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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. ) CASE NO. 1:26-cr-00001-AHA  
 )  
 BRIAN J. COLE, JR., )  
 )  
 Defendant. )  
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TRANSCRIPT OF STATUS CONFERENCE  
**BEFORE THE HONORABLE AMIR H. ALI, DISTRICT JUDGE**  
Wednesday, April 22, 2026  
2:37 p.m. - 3:48 p.m.  
Washington, DC

**FOR THE GOVERNMENT:**  
Office of the United States Attorney  
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**FOR THE DEFENDANT:**  
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**SONJA L. REEVES**  
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**Federal Official Court Reporter**  
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Washington, DC 20002  
Transcript Produced from the Stenographic Record

1 (Call to Order of the Court at 2:37 p.m.)

2 DEPUTY CLERK: This is Criminal Matter 26-1, *United*  
3 *States of America versus Brian J. Cole, Jr.*

4 May I have counsel approach the lectern and state your  
5 appearance for the record, beginning with the government.

6 MR. JONES: Good afternoon, Your Honor. Charles Jones  
7 and Jocelyn Ballantine for the United States.

8 THE COURT: Good afternoon to both of you.

9 MR. SHOREMAN: Good afternoon, Your Honor. John  
10 Shoreman and Alex Little for the defendant.

11 THE COURT: Good afternoon to both of you as well.  
12 Good afternoon, Mr. Cole. Good to be with you all.

13 We have got a number of different matters today, so  
14 I'll try to be clear up front what I think is realistic to  
15 address today and what's not.

16 I understand that there was a superseding indictment  
17 filed since we last got together, so I assume we'll start with  
18 an arraignment on the new charges. Is that consistent with  
19 everyone's understanding? I'm seeing nods.

20 Then move into just the status conference that we had  
21 planned to begin with so I can get an update on where things  
22 are compared to when we last got together in terms of any  
23 discovery remaining to be completed, setting aside the current  
24 subpoena issue for that discussion, as well as any anticipated  
25 motions that I should have in mind or anything else that

1 affects scheduling.

2           Then we'll talk about the motions to seal the order to  
3 show cause on contempt and the motion for authorization and  
4 early return. The motion to dismiss for lack of jurisdiction  
5 is not fully briefed yet. I understand defense counsel has  
6 asked for more time, so I'm not planning to get into that  
7 today.

8           We'll talk about deadlines for any further submissions  
9 as it relates to the motions. I think there may be some that  
10 I'll want from the parties, but we'll see, as well as a date  
11 for the next conference. And then we'll talk speedy trial. I  
12 think it may be paused just by virtue of the motions, but I'll  
13 want your positions on that at end before we break.

14           Is there anything else that should be on my radar that  
15 I haven't mentioned? Go ahead, Mr. Little.

16           MR. LITTLE: Thank you. Consistent with the status  
17 conference piece, we spoke in the hallway with the government.  
18 We think it might make sense to start thinking about an actual  
19 trial date, which would also address the speedy trial question.  
20 I have some trials stacked up. We would like to get on your  
21 calendar before your calendar gets stacked up. So I think at  
22 the end of this it would be a fruitful conversation as well.

23           THE COURT: All right. Let's talk about that as part  
24 of the status conference.

25           Anything else, Mr. Jones, from the government?

1 MR. JONES: No, Your Honor.

2 THE COURT: Okay. Why don't we go ahead and arraign  
3 Mr. Cole on the new charges.

4 DEPUTY CLERK: May I have Mr. Cole and counsel  
5 approach the lectern for me, please.

6 (Defendant and defense counsel approach the lectern.)

7 DEPUTY CLERK: May the record reflect that the  
8 defendant has received a copy of the second superseding  
9 indictment, Brian Cole, Jr. in Criminal Case No. 26-1, in which  
10 you are charged with a four-count second superseding indictment  
11 with the following charges of:

12 Count 1, interstate transportation of explosives;

13 Count 2, malicious attempt to use explosives;

14 Count 3, attempt to use weapons of mass destruction;

15 And Count 4, act of terrorism while armed, attempted  
16 malicious burning, destruction or injury of property.

17 Do you wish to waive the formal reading of the second  
18 superseding indictment, and, if so, how do you wish to plead?

19 MR. SHOREMAN: We waive reading.

20 THE DEFENDANT: I plead not guilty.

21 DEPUTY CLERK: A plea of not guilty is entered for the  
22 record.

23 THE COURT: Okay.

24 DEPUTY CLERK: You may be seated.

25 (Defendant and defense counsel return to defense

1 table.)

2 THE COURT: Mr. Jones, do you want to tell me where we  
3 are in terms of the status of the case and status of discovery?  
4 I'll give you my recollection while you walk up here, and maybe  
5 that will be helpful to ground us and you can tell me where  
6 it's moved to since then.

7 I think the last time we were here you had said there  
8 were, I think, four tranches of discovery that had already been  
9 completed, and two more were to happen hopefully by today.  
10 Where are we on that?

11 MR. JONES: We are at five total productions as of  
12 today, totaling, at this point, over a terabyte of data. The  
13 most recent production, which was provided to the defense on  
14 April 17th, included all of the search warrants in the  
15 investigation, as well as the search warrant returns and  
16 2703(d) materials, as well as the copies of the electronic  
17 devices recovered from the defendant, along with the forensic  
18 review materials of all of the electronic devices seized in  
19 this case from all individuals pursuant to search warrants for  
20 those devices.

21 We have also provided in the most recent production  
22 additional materials from the Capitol Police, as well as a  
23 series of native image files for all of the search warrants  
24 that were conducted, the Rule 41 search warrants that were  
25 conducted related to Mr. Cole.

1           So that, is in summary terms, the most recent  
2 production. We do, consistent with the representations  
3 previously, we do think there needs to be one more, I would  
4 say, relatively significant in size production in order for the  
5 government to reach substantial completion of discovery, for  
6 lack of a better term.

7           We have gathered some of those materials. There is  
8 some additional materials I'm still in the process of  
9 gathering. Part of it is I think also held up given the  
10 government's concerns about compliance with the protective  
11 order that's in place in this case, and so I think at least in  
12 part that remaining production is contingent upon how that  
13 issue is resolved.

14           THE COURT: Okay. That's helpful to know. What, at a  
15 high level, is in the next tranche?

16           MR. JONES: At a high level, we're talking about  
17 witness interview materials and grand jury subpoena return  
18 materials involving lots of personal identifying information  
19 for third parties, the type of materials that the government  
20 anticipates designated sensitive under the protective order.  
21 There are some odds and ends outside of that, but that's the  
22 core of what is outstanding.

23           THE COURT: Is there anything outside of what will be  
24 the sixth tranche? You said you will be kind of substantially  
25 complete. You say "substantially," because you know there to

1 be some other things that's going to take more time, or  
2 substantially because you're doing your best and there could  
3 always be something else?

4 MR. JONES: A little of both. There are some  
5 materials that are still pending review processes to be cleared  
6 to be produced that I think in the coming weeks we'll be able  
7 to produce. But as far as those outstanding categories  
8 materially are concerned, we're talking about comparatively  
9 small amounts of discovery.

10 I can think of things that I think will need to be  
11 produced on that rolling timeline, and I suspect that there  
12 will be things that come up in the coming weeks and months, but  
13 that's what I mean by substantial completion.

14 THE COURT: Okay. And are the parties in discussions  
15 about resolution outside of litigation?

16 MR. JONES: Of the case?

17 THE COURT: Yes.

18 MR. JONES: At this point, there have not been any of  
19 those kinds of conversations.

20 THE COURT: Okay. Anything else you want to put on my  
21 radar?

22 MR. JONES: The only other thing I will note for the  
23 Court is that the defense reached out some weeks ago about  
24 inspecting various physical evidence collected in this case, in  
25 particular, components of the devices. The government offered

1 to arrange for that to happen at the FBI Washington field  
2 office in connection with this status hearing because we know  
3 that most counsel come from out of town.

