ORAL ARGUMENT: MAY 9, 2005

Case Nos. 04-5301, 04-5302, 04-5321, 04-5322, and 04-5323

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WEN HO LEE, Plaintiff-Appellee, v. U.S. DEPARTMENT OF JUSTICE, Defendant-Appellee, JEFF GERTH; JAMES RISEN; H. JOSEF HEBERT; BOB DROGIN; PIERRE THOMAS, Appellants.	) Case No. 04-5301) Consolidated with 04-5302,) 04-5321, 04-5322, 04-5323) District Court No. 1:99-CV-3380

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEE WEN HO LEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties And *Amici Curiae.*

All parties, intervenors, and *amici* appearing before the district court and this Court are listed in the Brief of Appellants Jeff Gerth and James Risen, Brief of Appellants H. Josef Hebert and Bob Drogin, and Brief of Appellant Pierre Thomas.

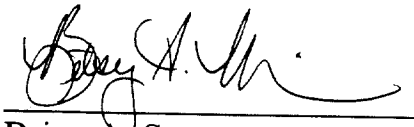
(B) Rulings Under Review.

References to the rulings at issue appear in the Brief of Appellants Jeff Gerth and James Risen, Brief of Appellants H. Josef Hebert and Bob Drogin, and Brief of Appellant Pierre Thomas.

(C) Related Cases.

The appeals of Appellants Jeff Gerth, James Risen, H. Josef Hebert, Bob Drogin, and Pierre Thomas are all related, pending before this Court as Case Nos. 04-5301, 04-5302, 04-5321, 04-5322, and 04-5323, and addressed herein. Walter Pincus is presenting litigating identical issues in the underlying district court case, D.D.C. No. 1:99-CV-3380.

Respectfully submitted,



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IN THE
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WEN HO LEE,

Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant-Appellee.

JEFF GERTH; JAMES RISEN; H. JOSEF HEBERT;
BOB DROGIN; PIERRE THOMAS,

Appellants.

Appeal From The United States District Court
For The District Of Columbia (D.D.C. No. 1:99-CV-3380)

BRIEF OF APPELLEE WEN HO LEE

PERTINENT STATUTES AND REGULATIONS

All applicable statutes are contained in the Statutory Addendum to the Brief of Appellants Jeff Gerth and James Risen.

ISSUES PRESENTED FOR REVIEW

1. Assuming any qualified privilege exists, whether the District Court abused its discretion in permitting discovery from Appellant Contemnors

in view of evidence that years of expensive and exhaustive efforts by Dr. Lee and government officials separately investigating the same violations of the Privacy Act failed to identify the source of the violations?

2. Whether any qualified privilege against disclosure obtains in this Privacy Act case in view of the Supreme Court's repeated rejection of any such privilege?

STATEMENT OF THE CASE

The Privacy Act, 5 U.S.C. § 552a, provides a private cause of action as well as criminal liability for illegal leaks by federal government officials and employees of protected information. Dr. Wen Ho Lee was the victim of a gross violation of that Act during the government's attempts to investigate and prosecute Dr. Lee (during which Dr. Lee was imprisoned in solitary confinement).

The leaks at issue in this case involve the "revelation to the news media of private, personal, and acutely hurtful information about Dr. [Wen Ho] Lee," Joint Appendix at ("JA-") 1256, and "intimations of his disloyalty to the U.S. and suspicions of his complicity in espionage," JA-1241. The violations at issue materially contributed to a media frenzy that surrounded Dr. Lee's case and

resulted in his being unfairly, but indelibly, "branded a disloyal American citizen and a spy." JA-1248.[1]

The government, despite its vast resources and its own investigation, has been unable to identify any individual responsible for the admitted leaks of detailed information about the government's investigations of the espionage efforts of the People's Republic of China ("PRC") in general and Dr. Lee in particular. JA-33-40.

Dr. Lee instituted this action against three agencies of the federal government[2] and has attempted to ascertain from government officials high and low who was responsible for the illegal leaks, but his efforts have been frustrated at every turn. The District Court was intimately involved with these discovery efforts and concluded the information Dr. Lee requires to vindicate his statutorily protected privacy rights could only be obtained from the reporters with direct knowledge of the identity of the leakers.

The reporters do not deny they know the identity of the government officials and employees who leaked Dr. Lee's protected information in violation of the Privacy Act. However, the reporters nevertheless refuse, on the basis of a claim of

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[1] The *New York Times* was forced to admit that its "coverage of this story" fell "short of our standards." Editor's Note, *The Times and Wen Ho Lee*, N.Y. Times (Sept. 26, 2000). JA-328.

privilege rejected by the District Court, to comply with the District Court's orders that they reveal this information in response to Dr. Lee's discovery requests. The District Court therefore held five reporters in contempt on August 18, 2004. The contemnor reporters now appeal from that order.

STATEMENT OF FACTS

The Government's Espionage Investigation Of Dr. Lee Uncovers No Evidence Of Espionage

From 1978 until the Department of Energy ("DOE") ordered him fired on March 8, 1999, Dr. Lee was a scientist employed by the Los Alamos National Laboratory. JA-33. The government records and information at issue in this case concern DOE and FBI investigations of Dr. Lee from approximately 1996 onward, as well as employment and other personal information about Dr. Lee. JA-30. The government initially suspected Dr. Lee of espionage on behalf of the PRC, and these unfounded and erroneous suspicions were the focus of the investigation of Dr. Lee. JA-33-34.

Despite an extensive three-year investigation, the government failed to uncover credible evidence linking Dr. Lee to the espionage or treason that was openly suggested to the press and the world by illegal government leaks, as

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[2] The Department of Energy ("DOE"), the Federal Bureau of Investigation ("FBI"), and the Department of Justice ("DOJ").

discussed below. JA-49-50. In fact, the government's investigation failed to uncover any evidence that Dr. Lee or anyone connected or related to him had transferred nuclear secrets to the PRC or to any other unauthorized entity. JA-49-50.

The Contemnors Publish Leaked Information About The Espionage Investigation

Frustrated by a lack of progress during the course of the investigation and seeking to deflect attention and expected criticism from the failure to uncover actual espionage by the PRC, one or more government employees turned to the press, illegally divulging harmful and misleading pieces of information about Dr. Lee in violation of the Privacy Act.

During the course of the government's investigation of Dr. Lee, on March 6, 1999, a lengthy and detailed article authored by Contemnors James Risen and Jeff Gerth appeared on the front page of the *New York Times*. JA-317-325. Although the article did not identify Dr. Lee by name, it relied extensively on anonymous government sources to provide detailed information about the government's investigation, including serious allegations of possible treason by Dr. Lee, Dr. Lee's employment information, the history of his travels to the PRC, allegations of improper conduct during a visit to Hong Kong, and the results of his polygraph tests. *Id.* Publication of the article had been delayed briefly at the FBI's request. JA 1294-95. Former FBI Director Louis Freeh characterized the March 6 article as

"the single most damaging ... reported statement of the facts to date." Supplemental Joint Appendix at ("SJA-") 2364 (Docket Entry #126, Att. #6).[3]

The government's leaks were not just embarrassing to Dr. Lee, they were also used to advance the investigation. JA-898. During a March 7, 1999 interrogation, FBI Agent Carol Covert wielded an actual copy of the March 6 Risen/Gerth article and repeatedly threatened Dr. Lee about the effect that such media coverage could have on his family and on his professional career:

> I mean look at this newspaper article! I mean, "China Stole Secrets For Bombs." It all but says your name in here.... Pretty soon you're going to have reporters knocking on your door.... They're going to be knocking on the door of your friends.... They're going to find your son.... And they are going to say, you know your father is a spy?

SJA-2366 (Docket Entry # 126, Att. #7). Unsurprisingly, the interrogation did not yield any concession of espionage or malfeasance by Dr. Lee or anyone connected to him.

The DOE fired Dr. Lee the next day and issued a press release stating Secretary Bill Richardson had recommended the dismissal of a University of California contract employee at the Los Alamos National Laboratory for various alleged violations of security procedures at the lab. JA-1620. The press release

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[3] Dr. Lee has pending an unopposed motion to file a *corrected* Joint Supplemental Appendix.

did not mention Dr. Lee by name. *Id.* That same day, however, Contemnor H. Josef Hebert, a beat reporter for Associated Press, along with several television news outlets, identified Dr. Lee by name, presumably having obtained his identity from someone employed by the government. JA-2154. During his deposition, Contemnor Hebert admitted talking to at least two confidential sources to confirm Dr. Lee's name and other details, prior to publishing Dr. Lee's name in his March 8, 1999 article. JA-1562, 1571-1575.

The next day, on March 9, the *New York Times* ran a front-page article authored once again by Contemnor Risen, that also identified Dr. Lee by name and provided additional details about the government's espionage investigation. JA-121. That same day, Contemnor Hebert published another article, again identifying Dr. Lee by name and offering yet more detail about the government's espionage investigation. JA-2156.[4] Contemnor Bob Drogin also published an article on March 9, 1999 and, although that article did not identify Dr. Lee by name, it did provide details about the government's espionage investigation and other information particular to Dr. Lee, including details concerning the recent March 7 interview conducted by Agent Covert. JA 420-423. Contemnor Drogin also identified Dr. Lee by name in a March 14, 1999 article. JA 428-431.

