports that the more Pearlstine looked at the issue,

> . . . the more he came to believe that it was more detrimental to hold on to the files. "The journalist and the lawyer were fighting in my head," he said. "*But if Presidents are not above the law, how is it that journalists are?*" . . . "Thinking we're above the law rings wrong to me," he said.

Lorne Manly & David D. Kirkpatrick, Top Editor at Time Inc. Made a Difficult Decision His Own, N.Y. Times, July 1, 2005, at A1 (emphasis added) ("Exhibit 2").[5]

Pearlstine is by no means alone among editors who adhere to the unremarkable proposition that the law must be obeyed by all. On July 3, 2005, Steve Chapman, a member of the editorial board of the *Chicago Tribune*, opined in "Special Privileges and Reporters":

> The editor in chief of Time Inc. made news the other day by offering to do what most of us take for granted: Obey the law. Its about time. ... 'The same constitution that protects the freedom of the press requires obedience to the final decisions of the courts,' said editor Norman Pearlstein – an insight that has eluded many of his fellow journalists.
>
> That would include *New York Times* reporter *Judith Miller, who claims the prerogative of deciding for herself what information the grand jury is entitled to hear, and whose publisher backs her up. ...*
>
> Journalists like nothing better than exposing self-seeking behavior by special interests who care nothing for the public good. In this case, they can find it by looking in the

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[5]In a formal statement issued by Time, Inc. Pearlstine stated:

> . . . I do not agree with that but I have to follow the laws like every other citizen. ... I found myself really coming to the conclusion that once the Supreme Court has spoken in a case involving national security and a grand jury, *we are not above the law and we have to behave the way ordinary citizens do*.
> Statement of Time Inc., June 30, 2005, available at http://biz.yahoo.com/prnews/050630/nyth071.html?.v=16 ("Exhibit 3").

mirror.

Steve Chapman, Special Privileges and Reporters, Chicago Tribune, July 3, 2005, at C9 (emphasis added)("Exhibit 4"). An earlier August 22, 2004 editorial in the *Chicago Tribune* also opined that *Time* correspondent Matt Cooper should testify in the Plame investigation.[6]

> An August 2004 *Los Angeles Times* editorial agreed:
>
> *But there are leaks and there are leaks.* It makes no sense for the government to encourage leaks that it rightly outlaws.
>
> Journalists would prefer not to make this kind of distinction.
>
> * * *
>
> In the haze of self-righteousness about protecting sources, though, it is easy to lose sight of the cost. *The cost of giving absolute legal protection to journalists' secrets is to make the government's secrets impossible to protect.*
>
> Maybe it's time for journalists . . . *to stop staging these 1st Amendment melodramas*. Journalists — who are citizens too — could help by being less promiscuous with offers of anonymity in the first place. *If it is information you believe should not be out there* — because it endangers lives (of a covert agent's contacts, for instance) or because it is wrong or deeply misleading — *why should you even consider going to jail to protect the source?*

Editorial, All Leaks Are Not Alike, L.A. Times, Aug. 13, 2004, at B12 ("Exhibit 6").

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[6] "Should he refuse, it's only appropriate that he face the same consequences as any other citizen. If someone in the federal government knowingly outed Valerie Plame despite the danger it might create for her, that person deserves to feel the full force of the law. If any ordinary citizen had valuable information about the crime, he or she would have a duty to turn it over. In this instance, *it's hard to see why Matt Cooper or any reporter should be excused from that duty*."
Editorial, Should a Journalist Go to Jail?, Chicago Tribune, Aug. 22, 2004, at C8.