4 We had not heard back on that, so we had not scheduled  
5 it for this trip, but the government stands ready to make  
6 arrangements for that to take place.

7 The defense had also requested, or at least made the  
8 government aware of their intent to secure transfer of custody  
9 of the powder samples collected in this case from the devices  
10 for purposes of defense testing of those materials. The  
11 government has -- we let the defense know this is how we intend  
12 to proceed -- we've drafted a protective order that will govern  
13 how those materials, in particular explosive materials, would  
14 be transferred.

15 We have not yet provided that to the defense. I think  
16 that also, in no small part, is contingent upon how the pending  
17 protective order issue is resolved in terms of the government's  
18 confidence that the provisions in this additional protective  
19 order governing the physical items transferred to the defense,  
20 how it would be structured.

21 THE COURT: Okay.

22 MR. JONES: But that's all I have for the Court.

23 THE COURT: Got it. Appreciate it, Mr. Jones.

24 Can I hear from defense counsel? Let me start with  
25 discovery. I think last time we were here, the goal set was

1 that discovery would continue, hopefully be done by today.  
2 Sounds like it's not completely done. I don't think the goal  
3 was ever that you all would have reviewed it. In fact, I think  
4 you all stated given the size of it that that would be  
5 unlikely. I assume that remains the case, in part because you  
6 don't have it all yet.

7 MR. LITTLE: That's correct. We just got the last  
8 set, I think, last week, the 17th or the 16th, and that was a  
9 rather substantial production. We're processing going through  
10 it, as many people as we can on it. We're not trying to delay.  
11 And we think we will move as quickly as we can there.

12 I will say that does affect the motions in terms of  
13 getting them filed. We just got the search warrant returns in  
14 this last tranche. We haven't even honestly indexed what  
15 search warrants are out there that we could challenge and  
16 things of that sort, so that's going to take some time.

17 I think we have the government's sort of agreement  
18 that there is going to be an ability for our expert to test  
19 things. That's good. We are sort of having to, on our side,  
20 confirm exactly what expert we want to use since it will likely  
21 be a testifying expert if we have an expert analyze things, and  
22 so that's going to take a little bit more time for us to do  
23 before we can take up their offer to do that.

24 THE COURT: Okay. So you need more time to go through  
25 so you can get your eyes on it so you can put together motions

1 so you can figure out exactly what it is you want to test.

2 MR. LITTLE: Yes. We have tried to get, like, the  
3 motion that was filed by co-counsel on the pardon issue, that's  
4 been filed. We're starting to do Rule 17s. We've got a couple  
5 more of those that we are trying to get done, which doesn't  
6 require us waiting for production. We're trying to get things  
7 out of the way that we can get done, knowing that we have some  
8 things that will require the full discovery.

9 THE COURT: What are the Rule 17s you're referring to?

10 MR. LITTLE: The third-party subpoenas, pretrial  
11 return of subpoenas.

12 THE COURT: You mean the motion that's pending?

13 MR. LITTLE: Others. I think we have a whole list  
14 that we're developing as we go through discovery of things that  
15 we think we want that weren't just things they gave us, like  
16 third parties, and so we have others that we expect we will  
17 file over time.

18 THE COURT: Are those going to the government or are  
19 they going to third parties?

20 MR. LITTLE: Third parties. Some third parties might  
21 -- one of the issues we're looking at is the congressional one  
22 that would not go to the Department of Justice, but would  
23 potentially go to Congress. Congress did its whole  
24 investigation. They have materials that we think would be  
25 useful. Congress made statements that are exculpatory.

1 COURT REPORTER: Can you slow down, please?

2 MR. LITTLE: So there is a branch of government that  
3 we may be sending subpoenas to. As you can imagine, there is a  
4 great deal of legal complexity to how they might deal with that  
5 that we're trying to get our heads around before we file such a  
6 motion.

7 THE COURT: But you would file a motion with me before  
8 you go and serve those?

9 MR. LITTLE: I think we have to under the --

10 THE COURT: I'm just making sure I understand exactly  
11 what things --

12 MR. LITTLE: Unless we get a trial subpoena, and then  
13 I think we have much broader rights under a trial subpoena, but  
14 we don't have a trial date.

15 THE COURT: Okay. That's helpful. Are you saying you  
16 need a trial date to do that, or you need the trial date to  
17 come and --

18 MR. LITTLE: No, no, no. I'm saying that I can't  
19 issue a subpoena right now that's not a pretrial return because  
20 we don't have a trial date. I could issue, theoretically, I  
21 think, trial subpoenas for witnesses, for example. I wouldn't  
22 do that for the same reasons we have put in the motion to you.  
23 It's not going to be very useful for me to get things the day  
24 of trial or the first day of trial. Our practice is to get  
25 motions for pretrial return for anything we think is actually

1 going to be part of our defense.

2 But I raise it because we have had litigation with  
3 judges about how the *Nixon* standards apply. I don't want to  
4 sort of preview all of that yet. And the Sixth Amendment, the  
5 right to compulsory process, and is there really a difference  
6 in those two ways and does it make a ton of sense to have a  
7 different rule for a trial subpoena for things that would need  
8 to be disclosed and analyzed that would require a continuance  
9 on the first day of trial.

10 So there is a distinction in the case law between  
11 these pretrial returns and the trial subpoenas I think as a  
12 constitutional matter.

13 THE COURT: All right. I agree we don't need to get  
14 into that at this point. I guess the reason I'm pausing, just  
15 to be clear, is you had asked for a trial date before, and I'm  
16 trying to figure out is that just because -- you said before  
17 it's because you want to get it on my calendar before my  
18 calendar fills up.

19 MR. LITTLE: That has nothing to do with the  
20 subpoenas.

21 THE COURT: Based on what you're describing, that  
22 doesn't strike me as a big concern. I know you're not  
23 delaying. It's clear to me you're not intending to delay.  
24 You've just got a lot of work to do to figure out both what's  
25 in the discovery and what you want to do in your next

1 substantive steps, but it seems like that's going to take a  
2 fair amount of time.

3 I don't have an opposition per se to setting a trial  
4 date today, but if it's just about getting on my calendar, let  
5 me tell you that I understand why you might want to raise that  
6 now. A lot of judges fill up their calendars with trials. My  
7 practice is not to do that. And so I don't set civil trials,  
8 for example, on my calendar until I'm going to have them. So I  
9 just had a hearing right before this in a civil case, and we're  
10 talking for trial really two, three months out for a trial date  
11 to start, pretrial conference starting in six weeks.

12 So my calendar, we can get a trial date on my  
13 calendar, I don't have that concern, in less time than what I  
14 think you're asking for already just to review discovery. So  
15 if it's just about getting it on my calendar, it's not --

16 MR. LITTLE: Well, I think it's also, frankly, to  
17 block for us as well. We have other cases we can tell other  
18 judges no, that date is blocked. We were suggesting something  
19 like the first of December, well away. Between now and then,  
20 we have got three trials set on our side at our firm. I know  
21 we have other criminal federal cases where judges will want to  
22 be setting trial dates, so if we don't sort of start that  
23 process here -- and I think it's reasonable to look at what we  
24 have, knowing today, December isn't a crazy estimate for us.  
25 If we get deep into discovery litigation and there is motions

1 to quash or other things that become really complicated, it  
2 might be different, but, today, I think we can reasonably say  
3 that a December date is a reasonable one.

4 THE COURT: Have you all conferred about specific  
5 trial dates and lengths?

6 MR. LITTLE: We had just said the first of December.

7 THE COURT: Do you have an idea of length of the trial  
8 yet?

9 MR. LITTLE: I think I would defer to them in terms of  
10 theirs. We will put on a defense, I suspect.

11 THE COURT: Mr. Jones, I'm not meaning to put you on  
12 the spot here if this is something you just talked about on the  
13 way in. My proposal, before you stand up, is that I'm fine for  
14 us to put a trial date together and on the calendar for the  
15 reasons that have been articulated, but kind of consistent with  
16 what I was just describing, on my docket generally, I put trial  
17 dates on the calendar when they are real trial dates.