Thus, within 48 hours of Dr. Lee's termination from DOE, four of the Contemnors had published five articles that either identified Dr. Lee by name, or provided significant and damaging detail about the government's espionage investigation (including the results of Dr. Lee's polygraph tests), and/or included other personal details about Dr. Lee. JA-121-123, 420-423, 2154-2155, 2156-2157, 2160-2162. In March and April 1999, Contemnors Hebert, Risen, and Drogin published additional articles containing Privacy Act-protected information about Dr. Lee. JA-156, 433-437, 438-440, 482-483.

In the ensuing media frenzy, journalists from the *Los Angeles Times*, CNN, and the Associated Press, among other media outlets, continually reported on the government's investigation of Dr. Lee, similarly relying on numerous anonymous government sources to provide extensive details about the investigation and Dr. Lee. JA-155, 229, 491, 1937, 1941, 1944.

Publication of Leaked Information Pressures the Government to Indict Dr. Lee

The government in Washington came under withering criticism as charges flew that "top Administration officials delayed and soft-pedaled the investigation into alleged Chinese spying at Los Alamos National Laboratory." JA-172.

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[4] The *Washington Post* published an article on March 9, 1999, authored by Walter Pincus, which identified Dr. Lee by name. JA-142-144.

Administration officials, including Attorney General Janet Reno, Energy Secretary Bill Richardson, FBI Director Louis Freeh, and National Security Advisor Sandy Berger all faced loud demands for their resignations. JA-48-49.

As the media firestorm raged and criticism mounted, the leaks generated intense political pressure on the DOJ to bring some criminal charge against Dr. Lee. JA-49. The government redoubled its efforts to prove some kind of misconduct by Dr. Lee, devoting vast resources to an effort that encompassed 60 FBI agents and interviewing over 1,000 witness solely on the espionage allegations against Dr. Lee. *Id.* Notwithstanding the overwhelming investment of resources, the government defendants still were unable to uncover "'a shred of evidence'" that Dr. Lee ever passed nuclear secrets to the PRC or to anyone else. JA-226-228.

The Unlawful Leaks Shift Focus And Trigger A New Series of Articles

After years of investigating and months of illegal leaking, the government remained unable to unearth any evidence that Dr. Lee was connected to espionage. JA-49-50. Having failed to discover any evidence of espionage, but under pressure to bring charges against Dr. Lee, the government shifted its focus in March 1999 to

investigating allegations concerning Dr. Lee's mishandling of computer files.[5] JA-990.

Government leaks about this new investigation first appeared almost immediately in an April 28, 1999 *New York Times* article authored by Contemnor Risen with assistance from Contemnor Gerth. JA-230-234. Again citing anonymous government sources, Contemnors Risen and Gerth disclosed information concerning allegations that Dr. Lee had mishandled important computer codes for nuclear weapons by downloading them to an unsecured computer. That same day, Contemnor Pierre Thomas separately published an article identifying Dr. Lee and providing details about the government's new focus on the alleged mishandling of classified information. JA 387-390. The next day, on April 29, 1999, Contemnor Drogin published an article, quoting an anonymous government source who predicted that Dr. Lee would be arrested by the FBI "within 10 days." SJA-2368 (Docket Entry #126, Att. #15).

The Government Initially Ignores Dr. Lee's Requests For A Leaks Investigation

As the damaging government leaks continued unabated during the winter and early spring of 1999, Dr. Lee's counsel wrote a series of unanswered letters to

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[5] The government's initial investigation focused on allegations that the PRC had obtained information on America's nuclear warhead technology. JA-33-34. By the summer of 1999, the government had completely abandoned this theory as to Dr. Lee. JA-49-53.

the DOJ and the FBI expressing concern that the unremitting leaks "directly violate U.S. Department of Justice policies" and requesting that steps be taken "to stop these apparent violations of its policies and federal law." *See, e.g.*, JA-147. In a March 1999 letter to FBI Director Freeh, Dr. Lee's counsel enclosed copies of more than 80 articles suggesting that "senior FBI officials" had "repeatedly made improper disclosures of confidential investigative information." JA-43, 149.

The Investigation Leads to Solitary Confinement and, After a Plea Bargain, an Apology from a Federal Court

Meanwhile, the government's new investigation of Dr. Lee's alleged mishandling of computer files led to his indictment in early December 1999 on 59 counts related to the mishandling.[6] Shortly after his indictment, Dr. Lee's counsel filed this Privacy Act suit on December 20, 1999, in an attempt to stem the incessant leaks to the news media and to seek redress. JA-29.

Ultimately, after holding Dr. Lee in solitary confinement for nine months, the government essentially conceded it had no proof of any espionage-related activities by Dr. Lee JA-256. In September 2000, pursuant to a plea agreement, the government consented to the dismissal of 58 counts and a guilty plea to a single count of mishandling information. JA-254. In an extraordinary statement made in

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[6] Due to the enormous media attention, the decision to charge Dr. Lee was made at a meeting at the White House according to press reports. JA-763.

open court, Judge James A. Parker of the United States District Court for the District of New Mexico apologized to Dr. Lee for what he called an "abuse of power" by the federal government in its prosecution of Dr. Lee. Judge Parker singled out "the top decision makers in the executive branch, especially the Department of Justice and the Department of Energy ... who have caused embarrassment by the way this case began and was handled" and who "have embarrassed our entire nation and each of us who is a citizen of it." JA-1267.

Judge Parker, who had initially ordered Dr. Lee jailed without bail in the midst of the media firestorm based on representations by the government that the nation's security was at stake if he was freed, also apologized for having been misled by the government's unfounded attacks on Dr. Lee's patriotism:

> Dr Lee, I tell you with great sadness that I feel I was led astray last December by the executive branch of our government through its Department of Justice, by its Federal Bureau of Investigation and by its United States attorney for the district of New Mexico, who held the office at that time.
>
> I am sad for your and your family because of the way in which you were kept in custody while you were presumed under the law to be innocent of the charges the executive branch brought against you.
>
> I am sad that I was induced in December to order your detention, since by the terms of the plea agreement that frees you today without conditions, it becomes clear that the executive branch now concedes, or should concede, that it was not necessary to confine you last December or at any time before your trial.

JA-255, 1266.

Dr. Lee Fulfills The District Court's Requirement To Exhaust All Reasonable Discovery Alternatives

The District Court entered an order on July 31, 2001, permitting unrestricted discovery in the Privacy Act case. Undaunted by the government's apparent unwillingness or inability to identify the leakers, Dr. Lee launched an extensive written discovery campaign in anticipation of depositions, propounding at least 420 individual written discovery requests to the government defendants, including special interrogatories, requests for production, and requests for admission. JA-578-735. The efficacy of written discovery was hampered by the confidential nature of some of the information sought and by defendants' own investigation of the leaks, which led to assertions of a law enforcement privilege. *Id.* Ultimately, none of the written discovery identified the source of the leaks.

Dr. Lee began moving forward with depositions in October 2001. These depositions focused heavily on the individuals identified by the government's responses to Dr. Lee's written discovery requests as most likely to have information concerning the sources of the illegal leaks. In addition, in these depositions, Dr. Lee's counsel asked every government witness for information about the identity of those individuals who may have leaked private information about Dr. Lee to the news media. *E.g.*, JA-1225-1226. Despite these extensive efforts (detailed below), none of these witnesses was able (or willing) to identify the actual sources of the leaks to the media.

From the DOE, Dr. Lee deposed: (1) Notra Trulock, Acting Director of Intelligence and Counterintelligence for DOE in 1996, and "star witness" of the Cox Committee whose testimony pointed the finger at Dr. Lee as the DOE's "chief suspect" in the alleged Chinese espionage, and who later told *60 Minutes* that it was he who, frustrated with the perceived inaction of his government superiors, had "reached out to the *New York Times*," JA-75 (though he later retreated from this statement in his deposition testimony, SJA-2314 (Docket Entry #101)); (2) Bill Richardson, former Secretary of Energy, who was identified by Notra Trulock as a *New York Times* source and, more specifically, as the individual who had provided reporters with Dr. Lee's name; (3) Edward Curran, former director of the Office of Counterintelligence and Mr. Trulock's successor;[7] (4) Mary Anne Sullivan, General Counsel at DOE and legal advisor to then-Secretary Bill Richardson; (5) Brooke Anderson, former director of DOE's Office of Public Affairs; and (6) Abel Lopez, head of DOE's Freedom of Information Act and Privacy Act division. JA-782, 798, 800, 914, 1007, 1024, 1039, 1045.

Dr. Lee made similar focused efforts with regard to the DOJ, deposing: (1) Myron Marlin, lead press official at the DOJ during the relevant period (JA-736);

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[7] Dr. Lee focused on Mr. Trulock, Mr. Richardson, and Mr. Curran, in particular, because Michael DeFeo, chief internal investigator for the FBI, specifically identified them as the likely sources of the leaks.

(2) John Dion, Acting Chief of the Internal Security Division ("ISD"), who took an early interest in Dr. Lee's case and was thoroughly briefed by the FBI in February 1999 (JA-769); (3) Michael Liebman, an ISD attorney who was dispatched to New Mexico in February 1999 (JA-854), ultimately became part of the prosecution team, and authored the "Dion Memo," a critical internal DOJ document asserting that then-Secretary of Energy Bill Richardson had disclosed Dr. Lee's name to the press (JA-850); (4) Craig Iscoe, who worked in the Deputy Attorney General's office, which was the office Dr. Lee's counsel considered to be a possible source of the leaks (JA-844); (5) Robert Gorence, Dr. Lee's chief prosecutor, who authored a letter to Director Freeh in late-March 1999 protesting governmental leaks regarding the investigation of Dr. Lee and demanding a leaks investigation (JA-929); and (6) John J. Kelly, the U.S. Attorney for the District of New Mexico and the attorney in charge of the criminal case against Dr. Lee in 1999. JA-987, 988.

