Case No. 04-5322
Consolidated with Case Nos. 04-5301(L), 04-5302, 04-5321, 04-5323

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WEN HO LEE,

Plaintiff-Appellee,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants-Appellees,

BOB DROGIN,

Appellant.

PETITION FOR PANEL REHEARING AND/OR PETITION FOR REHEARING EN BANC OF APPELLANT BOB DROGIN

Lee Levine
Nathan E. Siegel
Chad R. Bowman
LEVINE SULLIVAN
KOCH & SCHULZ, L.L.P.
1050 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100

Counsel for Appellant Bob Drogin

Of Counsel:

Karlene W. Goller
LOS ANGELES TIMES
202 West First Street
Los Angeles, California 90012
(213) 237-3760

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STATEMENT PURSUANT TO F.R.A.P. 40(A)(2) & 35(B)(1)

In the wake of this panel's decision, Appellant Bob Drogin of *The Los Angeles Times* remains in contempt of court, apparently for declining to answer a single question that does not concern information protected by the Privacy Act and was not cited by the district court as a basis for its Contempt Order. Drogin seeks rehearing because the panel reached this result while failing to address the two principal arguments he raised in his appeal. F.R.A.P. 40(a)(2). Specifically, in both the contempt proceedings below and on appeal, Drogin argued that it would be improper to hold him in contempt for declining to answer this question because the district's court's findings about the journalist's privilege, which preceded his deposition, cannot reasonably be applied to his conduct. Respectfully, Drogin has a right to have this defense addressed on its merits by this Court.

Drogin's case also warrants rehearing by the panel because the Court similarly failed to address his showing that the district court declined to make any findings regarding the journalist's privilege that apply specifically to him. The fact that this Court's Opinion focused principally on a single question that is never mentioned in any of the Orders below reinforces the significance of this point. There is a real possibility that the order holding Drogin in contempt was affirmed by this Court for conduct that the district court believed was not contemptuous. As a result, we respectfully submit that fundamental fairness requires that the Contempt Order be vacated and remanded so that the district court can clarify why Drogin's assertions of privilege were rejected and why it is a proper exercise of that court's discretion to hold him in contempt.

Finally, Drogin's case merits rehearing *en banc* for the reasons stated in Appellant H. Josef Hebert's Petition for Panel Rehearing and/or Rehearing *En Banc*. Rather than repeat those arguments here, Drogin hereby incorporates pages 5-15 of Hebert's Petition by this reference. F.R.A.P. 35(b)(1).[1]

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[1] Drogin recognizes that different considerations govern petitions for panel rehearing and rehearing *en banc* and has organized this Petition accordingly. However, should rehearing be

STATEMENT OF FACTS

Bob Drogin is a Pulitzer-Prize winning journalist and the *Los Angeles Times*' national security correspondent. After the Department of Energy announced that Dr. Wen Ho Lee had been terminated from his employment at Los Alamos, Drogin was assigned to the story because his newspaper viewed it as part of a larger issue about national security. The articles Drogin wrote were not solely, or in many cases even principally, about Dr. Lee. Rather, they focused extensively on the broader political and diplomatic controversy. A-420-47.

The Proceedings in the District Court

1. The District Court's Discovery Order

On October 28, 2002, Drogin moved to quash the deposition subpoena served on him, invoking a reporter's privilege under both the First Amendment and federal common law. A-16. The district court not only denied Drogin's motion, but affirmatively ordered all of the reporters involved in these appeals to disclose all sources of information about Wen Ho Lee even though no one, including the Plaintiff, had requested such an order (the "Discovery Order"). A-1257. The district court's lengthy memorandum opinion contained no facts or findings about Drogin at all, never even mentioning his name beyond a footnote identifying him as a party. At that point, the only facts potentially available to the district court concerning Drogin, beyond his own declaration, were three articles that Plaintiff referenced in opposing his motion to quash.

2. Drogin's Deposition

Drogin's subsequent deposition, however, made clear that whatever information he possesses about any confidential source is far more limited than his articles might suggest. As this Court noted, Drogin invoked the reporter's privilege only eight times at his deposition (each

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granted either by the panel or by the Court *en banc*, Drogin respectfully requests that all of the questions he raises herein be addressed.

time asserting both a constitutional and common-law privilege[2]) and testified that he simply did not remember the sources for virtually all of the anonymous information contained in his news articles. Op. at 17. Moreover, as this Court's Opinion appears to acknowledge, almost all of the questions that Drogin declined to answer were broad ones about issues like bifurcated interviews that did not ask specifically for sources of information about Wen Ho Lee and therefore were not responsive to the district court's Discovery Order. *Id.*; *see* A-1257 (ordering journalists to identify confidential sources of "information [provided to them] directly about Wen Ho Lee").

