

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

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

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WEN HO LEE,

*Plaintiff-Appellee,*

v.

DEPARTMENT OF JUSTICE, et al.,

*Defendants-Appellees,*

H. JOSEF HEBERT,

*Appellant.*

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**PETITION FOR PANEL REHEARING AND/OR PETITION FOR  
REHEARING EN BANC OF APPELLANT H. JOSEF HEBERT**

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

Appellant H. Josef Hebert's case merits rehearing for several reasons. First, Hebert's case should be reheard by the panel because it did not consider the principal defense he raised regarding the merits of the contempt order at issue. F.R.A.P. 40(a)(2). Like Appellant Bob Drogin, Hebert maintained that it would be unjust to hold him in contempt because the district's court's findings about the journalist's privilege, which preceded his deposition, cannot fairly be applied to the actual questions he declined to answer. The answers to those questions would not likely support Plaintiff's Privacy Act claim and, in Hebert's case, not a single alternative source has ever been asked anything resembling the same questions. Hebert has a right to have this defense considered, but neither the district court nor this Court has ever addressed it.<sup>1</sup>

Second, Hebert's case also warrants rehearing *en banc* because it presents three questions of exceptional importance: (1) whether the First Amendment-based reporter's privilege provides any meaningful protection to journalists in cases involving alleged leaks; (2) whether a reporter's privilege exists under federal common law and provides such protection; and (3) the appropriate standard of review for the district court's application of a constitutionally based legal privilege upon review of a contempt order. F.R.A.P. 35(b)(1). In addition to its inherent significance, the first question should be addressed for two additional reasons: the panel's characterization of the legal standard undergirding the journalist's privilege is inconsistent with this Court's decision in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), and conflicts with authoritative decisions of the First and Fourth Circuits. The second question raises an important question of law that this Court has expressly recognized but not resolved. *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir.), *cert. denied*, 125 S. Ct. 2977 (2005). The panel's decision with regard to the third question also conflicts with authoritative decisions of at least five other Circuits.

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<sup>1</sup> Like Appellant Drogin, Hebert respectfully requests that any or all of the questions he raises be addressed by either the panel or this Court sitting *en banc*.

## STATEMENT OF FACTS

H. Josef Hebert is a veteran reporter for the Associated Press (“AP”) who covers energy and environmental issues. A-2192-93 ¶¶ 3-4. Hebert is not an investigative reporter, but rather works a “beat” for a wire service. Hebert’s principal task is to synthesize and confirm breaking news developments that have already been reported in government press releases, official announcements and reports in other media. To that end, Hebert regularly speaks to confidential sources to confirm that what the government is claiming on the record, or other media are reporting, is accurate. A-2193-94 ¶5. This type of reporting does not utilize confidential sources to obtain “leaks” of previously undisclosed information. Rather, sources are typically used to confirm and explain information that has already been made public through official communications or other media reports. *See also* A-1795-96 ¶ 13.

Hebert first came to report about Wen Ho Lee on the night of March 8, 1999, because the government quite publicly fired him that morning and Hebert’s job was to report what happened. The government issued a press release explaining in considerable detail the reasons for Lee’s termination. A-2166-67. Though the release did not include Lee’s name, it included so many identifying details that some reporters quickly learned his identity and several television networks broadcast his name that evening. Hebert simply took the information that had already been imparted by the press release and the networks, including Lee’s name, and then confirmed its accuracy with his confidential source(s). A-471 ¶ 4; A-1548-49 at 33:17-34:1.