Finally, from the FBI, Dr. Lee deposed: (1) Louis Freeh, former Director of the FBI (JA-746); (2) Neil Gallagher, former Assistant Director, National Security Division, who was designated as the principal FBI representative at testimony and briefings concerning the Wen Ho Lee matter beginning in February 1999 (JA-958); (3) John Collingwood, former Assistant Director, Office of Public and Congressional Affairs (JA-980); (4) Michael DeFeo, chief internal investigator for

the FBI (JA-836); (5) Robert Bucknam, Mr. Freeh's chief of staff (JA-766); (6) David Kitchen, Special Agent in Charge of the Albuquerque, New Mexico office of the FBI (JA-1151); (7) William Lueckenhoff, Assistant Special Agent in Charge of the Albuquerque, New Mexico office (JA-1186); and (8) Carol Covert, the lead FBI Special Agent on Dr. Lee's case in early 1999 (JA-857). JA-870-871.

The Government's Investigations Have Likewise Exhausted Other Avenues

Notably, despite the government's initial refusal to investigate its own leaks, in late April 1999, the U.S. Attorney in charge of the case, John J. Kelly, publicly condemned leaks by an anonymous "senior Clinton administration official" to the *Los Angeles Times*. SA-2368-2369 (Docket Entry #126, Att. #15). Mr. Kelly criticized the government leaks, which "inaccurate[ly]" reported that the FBI was planning to arrest Dr. Lee within 10 days for the unauthorized disclosure of classified materials, as "unauthorized and a disservice to the ongoing investigation." *Id.* Similarly, Edward Curran, then Chief of Counterintelligence at DOE, described the effect of the government leaks as "absolutely devastating" to the investigation as well as to the "Wen Ho Lee family." JA-74, 76. Former FBI Director Freeh later echoed these sentiments in his own deposition testimony: "[M]y views were that not only was [the leaking] compromising our investigation and the rights of the people we were investigating, but anybody responsible for that should be prosecuted." JA-753.

The matter was ultimately referred to the Public Integrity Section of the DOJ, to handle because "it was potentially criminal" and "would involve a tremendous expenditure of resources with an *absolute minimal probability of success.*" JA-519 (emphasis added). However, despite its far more powerful investigative tools, the government itself has been stymied in its own parallel efforts to uncover the sources of the illegal government leaks.

The District Court Permits Dr. Lee To Seek The Journalists' Testimony As A Last Resort

Ultimately, having exhausted written discovery and deposed numerous government officials, Dr. Lee was left with no choice but to seek the crucial information from the journalists. Thus, beginning in early August 2002, Dr. Lee issued subpoenas to Mr. Risen, Mr. Gerth, Mr. Drogin, Mr. Hebert, and Mr. Thomas, seeking testimony and documents concerning the source of the government defendants' leaks. JA-334, 405, 448, 461, 485. All of them objected and moved to quash. JA-1242.

As the District Court observed, Dr. Lee "has made extensive use of Rule 30" by deposing twenty government officials identified as "likely knowledgeable deponents" in the "defendants' answers to interrogatories and document production." JA-1251. As the Court noted, "the possibility that disclosure of certain information might have entailed criminal liability has not been conducive to candor on the part of witnesses who have been deposed." *Id.* at n.5. Even the

FBI's own chief internal investigator, Mr. DeFeo, considered the task overwhelming and unlikely to be fruitful. JA-519 (noting that such an investigation "would involve a tremendous expenditure of resources with an absolute minimal probability of success"). Thus, Dr. Lee turned to the reporters only when it became apparent that his reasking these questions would not yield fruitful answers and that the government's own investigation had likewise failed.

On October 9, 2003, the District Court denied the Contemnors' motions to quash and ordered them to appear for their depositions and "truthfully answer questions as to the identity of any officer or agent of defendants, or any of them, who provided information to them directly about Wen Ho Lee, and as to the nature of the information so provided." JA-1257. The Court found that Dr. Lee had exhausted all reasonable discovery alternatives with the government, pursuant to *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), observing that Dr. Lee had made exhaustive use of the "five principal tactical devices available to a plaintiff under the Federal Rules of Civil Procedure to extract evidence from reticent defendants." JA-1249-1251.

The District Court noted material differences between the discovery efforts in this case and *Zerilli*, noting that, while the *Zerilli* plaintiffs took no depositions, Dr. Lee made "extensive use of Rule 30" depositions. JA-1249-1251. The District Court concluded that the "deposition transcripts generally reveal a pattern of

denials, vague or evasive answers, and stonewalling." *Id.* at 1252. The District Court also addressed and rejected the suggestion that Dr. Lee had failed to take sufficient discovery under Rule 30(b)(6): "[T]he identity of the deponents that [Dr. Lee has] interrogated seems to me to be pretty much the equivalent of a 30(b)(6) deposition. They have asked the top people from the department, from the FBI departments, and from the FBI to provide this information and they represent that it is not forthcoming." Appellant Hebert's Docketing Statement filed on October 22, 2004, Report Certifying Preparation of Transcripts, Exhibit C, August 27, 2003 Transcript of Motion Hearing ("Aug. 27, 2003 Hrg. Tr.") at 10:19-25; SJA-2323 (Docket Entry #102).

As the District Court well knew, counsel for the parties attended in-chambers and status conferences before the District Court judge presiding over the case, as he personally monitored discovery progress and advised the parties on discovery matters in an attempt to resolve outstanding discovery issues without the need for formal motion practice where it could be avoided. Aug. 27, 2003 Hrg. Tr. at 2-3; SJA-2316-2317. Nonetheless, despite that direct involvement and supervision, in light of the government's consistent stonewalling and the extensive efforts to resolve the discovery disputes, Dr. Lee had no choice but to seek information about the identify of the government leakers from the individual reporters.

The District Court Holds The Journalists In Contempt

Although the Contemnors subsequently appeared for additional deposition questioning, they again refused to reveal their confidential sources in violation of the District Court's October 9, 2003 Order. On August 18, 2004, the District Court found that refusal constituted contempt. JA-2275-2286. The District Court noted that it had previously ordered the reporters to "truthfully answer questions as to the identity of any officer or agent of defendants, or any of them, who provided information to them directly about Wen Ho Lee, and as to the nature of the information so provided...." *Lee v. United States DOJ*, 327 F. Supp. 2d 26, 28 (D.D.C. 2004). Disregarding this clear directive, the reporters "declined to reveal their confidential sources" in response to questioning from Plaintiff's attorneys, and raised "somewhat overlapping arguments about why there should be no finding of contempt." *Id.* The District Court rejected the reporters' common attempt to reargue the privilege issue and, in an opinion replete with citations to the record, separately addressed—and rejected—each of their unique arguments. *Id.* at 28-32. Having found all of the reporters in contempt, the District Court fined each of them $500 per day, but stayed the fine pending appeal. *Id.* at 33. These consolidated appeals followed. JA-2288-2302.

SUMMARY OF ARGUMENT

Relying on Circuit precedent indicating the existence of a qualified First Amendment testimonial privilege and vesting discretion in the District Court, the court below carefully weighed the centrality of the discovery and the extent to which other sources of the same information had been exhausted. Despite the District Court's order finding any possible privilege to be overcome, each of the Appellants nonetheless refused to respond to discovery that would identify the illegal government source of information leaked in violation of Dr. Lee's rights under the federal Privacy Act. None of the Contemnors have shown an abuse of discretion, as they must to sustain any challenge to the rejection of their claims of privilege.

Further, while the District Court cautiously assumed this Court's precedent to recognize a qualified First Amendment privilege, it is not at all clear either that this Court's prior decisions so indicating amount to holdings binding on the district courts and subsequent panels or that any such holding would survive subsequent Supreme Court decisions undermining any claim to a privilege.

Recognizing the tenuous foundation underlying their First Amendment privilege, Appellants separately seek the creation of a new privilege at common law that has been rejected repeatedly by the Supreme Court, this Court, Congress, and Federal Rules Committees. Creating such a privilege now and in this case on

the premise that it is essential to promote the public's right to know the leaked information, would be singularly inappropriate. The federal Privacy Act, which is unchallenged in its substance here, makes it unlawful for government employees to disclose to anyone, let alone members of the news media, the kind of information at issue in this case. Insulating violations of the Privacy Act from discovery would betray the very purpose of that statute and leave violations without any remedy.

In any event, the Court is not compelled to resolve the existence or source of any qualified privilege in this case. The District Court, being fully involved and most aware of the discovery efforts undertaken by Plaintiff, acted well within its discretion when it concluded that the information sought is central to the case and cannot be readily obtained elsewhere regardless of whether any privilege is extant. Indeed, despite its vast resources and grand jury powers, the government itself has failed to uncover the source of the Privacy Act violations in its own parallel investigation. Notably, in an effort to accommodate whatever legitimate interests the reporters have, Dr. Lee has been willing to accept from the reporters a confirmation that employees of particular governmental defendants—without identifying them by name—were the source of the illegal leaks, and yet the reporters still refuse to provide the information required by the District Court's discovery order.

ARGUMENT

The Privacy Act, 5 U.S.C. § 552a, precludes federal agencies from disclosing "any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains," with limited exceptions inapplicable here. 5 U.S.C. § 552a(b). The Act creates a cause of action for damages that private citizens can bring against the federal agency—not the individual government officer or employee—from which protected information is leaked. *Id.* § 552a(g)(1). In addition, the Act imposes criminal liability on government officers or employees who disclose protected information in violation of the Act. *Id.* § 552a(i)(1).