As Drogin has consistently maintained and this Court's Opinion appears to have recognized, the only question he declined to answer that sought information specifically about Dr. Lee asked for the identity of a source who offered the following prediction in an April 29, 1999 *Los Angeles Times* article:

> The FBI plans to arrest suspected spy Wen Ho Lee on charges related to the transfer to China of top-secret nuclear weapons computer programs and data into an insecure computer over a 12-year period, a senior Clinton Administration official said Wednesday.
>
> The official said the FBI is ["]reasonably close["] to making a case and expects to arrest Lee within 10 days on charges of unauthorized disclosure of highly classified material.

A-1749-50 at 67:18-23, 68:6-9; A-441. In fact, the "senior official's" prediction proved to be wrong. Dr. Lee was not arrested for another seven months, nor was he charged with disclosing any data to China. Indeed, Drogin's own reporting established that this prediction constituted one source's opinion and he also prominently quoted a different, on-the-record source who vigorously disagreed with it. A-444.

[2] When first asserting a testimonial privilege at his deposition, Mr. Drogin respectfully declined to answer a specific question based on the First Amendment and federal common law. A-1696 at 14:21-24. Counsel subsequently agreed that, should Mr. Drogin decline to answer additional questions, he would be doing so on the same grounds. A-1697 at 15:1-14.

3. Drogin's Defense to Contempt and the District Court's Contempt Order

In the contempt proceedings, Drogin maintained that the district court's conclusions about the reporter's privilege, set forth in its Discovery Order, had not been borne out by the actual questions to which he asserted a privilege at his deposition. In particular, Drogin pointed out that Lee had made no showing that the source's prediction involved disclosure of any "record" and therefore Drogin's answer could not be of central relevance to Lee's Privacy Act suit. Drogin Response to Order to Show Cause ("Drogin Show-Cause Response"), *Lee v. DOJ*, No. 99-03380 (D.D.C. July 30, 2004) at 18-21. Accordingly, Drogin argued that the district court was obliged to consider the deposition record that was unavailable when the Discovery Order was issued and decline to hold him in civil contempt, since it would be unjust to coerce him to answer questions that could not possibly go to the heart of a Privacy Act case and to which the First Amendment and common-law reporter's privilege properly applied. *Id.* at 11-16.[3]

The district court acknowledged that Drogin raised this defense, but it proceeded to hold him in contempt without addressing it. A-2283-84. In its Contempt Order, the district court cited only three questions that Drogin declined to answer, but did *not* cite the question about Lee's possible arrest. A-2283. Because Drogin had argued that the question went beyond the scope of the court's Discovery Order and was irrelevant to a Privacy Act case in any event, it is quite possible that the district court did not believe that question formed an appropriate basis to hold him in contempt. As to the three questions that the district court did cite, two of them were not even instances in which Drogin invoked a privilege. A-1698-1700 at 16:2-18:18 (clarifying broad question); A-1786 at 109:2-25 (clarifying prior testimony); *see generally* Brief of Appellants Hebert and Drogin ("Opening Brief") at 8-10. And the third asked for confidential source information (concerning bifurcated interviews) that went well beyond any information

[3] Indeed, in the district court, Drogin (along with Appellant Hebert) also brought, in the alternative, a formal motion to modify or dissolve the Discovery Order, in the event the district court deemed such a motion to be a necessary predicate for the arguments they raised. The district court never addressed that motion.

provided to Drogin *about Dr. Lee*, the only questions that the district court had ordered the reporters to answer in the first place. A-1696 at 14:15-24 (asking about "any interviews" with Secretary Richardson that were partially off the record in connection with Drogin's reporting, without limiting question to "information [provided to him] directly about Wen Ho Lee" pursuant to the Discovery Order).

