

ORAL ARGUMENT SCHEDULED FOR MAY 9, 2008

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

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STEVEN J. HATFILL, M.D.,  
Plaintiff-Appellee,

v.

ATTORNEY GENERAL MICHAEL B. MUKASEY, *et al.*,  
Defendants-Appellees,

TONI LOCY  
Appellant.

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

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**BRIEF FOR APPELLEE STEVEN J. HATFILL, M.D.**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. Parties and Amici**

Except for the following, all parties, intervenors, and amici appearing in this court are listed in the Brief for Appellant Toni Locy: ALM Media, Inc.; Landmark Communications, Inc.; National Federation of Press Women; NBC Universal; The Newspaper Guild-CWA; Daily News L.P.; U.S. News & World Report, L.P.

### **B. Rulings under Review**

Reference to the rulings at issue appear in the Brief for Appellant Toni Locy.

### **C. Related Cases**

The statement of related cases appearing in the Brief for Appellant Toni Locy is correct.

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## INTRODUCTION

In the wake of the 2001 anthrax attacks, federal investigators came under tremendous public pressure to demonstrate progress toward solving the crimes. When genuine progress was not achieved, government officials sought to relieve that pressure by gradually making over one hundred leaks of investigative information to the media all suggesting that Steven J. Hatfill -- a former biodefense researcher -- was the murderer. Of course, he was not. As the court below stated, after many years of investigation “there is not a scintilla of evidence that would indicate that Hatfill had anything to do with” the anthrax attacks. JA 961. But the government’s propaganda campaign had a “life-shattering” impact on Hatfill, rendering him “a pariah in the field that he chose to go into” and “basically destroy[ing] his professional life.” *Id.*

In the ongoing district court litigation that provides the context for this appeal by a third-party witness, Hatfill alleges that each of the scores of carefully orchestrated leaks about him by the FBI and the Department of Justice to reporters violated the Privacy Act. The government argues that Hatfill cannot carry his burden under the Privacy Act by establishing that the information has been leaked by the defendant *agencies*; it claims he must prove the identities of the *individuals* who leaked information to the reporters. In a March 30, 2007, order, the district court did not irrevocably commit itself to any final ruling on the sufficiency of

Hatfill's evidence, but did make unmistakably clear that the names of the individual leakers *may* be of make-or-break significance to Hatfill's case -- and that Hatfill would be proceeding "at his peril" if he were to go to trial without that evidence. JA. 404-05. Plainly, unless the leakers -- a smattering of the literally hundreds of FBI and DOJ officials who have worked on the investigation -- voluntarily come forward to acknowledge they violated the law, the only way to obtain the identity of the wrongdoers is from the reporters who cooperated with them to disseminate the unlawfully leaked information.

Locy is one of those reporters. While her brief and those of her *amici* are filled with invocations of Watergate and Abu Ghraib, this case has nothing to do with journalism that shines an investigative light on government misdeeds. This case involves government manipulation of journalists to disseminate "life-shattering" information about an innocent citizen in violation of federal law. Sadly, journalists were largely willing to cooperate in these smears by hiding the identities of the lawbreakers, thus lining up with the powerful against the innocent. Sadder still, Locy and her *amici* now line up against the one part of the government willing to provide Hatfill the opportunity to right the wrong: the courts. The role of the press here is thus the opposite of that in the circumstances invoked by Locy -- instead of *exposing* government wrongdoing, the media seeks here to *hide* government wrongdoing.

The law can and does distinguish these situations. The Privacy Act provides a private right of action for individuals like Hatfill, as well as criminal penalties for individuals who disclose confidential information about a private citizen. *See* 5 U.S.C. § 552a. In contrast, the Whistleblower Protection Act of 1989 protects federal employees who disclose information about violations of law or other abuses of government authority. *See* 5 U.S.C. § 2302(b)(8). Any formulation of the reporter's privilege must, at a minimum, respect this distinction -- the privilege should encourage *good* anonymous leaks, like "whistleblower" leaks, while discouraging *bad* anonymous leaks, like Privacy Act violations. To ignore that distinction is to gut the Privacy Act.

Locy's brief also takes pains to defend her journalism, as if the sanctions imposed by the district court in this case were designed to punish Locy for shoddy reporting. But the issue here involves the choices Locy made as a witness in Hatfill's Privacy Act case, not those she made as a reporter. As a witness, she chose not to reveal the names of government leakers, even after the district court ordered her to do so. As a witness, she chose not to answer questions that could have narrowed the universe of potential leakers, even though she now complains about the breadth of the court's order. And thus it is that she, as a witness, is rightly the focus of the district court's efforts to compel her testimony about facts that go to the heart of Hatfill's suit. The district court did not abuse its discretion

either by ordering Locy to testify or by imposing contempt sanctions for her refusal to do so.