All the questions Hebert declined to answer at his deposition and which the panel found were responsive to the Discovery Order related to just four sentences in two articles, written on the evening of March 8 and the morning of March 9, 1999, respectively. A-1562 at 47:23-25; A-1563 at 48:18-20; A-1571 at 56:19-21; A-1573 at 58:9-10. The gist of Hebert’s reporting was that Lee had been fired, had worked for years at Los Alamos, became a suspect in an espionage investigation in 1996, continued to work for three years after that, and had been shifted to a less sensitive job with his security clearance lifted a few months earlier. A-2282. As undisputed

evidence in the record demonstrates, all of that information had already been reported and was being widely and contemporaneously discussed by government officials on the record in any event. *See* Brief of Appellants Hebert & Drogin (“Opening Brief”) at 43-47. Most significantly, Lee’s name – the only material information about him contained in Hebert’s article that was not contained in the government’s press release – had been reported on the evening news by two national television networks hours before Hebert wrote his first article and *before Hebert asked his confidential source(s)* to confirm the accuracy of those broadcast reports. A-471; A-1548-49 at 33:17-34:1. In short, there was nothing Hebert reported about Wen Ho Lee that, by the time he talked to his confidential source(s), was private by any reasonable definition of the term.

The procedural history of Hebert’s case is similar to that of Appellant Drogin, and we refer the Court to pages 7-11 of Drogin’s Petition for Rehearing, incorporated herein by reference. As with Drogin, the district court’s opinion supporting its Discovery Order contained no facts or findings about Hebert. Hebert’s subsequent deposition made clear that he had no information responsive to the Discovery Order beyond the source(s) discussed above. A-22; *see also* A-2024-28, 2147-49. In the contempt proceedings, Hebert’s principal defense was that the district court’s analysis of the reporter’s privilege in its Discovery Order was not borne out by the actual questions to which he asserted a privilege at his deposition. The district court expressly declined to address the merits of those arguments on the grounds that “[t]he Court rejected similar arguments made by the journalists in its October 9th Order” – the same order that never discussed Hebert at all. A-2283. Hebert renewed these arguments on appeal, *see* Opening Brief at 15, but the panel declined to address them. Indeed, this Court indicated that, as long as it agreed with the district court’s finding that Hebert violated the Discovery Order (an issue Hebert has never contested), then “we must uphold the District Court’s holding of contempt.” Op. at 17. Finally, Hebert also expressly asserted in both the district court and on appeal that the privilege required more than the application of a two-part test and asserted a privilege under federal common law. The panel decision did not address either argument.

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

**A. The Panel Erred By Not Addressing Hebert’s Principal Argument**

The panel did not address Hebert’s principal argument concerning the merits of the district court’s privilege determinations as applied to him at the contempt phase. Rather, the panel asserted that its review of the contempt order was necessarily limited to the question of whether Hebert violated the Discovery Order. For the reasons discussed on pages 7-11 of the Drogin Petition and incorporated herein by reference, that conclusion is in error and, we respectfully submit, the panel should have considered the merits of Hebert’s argument.

**B. This Court Should Either Vacate and Remand the Case to the District Court to Address Hebert’s Defense or Vacate His Contempt Order on the Merits**

Because the district court also failed to address Hebert’s principal defense, this Court should vacate his contempt order and remand the case to that court to address the merits of Hebert’s arguments. In the event that this Court prefers to address those arguments now, we briefly summarize them and refer the Court to Hebert’s prior briefs in this matter, which contain a fuller discussion. *See* Opening Brief at 20-22, 24-25, 27-42; Reply Brief of Appellants Hebert and Drogin (“Reply Brief”) at 8-10, 11-16.

First, the answers to the handful of questions Hebert declined to answer that were responsive to the Discovery Order would not go ““to the heart”” of Plaintiff’s case. *Zerilli*, 656 F.2d at 713 (citation omitted).<sup>2</sup> All leaks do not violate the Privacy Act, and, on this record, there has been no credible showing that Hebert’s sources were “individuals who may have leaked information in violation of the [ ] Act.” *Op.* at 12. An official who merely confirms the accuracy of what the government has already announced publicly or the general public already knows is

