

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States of America

Docket No. CR 05-0394 RBW

vs.

Washington, D.C.
Friday, February 3, 2006
10:15 a.m.

Lewis Libby

Defendant

Transcript of CEPA Hearing
Before the Honorable Reggie B. Walton
United States District Judge

APPEARANCES:

For the Government:

Peter Zeidenberg, Esq.
Patrick Fitzgerald, Esq.

For the Defendant:

William Jeffress, Esq.
Theodore, Wells, Esq.
John Cline, Esq.

Reporter:

WILLIAM D. MC ALLISTER, CVR-CM
Official Court Reporter
Room 4806-B
333 Constitution Avenue, N.W.
Washington, D.C. 20001-8306
(202) 371-6446

Reported by Voice Writing and transcribed using SpeechCAT

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P R O C E E D I N G S

1
2 THE COURT: Where are we on the Section 5 notices and
3 the issues we had in that regard?

4 MR. FITZGERALD: Yes, judge. The Section 5 notices,
5 there are two issues. One is Mr. Libby's notes and the defense
6 designated the notes. We can't read a substantial part of
7 them. My handwriting is pretty bad myself. Mr. Libby's has a
8 little bit of hieroglyphics in there and so what we have to do
9 is to translate them so we can tell the intelligence agencies
10 what their content is so we can figure out how sensitive it is,
11 how much of an objection they have and then any substitutions,
12 what they might propose.

13 We talked to Mr. Cline about coming to some sort of
14 arrangement where if they provide us transliterations of the
15 notes that we can then begin the process of the agencies giving
16 protection to Mr. Libby from of the fact that he is helping us
17 transliterate them.

18 We are going to talk about some sort of stipulation
19 which may well be akin to when the government produces draft
20 transcripts and they're not held against the government if we
21 translate them wrong when we generate a final.

22 So I don't know how long it will take the defense to
23 transliterate the notes and type them out.

24 THE COURT: How much volume are we talking about?

25 MR. CLINE: Your Honor, I think we've identified 65

1 documents at this point.

2 THE COURT: Multipage documents?

3 MR. CLINE: Some and I estimate something in excess
4 of a hundred pages.

5 THE COURT: How long do you think it would take to do
6 that?

7 MR. CLINE: I think it will take a few weeks. I
8 confess, I had assumed incorrectly but the government had had
9 these for a while, that they figured out what they said and
10 they hadn't it turns out. So we need to do that.

11 We do have to work out an arrangement which I think
12 we can do quickly with Mr. Fitzgerald to make sure it's not
13 held against Mr. Libby when he provides them and we can do it
14 on a rolling basis. We can begin to get to them notes as we
15 complete them.

16 THE COURT: I think that's what should be done, and
17 two weeks would take us until the 17th. Hopefully by then we
18 can have all that done.

19 MR. CLINE: I hope we can. If we have a problem, we
20 can let Your Honor know.

21 THE COURT: I will order that be completed in the
22 17th. Obviously, as I said before, if there is an issue in
23 that regard, we can extend it but hopefully not.

24 MR. FITZGERALD: Your Honor, we are also discussing
25 the second half of the issue which is not the documents but Mr.

1 Libby has proffered evidence or information that he might cause
2 to be disclosed or disclose himself at trial. We just want to
3 make sure that that is the sum total of the information so that
4 when we litigate it and come to any decisions, Your Honor makes
5 decisions, we know what the grounds rules are.

6 So we are having discussions on the front as well.

7 THE COURT: How many agencies are concerned with
8 these classified documents?

9 MR. FITZGERALD: I think so far when we have gone to
10 have the classification review, the CIA has reviewed a number
11 of the documents but because this information may have come
12 from elsewhere, for example, Mr. Libby's testimony was also
13 reviewed by the State Department. It was also review by the
14 Department of Defense and then there was also a review done by
15 the White House, the executive office of the president, as well
16 as the National Security Council, NSC, together. And the
17 office of vice president documents have been treated at part of
18 the White House.