18 And so I only -- I want to do it with that  
19 expectation, and I do think, to that point, it does require  
20 some assessment of exactly how long this trial is going to take  
21 and how many witnesses and things like that. So if we're at  
22 that point, then, by all means, we can do it. I don't think  
23 we'll do it today. I think today we'll set a time for the next  
24 hearing, but I can have you all come back to me, and talk to  
25 each other first, and propose some dates. I can't guarantee

1 those will work on my calendar, but if they are far out, and  
2 given what I've told you today, my calendar tends to be clearer  
3 than other judges' because of the way I manage my docket, so we  
4 can probably make that work.

5 MR. LITTLE: I would guess two -- I would guess three  
6 days for defense case, plus or minus a day. So as few as two,  
7 as many as four. I do think we will call some expert  
8 testimony.

9 THE COURT: You said three days for the defense case?

10 MR. LITTLE: Three, plus or minus one.

11 THE COURT: Okay. Mr. Jones, do you want to make  
12 submissions on this, or do you want to chat offline and come  
13 back to me? It seems like you have something to say. You can  
14 either say it into the mic there or you can come up here.

15 MR. JONES: I'll give you my two cents for whatever  
16 it's worth, which is that, having heard the Court talk through  
17 its practice, I think the depth of conversation that the  
18 government and defense counsel have had to date about trial  
19 scheduling probably isn't sufficient for us to be setting a  
20 date, given your expectation that the trial date is going to  
21 stick for you to set it.

22 So I think it would make sense to at least have one  
23 more status date where we have the opportunity to talk about  
24 these matters in greater detail. My colleague and I haven't  
25 even sat down to try to estimate the number of witnesses or the

1 length of the trial, and I think that's the kind of thing that  
2 the Court would want to know.

3 THE COURT: So why don't we do this, we have got other  
4 issues to discuss today, and we'll set a time for us to get  
5 together again. At that point, Mr. Little, if it's not soon  
6 enough for us to have a conversation about trial date based on  
7 that status conference we set, we can figure out an interim  
8 time for you all to file something with me.

9 My guess is that won't be necessary, but if for some  
10 reason you think you all need to get back to me with  
11 information before we get together next time, you can --

12 MR. LITTLE: I will point out there is another  
13 variable. My client is detained, so detained defendants tend  
14 to want to go to trial more quickly. The appeal is still  
15 pending. If that were to change, I mean, I think we may be in  
16 a different situation, but that's still very much out there in  
17 the ether.

18 THE COURT: Okay. I understand that dynamic.

19 MR. LITTLE: I have nothing else on the status  
20 conference issue.

21 THE COURT: It sounds like you anticipate further  
22 motions. Do you have a sense of the timing for that?

23 MR. LITTLE: Again, it depends on -- some of these are  
24 going to be dependent on discovery, so it depends on when  
25 discovery is complete. We also have the new indictment. I

1 think there may be one question we're going to ask the  
2 government that may preclude a bill of particulars with respect  
3 to the last count. We just need some more information with  
4 respect to the DC Code count, but, generally, there may be one  
5 motion with respect to that new indictment. I suspect there  
6 will be motions about statutes of limitations issues similar,  
7 and then Fourth Amendment and Fifth Amendment motions, both the  
8 confession and any of the searches, which there may be a couple  
9 different searches.

10           The one thing I will flag for Your Honor is the  
11 Supreme Court is considering a general warrant sort of Fourth  
12 Amendment case that could have issues to some of the things,  
13 not the exact same types of data collection here, but we would  
14 expect that decision would come down by June or by mid June.  
15 As you're well aware, it was argued this term, so that may  
16 affect things if there is a new decision in June that does  
17 materially change the view of how those things are dealt with.

18           THE COURT: Okay. Are you raising that because it's  
19 your proposal to wait for the motions to be filed after that?

20           MR. LITTLE: No, but I have had -- recently we had a  
21 restitution issue that the Supreme Court comes down with a  
22 decision, totally changes the law a bit and there is new  
23 motions that come there.

24           I think the ones we can tell you are going to come are  
25 Fourth Amendment, Fifth Amendment. So in terms of the time of

1 the resolution of that one, there is one that we may flag, hey,  
2 this is going to be implicated by this decision that's pending.

3 THE COURT: Got it.

4 MR. LITTLE: We're certainly on track to be filing and  
5 preparing things presently.

6 THE COURT: Okay. Well, if at some point you think it  
7 makes sense to put that on my radar and have the timing of the  
8 motions depend on that, just so I understand it's not delay,  
9 it's just sensible planning, you should let me know that.

10 MR. LITTLE: It would just be the one Fourth Amendment  
11 issue because of the Supreme Court case.

12 THE COURT: Understood. Let's talk pending motions  
13 then. I want to start with the motion to seal. And go ahead  
14 and get any notes you need.

15 Let me ask this question: Have the parties, as of  
16 today, now conferred as the protective order contemplates?

17 MR. LITTLE: We have not. I got the government's  
18 filing last night referencing an external filing. I was able  
19 to see that late last night. We have not conferred about that  
20 issue. I don't know if the government is now withdrawing its  
21 opposition to being unsealed. We certainly think there is a  
22 basis for that, especially with what was filed, that is sort of  
23 mooted in some ways, the sealing issue.

24 THE COURT: Just to be clear, you're talking about the  
25 defamation complaint that was filed that includes information

1 in it?

2 MR. LITTLE: That's correct. In fact, today there was  
3 even a *New York Times* article I just read in the cafeteria  
4 before I walked up here that was extremely lengthy that has  
5 numerous things that were discussed by the government as  
6 needing to be under seal, where the individuals themselves and  
7 their lawyers are providing information in the *New York Times*  
8 today.

9 THE COURT: I didn't quite hear that. Can you say it  
10 again?

11 MR. LITTLE: Where the lawyer and the individual are  
12 providing new information in the *New York Times* today about the  
13 matters that are subject to the sealing motion.

14 THE COURT: Okay. I'm not sure -- well, let me say  
15 this. Some of this information that was included in the motion  
16 for authorization and for early release, it seems to me, was  
17 not public and was marked sensitive.

18 It does seem to me, consistent with the government's  
19 most recent reply, that you didn't do a super nuanced job  
20 parsing through all of that in the briefing. At the same time,  
21 the government -- it does seem to me like some of this  
22 information -- I don't know that the government has necessarily  
23 -- well, at least one of their positions is disagreeing with  
24 this, but I don't know that they are full-throatedly  
25 disagreeing with this.

1           Some of the information I think was marked sensitive,  
2 but, realistically, is probably not going to be sealed. I'm  
3 not making any rule on that, but it does seem to me like there  
4 is frankly just work to do and work that frankly should have  
5 been done on this question. And I think the parties need to do  
6 what the protective order entails, and I don't really see it as  
7 a ripe issue for me until you all do that.

8           So maybe this will affect the timing of resolution of  
9 the subpoenas you want, but I think, to some degree -- and we  
10 can come to that in a moment -- I think that's in some ways on  
11 you based on how this went forward, and this work could have  
12 been done before the motion was filed.

13           What I want is the parties to meet and confer, and I  
14 want a joint proposal of a redacted version of -- it would be  
15 the motion for authorization and early return. Now there has  
16 been briefing back and forth, so it's got to be that briefing  
17 as well. And those -- that proposed version can be filed with  
18 me under seal.

19           I have an obligation to consider the factors the  
20 Circuit has set, and there is a presumption in favor of public  
21 access, and I take that seriously. I think you all have to do  
22 that work in the first instance. And any proposal to seal or  
23 not seal information should be justified with reference to  
24 applicable law, including the *Hubbard* factors.