### **ISSUES PRESENTED FOR REVIEW**

1. Whether the district court properly exercised its discretion when it ordered Locy to disclose the names of government sources who may have disclosed information to her in violation of the Privacy Act, 5 U.S.C. § 552a.

2. Whether the district court properly refused to create a new “common-law” reporters’ privilege that would excuse Locy from revealing her sources in this case.

3. Whether the district court properly exercised its discretion when it held Locy in civil contempt and required her to pay *per diem* sanctions personally if she did not cure her contempt by a date certain.

### **PERTINENT STATUTES**

Relevant portions of the Privacy Act and the Whistleblower Protection Act are set out in the addendum to this brief.

### **STATEMENT OF FACTS**

Appellee Steven J. Hatfill, M.D., is a former biodefense researcher who was victimized by government leaks suggesting that he committed the anthrax attacks of 2001, and whose professional life was thereby destroyed. In the ongoing district court litigation. Hatfill alleges that by making over a hundred leaks of

investigative information relating to him, the FBI and the Department of Justice violated the Privacy Act. JA 44-83, 89-154. Now in its fifth year, the Privacy Act case has recently been scheduled for a final pretrial conference on October 10, 2008, in anticipation of a December 2008 trial. JA 1048.

The vast majority of the leaks that form the basis for Hatfill's Privacy Act claim were attributed to anonymous sources. JA 99-103, 110-13, 116-18, 131-37, 139-41. Locy, formerly a reporter for *USA Today*, was one of the reporters who published leaked information while agreeing to conceal the names of the government officials who unlawfully leaked it to her. JA 132-33. Locy's 2003 articles attributed to anonymous law enforcement sources the belief that Hatfill (mentioned by name) was behind the attacks.

### **Locy's Reporting for *USA Today***

Locy's appellate brief fails to convey how detailed and deeply sourced her reporting was. In fact, she collected far more inside information on the anthrax investigation than her appellate brief now gives her credit for. This is no time for modesty:

- Locy did not simply report that Hatfill was under around-the-clock surveillance; she reported that "four law enforcement sources familiar with the investigation" told her the FBI could not "risk the

embarrassment of losing track of Hatfill, even for a few hours, and then being confronted with more anthrax attacks.” JA 224.

- Locy did not simply report that the evidence against Hatfill was “largely circumstantial”; she wrote that “many investigators -- but not all of them -- [believed] that he was behind the mail attacks that killed five people,” and she attributed the “largely circumstantial” view to only two of her five sources for that article. *Id.*
- Locy did not simply report that Hatfill’s answers to questions were evasive; she reported that his alleged evasiveness occurred during an FBI *polygraph* examination, and that Hatfill had a “penchant for exaggerating his credentials on resumés and in statements to other scientists.” JA 225.
- Likewise, a month later, Locy did not simply report that the FBI planned to search a pond in Frederick, Maryland; she reported that investigators “were interested in the ponds because they are near the former home of Steven Hatfill.” JA 222.

For her May 2003 article, Locy cited “four law enforcement sources familiar with the anthrax probe” plus “a fifth source close to the investigation.” JA 224-25. Her June 2003 article cited at least “[t]hree federal law enforcement sources,” as well as an unspecified number of “other law enforcement sources.” JA 222. Locy has

testified that she had a total of “about a half dozen” FBI sources for her reporting on the case, as well as “three or four, maybe more” sources within other components of the Department of Justice. JA 273, 280, 740.

### **The Course of Discovery**

The Justice Department initially sought and received a stay of almost all discovery. JA 84-86. Depositions of reporters, however, were specifically authorized in the final months of 2004, despite the stay. JA 87-88. Unable to pursue discovery against the government, Hatfill subpoenaed testimony from Gannett Co., Inc. (publisher of *USA Today*) to determine the identities of Locy’s sources. In January 2005, Gannett (like the other media companies subpoenaed by Hatfill) filed a motion to quash. JA 20. However, while that motion was still pending, the agency defendants indicated they were prepared to proceed with depositions, and the Court lifted the stay on depositions of FBI and DOJ officials. JA 21-22 (docket entries 70-72). Accordingly, Hatfill voluntarily withdrew his subpoena of Gannett in exchange for the eventual testimony of Locy, the individual reporter Gannett identified as the proper witness for discovery of the anonymous sources. JA 715.