In refusing to provide information that is critical to Dr. Lee's action under the Privacy Act, Contemnors rely exclusively upon a qualified privilege, purportedly arising either from the First Amendment or federal common law and only in the context of civil proceedings, that is of questionable application, much less continuing existence, in this case. Because that privilege, regardless of its source, would be overcome where, as here, the information sought is central to the issue before the court and other means have been thoroughly pursued without success, the Court is not required to resolve the controversy over the existence of

the qualified privilege. Nonetheless, the existence of the claimed qualified privilege is highly doubtful. *See infra* Sections II and III.

I. EVEN ASSUMING *ZERILLI* REPRESENTS THE LAW OF THE CIRCUIT OR SOME OTHER QUALIFIED PRIVILEGE IS DISCOVERED HERE, THE DISTRICT COURT CORRECTLY FOUND ANY QUALIFIED PRIVILEGE TO BE OVERCOME

The District Court here did not, contrary to Contemnor's insinuations in their briefs, come close to purporting to overrule this Court's *Zerilli* decision. Likewise, even if *Zerilli* states the law of this Circuit regarding the existence of a qualified First Amendment privilege in civil cases, this Court need not do so either.[8]

First, as noted above and discussed more fully in Section II.A below, *Zerilli*'s discussion of a qualified First Amendment reporter's privilege may not state a holding binding on this panel. Second, as the District Court correctly found, Dr. Lee has easily met the standard outlined in *Zerilli*, and the District Court did not abuse its discretion in so concluding, denying Contemnors' motions to quash, and subsequently holding them in contempt.

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[8] *Cf. In re Grand Jury Subpoena (Miller)*, Nos. 04-3138, 04-3139, & 04-3140, 2005 U.S. App. LEXIS 2494, at *54, 2005 WL 350745, at *17 (D.C. Cir. Feb. 15, 2005) (Henderson, J., concurring).

Instead of showing any abuse of discretion, Contemnors hope to superimpose a *de novo* standard on appeal and claim a talismanic number of either 60 or 65 depositions must be taken before a District Court can find exhaustion.

A. The Claim for De Novo Review Is Demonstrably Erroneous

While extolling the correctness and applicability of *Zerilli* in all other aspects, Contemnors simultaneously argue that the abuse of discretion standard of appellate review mandated there is inapplicable because of the Supreme Court's decision three years later in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). *See, e.g.*, Gerth/Risen Br. at 17-19; Hebert/Drogin Br. at 20. An examination of *Bose*, however, reveals that it has no applicability to discovery orders in general, or to discovery from journalists in particular. Indeed, this Court has rejected the very argument put forth by Contemnors that *Bose* requires independent appellate review whenever trial court findings "implicate the availability of First Amendment protection." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 n.3 (D.C. Cir. 1985). Thus, in the years after *Bose*, this Circuit, and others, continue to review the compelled disclosure of sources from reporters under the abuse of discretion standard. *See, e.g., United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000).

Courts and commentators alike recognize that discovery orders are entitled to great deference. Steven Childress & Martha Davis, *Federal Standards of Review* § 4.11 at 4-74 (2004) (stating trial courts have "broad discretion in controlling discovery"); 8 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE Civ. 2d § 2006 at 91 (2004) (same). In *Zerilli*, this Court applied this general principle to a case specifically involving a reporter's claim of First Amendment privilege.[9] It stated that the appellate court's role in reviewing an order regarding that claimed privilege is "narrowly circumscribed" because "[a] motion to compel discovery is committed to the discretion of the trial court...." *Zerilli*, 656 F.2d at 710. The Court therefore held that its "function on appeal is solely to determine whether the trial court abused its discretion in entering the challenged order." *Id.*

Nothing in *Bose* even purports to alter the deference required by *Zerilli* and long afforded discovery orders entered by the very trial court judges who live with cases for years and are attuned to the discovery efforts of the parties and the relevance of information sought. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36

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[9] It is worth noting that all other privilege determinations also are reviewed under an abuse of discretion standard, even though many touch upon constitutional rights, such as effective assistance of counsel. *Tuite v. Henry*, 98 F.3d 1411, 1413 (D.C. Cir. 1996) (law enforcement privilege); *In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1989) (waiver of attorney-client privilege); *United States v. Brodie*, 871 F.2d 125, 128 (D.C. Cir. 1989) (qualified privilege of informant anonymity); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 398-99 (D.C. Cir. 1984) (state secrets privilege).

(1984) ("The trial court is in the best position to weigh fairly the competing needs and interest of parties affected by discovery."). *Bose* simply held that the constitutionally-required finding of actual malice in the public figure defamation context was subject to independent appellate review. The Court emphasized that the judgment in that case constituted a legal determination whether speech itself could subject a speaker to liability, and therefore independent review of that ultimate constitutional fact was appropriate. *Bose*, 466 U.S. at 511-22. Nowhere in the *Bose* decision did the Court suggest this limited holding extended to determinations of privilege in the discovery context.[10] In fact, only a month after the *Bose* decision, the Supreme Court itself rejected the argument that discovery orders implicating First Amendment concerns required heightened appellate scrutiny. *Seattle Times*, 467 U.S. at 36 & n.23.

Contemnors' argument for *de novo* review also fails on an even more fundamental level, because it rests on the false assertion that *Bose* created new law after *Zerilli*. In truth, *Bose* merely reaffirmed the independent review requirement of *New York Times v. Sullivan*, 376 U.S. 254, 285 (1965), decided nearly twenty years prior to *Zerilli*. Thus, the D.C. Circuit was well aware of the concept of

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[10] This Court has rejected efforts to extend the holding of *Bose* to situations much more analogous to *Bose* itself than discovery rulings such as those at issue in this case. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 n.3 (D.C. Cir. 1985).

independent review when it decided *Zerilli*, but determined it did not apply in the discovery context. Furthermore, 16 years after *Bose*, in *Ahn*, this Circuit once again affirmed that review of efforts to compel a reporter's confidential sources is subject to the abuse of discretion standard. 231 F.3d at 37.[11]

Contemnors also suggest in passing, citing only dicta from a concurring opinion in a case with no applicability to any of the issues of this appeal, that, even if deference is warranted where no testimony is compelled, where the trial court denies an alleged constitutional claim (*i.e.*, a reporter's claimed privilege), the appellate court must independently review that decision. There is no support for this shifting standard of review in *Zerilli*, which states that "[a] motion to compel discovery is committed to the discretion of the trial court," without any regard to which way the trial court decides the issue. *Zerilli*, 656 F.2d at 710. Moreover, in *Ashcraft v. Conoco, Inc.*, another case decided after *Bose* and involving a trial court order *compelling disclosure* of a reporter's sources, the Fourth Circuit held that abuse of discretion was the appropriate standard of review. 218 F.3d at 287 ("On a motion to compel disclosure of confidential news sources, this balancing of the reporter's interests and society's interests is committed to the sound discretion

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[11] Remarkably, Contemnors suggest that *Ahn* failed to address the standard of review, when the language from *Ahn* that Contemnors cite actually sets forth the textbook definition of the abuse of discretion standard of review. *Compare United States v. Ahn*, 231 F.3d 231 F.3d 26, 37 (D.C. Cir. 2000), *with In re Sealed Case (Medical Records)*, 381 F.3d at 1211.

of the district court."). Similarly, although the media-appellants in *Seattle Times* sought review of the protective order entered by the trial court because it restricted their ability to disseminate information (and therefore denied their constitutional claim), the Supreme Court explicitly endorsed abuse of discretion review. 467 U.S. at 36.

Finally, as a practical matter the trial court's findings at issue in this case are far different from the judgment in *Bose*. In this case, as in *Zerilli*, the trial court was not called upon to render judgment whether certain speech ultimately gave rise to criminal or civil liability. Instead, the District Court simply found that the information sought from the reporters was crucial to the claims before him (*Zerilli* supports the determination that it is), and that in light of all the circumstances Dr. Lee had exhausted all reasonable alternative sources of information. JA-1247-1248; *accord Zerilli*, 656 F.2d at 713.

In sum, Contemnors ask this Court to apply *Bose* out of context and against all controlling precedent on the proper standard of review for discovery orders. Contemnors' requested, entirely new standard of review fails to recognize that trial courts manage discovery disputes almost daily. These responsibilities often call upon them to balance competing interests, evaluate the need for further discovery, and judge the reasonableness of discovery efforts. The deference required by *Zerilli* is a recognition that the trial court is uniquely positioned to judge the

reasonableness of a litigant's discovery efforts. *See, e.g., Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998) (holding trial court's finding that "same information was otherwise available" must be reviewed "deferentially"). Indeed, cases such as *Zerilli* and *Seattle Times* recognize that this expertise is properly afforded deference even where First Amendment interests are arguably implicated. *Bose* does not affect the standard of review applied by the Supreme Court and this Court to afford that deference.