25           I'm not going to rule on this until I have that from

1 you all, which is the work I think that should have been done  
2 in the first instance. I will say that I think the  
3 government's categories focused on identifying information. I  
4 realize -- let me back up for a moment.

5 Things may have changed in light of the most recent  
6 events. I'm going to leave that to your discussion, and I  
7 assume you guys will take that discussion very seriously in  
8 light of this.

9 Setting kind of how things might have evolved aside,  
10 the government's proposed categories focused on identifying  
11 information seemed reasonable to me. I understand your  
12 subsequent briefing and that some of this information was  
13 known. There is a difference, though, which is that now it's  
14 being known in connection with an investigation. Again,  
15 subsequent filings bracketed for a moment, there is a  
16 difference in the information that's being known now.

17 And some of the stuff I think in your briefing that it  
18 didn't really engage with was the fact that it was describing  
19 the context of investigation that had occurred. So I think I  
20 want you two to sit down and think about the lines that make  
21 sense in the first instance, and give me the authorities that  
22 make sense in terms of sealing or not sealing in the first  
23 instance. It doesn't strike me as an exercise that is going to  
24 be like an impasse for the parties, but I have been surprised  
25 before. You should be able to work this out, and I think you

1 have got a pretty good starting point to work it out.

2 MR. LITTLE: Your Honor, could I respond to a bit of  
3 that? There was nothing about the fact -- it was in a public  
4 *New York Times* article by the individual's lawyer that this  
5 person had been investigated by the FBI. That was public and  
6 known before I ever looked at discovery. It was public and  
7 known before I was hired to work on this case.

8 I think the government was not accurate in the way  
9 they presented that to the Court because we gave you an entire  
10 appendix of multiple articles and mainstream publications where  
11 that was done and cited by that person's own attorney. So I  
12 think the difficulty that we have --

13 THE COURT: Are you actually saying -- you're saying  
14 all of the details that you had included in there were public?  
15 "Was investigated" isn't what you wrote --

16 MR. LITTLE: There was one detail that was not  
17 included, and it was a detail the government did not mention in  
18 their motion to seal. It was the detail about the  
19 investigative method it had taken, which suggested to the FBI  
20 that this was a viable investigation.

21 Now, that's also the piece that is probably most  
22 useful to the Court in deciding whether to issue a Rule 17  
23 subpoena, because it shows we're not out here chasing rainbows.  
24 That piece of information, we didn't provide a document. We  
25 didn't provide specifics about it. We provided an overarching

1 piece which would be relevant to the Court's Rule 17 analysis  
2 under *Nixon* about that piece of information.

3           Let me give you an analog. We just got last week all  
4 of these cell phone dumps and the cell tower dumps. For the  
5 Fourth Amendment information, we're going to likely argue about  
6 just the vast scope of that, right. And part of the scope is  
7 the number of cell phones that were collected by the  
8 government. Every single document related to that the  
9 government has marked sensitive.

10           And so under the government's interpretation of the  
11 protective order, the mere number, I can't provide the Court  
12 with the number without first checking with them to see whether  
13 that piece of information which I gleaned from the discovery is  
14 something that they are allowing me to put in a motion.

15           I have never in my 20 years practice on either side  
16 had that sort of pre-publication review of a motion. The  
17 protective order is clear, and it wasn't until this last reply  
18 filing I think the government started to identify where in the  
19 protective order it thought we had violated.

20           Your Honor, they immediately jumped to ask to hold me  
21 in contempt, so I am a little bit, I think -- I find it  
22 important to make this record for the Court. There was nothing  
23 in that protective order that we believed are satisfied by the  
24 things we put in that motion. We wouldn't have filed them.  
25 That's not the way we do things.

1           But information I learn generally in discovery that is  
2 helpful to my client's defense and relevant to a motion that  
3 does not endanger an undercover officer, that does not disclose  
4 personally identifying information --

5           THE COURT: But you did disclose that.

6           MR. LITTLE: We did do the address, and I think from  
7 the moment --

8           THE COURT: There was other identifying material in  
9 there too.

10          MR. LITTLE: I'm not sure that I know what the Court  
11 is referring to. The address we certainly did, and we  
12 immediately from the first phone call we got from the  
13 government said that should go down, we will call the clerk.

14                But they couldn't identify anything else besides that.  
15 That was a mistake that we should not have made. I think the  
16 difficulty is when we have now two terabytes, three terabytes  
17 of discovery, do I need to show the government a draft of each  
18 of my motions to decide whether the information -- half of it  
19 they have marked sensitive. There is photographs of shoes that  
20 you can get on the web they have marked as sensitive. There is  
21 literally, like, hundreds of pages of photographs of tennis  
22 shoes they have marked --

23          THE COURT: So what's your interpretation of the  
24 protective order?

25          MR. LITTLE: There are specific categories enumerated

1 there, those things need to be protected. And they are  
2 reasonable things that are consistent with the way courts have  
3 ruled for a long, long time.

4 But the fact that in an investigation a third-party  
5 perpetrator, not a witness -- this is not a government witness  
6 who is going to come in here and testify, as best we know -- a  
7 potential third-party perpetrator, the FBI had legitimate  
8 reasons to continue an investigation, that's information that's  
9 relevant to a motion that I need to present to the Court, and  
10 it has nothing to do with the factors in paragraph four of the  
11 protective order, nothing whatsoever.

12 THE COURT: Let me hear from Mr. Jones on this.

13 MR. JONES: I want to be mindful of the fact that  
14 we're still in the public portion of this hearing.

15 What defense counsel just articulated is precisely why  
16 the government is extraordinarily concerned about compliance  
17 with the protective order going forward. The protective  
18 order's language is clear and unambiguous. It required, if the  
19 government designated, plainly marks materials as sensitive  
20 under paragraph four, it required the defense to either get the  
21 government's approval beforehand or to go to the Court for  
22 approval before it could publicly file the information or talk  
23 about it at a public hearing. That is a customary structure of  
24 a protective order, at least in this district, and has been for  
25 some time.

1           And it's particularly important in a case like this  
2 where we're talking about an enormous volume of discovery with  
3 lots and lots of personal identifying information of third  
4 parties.

5           THE COURT: Maybe you could address the concern that  
6 Mr. Little raised a moment ago about a case with this  
7 voluminous discovery kind of cutting the other way. Is your  
8 position that they have got to run every motion by you? Is it  
9 that they have just got to have more specific meet and confers  
10 with you that describes the type of stuff, because it's not  
11 that typical to have kind of a screening process of the motions  
12 that are going to be filed.

13           MR. JONES: I'm not sure I would characterize it as a  
14 screening process, but what the defense was required to do  
15 under the protective order, and what they did not do, was to  
16 confer with the government about the fact that they intended to  
17 file this information publicly, which would have put the  
18 government in a position to either work with the defense to  
19 redact it appropriately, which the protective order spells out  
20 that if redactions would assuage the government's concerns  
21 under the protective order in terms of the sensitivity of the  
22 material, then the government, unless it's unduly burdensome,  
23 has to agree to redactions.

24           Otherwise, if there continued to be a dispute between  
25 the parties, they would need to go to the Court to resolve it.

1 And the whole person of this -- the *Cudd* case that we cite,  
2 C-u-d-d, in our papers I think explains this really well. The  
3 whole purpose of this is to balance the importance to the  
4 defense of efficient discovery, and in a context of a case like  
5 this with this kind of discovery, the protection for  
6 third-party privacy that is inherent in providing this kind of  
7 material to the defense team.