Drogin's Appeal

1. Drogin's Two Primary Arguments on Appeal

In his appeal, the principal contention asserted by Drogin (along with Appellant Hebert) regarding the merits of his case was once again that "the information [he and Hebert] declined to provide *at their depositions* is protected from compelled disclosure as a matter of law." Opening Brief at 15 (emphasis added). Both Drogin and Hebert also argued that the district court failed to make any findings specific to them sufficient to permit appellate review of its privilege rulings. *Id*. at 17-20.

2. The Panel's Decision

The panel's opinion, however, did not address either of these arguments. Rather, this Court characterized all of the journalists' appeals as raising only two questions: the validity of the privilege ruling made in the district court's underlying Discovery Order and the validity of the factual finding in the Contempt Order that each journalist had violated the Discovery Order. With regard to the Discovery Order, this Court simply noted that Drogin wrote articles in March 1999 concerning Dr. Lee. Op. at 4. Yet Drogin's deposition established that he does not recall the identities of any anonymous sources quoted in those articles and he was not held in contempt for declining to answer any questions about those articles. With regard to the Contempt Order, this Court pointed to the question about the prediction of Lee's arrest as evidence that there was "at least one response" in which Drogin "clearly violated the Discovery Order and thus [] was properly held in contempt." Op. at 17. The panel further held that the applicable standard of

review of the district court's privilege determinations was whether the court abused its discretion. Op. at 9-11.

Finally, Drogin expressly asserted in both the district court and on appeal that the reporter's privilege requires more than the application of a two-part test focusing on need and exhaustion of alternative sources. Rather, Drogin (and Hebert) maintained that both the First Amendment and federal common law require a broader balancing test, which asks whether the resolution of the Plaintiff's civil claims constitutes a sufficiently compelling reason to require disclosure of his confidential sources. Drogin Show-Cause Response at 17, 23-24; Opening Brief at 38-42; Reply Brief of Appellants Hebert & Drogin ("Reply Brief") at 14-16.[4] The panel decision did not address that argument, but rather applied the First Amendment privilege as a two-part test. The panel similarly declined to address the common law issue, despite the fact that Drogin (and Hebert) had expressly raised it and Dr. Lee had specifically responded to it in his own briefing. Memorandum of Law in Support of Motion of Non-Party Bob Drogin to Quash Subpoena Issued by Plaintiffs and/or for a Protective Order, *Lee v. DOJ*, No. 99-03380 (D.D.C. July 30, 2004) at 1-3; A-1696-97 at 14:21-24, 15:1-14; Drogin and Hebert Statement of Issues to be Raised on Appeal, No. 1; Opening Brief at 21 n.9; Brief of Appellee Lee at 50-52; Reply Brief at 19-20.[5]

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[4] See also Hebert Response to Order to Show Cause, *Lee v. DOJ*, No. 99-03380 (D.D.C. July 30, 2004) at 1-2 n.1, 9 (incorporating argument in Drogin Show-Cause Response by reference).

[5] *See also* Memorandum in Support of Motion by Non-Party H. Josef Hebert to Quash the Subpoena and/or For a Protective Order, *Lee v. DOJ*, No. 99-03380 (D.D.C. October 28, 2002), at 1, 3, 8 (incorporating by reference arguments at Motion of Non-Party Jeff Gerth to Quash Subpoena and/or for Protective Order (September 23, 2002), at 14-16 ("Federal courts in federal question cases as well have looked to state shield laws in determining the scope of the federal common law privilege arising under Federal Rule of Evidence 501.")). *See also* A-1522 at 7:13-21 (asserting common law privilege).

ARGUMENT

I. The Panel Should Re-Hear this Matter Because it Failed to Address the Principal Defenses Drogin Raised in Both the Contempt Proceedings Below and this Appeal

A. The Panel Erred By Not Addressing Drogin's Principal Argument About the Merits of the Privilege Determination Supporting the Contempt Order

The panel did not address Drogin's argument that, in the wake of his deposition, the district court's privilege rulings could not fairly be applied to any material question he declined to answer and therefore it was improper to hold him in contempt. Rather, the panel expressly limited its review of the Contempt Order to the factual question of whether Drogin and the other reporters had violated the Discovery Order. As a result, the panel never considered the relationship of the reporter's privilege to the actual questions – or more accurately, the single question – for which it appears Drogin was held in contempt. We respectfully submit that the panel erred in not conducting that analysis. Courts have consistently held that, even where it is undisputed that a court order has been violated, an alleged civil contemnor has a right to raise and have considered any circumstances that would make it unjust to continue to apply the underlying order at the point of a contempt proceeding, including the merits of privilege claims asserted in response to specific questions at a deposition.