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<sup>2</sup> The vast majority of the questions concerning confidential sources posed to Hebert were generic questions that were not limited to disclosures by any of the Defendants about Wen Ho Lee. *See* A-1528 at 13:5-16, A-1534 at 19:2-6, A-1539 at 24:8-22, A-1541 at 26:2-9, A-1548 at 33:1-8, A-1562 at 47:14-22, A-1568 at 53:3-6, A-1568 at 53:19-24, A-1576-77 at 61:21-62:1, A-1585 at 70:7-10, A-1587 at 72:1-4, A-1588 at 73:23-25, A-1590 at 75:9-13, A-1593 at 78:13-17, A-1602 at 87:15-18, A-1613 at 98:17-24, A-1616 at 101:3-7.

not “disclosing” anything under any reasonable definition of that term. *See, e.g., Pilon v. DOJ*, 73 F.3d 1111, 1123 n.10 (D.C. Cir. 1996) (holding only that the initial disclosure of a record violates the Act); *Barry v. DOJ*, 63 F. Supp. 2d 25 (D.D.C. 1999); *King v. Califano*, 471 F. Supp. 180, 181 (D.D.C. 1979); *Restatement (Second) of Torts* § 652D, cmt. b (1977). Hebert’s main point was not that his testimony “would be duplicative” of other reporters, Op. at 12, but that Lee’s attempt to compel it simply fails to meet the *Zerilli* test.

Second, it is undisputed that Lee did not ask a single deposition witness *any* questions concerning Hebert’s confidential sources or propound any written discovery that mentioned Hebert. Quite literally, the following is the only question posed in 21 depositions and hundreds of interrogatories that even arguably touched specifically on the identity of Hebert’s sources:

- Q. Have you ever had any communications with anyone at the Associated Press regarding the Wen Ho Lee case?
- A. No.

A-957 at 171:5-8 (Deposition of Robert Gorence). This reality establishes beyond legitimate dispute that Lee has not attempted to exhaust other potential sources of the information he seeks from Hebert, regardless of his efforts to find leakers in general. Indeed, this issue also independently warrants rehearing *en banc*. This Court should make clear that “exhaustion” requires at a minimum that a litigant seek from alternative sources information pertinent to each reporter it ultimately wishes to subpoena.

## **II. This Court Should Re-Hear the Case En Banc Because the Panel’s Construction of the Legal Definition of the Reporter’s Privilege Is In Error**

Recently, Americans have been fascinated by the revelation of one of the nation’s most famous secrets, the identity of “Deep Throat.” While the complicated motivations of former F.B.I. Deputy Director Mark Felt remain a subject of intense debate, the overwhelming consensus of history is that the country was well-served by the *Washington Post*’s ability credibly to promise confidentiality to him and other government officials who provided information about an investigation the White House sought to sabotage. Yet Deep Throat did exactly what confidential

sources are alleged to have done in this case: reveal “records pertaining to an individual” pertinent to an on-going government investigation that some sources maintained had been deliberately squelched by a self-interested Administration. Op. at 3. Thus, under the rationale of the panel’s decision, no reporter today could make a credible promise of confidentiality to a contemporary Deep Throat, because any modern-day Watergate suspect or even convicted felon could file a Privacy Act suit and compel disclosure of the reporter’s confidential sources.

We respectfully submit that the panel erred in reaching this conclusion, the first time in American history that a federal court of appeals has affirmed a contempt citation to a non-party journalist for declining to reveal a confidential source in a civil proceeding.<sup>3</sup> This case therefore presents the kind of issue of “exceptional public importance” that merits re-hearing *en banc*.