Anthony Lewis, a well known *New York Times* columnist for 32 years and Harvard Law School lecturer on the Constitution and the press from 1974 to 1989, who has served since 1983 as the James Madison Visiting Professor of First Amendment Issues at the Graduate School of Journalism at Columbia University, and who has also won two Pulitzer Prizes, also disagrees with Miller's absolutism.[7]

Another "opinion leader", Professor Geoffrey Stone, a constitutional scholar at the University of Chicago who advocates for a federal reporter's shield law,[8] has opined that: no such shield law should protect Miller on the facts of the Plame case;[9] Miller should not break

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[7]

> But it does not follow that the law must always back off from an attempt to discover the sources.
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> * * *
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> Reputations can easily be ruined by false reports in the press. Do we really want the authors of defamatory articles to be able to hide behind alleged anonymous sources? And the argument that journalists should be given a privilege against having to testify, whether by judicial decision or a new federal shield law, courts another danger. It would risk adding to the already evident public feeling that the press thinks it is entitled to special treatment. The press does not need, right now, to separate itself further from the public. Any privilege that is won should surely be qualified, not absolute, with judges balancing the interests, as Judge Tatel indicated, and with his respectful care.
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> Anthony Lewis, Privilege & the Press, New York Review of Books, July 14, 2005, available at http://www.nybooks.com/articles/18111.("Exhibit 7").

[8] Professor Stone is a former member of the Board of Directors of the American Civil Liberties Union and author of "*Perilous Times: Free Speech During Wartime*."

[9]

> In the Plame case, we have a relatively unusual circumstance where the source is essentially using the press in an effort to commit a federal crime ... no version of a reporter-source privilege in my view or my judgment would cover the particulars of this situation.

The NewsHour with Jim Lehrer, June 29, 2005 ("Exhibit 8").

When asked about the chilling effect, Prof. Stone noted:

the law by committing contempt;[10] and that by committing contempt Miller would be engaging in "irresponsible martyrdom."[11]

The Court need not guess as to how fellow journalists have viewed the principles asserted by the *New York Times*. That issue was explicitly addressed at length in a recent article in the Columbia Journalism Review:

> In fact, among the more than two dozen reporters, lawyers and editors I talked to for this article there was a real concern that, far from enhancing the reporter's privilege, the Plame case could put a stake through its heart ... there is a sense that the Plame outing ... was the kind of sleazy Beltway maneuver that represents the worst use of confidential information. Moreover, as in Branzburg, any reporters getting the leaks may have directly witnessed a crime being committed, the hardest situation in which to assert a privilege. ... *Though reluctant to come out and say so publicly, it is clear that many reporters and press advocates are upset that the Times has allowed the Plame case to develop into a potential seminal test of the reporter's privilege. ...*

> If there is a chilling effect, it troubles me, but I think it is because the press has overreached in these cases. These are situations where in fact the leakers are presumably committing a criminal offense. This is a tiny fraction of situations in which the reporter-source privilege might be applicable." *Id.*

[10]

> "We do not live in a society where individuals ordinarily ought to violate the law simply because they think that they have good reasons for doing so. . . . *Judith Miller and Matthew Cooper will have committed a crime when they refuse to disclose this information* . . ."

Interview with Geofrrey Stone, On the Media from NPR, Dec. 10, 2004(emphasis added)("Exhibit 9").

See also Prof. Stones's June 1, 2005, posting observing that Miller and Cooper are "not Woodward and Bernstein." Geoffrey R. Stone, Deep Throat Redux: Are Miller and Cooper Woodward and Bernstein?, The Huffington Post, June 1, 2005, available at http://huffingtonpost.com/theblog/archive/geoffrey-r-stone ("Exhibit 10").

[11] Adam Liptak, Court Declines to Rule on Case of Reporter's Refusal to Testify, N.Y. Times, June 28, 2005, at A-1 (quoting Professor Geoffrey Stone)("Exhibit 11").

> Woodward, an assistant managing editor at the Post, agrees that confidential sources should be used only for important matters and clearly thinks that the Plame matter didn't meet that test. "This is not the Pentagon papers," Woodward dryly observes. "it's not the case you'd choose to make law on."
>
> By contrast, in our interview Arthur Sulzberger directly invoked the Pentagon Papers case in justifying the Times' hard stand on Plame. And if others are put out with Miller and the Times, it's just as clear that Miller and the Times are less than thrilled with the tepid support they received from [media entities].

Douglas McCollam, Attack at the Source, Columbia Journalism Review, Jan/Feb. 2005, available at: http://www.cjr.org/issues/2005/2/mccollam-plame.asp ("Exhibit 12").