19 So we've been dealing with, if I got that correctly,
20 and I'm looking at Mr. Kean, but the White House as an entity
21 has multiple components. But then CIA, State, and NSC; and
22 also I think sometimes other agencies are looking to see if the
23 NSA has any material involved.

24 So there's been five reviews done of a number of
25 materials and sometimes it comes out when we think we're one

1 day away from being done that someone identifies that it came
2 from somewhere else and we go back. So it has been much more
3 complicated than one would think although I understand the
4 reasons why.

5 THE COURT: I talked to one of my colleagues about
6 this type of situation, who handled a case that actually
7 involved a lot more classified information than this case.

8 He recommended, and I think I agree with that
9 recommendation, that somebody at the agencies involved that may
10 have to give some clearance in reference to supplemental
11 documents or summaries or whatever if we reach that point, be
12 designated to be present in court whenever we have hearings so
13 that we can try to expeditiously address any issues that arise
14 in that regard.

15 Judge Lamberth said that he had a lot of success in
16 getting things done quickly by having that done. If you could
17 take that request of the agency so that they have somebody
18 available for us when we have hearings I think that would be
19 helpful.

20 MR. FITZGERALD: I think it would, Judge. We've been
21 using the need to report back to the court when necessary but I
22 think hearing directly from Your Honor would be beneficial but
23 we've been pressing people letting them know how important it
24 is to move things along.

25 THE COURT: Okay.

1 MR. FITZGERALD: To finish sort of the discussions of
2 what we proposed for discussion yesterday, in addition to
3 resolving the existing Section 5 notice which we can't go to
4 the agencies until we get the notes, that's part of the reason
5 why we had suggested a further Section 2 conference after the
6 argument on the motion because then we would have a better
7 sense of what we're dealing with.

8 THE COURT: You mean after the 24th?

9 MR. FITZGERALD: After the 24th, the same day, that
10 afternoon if possible that we'll have a sense of where we're
11 at.

12 We also were going to propose that by March 1 the
13 government would submit any Section 4 ex parte notices which
14 are materials that we're going to submit to the court we think
15 should not be produced to defense and why. That will be ex
16 parte.

17 But Mr. Cline wishes to brief to Your Honor on the
18 issue of whether you should receive the ex parte in advance.
19 So he would make a filing October 24 and that was the proposed
20 schedule.

21 MR. CLINE: If we could, Your Honor, what the
22 government contemplates which is sometimes done in these cases
23 is to file an ex parte pleading. We get notice that they filed
24 but not the substance of the pleading at all. In this case,
25 under the circumstances of this case, we don't think that's

1 appropriate. We would like to brief that to Your Honor by a
2 filing on October 24 if we could.

3 THE COURT: That is fine.

4 MR. FITZGERALD: Then we were going to propose that
5 any additional Section 5 notices of the defense, besides the
6 one already filed be file by March 1 on the caveat that the
7 defense is obviously operating based upon materials they
8 received up to and including today but not anything that they
9 may receive in the future as a result of any ruling that Your
10 Honor issues where we may have disagreements.

11 THE COURT: I would assume that you would anticipate
12 filing additional Section 5 notices?

13 MR. CLINE: We would. I agree with what Mr.
14 Fitzgerald has said with a little clarification. They are
15 producing stuff to us today and some this morning and maybe
16 some yesterday that is classified. New stuff that we haven't
17 had before. We will file a Section 5 notice based on that
18 material by March 1st with no problem. I think it is likely
19 there will be additional classified stuff coming in some
20 fashion, either in response to discovery requests or discovery
21 orders or whatever and, of course, for additional classified
22 material we would need and hope we could file additional
23 Section 5 notices.

24 THE COURT: I will set March 1 for the filing of any
25 additional Section 5 notices. Obviously if you need more time

1 because you get information you didn't have before and you need
2 to file any additional notices we can deal with that at that
3 time. I would like to get everything before me by that time if
4 at all possible. Okay.