**A. The First Amendment-Based Reporter’s Privilege Requires a Broader Showing Than Simply Need and Exhaustion**

The fundamental reason the panel’s decision has such broad implications lies in its failure to define properly the contours of the reporter’s privilege. The panel proceeded as if the qualified journalist’s privilege recognized in *Zerilli v. Smith* was a two-part test that is automatically overcome upon a showing of need and exhaustion. By definition, this test presupposes that the interest in resolving any civil dispute, no matter how trivial, always outweighs any interest in protecting confidential sources because disclosure will always be required if necessary to resolve the dispute. This test is not really a privilege at all, but simply prioritizes the order of normal discovery, putting reporters at the end of the line. A test that says it is ultimately more important to get to the bottom of a traffic ticket than protect a reporter’s confidential sources is not one that adequately reflects the substantial First Amendment interests recognized by this Court in *Zerilli*.

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<sup>3</sup> See *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Baker v. F&F Inv.*, 470 F.2d 778 (2d Cir. 1972).

In addition, in any case in which the communication from source to reporter is itself the focus of a civil dispute, this test will – more often than not – provide little meaningful protection to reporters. *See Miller*, 397 F.2d at 988 (Tatel, J., concurring). The panel decision appears to suggest that the Supreme Court has affirmatively endorsed this result by equating the facts of this case to what the Court has characterized as “a newsman’s agreement to conceal the criminal conduct of his source.” *Branzburg v. Hayes*, 408 U.S. 665, 692 (1972), *quoted in Op.* at 11. However, this case presents a fundamentally different question than *Branzburg* did.

In addition to the fact that this case is not a criminal matter, *Branzburg* involved reporters who witnessed “criminal conduct” such as violations of narcotics laws and the possession of illegal firearms that had little or no relationship to speech. 408 U.S. at 692. In this case, speech itself is the alleged wrongful activity and consists of government officials providing newsworthy information about a raging political controversy to the citizens who elected them. Moreover, the particular statute at issue is not a narrowly targeted secrecy provision like the law at issue in *Miller*. Rather, it is an extremely broad statute that appears to criminalize vast amounts of government speech about matters of obvious public concern.

Such broad non-disclosure rules, or analogous legal duties applicable to the private sector, raise a very different set of balancing considerations than did the kind of criminal conduct at issue in *Branzburg*. *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (while “[t]he right to remain anonymous may be abused when it shields fraudulent conduct,” it remains the case that, “in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”). One of the defining principles of a functioning democracy is the recognition of the natural tension between two competing values: government’s need at times to act secretly to protect the public welfare and the public’s need to know what its government is doing so that it can engage in meaningful democratic decision-making. Although some confidentiality within government is surely necessary, excessive government secrecy is the

hallmark of authoritarian regimes. And while democracy is meaningless without an informed public, total government transparency would invite paralysis and even self-destruction.

While in the abstract it would be ideal if legislators and regulators could strike the perfect balance between the two, both history and logic suggest otherwise. As a result, the ability of a free press to act as a kind of safety valve preventing the pendulum from swinging too far towards the side of secrecy is a well-established, historically validated principle of American democracy. Indeed, the first confidential source controversy in American history involved an anonymous communication to a newspaper publisher that constituted “criminal conduct” under the laws of the day. *See McIntyre*, 514 U.S. at 360-69 (Thomas, J., concurring) (discussing the 18th-century trial of John Peter Zenger and other similar historical controversies). *See also, New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“The press was protected so that it could bare the secrets of government and inform the people.”).

As Deep Throat and numerous other examples demonstrate, some of the most important news reports in modern history have come to light only because a source was willing to provide information to a reporter despite a legal duty to keep it secret.<sup>4</sup> The authors of the Privacy Act themselves shared these concerns and would likely be among those most surprised and troubled to find that a statute aimed at combating the misuse of computer database technology has become a vehicle for imposing onerous sanctions on reporters for using normal journalistic methods to report about a matter of such obvious public importance as alleged nuclear espionage. *See Cochran v. United States*, 770 F.2d 949, 959 n.15 (11th Cir. 1985); *Thomas v. U.S. Dep’t of*

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<sup>4</sup> *See, e.g.*, Walter Pincus, *Carter is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5 (revealing Carter Administration plans to develop a “neutron bomb,” creating public outcry that led to abandonment of the plans). *See also, e.g.*, Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A1 (part of Pulitzer Prize-winning series relying on confidential records exposing fertility clinic’s practice of implanting eggs retrieved from one patient into another, which prompted legislative action and redrafting of ethical guidelines); Rebecca Smith & John R. Emshwiller, *Enron CFO’s Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1 (confidential sources provided information about two partnerships that were used to hide corporate debt from the company’s investors).