United States v. Ryan, 402 U.S. 530, 531 (1971), establishes the principle that the scope of review of a contempt order resulting from a witness's assertion of a legal right to decline to answer questions is broad. In that case, the petitioner brought a motion to quash a grand jury subpoena for production of certain records. The district court in *Ryan*, like the district court in this case, denied a motion to quash and also affirmatively ordered the movant to produce certain materials. Holding that the discovery decision was a non-appealable interlocutory order, the Supreme Court nevertheless noted that:

> If, as [Petitioner] claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

Id. at 532. *Ryan* establishes that the material issues in both a contempt proceeding and appellate review of a contempt order are not limited to determining whether a prior order denying a motion to quash has been violated. Rather, they encompass as well any defense that may be raised concerning the merits of applying an underlying discovery order at the point of contempt.

In particular, courts have emphasized that, where relevant circumstances have changed between the issuance of an underlying order and subsequent contempt proceedings, a trial court must consider whether it is appropriate to continue to apply the order before issuing a finding of contempt. *See, e.g.*, *Maggio v. Zeitz*, 333 U.S. 56, 76-77 (1948) (district court at a contempt hearing must consider any "intervening events" between the time Order was issued and disobeyed); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1360 (5th Cir. 1995); *Mercer v. Mitchell*, 908 F.2d 763, 769 (11th Cir. 1990) ("a defendant should *always* be given an opportunity to show that changed circumstances would make holding him in contempt unjust") (emphasis in original). In *Matter of Fula*, 672 F.2d 279 (2d Cir. 1982), the Second Circuit explicitly addressed the question of what defenses may be raised in a contempt proceeding where a party has previously lost a motion to quash a subpoena. The court in *Fula* held that an alleged contemnor always has a right to demonstrate "just cause" for disobeying an order by raising any arguments that could not have been raised in the prior motion to quash. *Id*. at 284. This Court, moreover, has applied an even more relaxed standard, reviewing question-by-question the merits of a First Amendment privilege that was first asserted only after the district court had compelled a witness to answer those same questions. *See In re Possible Violations of 18 USC 371*, 564 F.2d 567 (D.C. Cir. 1977).

Applying these principles to circumstances analogous to those presented by Drogin's case, appellate courts reviewing contempt orders have assessed the merits of privilege assertions made in response to the specific question(s) supporting contempt, even where the efficacy of the privilege had been addressed by the court in broad outline prior to the deposition. In *In re Allen*, 106 F.3d 582, 598-99 (4th Cir. 1997), for example, the Fourth Circuit considered another situation in which a non-party deponent's motion to quash on the grounds of privilege was

denied, he sat for a deposition, and was thereafter held in civil contempt. On appeal, the Fourth Circuit considered the totality of the record, including the significance of the testimony actually given at deposition, in determining that the district court's privilege determinations could not fairly support a finding of contempt. *Id.* at 600-08. Even closer to the circumstances of this case, in *United States v. Doe*, 460 F.2d 328 (1st Cir. 1972), a grand jury witness lost a motion to quash in which he had asserted a First Amendment privilege to protect a confidential source. The witness then answered some questions, but asserted a privilege in response to others and was held in civil contempt. On appeal, the First Circuit evaluated the merits of the privilege issue in the context of the specific questions the witness declined to answer, not merely the merits of the underlying motion to quash. *Id.* at 330-35.

As these cases demonstrate, it was an abuse of discretion for the trial court to fail to address and make any findings in response to Drogin's arguments concerning the application of the privilege to the record actually generated at his deposition and, with respect, it was error for this Court to do the same on its review of the Contempt Order. Drogin's arguments concerning the questions that emerged from his deposition simply could not have been raised in his motion to quash, when no deposition had yet been taken. And, as *Ryan* and the other authorities we have cited demonstrate, civil contempt is a well-established mechanism for seeking appellate review of whether a privilege was properly invoked. *See, e.g.*, 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3902.1 ("nonparty witnesses held in contempt for refusal to comply with a discovery subpoena *duces tecum* obviously must have standing to appeal on claims of privilege"). To hold a witness in contempt for declining to answer a question that is privileged is inconsistent with the purposes of both the contempt mechanism and appellate review in this context.