B. The District Court Did Not Abuse Its Discretion

Even assuming the existence of a qualified privilege under *Zerilli* or some other source, the District Court concluded that discovery from the government defendants was decidedly unlikely to yield the proof confirming that one or more persons within the government itself unlawfully released information about Dr. Lee to the press during the course of the criminal investigation and prosecution. That decision was vested in the district court's discretion. To be sure, there has long "been much discussion of the content which should be given to the elusive phrase 'abuse of discretion,' with the weight of learning against appellate reversal except in relatively rare cases." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 147-48 (D.C. Cir. 1969). Notably, Contemnors cite no decision of this Circuit finding a district court to have abused its discretion. *Carey*, applying the abuse of discretion standard, affirmed a decision requiring disclosure. And, once

again applying the abuse of discretion standard, *Zerilli* affirmed a decision refusing to order disclosure where the Plaintiff had made essentially no attempt to take discovery from the opposing party.

Indeed, none of the Contemnors attempt to explain why, at least insofar as the asserted privilege is concerned, the District Court actually abused it discretion. Nonetheless, it is clear that no abuse is extant should this Court be inclined to undertake that analysis on its own. The District Court, having lived with this case and recognized the government's "pattern [of] denials, vague or evasive answers and stonewalling," JA-1252, acted well within its discretion.

1. Information Regarding the Source of Government Leaks is Crucial to This Privacy Act Case

This lawsuit states a claim for violation of the Privacy Act by governmental employees that occurred simultaneous with Dr. Lee's investigation, prosecution, incarceration, and solitary confinement. The unlawful news leaks undeniably had the effect, almost certainly intended by those who made them, of increasing the stress and pressure on Dr. Lee and his family as the government interrogated and negotiated with him. If the leaks originated within the government, they would undeniably be unlawful and would form the evidentiary basis of a Privacy Act claim, likely to prevail on summary judgment and avoid a trial. The sole lingering question of fact is whether the leaks did in fact originate with the government. None of the Contemnors affirmatively deny that they were recipients of such

unlawful leaks or that they have personal knowledge of them. They simply refuse to confirm the facts.

Dr. Lee reasonably seeks information as to whether someone within the government was the source of the reports, for instance, about the government's suspicions that Dr. Lee was connected to espionage, JA-34-35; that Dr. Lee had taken a lie detector test, JA-36; that Dr. Lee's wife behaved "suspiciously", JA-37; or any of the other damning accusations heaped on Dr. Lee and the American public while the government negotiated with him. Simple affirmations from the Contemonors in response to questions on these factual issues would confirm liability, likely avoid a trial, and vindicate an unchallenged federal law forbidding abuse of protected privacy interests.

Nonetheless Contemnors still fault the District Court's conclusion that information confirming that the leaks originated with the government goes to the heart of this case. *E.g.*, Gerth/Risen Br. at 40-42; Thomas Br. at 10-12. Rather than contesting the obvious logical significance of the discovery, Contemnors suggest that the existing information is possibly or probably enough "for a jury to conclude that [Dr. Lee] has [already] proven his Privacy Act claims." Gerth/Risen Br. at 40; *see also* Hebert/Drogin Br. at 21-24, 33-36. Despite speaking in a double negative while faulting Dr. Lee for not conducting enough discovery, Contemnors now qualifiedly assure the District Court and this Court that "it is not

at all clear that Dr. Lee does not already have sufficient evidence" to proceed to trial. Gerth/Risen Br. at 40-42.

Truth-seeking is the essential goal of discovery and every judicial proceeding. It is not for each Contemnor to decide for the District Court that there is likely enough evidence to proceed to an *almost* fair and *almost* complete trial if the other Contemnors proceed without them. *Zerilli* does not pose questions about the weight of the other evidence available if the district court's discovery orders are successfully defied. Nor does it even purport to authorize the reporter to conclude for the District Court that the information he refuses to share would not be necessary. *E.g.,* Hebert/Drogin Br. at 25-33. Rather, *Zerilli* asks the court to determine whether, as here, the substance of the evidence sought is central to the claim. Not even the Contemnors can or do contest that a "yes" answer by any or all of them to the question of whether their confidential source was an officer or employee of defendants would do anything less than confirm Dr. Lee's claim and likely relieve the District Court, the Plaintiff, and the jury of the burden of going to trial on liability or of avoiding a possibly erroneous outcome.

2. The District Court Did Not Abuse its Discretion in Finding Discovery From the Contemnors Timely Based on *Zerilli*'s Exhaustion Prong

In *Zerilli* the district court denied discovery from reporters because the Plaintiff had made virtually no effort to obtain the information from the Defendant.

This Court affirmed that decision as within the district court's discretion. Here, just the opposite is true.[12] As detailed above, there were extensive, but ultimately fruitless, efforts to force the government to disclose the truth. These efforts included hundreds of written discovery requests, *in camera* and status conferences, reporting on status of discovery, and numerous depositions from the most likely sources of information, including the government's own leaks investigators who themselves concede the apparent impossibility of identifying the leaks within the government. Only after that effort repeatedly failed did Dr. Lee turn to the reporters. Even then, in order to assuage their concerns about identifying the particular officials, and reduce the likely delay, Dr. Lee offered to accept from the reporters a more general confirmation that employees of particular governmental defendants—without identifying them by name—were the source of the illegal leaks.

Neither the Plaintiff nor the District Court lightly turned away from the Defendants as the most convenient source of proof. Indeed, no Plaintiff would take on the burden and delay associated with the process currently unfolding itself

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[12] The District Court clearly recognized the differences between *Zerilli* and Dr. Lee's case, explaining at the August 27, 2003 hearing: "The *Zerilli* plaintiffs took no depositions. [Dr. Lee's counsel] Mr. Sun has taken the deposition of the chief government investigator assigned the task of trying to identify the source of the leaks. He didn't take the government's word for it. He took the deposition." Aug. 27, 2003 Hrg. Tr. at 18:2-6; SJA-2332

here when presented with any reasonable prospect that it could simply demand and obtain better answers from its party opponent, as the Contemnors suggest Dr. Lee somehow could. *E.g.*, Gerth/Risen Br. at 31-32 (extolling the prospects of pursuing 30(b)(6) depositions). However, as the District Court aptly noted after living with the case for a period of years and carefully reviewing the totality of Plaintiffs' discovery efforts in connection with its decision on the Contemnors' motions to quash, the quest to obtain the information from the Defendants proved a hopeless task.

Having presided over the Privacy Act case since its inception, and having personally monitored the underlying discovery difficulties raised in open hearings and *in camera* conferences, the District Court was in the best position to assess Dr. Lee's efforts in obtaining the identities of the government leakers before resorting to the Contemnor reporters. The clear and unequivocal conclusion of the District Court was that Dr. Lee had properly exhausted the reasonable alternatives thereto.

"[T]he identity of the deponents that [Dr. Lee has] interrogated seems to me to be pretty much the functional equivalent of a 30(b)(6) deposition. They have asked the top people from the department, from the FBI departments, and from the FBI to provide this information and they represent that it is not forthcoming." Aug. 27, 2003 Hrg. Tr. at 10:19-25; SJA-2324. The District Court concluded that the government and numerous government employees would simply not confirm

or identify who was responsible for leaking the information to the press after repeatedly evading the issue in response to numerous inquiries. *Id.* at 14; SJA-2328 ("I think [Dr. Lee has] made an effort in that regard. What they say is that we have to prove that a government agency, to wit, a defendant, was the source of the information ... and to date the government won't admit it and says they don't know who did it, and when the case goes to trial, [Dr. Lee's counsel] is not going to have the evidence to prove it and he knows that this is part of his prima facie case."). Neither *Zerilli* nor any conceivable privilege in the making would require the Plaintiff or the District Court to continue in an indefinite and likely futile scavenger hunt for the sole purpose of satisfying the press that an adequate number of depositions have been taken or an adequate number of motions to compel have been heard.

Dr. Lee deposed numerous government witnesses who were most likely knowledgeable of the identity of the leakers, including those responsible for the government's own leaks investigation, the former FBI Director and former Secretary of Energy. To be sure, additional governmental employees could have been added to this list, or additional redundant discovery could have been served. But it was perfectly obvious that the government and those governmental employees with knowledge were not going to respond, regardless of how many

times they were asked or what form the questions took.[13] Moreover, unlike a corporation (or the government), Dr. Lee is a private citizen who has lost his job and his resources are limited. The District Court therefore, properly exercising discretion plainly vested in it, denied the reporters' motions to quash, and later granted Dr. Lee's motions for orders to show cause, ultimately holding each of the Appellants in contempt when they knowingly refused to comply with the court's order.

II. THE SUPREME COURT AND FEDERAL RULES COMMITTEES HAVE FLATLY REJECTED THE PRIVILEGES ASSERTED HERE BEFORE AND AFTER *ZERILLI*

Putting aside the fact that none of the Appellant Contemnors have shown an abuse of discretion, let alone error of any kind, it is highly doubtful that the privilege they assert has any application in this Privacy Act case. As explained below, *Zerilli*'s interpretation of *Branzburg* has been undermined, even if that interpretation ever amounted to a holding by that panel. Separately, the existence of a privilege cannot be premised on the "public's right to know" where the public expressly *does not* have a right to know. Indeed, the Privacy Act makes disclosure

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[13] Contemnors Risen and Gerth suggest that the decisions in *In re Roche*, 448 U.S. 1312 (1980), and *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974), require a talismanic minimum of 60 or 65 depositions before a district court may permit a press deposition. In fact, neither case makes any such holding. The lack of any such requirement was not lost on the District Court: "It is not a quantitative analysis. The number of depositions is not to my judgment nearly as significant as who was deposed." Aug. 27, 2003 Hrg. Tr. at 20:18-20; SJA-2334.

to a single member of the public—let alone the world—illegal. As the Supreme Court has recently reaffirmed, the press does not enjoy immunity to general law. *University of Pa. v. EEOC*, 493 U.S. 182, 201 (1990); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991).