*Energy*, 719 F.2d 342, 345 (10th Cir. 1983). Yet under the panel’s rendition of the *Zerilli* privilege, if Congress or the Executive Branch simply barred officials from sharing any information with the public, neither the First Amendment nor the common law would have any interest in protecting a reporter’s ability to pierce that veil by speaking to sources in confidence.

We do not mean to suggest that journalists have *carte blanche* to conceal the identities of those who may have violated non-disclosure laws. Rather, we submit that, to protect the press’s constitutionally valuable role, the reporter’s privilege necessarily implicates more than consideration of the questions of need and exhaustion. As at least two other Circuits have held, the privilege must also include a broader balancing exercise that asks whether the presumption that confidential newsgathering should be protected is outweighed by any extraordinary circumstances presented by the dispute in question. *See Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998).

And, as Hebert has also maintained, *see Drogin Petition* at 5, this definition of the reporter’s privilege requires this Court to break no new legal ground because it is entirely consistent with *Zerilli*. In that case, this Court expressly conceived the reporter’s privilege as a balancing exercise, holding that the privilege should prevail “in all but the most exceptional cases” and suggesting other factors that ought to be considered in striking an appropriate balance in a given case. 656 F.2d at 712. It also specifically recognized the possibility that a demonstration of need and exhaustion might not be sufficient to compel disclosure. *Id.* at 714 n.52. The panel’s characterization of the privilege as a two-part test is therefore difficult to reconcile with *Zerilli*, because it renders irrelevant all of the other factors identified in that case and provides no assurance that disclosure will be rare, as *Zerilli* expressly contemplated. Indeed, though the panel characterizes the district court’s duty as a “balancing of the factors,” the test it articulates leaves nothing to balance. Re-hearing *en banc* is therefore necessary to make clear that the reporter’s privilege ultimately requires balancing the importance of disclosure against the substantial interests in protecting confidential newsgathering.

**B. Alternatively, this Court Should Recognize a Reporter’s Privilege Under Federal Common Law**

Alternatively, this Court should recognize a reporter’s privilege under federal common law that incorporates a broader balancing component. Though the panel chose not to address the issue, Hebert has consistently asserted a federal common law privilege throughout this litigation, *see* Drogin Petition at 5, a point made obvious by the fact that the Respondent dedicated a substantial part of his brief on appeal to arguing in response that no such privilege exists. Brief of Appellee Lee at 50-52.

Because the reasons supporting the recognition of a common law privilege are persuasively and exhaustively set forth in Judge Tatel’s concurring opinion in *Miller*, we refer the Court to that portion of his opinion rather than repeat those arguments here. *See Miller*, 397 F.3d at 991-996 (Tatel, J., concurring). As Judge Tatel has explained, a common law privilege typically presupposes that the privilege cannot be overcome merely by a showing of need and exhaustion – a point, as we have noted, that is especially applicable in a leak case.

The very concept of a privilege recognizes that broader interests typically outweigh the interest in resolving most disputes. There are numerous cases, including serious crimes, that could likely be resolved if information known to attorneys, therapists, priests, and spouses were available to the litigants and the court. Common law privileges are thus either virtually absolute, *see, e.g., Jaffe v. Redmond*, 518 U.S. 1, 17-18 (1996) (rejecting a “balancing component”), or limit disclosure to the relatively rare case where the importance of disclosure outweighs the interests protected by the privilege, *see, e.g., In re Grand Jury Proceedings (Violette)*, 183 F.3d 71 (1st Cir 1999). Moreover, the large majority of the state statutes that support recognition of a common-law reporter’s privilege establish a privilege that is broader than a two-part test. About half of those statutes would provide an absolute privilege in the circumstances of this case,<sup>5</sup> while