In addressing whether Miller may rethink her position, this Court can look for guidance to the experience of another reporter who committed contempt. Veteran investigative reporter Mark Bowden, author of "Black Hawk Down" and other works, candidly described his thought process while being held in contempt for refusing to testify to certain questions at a criminal trial:

> It is one thing to enjoy the luster and admiration of your fellows for boldly defying authority at the risk of going to jail, and quite another to actually go to jail . . . . I had assumed over the years that by virtue of some special clause in First Amendment law, reporters enjoyed a special standing in American courts. . . . I considered such protections my due, vital to the practice of journalism, and deeply rooted in law and tradition. As with lawyers, doctors and priests, journalists have a profound obligation to keep certain matters secret. . . . Yet as I listened to the arguments over my fate in court . . . it became clear that I enjoyed no strong legal protections or traditions . . . *What was even more troubling was that [the prosecutor] Zimmerman's argument made a lot of sense. Why should reporters enjoy any kind of special status before a judge and jury in a murder trial?* . . . In the case of Plame . . . the state certainly has a compelling interest in any or all information that might get to the truth. . . . But backing down at that point seemed out of the question. *I was caught in a web of professional fraternity . . . If I had paid attention earlier, I would have had a better idea of the issues at stake and I might have persuaded my editors to avoid this showdown.* The First Amendment protects freedom of the press but it doesn't absolve

> it from all civic responsibility. . . . There has not been a direct constitutional showdown on the question because the First Amendment lawyers have been unwilling to put this jerrybuilt framework to the test. . . . In most states, even many with shield laws, reporters can be compelled to testify and even to reveal confidential sources. . . . [quoting former Times editor] "The strategy has been to resist to the point where it kind of becomes a pain in the ass, on the theory that prosecutors and judges will eventually give up." . . . Common sense can be the first casualty in these legal battles. My stand on 'principle' was in fact just part of the newspaper's effort to discourage such subpoenas in the future, to help the *Inquirer* make itself a "pain in the ass."

Mark Bowden, Lowering My Shield: A Murder Case, a Subpoena, and a Reporter Ready to Go to Jail to Protect What He Knows. Why Did He Start to Feel Like a Dope?, Columbia Journalism Review, Aug. 2004, available at: http://www.cjr.org/issues/2004/4/bowden-shields.asp ("Exhibit 13").

Bowden goes on opine that, in view of the fact that his source had not sought confidentiality (a situation analogous to that presented here because the source in this case has waived confidentiality in writing), it would have been better for him promptly to have responded to the prosecutor's inquiries:

> I think, in retrospect, I should have promptly answered all the prosecutor's questions and showed them my notes. The newspaper would have been better off. *The Inquirer* appealed my case . . . all the way to the State supreme court and lost. It now stands as a permanent setback for the Pennsylvania shield law. . . . And for what? I had nothing to protect. Instead of contesting every subpoena that arrives, newspapers should do a better job of picking their fights.

Id.

Bowden obviously thought a lot about the consequences of his conduct, as did Pearlstine. And Special Counsel appreciates that Miller is also someone who thinks deeply. She is an investigative journalist who has won a Pulitzer Prize and authored several books, including one titled "*God Has Ninety Nine Names*" that contains a chapter singularly

insightful as to the history and orientation of Egyptian terrorist groups. Neither Special Counsel, nor this Court, should lightly conclude that Miller will spend months in jail without thinking more deeply about the issues discussed above and, in particular, thinking about whether the interests of journalism at large and, even more broadly, the proper conduct of government, are truly served by her continued refuals to obey this Court's order to testify in an investigation in which she is an eyewitness and her putative source has been identified and has waived confidentiality.

Like editor Pearlstine and investigative reporter Bowden, Miller's views may change over time, especially if what is viewed as her "irresponsible martyrdom" obstructing an important grand jury investigation is seen to undercut, not enhance, the credibility of the press and, with it, any case to be made for a federal reporter's shield law.