A. Any Prior Indication By This Court of the Existence of Any First Amendment Reporter's Privilege May Be Dicta

The Supreme Court expressly disclaimed the existence of a First Amendment privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), this Court, following *Branzburg*, flatly rejected the existence of an absolute privilege in either civil or criminal proceedings.

Nonetheless, in both *Carey* and later in *Zerilli,* this Court read *Branzburg* as limited to criminal cases and indicated the possible existence in civil cases of a qualified First Amendment privilege to protect reporters from revealing the identity of confidential sources. In so doing, this Court looked to Justice Powell's concurring opinion in *Branzburg* as supporting a balancing approach for overcoming this privilege and then outlined several "more precise guidelines"—essentially a three-factor balancing test—that could "determine how the balance

should be struck in a particular case." *Zerilli*, 656 F.2d at 713; *Carey*, 492 F.2d at 636.[14]

This Court, however, has very recently suggested that *Zerilli* may have only recognized or "suggest[ed] the possibility of" a First Amendment privilege "in dicta." *In re Grand Jury Subpoena (Miller)*, Nos. 04-3138, 04-3139, & 04-3140, 2005 U.S. App. LEXIS 2494, at *23-*24, 2005 WL 350745, at *8 (D.C. Cir. Feb. 15, 2005). This observation may stem from either of two observations about *Zerilli*. First, the plaintiff had conducted such minimal discovery of his government opponents that the Court of Appeals could affirm the district court's denial of his motion to compel even if no reporter were involved and no First Amendment interests were implicated. *Zerilli*, 656 F.2d at 714-15. Second, insofar as the district court's discovery order was reviewable only for abuse of discretion, the absence of any abuse of discretion, whatever privilege the reporters were claiming, could have pretermitted the legal question of whether a First Amendment reporter's privilege exists. *Id.* at 710, 714.

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[14] Leaving aside for the moment whether *Zerilli* and *Carey* accord with *Branzburg*'s majority, this Court recently joined other courts around the country casting doubt on reliance on Justice Powell's concurring opinion to discover a balancing test in *Branzburg*. *Miller*, 2005 U.S. App. LEXIS 2494, at *21-*22, 2005 WL 350745, at *8; *Storer Communications, Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580, 583-84 (6th Cir. 1987); *State v. Smith (In re Decker)*, 471 S.E.2d 462, 465 (S.C. 1995). Indeed, Justice Powell himself rejected the three-factor test that Justice Stewart's dissenting opinion advocated. *Branzburg*, 408 U.S. at 710 n.* (Powell, J., concurring).

Likewise, although the Court in *Zerilli* stated that *Carey* "indicated ... that a qualified reporter's privilege under the First Amendment should be readily available in civil cases" and "adopted" "[a]n approach similar to that described by Justice Powell in *Branzburg*," the *Carey* Court affirmed an order requiring disclosure and described itself as issuing a far narrower holding. *Zerilli*, 656 F.2d at 712. The *Carey* Court explicitly stated:

> What we have decided—and all that we have decided—is that the District Court cannot, on the limited record before us, be said to have abused the discretion vested in it to grant or to deny a motion to compel discovery under Rule 37. We have rejected the only contention made to us by appellant, and that was the pre-*Branzburg* claim that there either is, or should be, an absolute First Amendment barrier to the compelled disclosure by a newsman of his confidential sources under any circumstances. That was not, in our view, the law before *Branzburg*, and it is certainly not the law after, in either civil or criminal proceedings.

492 F.2d at 639.

B. The Supreme Court's Decision in Branzburg *Rejected Any First Amendment Reporter's Privilege*

If, however, either *Zerilli* or *Carey* hold that "that there is a reporter's privilege" under the First Amendment in a civil case, that conclusion, as Judge Posner has very recently observed, is "rather surprising[] in light of *Branzburg*." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). In *Branzburg*, a five-member majority of the Court—including Justice Powell, who joined the majority opinion authored by Justice White and also issued a separate concurring

opinion[15]—declined "to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." 408 U.S. at 690. *Branzburg*'s holding relied upon the long-standing rule that journalists have "'no special immunity from the application of general laws,'" even if civil or criminal laws of general applicability incidentally burden newsgathering activities. 408 U.S. at 682-83 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)). Certainly, it seems plain that "[a] discovery demand is fairly seen in this category" of laws of general applicability, for "[u]ltimately a grand jury subpoena and a discovery subpoena are justified by the notion that the public has the right to know every person's evidence." *State v. Cline*, 693 N.E.2d 1, 11 (Ind. 1998).

Most notably, the *Branzburg* Court did not find a First Amendment privilege and a compelling interest confined to criminal proceedings that would overcome it. Quite the contrary—relying on a civil defamation case, the Court flatly rejected the very existence of the privilege at all, *Branzburg*, 408 U.S. at 686 (citing *Garland v.*

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[15] As this Court recently made clear, Justice Powell's concurring opinion is not somehow the controlling decision in *Branzburg*, and "Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent." *Miller*, 2005 U.S. App. LEXIS 2494, at *19-*21, 2005 WL 350745, at *7.

Torre, 259 F.2d 545 (2d Cir. 1958) (Stewart, J.),[16] ultimately rejecting the argument that a "burden on news gathering ... make[s] compelled testimony from newsmen constitutionally suspect and ... require[s] a privileged position for them." *Branzburg*, 408 U.S. at 682. The *Branzburg* Court further repudiated any suggestion that a qualified reporter's privilege existed at common law. *Id.* at 683, 695.

Thus, *Branzburg* "flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege." *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004); *accord Miller*, 2005 U.S. App. LEXIS 2494, at *15, 2005 WL 350745, at *5; *id.*, 2005 U.S. App. LEXIS 2494, at *41, 2005 WL 350745, at *13 (Sentelle, J., concurring).

C. **Branzburg*'s Holding Extends Perforce to This Privacy Act Case***

The Court's *Branzburg* decision, though issued in connection with grand jury subpoenas, clearly speaks to the applicability or even existence of the qualified First Amendment reporter's privilege upon which the Contemnors rely in

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[16] In *Garland*, despite the civil nature of the case, the Second Circuit observed that the "concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press." 259 F.2d at 548. "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice." *Id.* at 549.

this Privacy Act case. Indeed, no federal case outside this Circuit[17] appears to have ever accepted that the protections of the Privacy Act can be effectively overridden by a privilege of dubious origin that was decisively rejected by the Supreme Court in *Branzburg* and that has been repeatedly rejected by Congress. This Circuit's courts thus appear to be alone in even suggesting this protection, however indirectly established, to the federal government when it is violating its own laws designed to protect the general public.

As Justice Holmes observed almost a century ago, "the character of every act depends upon the circumstances in which it is done," such that, in general, where the First Amendment is concerned, "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919). The violations of Dr. Lee's privacy interests were perpetrated in the course of a federal criminal investigation with the clear purpose of putting improper pressure on the target of that investigation. Dr. Lee, in fact, has alleged that government actors engaged in criminal Privacy Act violations, but, of course, Dr. Lee has no

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[17] Research reveals only three published cases—*Zerilli* and two district court decisions following it—indicating the existence of a qualified reporter's privilege in Privacy Act cases. *Zerilli v. Smith*, 656 F.2d at 706, 710-12; *Tripp v. DOD*, 284 F. Supp. 2d 50, 52, 54-55 (D.D.C. 2003); *Alexander v. FBI*, 186 F.R.D. 71, 78 (D.D.C. 1998).

authority to empanel a grand jury or issue a criminal indictment for a criminal Privacy Act offense and the government's own investigation has failed to produce any result that would satisfy the law. And, as with criminals from whom a grand jury or a criminal trial jury cannot reasonably expect to obtain truthful, inculpatory information, Dr. Lee can likewise entertain no serious hope that the culpable government actors in this case, who sought to use Contemnors as their megaphone while remaining hidden from view, will reveal themselves of their own accord.

Whatever may be the normal limits of the concerns with the public's right to know every person's evidence in an ordinary civil case, and notwithstanding *Zerilli*'s discussion of a qualified First Amendment privilege in the context of a Privacy Act case, courts should observe similar regard for the production of "every person's evidence" of unlawful government conduct in a Privacy Act case—or, more precisely, the evidence of the reporters who are the only persons (other than the culpable government agents) directly privy to the otherwise likely "unprovable" illegal leak of federally-protected privacy interests. *Miller*, 2005 U.S. App. LEXIS 2494, at *104, 2005 WL 350745, at *31 (Tatel, J., concurring in the judgment). Thus, while this case involves a private citizen challenging the federal government, whereas the criminal and grand jury cases involve actions by the federal government against criminals, Dr. Lee's Privacy Act case gives rise to the same concerns that the public at large has in ensuring that illegal and criminal

activity that threatens the public interest—whether committed by criminals or by agents of the government that usually prosecutes them—does not remain hidden from view and beyond accountability in our court system. *Cf. id.*, 2005 U.S. App. LEXIS 2494, at *122-*123, 2005 WL 350745, at *37 (Tatel, J., concurring in the judgment); *accord id.*, 2005 U.S. App. LEXIS 2494, at *16-*17, 2005 WL 350745, at *6 (quoting *Branzburg*, 408 U.S. at 693, 695).