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<sup>5</sup> *See* ALA. CODE § 12-21-142; ARIZ. REV. STAT. ANN. § 12-2214; ARK. CODE ANN. § 16-85-510; D.C. CODE ANN. §§ 16-4701 – 16-4704; IND. CODE ANN. §§ 34-46-4-1, 34-46-4-2; KY. REV. STAT. ANN. 421.100; MD. CTS. & JUD. PROC. CODE ANN. § 9-112; MICH. COMP. LAWS ANN.

a number of others require a showing above and beyond the twin elements of need and exhaustion.<sup>6</sup>

**C. Plaintiff's Privacy Act Suit Does Not Present any Compelling Interest Sufficient to Justify Disclosure of Confidential Sources**

Once the appropriate legal standard is applied to the facts of this case, we respectfully submit, potentially resolving Lee's civil Privacy Act claims is not an interest that reasonably can be said to overcome the presumption that confidential newsgathering should be protected.<sup>7</sup>

Hebert came to report about Lee because he had just been publicly fired in the midst of an entirely legitimate public controversy over whether the Clinton Administration was ignoring a major breach of national security for political and policy reasons. *See* Opening Brief at 4-7. Hebert did not report basic background facts about matters such as Lee's "employment information," Op. at 4, to satisfy some voyeuristic curiosity about his resume, but rather to explain how the government handled an investigation into what appeared to be a serious threat to the national security. Such stories are exactly what a free press should be encouraged to pursue vigorously, even if some reputational injury to potentially innocent persons may at times result.

On the other side of the balance, this lawsuit seeks to vindicate the reputational interests of one individual who was already the subject of an investigation that resulted in employment

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§ 767.5a; MINN. STAT. ANN. §§ 595.021 – 595.025; MONT. CODE ANN. §§ 26-1-901 – 26-1-903; NEB. REV. STAT. §§ 20-144 – 20-147; NEV. REV. STAT. ANN. §§ 49.275, 49.385; N.J. STAT. ANN. § 2A: 84A-21; N.Y. CIV. RIGHTS LAW § 79-h; OHIO REV. CODE ANN. § 2739.12; OR. REV. STAT. §§ 44.510-44.540; 42 PA. C.S.A. § 5942; R.I. GEN. LAWS §§ 9-19.1-1.

<sup>6</sup> *See, e.g.*, TENN. CODE ANN. § 24-1-208 (disclosure must further "a compelling and overriding public interest."). *See also* ALASKA STAT. §§ 09.25.300 – 09.25.390; COLO. REV. STAT. ANN. §13-90-119; DEL. CODE ANN. tit. 10, §§ 4320 – 4326; FLA. STAT. § 90.5015; GA. CODE ANN. § 24-9-30; 735 ILCS 5/8-901 – 909; LA. REV. STAT. ANN. §§ 45:1451 – 1459; N.C. GEN. STAT. § 8-53.9; N.D. CENT. CODE § 31-01-06.2; S.C. CODE § 19-11-100.

<sup>7</sup> The panel opinion also suggests that this dispute could have been resolved had reporters agreed to identify who employed their sources. Op. at 12. However, that is simply not the case. The Defendants have made clear that, in that event, they would then seek on cross-examination to learn the names of sources, if any, who were employed by them. Subsequently, they put that position on the record in another Privacy Act suit and have also argued that identifying the employer would waive the journalist's privilege. Defendants' Reply to Plaintiff's Opp. to Media Companies' Motions to Quash at 2-6, *Hatfill v. Ashcroft*, No. 03-1793 (D.D.C. Feb. 22, 2005).

discipline and criminal charges, separate from any information leaked to the press. His interest in recovering such damages, which the Privacy Act does not appear to permit in any event, *see Hudson v. Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997), *overruled in part on other grounds by Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001), does not rise to the level of the overriding national security concerns that this Court in *Miller* held would override any common law privilege that might exist.