8           The government, given the volume of discovery in this  
9 case, would need probably months to go through all of this  
10 material and redact it appropriately. The protective order,  
11 which the defense consented to -- this wasn't issued over  
12 defense objection, it was issued with the defense's consent.  
13 The protective order allows the government to take a broad  
14 approach to discovery under Rule 16, and it allows the  
15 government to not undertake the monumental burden -- those are  
16 the words in *Cudd* -- of going through all of this material for  
17 Rule 16 and for redaction purposes before it's disclosed to the  
18 defense, because the protective order contemplates that if the  
19 defense is going to file sensitive material, they will talk to  
20 the government first.

21           And they always have the ability under the protective  
22 order, it's written into it, to challenge the sensitivity  
23 designations of the government. Clearly the defense thinks  
24 that the government has over-designated. They haven't said any  
25 of that to the government. This is the first time I have heard

1 of it. But what they can't do is they can't circumvent the  
2 process and go ahead and file it publicly and deprive the  
3 government and the Court of its obligations under the  
4 protective order to balance all of the equities at stake when  
5 we're dealing with discovery of people's sensitive information.

6 And in a situation like this, it's particularly  
7 egregious, because it's one thing to have your personal  
8 information associated with this case, it's another thing to  
9 have it associated with this case as a person of interest,  
10 somebody that the FBI investigated, and with no context, just  
11 slapped onto a public docket.

12 I mean, that is -- the reason why we're in a different  
13 place right now in terms of the redactions that the government  
14 will ultimately be agreeing to here is because this gambit  
15 worked. That public filing went everywhere. It was covered by  
16 the media. The damage was done.

17 So when the government now is in a position to propose  
18 redactions, it's not writing on a blank slate. It's not able  
19 to take the position that it would have taken had the  
20 protective order been followed, which would have been to seek  
21 the redaction of all of this investigative information to  
22 protect a person's personal safety. We have a very strong  
23 basis for taking that position.

24 THE COURT: Can I ask you, is it all of the  
25 investigative information or is it the identifying information?

1           MR. JONES: As Your Honor, I think, appropriately  
2 pointed out, it's the connecting of the two. So I think in  
3 this case, the government's position would have been that the  
4 identifying information and the investigative information that  
5 was nonpublic should have been redacted because we have such  
6 acute concerns here, that we can get more into in the sealed  
7 portion of this proceeding, and we have addressed them in our  
8 papers.

9           But there are very real concerns, and they are  
10 presented by both the personal identifying information, which  
11 in this case was about as identifying as you could get, with  
12 the investigative steps that were taken, and the ultimate  
13 suggestion of the motion, which was explicit, which was that  
14 this was the real culprit, this was the real person who  
15 perpetrated the crimes that the defendant is charged with.

16           THE COURT: All right.

17           MR. JONES: I will say to the Court that part of the  
18 reason we filed the notice of filing yesterday to make the  
19 Court aware of the lawsuit was because that information, the  
20 publicization of that information, it's adverse to the position  
21 that we have taken to this point. It's something that the  
22 Court should be aware of because it affects the government's  
23 position. As I said, we're not writing on a blank slate. The  
24 *Hubbard* factors are numerous and they require a balancing that  
25 takes into account the various circumstances. We take that

1 seriously, and we will take the Court's admonition seriously.

2 But the point is we should never have been in this  
3 position because none of this should have been filed publicly  
4 in the first place. It should have been resolved by the Court  
5 before any of this information --

6 THE COURT: Or resolved by the parties in the first  
7 instance. I agree, I mean, ultimately, even if resolved by the  
8 parties, I suppose I'm still going to need to know that it  
9 satisfies *Hubbard* in terms of being sealed on the public  
10 docket, but it does seem to me like this kind of -- I agree,  
11 it's in the protective order. The protective order means  
12 something, and I think the parties need to go do that.

13 I'm worried that to the extent it's going to delay  
14 resolution of the motion you wanted to file, again, I said it,  
15 I think it's on defense counsel. I think that it's on you. I  
16 think you are going to have to do that work that should have  
17 been done, and it is in the protective order that you signed on  
18 to and consented to, and I must say that the Court entered.

19 MR. LITTLE: I think we're going to have a great deal  
20 of litigation about designations. The way that -- the only --

21 THE COURT: Hold on.

22 MR. LITTLE: We're going to have --

23 THE COURT: Hold on. Stop. Stop talking. Okay.

24 No one is preventing you from bringing arguments to  
25 the Court. You have said that multiple times. No one is

1 stopping you from bringing arguments to the Court. The  
2 password doesn't stop you from doing; in fact, contemplates  
3 reasons, and you consented to that protective order.

4 No one is stopping you from bringing arguments to the  
5 Court. You entered into a protective order, Mr. Cole entered  
6 into a protective order that has particular procedures that  
7 must be followed. Those procedures include marking information  
8 sensitive. They include a process for you disputing whether  
9 something ought to be redacted in court, and then also there is  
10 the *Hubbard* factors that would allow you to argue otherwise.

11 No one is preventing the defendant here from filing  
12 anything in court, but there is a procedure you agreed to. And  
13 I will say that I don't think your submissions here are helping  
14 win confidence when it comes to following the protective order  
15 in the future.

16 MR. LITTLE: Your Honor, we certainly want to follow  
17 the protective order, but we also want to know what it means,  
18 because if the government can willy-nilly designate anything  
19 without having to actually do that in good faith --

20 COURT REPORTER: Slow down, please.

21 MR. LITTLE: There are numerous factors under 4A to J  
22 as to what this protective order covers. The government just  
23 said four things, multiple things that aren't covered by A  
24 through J, including person's personal safety, just out there  
25 in the world that I'm supposed to know that something in the

1 discovery might hurt some person's personal safety.

2 Now, there are references to safety, and it  
3 specifically talks about undercover officers and government  
4 witnesses. Those are -- the reason -- this doesn't generally  
5 come up in litigation because the parties reasonably construe  
6 the terms of the agreement.

7 THE COURT: Well, but you don't even know. You can't  
8 come in here and tell me they didn't reasonably construe it  
9 because you didn't even confer with them. You didn't confer  
10 with them before you filed this thing, and you still haven't  
11 conferred with them as of today, so don't tell me about  
12 reasonable construction of anything.

13 MR. LITTLE: As soon as they had the phone call, Your  
14 Honor, we had a conversation with them immediately and we asked  
15 them, "How does this violate the protective order." We did  
16 that as soon as they made the phone call.

17 THE COURT: After you filed it.

18 MR. LITTLE: Yes, but every pleading -- it's just not  
19 true that we didn't do it until today. Every pleading that you  
20 have seen since the --

21 THE COURT: I asked you -- literally, the first  
22 question I asked you when you stood up was, "As of today, have  
23 you conferred with the government about this," and you said  
24 something about how you had a phone call really recently, and  
25 the answer was no, you hadn't conferred with them. You haven't

1 done what is required under the protective order to this day.

2 MR. LITTLE: Your Honor, I think I misunderstood two  
3 different things, because now that the motions have been filed  
4 -- I thought the Court was asking, especially with the new  
5 developments, whether the parties had come to some agreement  
6 based on new developments about whether those motions still  
7 need to be resolved by the Court. There has not been a  
8 conferral about that.

9 In the pleadings that we filed and the government's  
10 pleadings, both parties laid out the series of communications  
11 that took place on the day that the pretrial subpoena motion  
12 was filed. There were communications that day both via phone  
13 call and email between the parties.

14 And what I'm referring to now is that phone call that  
15 was the first time we received notice that they believed this  
16 violated the protective order, we were surprised. And I  
17 expressed -- I tried to understand why they thought that it  
18 violated the protective order, because their position was that  
19 generally this sort of information, not necessarily specific  
20 information or not necessarily -- I'm not talking about the  
21 address. The address we totally owned, that we messed that up,  
22 and we immediately moved to get it under seal.

23 But I think what we're coming down to is there was one  
24 piece, only one piece that had not been publicly reported in  
25 multiple mainstream publications. And the government did not

1 mention that piece of information.