5 So we will set a hearing that we will conduct
6 immediately after the hearing on the motion to compel on the
7 24th.

8 Any other issues we need to address at this time?

9 MR. FITZGERALD: No, Your Honor. As we review
10 matters, sometimes we spot issues so we are trying to keep
11 alert to any issues that either are a disclosure to the defense
12 or a possible Section 4 notice to the court. So we'll do our
13 best to bring everything to you as soon as we reasonably can as
14 we discover issues but we're on the lookout to make sure that
15 this is teed up as quickly as possible.

16 THE COURT: Okay. I have made a request, and
17 sometimes our requests aren't granted, to the chief judge for
18 some additional law clerk help because I assume, based upon
19 what's been filed thus far and all the work that we have to do,
20 that my clerk is going to be consumed, one of them, with
21 dealing with nothing but this, and unfortunately this isn't the
22 only case that I have.

23 So I don't know. It depends upon whether there is
24 money available in the system as to whether I can get that
25 additional help but I hope I will. Because if I don't,

1 obviously my other cases are going to suffer.

2 MR. JEFFRESS: If I may concur with Mr. Cline, Your
3 Honor?

4 THE COURT: Yes

5 (Pause.)

6 MR. CLINE: Your Honor, Mr. Jeffress raised a good
7 point. Mr. Libby's notes, as has been mentioned, are a little
8 hard to read. We just got a bunch of new stuff and we are not
9 exactly sure what's in that. May we have instead of March 1
10 to March 8th to file that additional CEPA Section 5 notice?

11 MR. FITZGERALD: No objection.

12 THE COURT: Very well.

13 MR. CLINE: March the 8th then. Thank you.

14 THE COURT: Mr. Fitzgerald, do you anticipate having
15 any problems getting the agencies to designate a point person
16 to deal with these issues?

17 MR. FITZGERALD: No, Your Honor. In fact,
18 effectively, we have had them designate a point person. Part
19 of the issue is that, with regard to transcripts, we have
20 people who are read in and briefed on the case who are looking
21 at the classification issues.

22 But if something goes off track into a different
23 topic, they have been going out to check what about those other
24 topics might be classified. So we have asked them for a point
25 of contact. We can't have 12 people in a room and review it.

1 We already had that.

2 That's going to be particularly important because Mr.
3 Libby's notes by and large cover predominantly topics other
4 than the issue of Mr. Wilson's wife. So that's the reason why
5 we don't know what will be involved.

6 Those points of contact have been designated. They
7 have been at our offices doing the declassification review. It
8 is just a matter of having that person or a lawyer from the
9 agency come to court. I'm confident that if we tell the
10 agencies that Your Honor would like someone here they will be
11 here. If, for some reason I can't anticipate, that they either
12 don't recognize the need to be here or we can't persuade them
13 of that, I will let your law clerk know and we can do something
14 different. But I don't expect that to be a problem at all.

15 THE COURT: Okay. The only other issue is obviously
16 the press is going to want to know what took place here today.
17 I don't know if counsel believes or if it is believed that
18 anything that has been said here today can't be released.

19 MR. FITZGERALD: I think the only issue I have is
20 whether or not the identity of the agencies that are involved
21 in the review process, whether that might be classified with
22 regard to one agency. That's the only issue I see. But I take
23 it Mr. Macisso is responsible for the classification review of
24 the transcript.

25 MR. MACISSO: Your Honor, what we will do is once Mr.

1 McAllister is done with his copy, we will send it out for
2 immediate classification review, give it a quick reviewing and
3 have it available by the latest next week.

4 THE COURT: I'll have the court reporter forthwith
5 prepare a transcript that we'll give to you and then get out to
6 the other agencies to see if there is anything that needs to be
7 omitted because I'll be getting hounded by the press to find
8 out what took place.

9 MR. FITZGERALD: Other than the reference to
10 particular agencies, I don't see anything that strikes me as
11 being classified.

12 THE COURT: Anything else?

13 MR. FITZGERALD: No, Your Honor.

14 MR. CLINE: No, Your Honor.

15 THE COURT: Have a good weekend.

16 (Proceedings concluded at 10:27 a.m.)

17 CERTIFICATE OF REPORTER

18 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
19 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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21 WILLIAM D. MCALLISTER
22 OFFICIAL COURT REPORTER
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