Miller also argues that she is unlikely to testify, citing opinion evidence of others who know her. She cites to military officers who know her from her time as an "embedded reporter" in Iraq. Those officers attest to Miller's good character, a trait Special Counsel does not contest. Indeed, it is Miller's good character that we suggest gives hope that she will desist from breaking the law and obstructing the work of the grand jury. The proffered letters from the military officers miss a key point. The question is not whether Miller would illegally divulge classified information exposed to her by the government on the condition that it not be published. The question is whether Miller would defy a final court order and commit the crime of contempt and thereby obstruct an investigation of persons who may

have compromised classified information. Thus, Lt. Gen. David H. Petreaus' letter testifies to Miller's commitment to "values as a American citizen." It is precisely her values and responsibilities as an American citizen that should compel her to comply with the final order of this court.

For all the foregoing reasons, Miller has failed to carry her burden to prove that there is no reasonable possibility that confinement will not achieve the intended purpose of causing her to comply with this Court's order.

II. THE ALTERNATIVE MOTION FOR AN ORDER DESIGNATING A PARTICULAR PLACE OF CONFINEMENT SHOULD BE DENIED.

Miller requests that if this Court orders confinement under Section 1826, that the Court either order home confinement or designate Miller to one of two preferred Bureau of Prisons residential prison camps. Miller bases these requests on, among other things, her health and her family circumstances. It goes without saying that there is a tension between Miller's claim that confinement will never coerce her to testify and her alternative position that this Court should consider less restrictive forms of confinement than that faced by the typical contemnor. In any event, the Special Counsel opposes these requests.

A. Legal Background

The Special Counsel acknowledges that this Court has discretion to craft civil sanctions designed to achieve the intended results. *See In re Buonacoure*, 412 F.Supp 904 (E.D. Pa. 1976)(Section 1826 "plainly contemplates a relatively broad latitude in which a district judge may exercise his discretion in deciding whether to incarcerate a recalcitrant

witness"). The court should consider the need for the contemnor's testimony and the contemnor's refusal to testify. *Id.* at 907. In particular, "the character and magnitude of the harm threatened by continued contumacy" is a compelling factor arguing for incarceration in a federal facility. *United States v. United Mine Workers of America*, 330 U.S. 258, 304 (1947).

Medical conditions and family circumstances do not prevent courts from ordering normal custodial confinement in civil contempt cases. *Id.*; *In the Matter of Proceedings Before the Federal Grand Jury February 1987 Term (Griffin)*, 677 F.Supp. 26, 28-29 (D. Maine 1988); *In the Matter of Rene Thorton*, 560 F. Supp. 183, 185 (S.D.N.Y. 1983).

Miller cites two cases involving home confinement. *In re Grand Jury Subpoena Served on John Doe*, 889 F.2d 384, 385 (2d Cir. 1989), involved a single mention, without discussion, that a civil contemnor "remain[ed] under house arrest." The opinion did not otherwise address that issue, though elsewhere it briefly mentioned that the contemnor had unsuccessfully argued an inability to testify because he claimed to be "suffering from a number of cardiovascular and respiratory ailments." *Id*. at 386. Miller also cites to *In re Special Proceedings*, 291 F. Supp. 2d 44 (D.R.I. 2003), a decision which nowhere discusses "home detention for six months with conditions akin to incarceration." Motion at 15, n. 21. However, that opinion refers to reporter Jim Taricani, a heart transplant patient, who was sentenced in December 2004 to 6 months home confinement after being convicted of *criminal* contempt.

As for the BOP regulations concerning designation of BOP facilities for the service of civil contempt confinement, by their terms the regulations state that the U.S. Marshal's Service "has primary jurisdiction in federal civil contempt commitments." 28 C.F.R § 522.11(a). Request by a court for designation is ordinarily because local jails are not suitable because of medical or security reasons. 28 C.F.R. § 522.11(b). The regulations contemplate that referrals to the BOP will be "occasional[]." 28 C.F.R. § 522.10. In any event, confinement of a witness usually should be near the location where the grand jury sits. *Thorton*, 560 F.Supp. at 185.