2 THE COURT: Well --

3 MR. LITTLE: They didn't identify any of those  
4 provisions --

5 THE COURT: Okay.

6 MR. LITTLE: But what --

7 THE COURT: No, no. This is a sign for you to stop  
8 talking.

9 I'm going to order the parties to confer and come back  
10 to me with a proposed redacted version. I want briefing. To  
11 the extent someone -- if you're jointly proposing sealing, I  
12 think you still need to support it, because I need to  
13 understand why it should be sealed. And if you're opposing it,  
14 I want your positions.

15 I will tell you I understand how you're describing it  
16 today as there was this one slip-up and that everything else  
17 was public. It seems to me like what's happening here, and I  
18 am imploring you not to do this as you sit down with the  
19 government and discuss, is that you have been able to assemble  
20 an appendix of things that suggest that a lot of this was  
21 public, when I think the connection between the two and things  
22 in here was not public. And so you're making an after-the-case  
23 fact, as you do under the threat of an order to show contempt  
24 that all of this was fine.

25 I strongly encourage you when you get out of this

1 courtroom to not take that position and to actually sit down  
2 and think about what should have been redacted -- what should  
3 have been discussed and what should be redacted, which would  
4 include personal identifying information, as far as I can tell.

5           Now, again, I do think it's a different thing when  
6 it's being reported as coming from the government's documents.  
7 Other people outside of the court can draw the connections they  
8 want to draw, but I think you need to think about what is  
9 actually being revealed in what you file.

10           And I strongly -- I'll say it again. I strongly  
11 encourage you not -- in fact, what I'm going to do, I'm going  
12 to deny the motion for an order to show cause on contempt  
13 without prejudice. I'm going to emphasize without prejudice.  
14 Because I don't want that hanging over the discussions that  
15 come at the moment.

16           Okay. But I will tell you that I do think, and this  
17 should be communicated to the defense counsel who aren't in the  
18 room, Mr. Williams, whoever else, that you ought to be more  
19 careful in this and you ought to read the protective order very  
20 closely and follow the processes in the protective order, which  
21 are not just something you unilaterally decide. You do that at  
22 your own risk. And go through this process in good faith.

23           If you want to come back and make the same arguments  
24 you're making today -- again, you're free for the moment of the  
25 contempt order -- if you want to come back and make those same

1 arguments, I'll let you come back and make those same  
2 arguments, but I strongly implore you not to be dug in on this  
3 rationale that I've got to justify everything that happened in  
4 the past, because I don't think you're going to like the  
5 outcome of that.

6 MR. LITTLE: The one thing we want more than anything,  
7 Your Honor, is the ability to know how to litigate going  
8 forward, because I think our genuine concern --

9 THE COURT: The way to do that is for you go confer  
10 with the government along the terms of the protective order and  
11 to raise these issues with me. I have little interest in today  
12 coming up with a process for you all on how to litigate this  
13 based on a protective order you all put together that I entered  
14 that you haven't even tried to go through the process on.

15 So if you want to go through the process, we can come  
16 up with one. Maybe the process involves you filing things  
17 under seal and then agreeing on how to put together a public  
18 one. That means nothing will stop you from filing something in  
19 court. The parties get to do their conference, and I get to  
20 consider the *Hubbard* factors, and we do it as expeditiously as  
21 possible to get something out publicly.

22 There is different ways to do this. My point is you  
23 didn't do any of the work before you filed this one. And so to  
24 come to court now and say, oh, there is no way for us to do  
25 this thing we agreed to do, there is no way for us to litigate

1 our case, that's not true. Nobody is stopping you from filing  
2 anything in court. You didn't even try.

3 MR. LITTLE: We will absolutely get with the  
4 government to do that. I think that the current structure of  
5 the government not having to make -- being able to make blanket  
6 sort of designations like this leads to a world in which the  
7 government gets to decide what can be freely put on the docket  
8 without the other party having to go through the steps of  
9 litigating, which does incur my client expenses, it does incur  
10 time. They get to put things in the docket by removing  
11 designations or not putting --

12 THE COURT: So have this conversation with the  
13 government and come up with a proposal for me that works.  
14 You're making arguments, but, again, you haven't even tried.

15 MR. LITTLE: We will. I think that's where I want the  
16 Court to know we are focused on those issues.

17 THE COURT: Okay. All right. I do implore all  
18 counsel, just don't -- we shouldn't be going down a path where  
19 we have to have contempt motions filed to get things done. And  
20 don't test me on this, really. Just be more careful.

21 MR. LITTLE: Yes, Your Honor.

22 THE COURT: I want to move to the motion for issuance  
23 and early return of the subpoenas.

24 MR. LITTLE: Yes.

25 THE COURT: You are asking for this because -- you

1 filed this motion because you want this before trial?

2 MR. LITTLE: That's right. We have laid out the  
3 reasons. We have to make a showing under circuit case law that  
4 we have justified presenting a third-party perpetrator defense.  
5 We would need this discovery to be able to do that, to be able  
6 to rebut potential alibis of that third party.

7 THE COURT: What's the significance of the April 24th  
8 date? Is it just to have a date?

9 MR. LITTLE: Have a date.

10 THE COURT: There is not a particular urgency or  
11 something that's happening in the outside world?

12 MR. LITTLE: Not at all. It was a month out.

13 THE COURT: So the government has said that they are  
14 going to give you most of this. Have you conferred with the  
15 government about what exactly they are going to give you that's  
16 within the scope of this?

17 MR. LITTLE: The first time we learned of that was the  
18 response that they had to the motion, not during the phone  
19 call. When they responded to that in writing was the first  
20 time we learned they have those things.

21 From what we had at the time, as we put in the motion,  
22 we did not have any of that information in the discovery at  
23 that time. And based on the reports that were in the discovery  
24 we thought that they -- it's unclear whether the government had  
25 it. It's not as if there was a report that said the government

1 definitely has this document.

2 THE COURT: All right. The government is now saying  
3 that it's going to give you virtually all, if not all, of this.  
4 Seems to me if the goal is to get this as soon as possible to  
5 be able to prepare your defense, that would be a fruitful place  
6 to start is to talk to the government about what they are going  
7 to give you.

8 MR. LITTLE: Sure. I think there may be a world in  
9 which, obviously, to be admissible, we're going to need to get  
10 it from the person who can authenticate it and say they gave it  
11 to us. The source of where you get your documents often is  
12 going to determine authenticity and determine chain of custody  
13 and things of that sort.

14 And so it would certainly be useful for us to get this  
15 from the government, but I don't think that it completely moots  
16 the subpoena until we know what it looks like when we get it  
17 and how we might use it.

18 THE COURT: It might not completely moot your request  
19 for a subpoena, but it might vastly alter the scope of the  
20 subpoena. I saw your argument about the source. You might --  
21 I'm not sure the citation you gave me for that supports it.  
22 There was a single citation to a Supreme Court case saying that  
23 you get to go to the source, not to the government, but it was  
24 a case that only involved a subpoena against the government.  
25 And in fact, the language in *Bowman* suggests that you go to the

1 government and you have the right to go to the government to  
2 get information from third parties, so I'm not sure -- it  
3 seemed like somewhat of a misleading citation to me.

4 MR. LITTLE: There is not a ton of case law out there  
5 because the connecting point is there can be admissibility  
6 problems. There is two questions, who you can get it from and  
7 then what's the impact of when you get it. I think that's what  
8 we're trying to focus on, that argument.

9 THE COURT: Well, look, even if it comes down to you  
10 make this argument that if the government gives it to us there  
11 could be issues of authenticity. That's a very different scope  
12 of discovery that you're talking about in a way that I think  
13 might benefit you. You might want to think about a narrower  
14 scope.

15 I think, if that's what we're talking about, then  
16 we're in the world of something that is a much smaller slice.  
17 It kind of presupposes that there would be a dispute as to  
18 authenticity or that there would be some value to confirming  
19 authenticity from the defense, one of those two things.