In this case, moreover, it is particularly appropriate to evaluate the privilege in light of Drogin's deposition testimony because the district court's Discovery Order was issued at an early stage of the litigation and the only question necessarily presented by the motions to quash was

whether depositions should proceed at all. Nevertheless, the district court *sua sponte* issued a broad Discovery Order determining precisely what questions should be answered without the benefit of any testimonial record. The Order on its face was therefore likely to require disclosure of at least some sources of information that did not violate the Privacy Act, since it broadly required disclosure of all information about Wen Ho Lee regardless of its likely relevance to Lee's claims under the Act and regardless of whether he had made any effort, of any kind, to seek alternative sources of such information. Indeed, of the four journalists whose contempt orders were affirmed, Drogin's case most closely resembles Jeff Gerth's in that what emerged from his deposition differed dramatically from what the district court may have assumed he knew on the basis of the news articles in the discovery record at the time the motions to quash were adjudicated.

B. This Court Also Erred By Not Addressing Drogin's Contention that the District Court Failed to Make Any Findings Permitting Appellate Review of His Privilege Arguments

The panel also erred because its reasons for affirming the Contempt Order appear to rely virtually entirely on a question that the district court did not cite as a basis for holding Drogin in contempt. Indeed, given that Drogin argued at some length in the district court that his failure to answer this question did not constitute an appropriate basis to hold him in contempt, it is quite possible that the district court's omission was intentional and reflected its conclusion either that Drogin's answer in this regard was not contemptuous, or that his privilege arguments on this point had merit, or both. In either case, as the Fifth Circuit expressly found, it would be improper for this Court to affirm the district court's exercise of its discretion to hold Drogin in contempt for reasons that the district court may actually have concluded would have been an abuse of its own discretion. *See Crowe v. Smith*, 151 F.3d 217, 240 (5th Cir. 1998) (vacating and remanding criminal contempt judgment because "[f]or this court to affirm inherent power sanctions on grounds other than those expressly chosen by the imposing court would constitute an encroachment upon that court's discretion unwarranted by the concerns for order and necessity

inherent in their use”); *see also Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289-90 (D.C. Cir. 1993) (vacating and remanding for reconsideration where one of two grounds for district court’s finding of civil contempt was in error). Whether the panel decision has produced such an anomalous result, however, is impossible to know due to the absence of any findings by the district court regarding Drogin, particularly with regard to the question that appears to be the basis of this panel’s decision as applied to him. Specifically, with regard to Drogin’s assertion of the First Amendment and common-law reporter’s privileges, the district court never made any findings articulating what aspects of Drogin’s reporting, if any, went “to ‘the heart of the matter.’” *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981) (citation omitted).

On this appeal, therefore, Drogin affirmatively argued that the district court failed to make sufficient findings with regard to his individual case to permit meaningful appellate review. *See Confederate Mem’l Ass’n v. Hines*, 995 F.2d 295 (D.C. Cir. 1993) (vacating award of sanction because district court failed to make reviewable findings concerning each appellant’s conduct individually); *Lyles v. United States*, 759 F.2d 941, 944 (D.C. Cir. 1985) (reversing dismissal of action due to the “insufficiency of the trial judge's factual findings, particularly his failure to address in those findings apparently relevant evidence”); *Defenders of Wildlife, Inc. v. Engangered Species Scientific Auth.*, 659 F.2d 168, 176 (D.C. Cir. 1981) (“The district court's conclusory statement fails to provide us with an adequate basis upon which we can review its ruling”); *Washington Metro. Area Transit Auth. v. Amalgamated Transit Union*, 531 F.2d 617, 620-21 (D.C. Cir. 1976) (vacating contempt citation where trial court failed to make findings about potentially relevant defenses). We respectfully submit that the fact that the rationale of the panel decision and that of the district court are difficult to reconcile further demonstrates the merit of this argument and requires rehearing.

C. This Court Should Either Vacate and Remand the Case to the District Court to Clarify its Order and Address Drogin's Defenses or Vacate His Contempt Order on the Merits

Because the district court abused its discretion by failing to address Drogin's privilege arguments in the contempt phase, and because there is a real possibility that this Court may have affirmed a finding that the district court never made, this Court should vacate the contempt order entered against him and remand the case to the district court to make the necessary findings on both questions. Given that contempt proceedings in the district court are currently underway in connection with another journalist (Walter Pincus of *The Washington Post*), remand is particularly appropriate in these circumstances.