B. The Alternative Motions for Home Confinement and Designations to Specified Prison Camps Should be Denied.

That forms of confinement other than jail in the district where the grand jury sits may be possible does not mean that this is an exceptional case warranting a special form of confinement. Like any other contemnor, Miller should be confined in a federal detention facility so as to produce the coercive effect contemplated by 28 U.S.C. § 1826.

The need for the contemnor's testimony, as well as "the character and magnitude of the harm threatened by continued contumacy," have already been considered by this cour in the contempt proceedings, and militate toward incarceration in a federal facility. If Miller persists in unlawfully depriving the grand jury of her prospective testimony and documents, which the Court of Appeals found to be "both critical and unobtainable from any other source" and necessary to an effort "to remedy[] a serious breach of the public trust," she will frustrate the purpose of this national security investigation where the Court of Appeals noted

the "gravity of the suspected crime." Miller's obstruction of justice would undermine the public faith in the government's ability to enforce the laws involving national security, as well as erode the public trust in the good faith of the press and its willingness to obey the law. Thus, the interests in coercing compliance are compelling.

In arguing for home confinement, Miller argues that "denying the attributes of everyday living that are the most important to Miller ... [citing loss of use of her cellphone and email and ready access to government sources] ... would present the strictest from of coercion to her." Motion at 12. Forced vacation at a comfortable home is not a compelling form of coercion. Indeed, the perception of any special treatment may to some extent enable Miller's contempt. Miller contends that the "setting for such deprivation – whether detained at home at private expense or in a federal correctional institution at taxpayer expense – essentially would be beside the point ..." It would not be beside the point. Much of what appears to motivate Miller to commit contempt is the misguided reinforcement from others (specifically including her publisher) that placing herself above the law can be condoned -- and even her assertion that this Court has already condoned her planned breaking of the law. Confinement as an inmate in a federal facility would make it clear that in the view of this Court Miller is engaging in wrongful conduct by breaking the law in a way that society cannot condone.

Miller also argues that "while we do not believe we can argue in good faith that Miller's physical health requires imposition of home detention," there are certain

circumstances which "militate in favor of a home detention setting for health reasons." Motion at 12. We do not dispute the accuracy of the sealed filings concerning Miller's health conditions, nor those concerning her husband. Suffice it to say, however, that her health circumstances obtained when Miller was dispatched to Iraq during the conduct of a war. Certainly one who can handle the desert in wartime is far better equipped than the average person jailed in a federal facility.

Miller argues without elaboration that the D.C. Jail would "be unduly dangerous for a woman in [her] situation." The motion provides no evidence that the U.S. Marshal's Service cannot carry out its mission of safely confining a civil contemnor. Special Counsel has no personal knowledge of the conditions in the D.C. Jail for female detainees, or the manner in which the United States Marshals Service and the Bureau of Prisons generally handle civil contemnors in the District of Columbia. Accordingly, Special Counsel defers to the Court's judgment and experience in determining whether Miller should be confined to the D.C. Jail or some other nearby federal facility. Unless confinement in the D.C. Jail would expose Miller to unacceptable risks, however, it would be inappropriate for Miller to receive any special treatment not provided to other contemnors.

In closing, it is important to bear in mind that a contemnor is not "prosecuted" and is not "sentenced." While Miller faces imprisonment, it is because she is defying a court order, not because she is being "prosecuted." And she will be in jail only for as long as she continues to break the law. That is not a semantic distinction. In courtrooms across America every day, defendants who really have been "prosecuted" are "sentenced" to fixed periods

of time in prison. Most profess that if they could do it all over again, they would not commit the crime that has them standing before the court Some are sincere; others are not. But courts are compelled to impose prison sentences on people who have no ability to change what has occurred that causes them to be punished and no ability to undo past crimes that will now separate them from spouses, small children and other loved ones. But if Miller maintains her defiant intent to commit the crime of contempt, the Court will on this rare occasion be looking at a person whose crime in many respects lies ahead of her. Miller could avoid even a minute of separation from her husband if she would do no more than just follow the law like every other citizen in America is required to do.

CONCLUSION

The government respectfully requests that Judith Miller's motion for reconsideration or a supplemental order designating a particular place of confinement be denied.

Respectfully submitted,

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