20 But for this, I have to say my reaction -- again, I  
21 take your point that maybe you didn't know this at the time you  
22 drafted the subpoena, but in light of the way this has evolved  
23 where the government is saying we're going to give you all this  
24 stuff, it seems to me like you all should have a conversation  
25 and figure out exactly what that is and we would have a more

1 ripe controversy about whether to issue the subpoena, and then  
2 also, if it is issued, exactly what disputes happen on the back  
3 end. I don't know that you necessarily want to go into this  
4 with the breadth you have here if it's not necessary. That's  
5 not going to be helpful to you.

6 MR. LITTLE: I think that would deal with one of the  
7 two subpoenas. I don't think they made that same  
8 representation with the other two, but I may be incorrect. I  
9 can let them respond to that.

10 THE COURT: Okay.

11 MR. LITTLE: I think if the Court is saying, "Let that  
12 play out," either deny it with prejudice or hold off ruling. I  
13 don't think we have a huge objection to that order of  
14 operations.

15 THE COURT: Mr. Jones, can I hear from you on this?

16 MR. JONES: As the government has indicated, there are  
17 additional materials -- some of what's in the subpoena requests  
18 has already been provided. We can point the defense to the  
19 locations in the discovery. Some of it is to be provided.  
20 Although, I will reiterate we have deep concerns about  
21 providing information, especially on this topic, to the defense  
22 given their position on the protective order. We're going to  
23 work in good faith to avoid any issues, but those concerns, I  
24 think, at this point, are legitimate and they have not been  
25 mitigated by the representations today by the defense.

1           Putting aside what the government --

2           THE COURT: And that's something you all will suss out  
3 in these discussions. We're not reinventing the wheel here.  
4 There has been sensitive information handed across sides in  
5 cases for a long time and in thousands of cases across the  
6 country. You should be able to work out a process here that  
7 makes sense.

8           MR. JONES: The Court knows this, but the protective  
9 order has a process. It allows the defense to file their  
10 motions under seal. It doesn't require them to get the  
11 government's preclearance before it files under seal,  
12 consistent with the local rules. That's in the protective  
13 order. Putting that to the side, what the parties aren't  
14 able to --

15           THE COURT: I take that point. Obviously, I think  
16 it's important to consider how to move from under seal to also  
17 a version that can be available to the public as well.

18           MR. JONES: One way is to agree on redactions in  
19 advance. Another way is to litigate with the Court.

20           Putting that to the side, what I think we're going to  
21 eventually have to have the Court resolve is whether any of  
22 this information is relevant or admissible under the *Nixon* test  
23 for Rule 17(c) subpoenas in the first place. I appreciate the  
24 Court's interest in the parties trying to work through this as  
25 best they can. The government shares that interest. This is

1 another situation where the defense did not say anything to the  
2 government before they filed their motion. They didn't ask for  
3 clarification, where these materials might be in the discovery.  
4 They didn't ask whether the government had materials responsive  
5 to the discovery -- the subpoena requests beforehand.

6           So some of it can be resolved, but some of it is going  
7 to require the Court to address the issue of whether any of  
8 this information related to person one is relevant and  
9 admissible, and both of those are prerequisites to issuing a  
10 Rule 17 subpoena. In fact, if neither of those, or if one of  
11 those is lacking, the Court's obligation under *Nixon* is that it  
12 has to quash the subpoena, or at least modify it, consistent  
13 with the relevance or admissibility issues.

14           So I don't know if the Court wants to get into that  
15 issue today, but while I --

16           THE COURT: My concern with getting into it today is  
17 that I don't know what the "it" is in your sentence. You said  
18 we're ultimately going to need to -- the Court is going to need  
19 to resolve whether it is admissible and relevant and passes the  
20 *Nixon* test, but I don't know the "it," because in some ways  
21 there is the subpoena that's drafted. You all have said you're  
22 going to provide -- already have or are going to provide a lot  
23 of that, and I don't have an interest in resolving the  
24 relevance and admissibility, whatever it might be -- I  
25 understand the defense wants to argue *Nixon* doesn't apply. I'm

1 not ruling on that obviously right now. But I don't have an  
2 interest in resolving that for things that aren't actually  
3 needed.

4 I think the work to be done is to figure out exactly  
5 what the defense is already getting from the government before  
6 I start thinking about whether they can go get that same  
7 information from third parties, and then I think this works to  
8 both benefits because it narrows what the defense is talking  
9 about, it also sharpens what the argument is for the  
10 government. If they are going to seek whatever residual there  
11 is, if it's something they have already gotten, well, they are  
12 going to have to have a reason under any test to go seek it.  
13 If it is something they haven't gotten, they are still going to  
14 have to have a reason. The reasons may differ. So it will  
15 allow you to actually make these arguments on the stuff that is  
16 relevant.

17 MR. JONES: All of that makes sense, Your Honor, and I  
18 think it's eminently reasonable. The only reason I'm raising  
19 this now is because on this record with this particular issue,  
20 it's a categorical analysis. In other words, everything they  
21 are seeking is in service of this alternative perpetrator  
22 defense theory. That's the only way it could be relevant, and  
23 that's the only means through which it could be admissible.  
24 Whatever is going to remain, and hopefully we can knock out as  
25 much of it as possible, whatever is going to remain of disputed

1 requests in these subpoenas is going to implicate that same  
2 categorical analysis. And the government's position is as a  
3 matter of law --

4 THE COURT: I see that. I have your position being no  
5 matter what comes back, provided that there is a subpoena to a  
6 third party, we're going to make this broad argument, but you  
7 may also make arguments that are tailored to what's actually  
8 being sought, and this may not require me to decide that at  
9 this point.

10 I'm not saying I have a particular reticence to, but I  
11 just want to make sure that I'm deciding an issue that needs to  
12 be decided and makes sense to decide, so I take your point that  
13 this argument you're making is likely to come back. I'm just  
14 not sure that counsels in favor of deciding it right now when I  
15 don't know exactly what actually needs to be sought by a third  
16 party.

17 And I think there will be the opportunity, as I  
18 understand it, if the motion is renewed, to raise your  
19 arguments then and the defense will have to again justify what  
20 they are seeking. You will be able to raise that argument  
21 among others you might raise then, and in the event a subpoena  
22 were issued, there would also be, presumably, a motion to quash  
23 to follow. And one of the concerns I have -- I'm not going to  
24 get into this right now today -- but as I was thinking about  
25 the different issues about even sealing and scope, you're

1 making arguments, but I imagine the people who will be subject  
2 to the subpoena would have arguments to make that might be  
3 interests different from the government, again setting aside  
4 whether it's *Nixon* or another test that applies, the types of  
5 interests that are at play in *Nixon* are ones where they might  
6 have interests as well, right.

7           So I'm not saying that counsels in favor of just  
8 having the subpoena be issued or anything like that, but there  
9 may be additional arguments that aren't even raised by the  
10 government yet.

11           MR. JONES: All of that is fair. I'll just add to  
12 that list that some of the subpoena requests seek information  
13 or records that likely are not in the custody of the recipients  
14 or the proposed recipients of the subpoenas. They may be in  
15 the custody of agencies, in which case there may be a motion to  
16 intervene from those institutional actors who would actually  
17 have custody of those materials.

18           I think I'm in complete agreement with the Court's  
19 kind of assessment of the landscape here. I just wanted to  
20 flag the issue, because the government's position is not going  
21 to change. It may take me less time to articulate because  
22 there will be fewer items, but it's going to be the same  
23 position.

24           THE COURT: Okay. I think I have your submission on  
25 that. Let's do this. I'm going to deny the issue for issuance

1 and early return of the subpoena without prejudice along the  
2 lines we have discussed. And I'm going to order two next steps  
3 for the parties.