In the event that this Court nonetheless prefers to address Drogin's privilege arguments regarding the prediction question in the first instance, we briefly summarize them here and refer the Court as well to Drogin's prior briefs, which contain a fuller discussion. Opening Brief at 25-27; Reply Brief at 10-11. By this juncture in this litigation, it is essentially undisputed that Drogin's confidential source who incorrectly predicted Lee's arrest was not disclosing the content of any "record" subject to the Privacy Act, but was merely engaging in the not unusual public airing of conflicting opinions. Such expressions of opinion are not "records" within the scope of the Privacy Act. *See FDIC v. Dye*, 642 F.2d 833, 836 n. 5 (5th Cir. 1981); *Fagot v. FDIC*, 584 F. Supp. 1168, 1176 (D.P.R. 1984); *King v. Califano*, 471 F. Supp. 180, 181 (D.D.C. 1979). Moreover, whether such a prediction could in theory be traced back to some document may be readily determined through discovery of the actual records within the government's possession, but Plaintiff has produced no such document. Furthermore, as Judge Randolph himself suggested at oral argument, a document such as an arrest warrant would not be subject to the Act in any event because the Privacy Act does not apply to judicial records. Oral Argument Transcript ("Transcript") at 48:5-7; *see also* 5 U.S.C. § 552a(d)(1); 5 U.S.C. § 551(1)(B); *Standley v. DOJ*, 835 F.2d 216, 218 (9th Cir. 1987).

If there was ever any doubt on this point, the oral argument in this appeal removed it. When the Court asked Lee's counsel how this prediction could relate to the Privacy Act, counsel's answer was that the Act "does allow you to pursue also those government officials which disclose inaccurate information" because "there could well have been a record out there suggesting that the government was *not* ready to indict him." Transcript at 44:13-45:1 (emphasis added). With respect, counsel's answer is incorrect as a matter of law, as Drogin's counsel noted at the argument. *Id.* at 47:25-48:4. The Privacy Act provides a cause of action for failure to maintain accurate records, not for making an inaccurate statement to a reporter that is contradicted by a record. 5 U.S.C. § 552a(g)(1)(C).

Finally, we note that, apart from this question, the only other substantive inquiries to which Drogin invoked a privilege all concerned whether former Secretary of Energy Bill Richardson provided information to him on an "off the record" basis in articles by Drogin in which the Secretary is otherwise quoted. *See* A-1696 at 14:15-24; A-1731 at 49:10-15; A-1740-41 at 58:15-59:3; A-1749 at 67:8-13. One of those questions was cited in the district court's Contempt Order. A-2283. Drogin argued below that all of those questions went beyond the scope of the Discovery Order because they were not limited to information about Lee and his articles on their face establish that Richardson provided much information to Drogin that was not about Lee at all. The panel's focus on the prediction question suggests that it may have agreed with this analysis. Nevertheless, out of an abundance of caution, we briefly address the questions concerning Richardson as well.

Whether or not Secretary Richardson provided information to Drogin "off the record" is not a question that could properly be a basis for overcoming his assertion of privilege at any stage of these proceedings, for two reasons. First, it is undisputed that Richardson granted interview after interview in which he disclosed on the record vast amounts of information that Lee claims is subject to the Privacy Act, so if there is a case to make against Richardson, Lee already has more than enough evidence available to him. Opening Brief at 34-36. Second, when Plaintiff deposed

Richardson, he *never once* asked him whether he spoke off the record to Drogin.[6] As the Eleventh Circuit's recent decision in *Price v. Time, Inc.*, No. 04-13027, 2005 U.S. App. LEXIS 14331, **54-55 (11th Cir. July 15, 2005), demonstrates, where a plaintiff suspects that an identifiable person is a confidential source for a particular reporter he must, at a minimum, pose that specific question to that person under oath before he can claim to have reasonably exhausted alternative sources of information. *See also In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982).

CONCLUSION

With respect, it is fundamentally unfair to hold this reporter in contempt for declining to answer questions that cannot be crucial to the plaintiff's case and which the district court noticeably omitted from its Contempt Order. For all of these reasons and for the reasons discussed in Appellant Hebert's Petition for Panel Rehearing and/or Rehearing *En Banc* and incorporated herein, Drogin respectfully requests that his petition for panel rehearing and/or rehearing *en banc* be granted and that his contempt order be vacated.