### **III. The Panel’s Determination of the Standard of Review Conflicts With the Decisions of Most Other Circuits**

The panel held that the standard of review applicable to the trial court’s application of the reporter’s privilege to the facts of this case is abuse of discretion. Op. at 10. This decision conflicts with the standard of review that would be applied by most other federal courts of appeals to the same question, for either of two independent reasons. First, a trial court’s application of the First Amendment to any particular set of facts is reviewed *de novo*. Second, *de novo* review is the standard typically applied to privilege rulings subsumed within review of a contempt order, including review of “the balancing of the relevant factors.” Op. at 10.

#### **A. The Application of First Amendment Scrutiny Is Reviewed *De Novo***

The first reason the panel erred is that the reporter’s privilege requires the application of First Amendment scrutiny, in this case to discovery requests for journalists’ confidential sources, just as the First Amendment requires scrutiny pursuant to other multi-part balancing tests in many other circumstances. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567, (1995) (“the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection”). As a general rule, whether a trial court correctly applied First Amendment scrutiny to the facts before it is a question of federal constitutional law that is reviewed *de novo*, at least where the appellant alleges a deprivation of such a right. *See United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992)

(“Whether the regulation meets the ‘narrowly tailored’ requirement is of course a question of law, to be reviewed by an appellate court *de novo*. This court has characterized ‘the test of ‘narrow tailoring’ . . . as a balancing test.”) (internal quotations omitted) (citations omitted); *United States v. Popa*, 187 F.3d 672, 674 (D.C. Cir. 1999) (“Whether the Government has infringed a defendant’s rights under the First Amendment is, of course, a question of law, which we would normally review *de novo*.”).

*Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), cited by the panel, actually illustrates the point. In *Rhinehart*, the Supreme Court did not hold that “no ‘heightened First Amendment scrutiny’ applied to discovery orders.” Op. at 9. Rather, the Court held that no First Amendment scrutiny applies to protective orders governing the conduct of parties to civil litigation because such orders implicate no substantive First Amendment rights in the first place. *Rhinehart*, 467 U.S. at 37. By the same token, *de novo* review is regularly applied to all manner of pre-trial rulings that do potentially infringe First Amendment or other constitutional rights, even though such rulings would typically be reviewed only for abuse of discretion. See, e.g., *County Sec. Agency v. Ohio Dep’t of Commerce*, 296 F.3d 477, 484-85 (6th Cir. 2002) (although temporary restraining order typically reviewed for abuse of discretion, review is *de novo* when First Amendment is implicated); *United States v. Yunis*, 859 F.2d 953, 957-58 (D.C. Cir. 1988) (“we should review *de novo* [the] determination that [appellant] did not voluntarily or knowingly waive his [Fifth and Sixth Amendment] rights”).<sup>8</sup> The panel’s conclusion that *de novo* review is limited to final judgments involving “free expression claims” is, with all due respect, incorrect. Op. at 10. To cite just two examples, closure and sealing orders are subject to *de novo* review, even though the First Amendment interests at stake involve access to information rather than pure speech, no final judgment is at issue, and orders regarding how a court conducts its proceedings

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<sup>8</sup> See also, e.g., *Neal v. Shimoda*, 131 F.3d 818, 823 (9th Cir. 1997) (“We also review *de novo* a district court’s conclusions on . . . mixed questions of law and fact that implicate constitutional rights.”); *Moore v. Morales*, 63 F.3d 358, 361 (5th Cir. 1995); *In re Grand Jury Subpoenas Dated Dec. 7 and 8*, 40 F.3d 1096, 1100 (10th Cir. 1994) (“[w]hether denial of the officers’ motions [to quash] has caused a violation of the Fifth Amendment is a conclusion that we review *de novo*”).

would ordinarily be reviewed for abuse of discretion. *See, e.g., In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (“constitutional access claims engender *de novo* review”).