Moreover, the First Amendment interests the Contemnors invoke simply do not come into play in a Privacy Act case. The First Amendment notion at work here is that, without assurance of confidentiality, the public's "right to know" will be infringed. Putting aside that this very argument has been rejected, *Branzburg*, 408 U.S. at 693, it is especially ill-suited here. This is not a circumstance in which the reporter or the confidential source can make any valid claim that the news gathering in itself is protected.

Rather, there is no "public right to know" information affirmatively protected from disclosure by a federal law, which is unchallenged in substance here, that makes dissemination to a single member of the public (the very act over which the Contemnors claim protection) a federal crime. The press itself has no more "right" to publish such information to the world than it does to knowingly repeat false accusations that a person suffers from a loathsome disease. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Notwithstanding all of this, Contemnors seek a First Amendment privilege that is effectively absolute—a position that no court accepts—and amounts to an immunity from generally applicable law that, to borrow Justice Holmes's famous phrase, not even "[t]he most stringent protection" of the First Amendment would afford. *Schenck*, 249 U.S. at 52. In this regard, the Supreme Court has refused to "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it." *Branzburg*, 408 U.S. at 692.

D. Subsequent Supreme Court Decisions Confirm that Branzburg*'s Rejection of a First Amendment Reporter's Privilege is not Limited to Grand Jury Investigations*

Regardless of how panels in 1974 and 1981 may have interpreted *Branzburg*'s scope, subsequent Supreme Court decisions have made clear that *Branzburg* is not so limited.[18] In a 1990 decision concerning the University of Pennsylvania's refusal to turn over peer review materials subject to a subpoena issued by the EEOC in a gender discrimination investigation, the unanimous Supreme Court stated unequivocally that, "[t]he case we decide today in many respects is similar to *Branzburg*," wherein "the Court rejected the notion that under

the First Amendment a reporter could not be required to appear or *to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary*." *University of Pa.*, 493 U.S. at 201 (emphasis added). The Court noted that *Branzburg* rejected a First Amendment argument "that requiring disclosure of information collected in confidence would inhibit the free flow of information in contravention of First Amendment principles," stating that "'the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.'" *Id.* (quoting *Branzburg*, 408 U.S. at 682).

One year later, in a civil case involving a claim of infringement on the same claimed First Amendment privilege, the Supreme Court clearly held that a newspaper was not immune under the First Amendment from a state common-law suit for breach of contract brought on a theory of promissory estoppel by a source whom the paper named after he provided information in exchange for confidentiality. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

The *Cohen* Court reaffirmed *Branzburg*'s holdings that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and

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[18] "The Supreme Court has not overruled *Branzburg*." *Miller*, 2005 U.S. App. LEXIS 2494, at *18,

report the news" and that "'the publisher of a newspaper has no special immunity from the application of general laws'" and "'has no special privilege to invade the rights and liberties of others.'" *Id.* at 669, 670 (quoting *Associated Press*, 301 U.S. at 132-33). The Court observed that "it is not at all clear that respondents obtained Cohen's name 'lawfully' in this case, at least for purposes of publishing it," where the journalists "obtained Cohen's name only by making a promise that they did not honor." *Id.* at 671. The *Cohen* Court further rejected the suggestion "that the press should not be subject to any law, including copyright law for example, which in any fashion or to any degree limits or restricts the press' right to report truthful information" and held that "[t]he First Amendment does not grant the press such limitless protection." *Id.*

Thus, whatever questions may present themselves regarding the correctness of this Court's indication that a qualified First Amendment reporter's privilege may exist in *Carey* in 1974 and *Branzburg* in 1981, "subsequent Supreme Court decisions discussing *Branzburg* give no reason to believe the [Supreme] Court meant anything other than what it said: no qualified reporter's privilege exists under the First Amendment." *State v. Cline*, 693 N.E.2d at 13.

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*24, 2005 WL 350745, at *6, *8.

"[T]he decisions construing *Branzburg* to recognize a qualified reporter's privilege in our view have misread Supreme Court precedent." *Id.* at 13. Indeed, even before these recent Supreme Court decisions, the Sixth Circuit "decline[d] to join some other circuit courts, to the extent that they have ... adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority," noting that Justice Powell's "use of the term 'privilege'" and discussion of a "balancing of interests should not [] be elevated on the basis of semantical confusion, to the status of a First Amendment constitutional privilege." *Storer Communications, Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580, 584, 586 (6th Cir. 1987) (citing, *inter alia*, *Zerilli*, 656 F.2d 705).[19]

As the Seventh Circuit has concluded, the reporters' legitimate concerns for unfettered access can be better and more fully addressed within the sound discretion of the district court and the normal requirement that non-party discovery requests be reasonable under the circumstances. *McKevitt*, 339 F.3d at 533.

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[19] At least one Court of Appeals decision has acknowledged that the *University of Pa.* and *Cohen* decisions may cast doubt on the continued vitality of its Circuit's own post-*Branzburg* decisions recognizing a qualified First Amendment reporter's privilege. *United States v. Cutler*, 6 F.3d 67, 71-73 (2d Cir. 1993).

III. THE ARGUMENT FOR CREATION OF A NEW COMMON LAW PRIVILEGE IS MERITLESS IN THE CONTEXT OF UNLAWFUL DISSEMINATION OF PROTECTED PRIVACY RIGHTS.

Contemnors and their supporting *amici*, understandably concerned that no qualified First Amendment privilege actually exists or applies, ask this Court to recognize for the first time a federal common law qualified reporters' privilege under Rule 501.

Contemnors cannot dispute that, like any testimonial privilege, the requested reporters' privilege—already expressly rejected as both a common law and constitutional privilege by the Supreme Court[20]—is disfavored because it would by its very nature hinder and impede the search for the truth.[21] Even in a civil context, "federal courts should not create evidentiary privileges lightly, 'inasmuch as testimonial exclusionary rules and privileges contravene the fundamental principle that the public ... has a right to every man's evidence.'" *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993) (quoting *University of Pa.*, 493 U.S. at 189) (internal quotation marks omitted). Moreover, this Court has itself recognized that privileges—even those already recognized—"should be narrowly construed," particularly where, as

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[20] *Branzburg*, 408 U.S. at 685, 688; *see also Miller*, 2005 U.S. App. LEXIS 2494, at *38-*41, 2005 WL 350745, at *13 (Sentelle, J., concurring).

here, "the public's ability to know how its government is being conducted is at stake." *In re Sealed Case*, 121 F.3d 729, 749 (D.C. Cir. 1997).

Furthermore, this particular privilege has been rejected in this country for over 200 years and repeatedly rebuffed over the last several decades by the Supreme Court, Congress, and the Federal Rules Committees. 23 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE Evid. § 5426 at 747 (2004); *Branzburg*, 408 U.S. at 698-99. Courts should be "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself," where "the balancing of conflicting interests of this type is particularly a legislative function." *University of Pa.*, 493 U.S. at 189.

Furthermore, given the requirement that all discovery from non-parties be reasonable and may be quashed on motion, Contemnors have not shown any such need, much less a "clear and convincing one." Fed. R. Civ. P. 26(c); 45(c)(3); *Seattle Times v. Rhinehart*, 467 U.S. 20, 36 (1984); *In re Sealed Case*, 148 F.3d 1073, 1078 (D.C. Cir. 1998).

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[21] *Pierce County v. Guillen*, 537 U.S. 129, 144 (2003); *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989).

Whatever state courts and legislatures may decide about state laws, this Court is not at liberty to overrule the Supreme Court's *Branzburg* decision, as recently reaffirmed in *University of Pa.* and *Cohen*, by means of Rule 501.[22]

Thus, Contemnors and *amici* fall far short of meeting the strict requirement that the "party seeking judicial recognition of a new evidentiary privilege under Rule 501 demonstrate with a high degree of clarity and certainty that the proposed privilege," while "permitting a refusal to testify," "will effectively advance" "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth," *In re Sealed Case*, 148 F.3d at 1076, and "promotes sufficiently important interests to outweigh the need for probative evidence," *In re Lindsey*, 148 F.3d 1100, 1104 (D.C. Cir. 1998). To the contrary, "it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Branzburg*, 408 U.S. at 696.

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[22] *See In re Grand Jury Proceedings*, 5 F.3d 397, 403 n.3 (9th Cir. 1993) ("We discern nothing in the text of Rule 501, however, that sanctions the creation of privileges by federal courts in contradiction of the Supreme Court's mandate."); *Miller*, 2005 U.S. App. LEXIS 2494, at *41, *43-*44, 2005 WL 350745, at *13 (Sentelle, J., concurring) (noting that, "[b]ecause the Supreme Court rejected the common law privilege, I think it would be at least presumptuous if not overreaching for us to now adopt the privilege" and that "it remains the prerogative of the Supreme Court rather than inferior federal tribunals to determine whether these changes are sufficient to warrant an overruling of the Court's rejection of such a common law privilege in *Branzburg*").

This Court has correctly recognized the Supreme Court's guidance that "considerable reluctance should greet any attempt—as is made here—to fashion a privilege lacking in historical or statutory basis." *Linde*, 5 F.3d at 1514. Reluctance followed by rejection should again be the order of the day for Contemnors' and *amici*'s Rule 501 request.

In any event, this Court need not consider, much less create, a new federal common law privilege under Fed. R. Evid. 501, as proposed by Contemnors and *amici*.[23] This Court recently made clear that any such created privilege would not be absolute. *Miller*, 2005 U.S. App. LEXIS 2494, at *2, *25, 2005 WL 350745, at *1, *9. Thus, Contemnors' and *amici*'s sought-after privilege would not cover material unlawfully-obtained from the government or unlawful dissemination of statutorily protected federal privacy rights, such that "the common law privilege, even if one exists, does not warrant reversal." *Miller*, 2005 U.S. App. LEXIS 2494, at *25, 2005 WL 350745, at *9.