Dated: July 28, 2005

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
Attorneys for Appellant Bob Drogin

By: ________________________________

Lee Levine
Nathan E. Siegel
Chad R. Bowman
1050 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100

[6] In response to two generic questions, Richardson did state that he may have at some time spoken on background to reporters generally, but did not believe that he had done so "[i]n the context of the matters involving Dr. Lee and Los Alamos." Deposition of William Richardson (May 15, 2002), at 126:20-127:5. No further questions were asked on the subject.

Of Counsel to Appellant Bob Drogin:

Karlene W. Goller
Los Angeles Times
202 West First Street
Los Angeles, CA 90012
(213) 237-3760

ADDENDUM

(1) OPINION OF THE PANEL

(2) CERTIFICATE OF PARTIES

CERTIFICATE OF PARTIES AND AMICI

Pursuant to Circuit Rule 35(c), Appellant hereby submits that the parties appearing before the district court in this matter (Case No. 1:99 CV 3380 (D.D.C.)) were Wen Ho Lee, the United States Department of Justice, the Federal Bureau of Investigation, and the United States Department of Energy. Third party Bob Drogin (Case No. 04-5322 (D.C. Cir.)) was brought into this case by subpoenas issued by Plaintiff Wen Ho Lee, as were other third parties. No *amici* or intervenors appeared before the district court in either of these related matters.

In this Court, Appellant Drogin's appeal was consolidated with appeals by Jeff Gerth (Case No. 04-5301 (D.C. Cir.)) (the lead case on appeal), James Risen (Case No. 04-5302 (D.C. Cir.)), H. Josef Hebert (Case No. 04-5322 (D.C. Cir.)) and Pierre Thomas (Case No. 04-5322 (D.C. Cir.)). Two separate groups of *amici* appeared in these consolidated cases with the consent of all parties: (1) a consortium of news organizations and reporters' groups, including The Reporters Committee for Freedom of the Press; ABC, Inc.; Advance Publications, Inc.; American Society of Magazine Editors; American Society of Newspaper Editors; Bloomberg, L.P.; Cable News Network LP, LLLP; The California Newspaper Publishers Association; CBS Broadcasting, Inc.; Daily News, L.P.; Dow Jones & Company, Inc.; The E.W. Scripps Company; Fox News Network, L.L.C.; The Hearst Corporation; Magazine Publishers of America; NBC Universal; The Newspaper Association of America; The Newspaper Guild-CWA; Newsweek, Inc.; The Radio-Television News Directors Association; The Society of Professional Journalists; Time Inc.; Tribune Company; U.S. News and World Report, L.P., and *Washington Post* reporter Walter Pincus; and (2) Steven J. Hatfill, M.D., plaintiff in a separate Privacy Act lawsuit against the U.S. Department of Justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 28, 2005, I directed that a true and correct copy of the foregoing papers be served, by first-class mail, to the following:

Brian A. Sun, Esq.
David Schenk, Esq.
Betsy A. Miller, Esq.
JONES DAY
51 Louisiana Avenue, NW
Washington, D.C. 20001-2113

Attorneys for Appellee Wen Ho Lee

Mark B. Stern, Esq.
U.S. Department of Justice Civil Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Attorney for Appellees U.S. Department of Justice, Federal Bureau of Investigation, and U.S. Department of Energy

Floyd Abrams, Esq.
Joel Kurtzberg, Esq.
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, N.Y. 10005

Attorneys for Appellants James Risen and Jeff Gerth

Charles D. Tobin, Esq.
HOLLAND & KNIGHT LLP
2099 Pennsylvania Ave., N.W.
Suite 100
Washington, D.C. 20006

Attorney for Appellant Pierre Thomas

Kevin T. Baine, Esq.
Kevin Hardy, Esq.
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005

Attorneys for Walter Pincus, Amicus Curiae for Appellants

Paul M. Smith, Esq.
Katherine A. Fallow, Esq.
JENNER & BLOCK
601 13th Street, N.W.
Suite 1200 South
Washington, D.C. 20005

Attorneys for Reporters Committee for Freedom of the Press et al., Amicus Curiae for Appellants

Mark A. Grannis, Esq.
HARRIS, WILTSHIRE & GRANNIS
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036

Attorney for Steven J. Hatfill, M.D., Amicus Curiae for Appellee Wen Ho Lee

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Chad R. Bowman