The *de novo* review applicable in this context is not necessarily synonymous with the principle of independent appellate review discussed in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), a form of review that Hebert noted he was not seeking in this case. Reply Brief at 3. Independent appellate review requires *de novo* review not only of the application of law to facts, but the underlying facts themselves. *Bose Corp.*, 466 U.S. at 499. Our argument here, in contrast, concerns only the former. *See Price v. Time, Inc.*, No. 04-13027, 2005 U.S. App. LEXIS 14331, \*\*15-16 (11th Cir. July 15, 2005) (reviewing application of reporter’s privilege *de novo* and any “subsidiary fact findings” for clear error). The only two other circuits to have explicitly addressed the question have both concluded that the balancing of the components of the First Amendment reporter’s privilege is reviewed *de novo*. *See id.*; *Shoen v. Shoen*, 48 F.3d 412, 414 (9th Cir. 1995).

**B. Underlying Privilege Rulings Supporting Contempt Orders are Typically Reviewed *De Novo***

*De novo* review is also appropriate because the privilege issues presented by these appeals arise in the context of review of a final contempt order, a point the panel also overlooked. Thus, the Court’s observation that “what we are reviewing is a discovery order, not the final judgment,” Op. at 9, is incomplete, because the contempt orders are final judgments. Most Circuits to address the question agree with the Sixth Circuit’s conclusion that, while a district court’s finding of contemptuous conduct is reviewed for abuse of discretion, where underlying privileges are at issue, “the application of law to those facts is reviewed *de novo*.” *United States v. Grable*, 98 F.3d 251, 253 (6th Cir. 1996).<sup>9</sup> Moreover, while this Circuit has never explicitly

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<sup>9</sup> *See also In re Grand Jury Subpoenas Dated Dec. 7 and 8*, 40 F.3d 1096, 1100 (10th Cir. 1994) (*de novo* review applied to underlying issue of whether the facts established an attorney-client privilege); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) (where “the legitimacy of the contempt adjudication is based on the validity of the underlying order,” challenge to underlying ruling is reviewed *de novo*); *In re Grand Jury Proceeding 88-9*,

addressed the issue, in practice it has applied what appears to be *de novo* review to analogous questions arising in the context of appellate review of a contempt order. *See, e.g., Miller*, 397 F.3d at 973; *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 888 (D.C. Cir. 1981).

There are very good reasons for treating appeals of contempt orders differently from party appeals implicating discovery rulings. A general deference to discovery rulings serves the interests of finality and judicial economy by avoiding the re-opening of long-resolved discovery disputes in final party appeals and discouraging interlocutory appeals, interests not implicated by appeals of contempt orders. Moreover, a party's loss of the opportunity to conduct specified discovery is of inherently less concern than holding a non-party in contempt for unsuccessfully asserting a right or privilege. For all of these reasons, the standard of review applied in *Zerilli* and *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), does not "bind" the panel in this case, nor would this Court sitting *en banc* need to reverse its holdings in either of those cases. Op. at 10. Neither was an appeal of a contempt order and *Zerilli* did not present this Court with a purported deprivation of any First Amendment right, since the trial court sided with the journalists.

### CONCLUSION

Appellant Hebert respectfully requests that his contempt order be vacated.

Dated: July 28, 2005

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899 F.2d 1039, 1042 (11th Cir. 1990) (as mixed law and fact question, review of "determination of the applicability of the attorney-client privilege is plenary" in appeal from contempt citation); *In re Grand Jury Empanelled March 17, 1987*, 836 F.2d 150, 151 (3d Cir. 1988) (*de novo* review applied to underlying discovery order's application of law to the facts).

## **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 H. Josef Hebert (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 Hebert'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.)), Bob Drogin (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:

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