IV. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT HELD EACH JOURNALIST IN CONTEMPT

In addition to, and separate from, their combined efforts to argue that the qualified "reporter's" privilege should apply in this case, each of the Contemnors

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[23] Contemnors do not seriously press for the protection of a federal common-law privilege. In fact, they relegate their discussion of such a imagined privilege to footnotes devoid of any analysis. Gerth/Risen Br. at 20 n.4; Hebert/Drogin Br. at 21 n.9; Thomas Br. at 11 n.5.

(with the exception of Contemnor Risen[24]) argues the District Court's contempt order, even if found to be valid and constitutional by this Court, should be vacated or reversed as to him. *See, e.g.*, Risen/Gerth Br. at 42-48 (arguing for reversal as to Gerth); Drogin/Hebert Br. at 17-20 (arguing for vacatur); Thomas Br. at 24. These arguments cannot support vacatur of the District Court's contempt order, which this Court reviews only for abuse of discretion. *Food Lion v. United Food & Commer. Workers Int'l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997).

At the August 18, 2004 hearing on the Order to Show Cause, each journalist was given the opportunity to argue why he should not be held in contempt. The District Court, after considering all relevant pleadings and deposition transcripts, found that each of the journalists violated its Order to Show Cause and, therefore, held each journalist in contempt for doing so. Unless this Court determines that the District Court's factual determination was in error, the Contemnors cannot prevail in their individual claims that the contempt order should not apply to them.

A. The Court Did Not Abuse Its Discretion or Commit Clear Error With Respect To Contemnor Gerth

Contemnor Gerth raises what amounts to a factual challenge to the District Court's conclusion that his claim of ignorance and lack of "direct" knowledge was

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[24] At the August 18, 2004 hearing on the Order to Show Cause, Mr. Risen conceded that he "did refuse to respond to certain questions in violation of [the Order to Show Cause]." August 2004 Tr. 45:15-16; *see also id.* at 45:20-46:1, JA-2265-2266.

implausible. Contemnor Gerth claims that, when he asserted the privilege during his deposition, in response to questions about his confidential sources for reporting on the "Wen Ho Lee" matter, this assertion of privilege did not violate the District Court's order because, "[i]n my mind, this included the reporting I did on the Peter Lee investigation and the articles ... relating to both the Peter Lee case and the Wen Ho Lee case." Risen/Gerth Br. at 46, *quoting* Gerth Aff. at JA-1958-1959; *see also* August 2004 Hearing Tr. 37:2-41:12; JA-2257-2261 (explaining the confusion between the "Wen Ho Lee case" and the "Peter Lee case"). Contemnor Gerth also claims that he does not know the identify of any the confidential sources he and Contemnor Risen relied upon when co-writing the articles at issue in this case.

The District Court considered and rejected Contemnor Gerth's arguments as "not credible" and "strain[ing] credulity." Contempt Order at 3, 4; JA-2277-2278. It is the District Court's duty and expertise, as the court living with the details and facts of the case, to determine credibility issues such as this.

Contemnor Gerth's argument to this Court seems to be premised on a strained parsing of the meaning of the District Court's own contempt order, and appears to be asking this Court to substitute its analysis of the facts and evaluation of Contemnor Gerth's credibility for that of the District Court's. Such a request is

wholly inappropriate and does not, in any event, demonstrate any abuse of discretion, much less clear error.[25]

B. Contemnors Hebert and Drogin's Claim For Vacatur Must Be Rejected

Contemnors Hebert and Drogin argue only that the order holding them in contempt lacks sufficient detail as to each of them. Their own brief demonstrates otherwise, and, in any case, the transcript of the August 18, 2004 hearing on the Order to Show Cause ("August 2004 Hearing"), along with the pleadings submitted in support and opposition thereto, demonstrate that the District Court considered the arguments set forth by Contemnors Drogin and Hebert and rejected those arguments by issuing the contempt order itself. Like the claims of their fellow Contemnor Gerth, Contemnors Hebert and Drogin are guilty of "straining credulity" by claiming here that the District Court did not adequately consider his individual circumstances and arguments. Contempt Order at 8-10 & nn.8-9; JA-2282-2284; *see also* August 18, 2004 Hearing Tr. 21:11-36:13; JA-2241-2256 (presentation of Hebert's and Drogin's arguments for no violation of the Order to Show Cause).

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[25] *See United States v. Pollard*, 959 F.2d 1011, 1024 (D.C. Cir. 1992); *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996).

Further, neither Contemnor proffered any legal authority in support of his assertion that the District Court is required to meet a certain standard of individual specificity in its consideration and explanation of each Contemnor's conduct. Contemnors Hebert and Drogin cite the *Allee* case, which, while not controlling in this Circuit, is inapposite because it involved a district court that failed to resolve a factual issue on which a challenge to contempt order was based. *United States v. Allee*, 888 F.2d 208, 213-14 (1st Cir. 1989). Here, the District Court considered the individual Contemnor's circumstances and addressed their individual claims in its contempt order. Therefore, the *Confederate Memorial Association* and *Teamsters* cases cited by Contemnors Hebert and Drogin are also inapplicable, because the District Court in the instant case did explain its reasons for imposing sanctions. *Cf. Confederate Mem'l Ass'n v. Hines*, 995 F.2d 295 (D.C. Cir. 1993); *United States v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 948 F.2d 1338 (2d Cir. 1991).

Contemnors Hebert and Drogin thus cannot satisfy the heavy burden of showing clear error as to the District Court's consideration of their individual circumstances.

C. The Court Did Not Abuse Its Discretion With Respect to Contemnor Thomas

Contemnor Thomas also does not deny that he defied the District Court's instruction to reveal his confidential sources directly relating to Dr. Lee, but he

asserts error in the order being enforced as to him, based on the argument that he was not the first journalist to publish certain information. Contemnor Thomas also argues that his invocation of the privilege was proper, based on his own legal conclusion that the information sought was not sufficiently "central" to Dr. Lee's claims. Thomas Br. at 23. Contemnor Thomas further reiterates his argument before the District Court that Dr. Lee did not exhaust "reasonable alternative sources to determine the identity of Mr. Thomas's sources." *Id.*

It is not clear why Contemnor Thomas feels his legal judgment should supplant the judgment that of the District Court's, especially in light of the court's thorough consideration of all 420 written discovery requests and all 20 depositions of government witnesses. JA-18 (Aug. 27, 2003 Motion Hrg. Minute Order, Docket Entry #101); Aug. 27, 2003 Hearing Tr. at 3:16-4:24; JSA-2317-2318. Moreover, the District Court is best-suited to evaluate Dr. Lee's discovery efforts. At the August 18, 2004 hearing, the court demonstrated a clear and detailed understanding of Contemnor Thomas's numerous violations of the Order to Show Cause, by inquiring about the answers to specific deposition questions. August 18, 2004 Hearing Tr. 17:2-19; JA-2237.

Contemnor Thomas argues that his violations of the District Court's order should be excused, and that the district abused its discretion, simply because Mr. Thomas views himself as a "minor player compared to some of the other

reporters." Thomas Br. at 24. However, Contemnor Thomas provides no legal authority in support of that argument, and whether or not Contemnor Thomas views himself as a "minor player" is irrelevant. The District Court thoroughly reviewed the entire record, including all discovery requests and deposition transcripts, before determining that the reporters' truthful testimony was a necessary last resort. In furtherance of his self-serving disagreement with that determination, Contemnor Thomas has not explained, nor can he prevail in any attempt to explain, why that thorough decision-making process amounts to an abuse of discretion.

Additionally, Contemnor Thomas also claims that his violations should be excused because any information he possesses about government sources is merely "cumulative" of the other Contemnors' confidential sources. This argument must fail. First, this Court very recently rejected a similar argument based on a reporter's failure to report some of the information he received. *Miller*, 2005 U.S. App. LEXIS 2494, at *122, 2005 WL 350745, at *37 (Tatel, J., concurring in the judgment). Just as a reporter cannot avoid his testimonial obligations based on what he did or did not do with the information, neither can Contemnor Thomas avoid his obligation to testify regarding information that he has simply because other reporters have it as well.

Second, identifying the sources for these articles can hardly be deemed cumulative. To date, neither the government nor any of the contemnor journalists have identified a single government source for these illegal leaks. Moreover, Dr. Lee has no way of knowing, without obtaining the truthful testimony the District Court required Contemnor Thomas and the other journalists to provide, how many different government sources were illegally leaking information to the press in violation of the Privacy Act. Therefore, there is simply no way to know, without this testimony, whether or not Contemnor Thomas's sources are, in fact, cumulative.

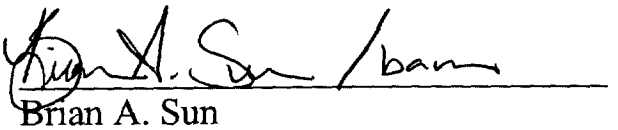
Furthermore, if this Court were to abide by Contemnor Thomas's instructions for how to proceed, the result would be an absurd and highly disruptive process by which defiant contemnors would control the course of proceedings in the District Court, based on their own proffers of cumulative sourcing.

For these reasons, the Court should reject the claims of all the individual Contemnors as meritless and failing to demonstrate any abuse of discretion or clear error.

CONCLUSION

The District Court's Order should be affirmed.

Respectfully submitted,



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