4           First, in all events, and by that I mean regardless of  
5 whether the defense plans to seek authorization and a new  
6 subpoena, the parties have to confer and discuss what  
7 information in the defense's last motion for issuance and early  
8 return is subject to being sealed. Because the parties also  
9 filed sealed briefs about whether to seal the motion for  
10 issuance, you got to confer and agree on what information  
11 within those motions is subject to being sealed.

12           My inclination -- let me pause for a moment on that  
13 first one. My inclination is to ask for that in seven days,  
14 but if the parties jointly want to tell me they need more time,  
15 I'll give you more time.

16           Want me to set seven days, and you can come back to me  
17 in writing if you need more time?

18           MR. JONES: That's fine with the government.

19           THE COURT: I see nods. I'm going to set seven days  
20 for that. It's an important thing to work out. You guys can  
21 see how this will come up again, so take the time you need and  
22 take it seriously.

23           The second thing I'm going to order, to the extent the  
24 defense wishes to pursue issuance of a third-party subpoena, is  
25 for the parties to confer regarding the information that will

1 be sought. That's going to include discussion of what  
2 documents the government itself will produce to the defense.

3 To the extent the defense wants to issue a subpoena  
4 still, Mr. Cole is free to file a motion with the Court. The  
5 motion should be specific about what information is sought,  
6 what information the government has provided or committed to  
7 providing in relation to the request, and justification for the  
8 information needed, as well as why 17(c) is the appropriate  
9 vehicle for it, all the stuff you would ordinarily discuss, but  
10 with the added context of information is being provided.

11 As noted for the record, I'm denying the motion for an  
12 order to show cause on contempt without prejudice.

13 And then I'm going to turn to scheduling our next  
14 hearing, but go ahead, Mr. Little.

15 MR. LITTLE: Just one clarifying question. As to that  
16 second directive, that's as to these three Rule 17s, not to  
17 future ones we may file as to other institutions, parties,  
18 service providers, things of that sort.

19 THE COURT: I'm not making a general order today that  
20 for any Rule 17(c) you have to go confer. You saw what played  
21 out today, so you may want to think is this something we have  
22 already gotten in discovery or is this something the government  
23 might just say they are going to give us.

24 MR. LITTLE: There are times when Rule 17 subpoenas  
25 are done under seal ex parte. For example, we had other cases

1 where we think something is out there, want to go look for it,  
2 do it ex parte.

3 THE COURT: I'm not foreclosing your ability and your  
4 rights to do those sorts of things.

5 MR. LITTLE: These three we filed already?

6 THE COURT: That's what I'm -- if you want to refile  
7 these ones, I'm ordering you to do that. It's a consideration  
8 you might want to make in the future if it's something the  
9 government is going to just give to you.

10 All right. We have the pending motion to dismiss for  
11 lack of jurisdiction. Defense counsel has asked for more time,  
12 but I think it's coming in soon. Why don't we schedule a next  
13 status conference that will at least be after the reply brief,  
14 and, to the extent that I want argument on the motion to  
15 dismiss, it would be at that hearing.

16 Have you all talked about a timeframe for getting back  
17 together? Mr. Jones?

18 MR. JONES: We talked about that in the context of  
19 setting an additional status hearing, which I think we were  
20 looking at the last week of May, like the week of the 25th, I  
21 think. I will say if the Court is expecting argument or  
22 contemplating argument on the motion to dismiss, I was not  
23 going to be available for the status hearing that we were  
24 discussing. I would be the person arguing that motion, so I  
25 think we would want to reassess on that and perhaps try to

1 schedule it even earlier.

2 THE COURT: Okay. Let me hear from Mr. Little on  
3 those questions too.

4 MR. LITTLE: Your Honor, that's a motion that's  
5 Mr. Williams' motion. I would not be arguing it. I can't  
6 represent one way or another. It may make sense to keep  
7 momentum to have a status the last week of May, which is what  
8 we had discussed. Obviously, if the government needs to argue  
9 that a different date we could take that into account, but I  
10 don't know that things have to happen on the same track.

11 MR. SHOREMAN: I can set the argument on the motion to  
12 dismiss. I have the calendar.

13 THE COURT: Why don't we pull our calendars up. Mr.  
14 Jones, is it the week of the 25th you're not available for?

15 MR. JONES: Yes, I expect to be --

16 THE COURT: We could do --

17 MR. LITTLE: I think it's a longer break for the  
18 government. There may be a delay where the government is  
19 unavailable for a long period of time. I'll let them --

20 THE COURT: Let me hear from Mr. Jones on his  
21 availability.

22 MR. JONES: I think on the motion to dismiss argument,  
23 if it's possible to schedule it for the first half of May, as  
24 early as possible frankly in May, that would be ideal, if that  
25 works for Mr. Williams' calendar.

1           MR. SHOREMAN: In the first week of May, the first  
2 full week, the 5th, the 6th or the 7th.

3           THE COURT: I'm in trial that week, which will limit  
4 my availability. Why don't we do this. Let's go ahead and  
5 schedule the status conference. I'll review the reply when it  
6 comes in, and we'll schedule something that way. My courtroom  
7 deputy can reach out and we'll find a time that works for  
8 everyone for a brief argument on the motion to dismiss, if  
9 needed.

10           MR. LITTLE: Would the Court want to do the week after  
11 Memorial Day for the status? That was the date we mentioned to  
12 the government, the last week of May after Memorial Day. My  
13 complication, I start a trial on June 1st, the following  
14 Monday.

15           THE COURT: Give me just one moment to confer with my  
16 team.

17           (Pause)

18           THE COURT: I think that week I could do the morning  
19 of the 29th. It may not be the most ideal time if you've got a  
20 trial starting the next week, but that's the time I could do  
21 that week, the morning of 29th of May. So I would say 10 a.m.  
22 on the 29th. Will that work?

23           MR. JONES: That works for the government.

24           MR. LITTLE: Yes, Your Honor.

25           THE COURT: So we'll get together on 10 a.m. on the

1 29th.

2 Any positions on tolling of the speedy trial that you  
3 could give me in terms of whether motions suffice or I need to  
4 make findings? I don't think it's a particularly tricky issue  
5 given how much is moving in this case.

6 MR. LITTLE: Given multiple motions pending, even with  
7 the Court's ruling today, there is at least one motion pending,  
8 and so we don't think the Court needs to find findings.

9 MR. JONES: I think given the nature and the extent of  
10 discovery and that it's ongoing, and for the reasons we  
11 discussed at this hearing, it's also in the interest of justice  
12 to exclude time, and so we would ask for that as well.

13 THE COURT: I will exclude the time until we get  
14 together on the 29th of May. I think that's done by default  
15 with the motions that are pending, but it's clearly in the  
16 interest of justice to do so given the voluminous discovery,  
17 defense counsel needs the time to review that discovery, more  
18 forthcoming motions to put together, and a lot of moving pieces  
19 in the case that is certainly more complex than average.

20 I'll toll the time finding it in the interest of  
21 justice to do so and that those interests outweigh the  
22 interests of the public and the parties in a speedier trial.

23 Anything else for today, Mr. Jones?

24 MR. JONES: No, Your Honor.

25 THE COURT: Mr. Little? Mr. Shoreman?

1 MR. SHOREMAN: Nothing more.

2 THE COURT: Good to be with you all. We can adjourn.

3 (Proceedings concluded at 3:48 p.m.)

4

5

CERTIFICATE

6 I, Sonja L. Reeves, Federal Official Court Reporter in and  
7 for the United States District Court of the District of  
8 Columbia, do hereby certify that the foregoing transcript is a  
9 true and accurate transcript from the original stenographic  
10 record in the above-entitled matter and that the transcript  
11 page format is in conformance with the regulations of the  
12 Judicial Conference of the United States.

13 Dated this 23rd day of April, 2026.

14

15

16

/s/ Sonja L. Reeves  
SONJA L. REEVES, RDR-CRR  
FEDERAL OFFICIAL COURT REPORTER

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