For the rest of 2005 and the early part of 2006, Hatfill attempted virtually every means of discovering the leakers’ identities from the government itself rather than from Locy and her fellow reporters. As the district court later noted, Hatfill

served the government defendants with 61 requests for production of documents, 230 interrogatories, and 836 requests for admission. He also took 27 depositions of current and former FBI and DOJ employees. JA 714. In addition to these standard discovery techniques, Hatfill sought and received the court's approval for the distribution of comprehensive waivers, giving numerous FBI and DOJ personnel the opportunity to waive, in writing, any promise of confidentiality made to them by a member of the press. More than 100 FBI and DOJ officials signed these waivers, which were designed to permit media witnesses to testify truthfully and completely without the need to violate any promises of confidentiality they may have made. JA 716-17. Unfortunately, these methods were insufficient to reveal the sources for the vast majority of anonymous leaks set forth in Hatfill's First Amended Complaint.

Thus, by the spring of 2006, Hatfill had no remaining options but to turn to depositions of individual reporters. Nonetheless, Hatfill's counsel remained reluctant to be drawn into extended ancillary litigation about privileged information. Furthermore, by this time all parties were aware of this Court's intervening decision in *Lee v. Department of Justice*, 413 F.3d 53, *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005). In particular, all parties were aware that this Court had noted that the reporters in *Lee* "refused to reveal even the employer

of their unidentified sources, information that arguably would have been sufficient to support at least a portion of Lee's claim" under the Privacy Act. 413 F.3d at 60.

### **Locy's 2006 Testimony**

At her first deposition, Locy confirmed under oath that she had granted anonymity to at least nine or ten FBI and DOJ officials in return for leaks of investigative information about Hatfill. JA 273, 278-82, 359 (47:3-13, 52:7-10, 53:16-56:22, 133:7-11). She remembered the identity of the FBI and DOJ sources who provided her with information, but she testified that she did not remember which specific official was responsible for which specific leak. She also refused to name the sources she *could* remember, thus precluding plaintiff's counsel from following up with depositions to fill the gaps in her memory. In addition, Locy refused to answer any questions designed to narrow the universe of sources who might have leaked in violation of the Privacy Act. For example, an unpublished draft of her May 29, 2003, article refers to one source as a "high-ranking FBI official" and another as a "top FBI source." JA 340-344 (114:12-118:1). Locy acknowledged that these descriptions did not fit every one of her sources, but she refused to define the terms or disclose the names of sources who fit the descriptions. JA 360-61 (134:11-135:21).

Locy also refused to answer a number of questions as to which her assertion of a reporter's privilege was exceedingly tenuous. For example, Locy refused to

reveal whether she had spoken with certain FBI officials who had *already* testified under oath that they had communicated with her. JA 346-49, 351-52 (120:12-123:1, 125:17-126:6). In addition, Locy refused to say whether any of her sources were among those who had voluntarily waived anonymity by returning one of the written waivers distributed in 2004 and 2005. JA 716-17, 345-46 (119:11-120:10).

### **Hatfill's Need for Individual Names**

Based on the suggestion in *Lee* that it might be sufficient to identify sources by agency only, Hatfill did not immediately move to compel disclosure of the sources' names. However, as discovery in the case drew to a close, the government defendants took the position that Hatfill could not carry his burden under the Privacy Act merely by establishing that information had been leaked by the defendant *agencies*; in their view, Hatfill would need to prove the identities of the *individuals* who leaked information to the press. Hatfill argued in response that the Privacy Act authorized damages whenever "the *agency* acted in a manner which was intentional or willful," 5 U.S.C. § 552a(g)(4) (emphasis added), and that based on the testimony of both government witnesses and reporters, there could be no doubt about the intentional and willful character of the leaks. In a March 30, 2007, order, however, the district court stated that it would be imprudent for Hatfill to proceed to trial without the names of the leakers:

The court is mindful that conceivably, Privacy Act violations can be proven through circumstantial evidence. However, a wealth of case

law suggests that in order to prove that a violation of the Privacy Act has occurred, the actual source of the information must be identified. And whether the plaintiff can satisfy this requirement with circumstantial evidence alone is an endeavor the plaintiff assumes at his peril if he decides not to further identify the source or sources of the purported improper disclosures.

JA 404-05.

Accordingly, Hatfill moved to compel identification of Locy's sources, as well as the sources of five other reporters. In August 2007, the district court granted Hatfill's motion, finding that the two-prong test articulated in *Lee* was satisfied because (1) "the actual identity of the sources will be important, and quite possibly essential, in proving [Hatfill's] Privacy Act claims," and (2) "Dr. Hatfill has exhausted all reasonable alternatives for acquiring the sources of the leaked information." JA 715-16. Consequently, the district court ordered Locy and four other reporters "to provide full and truthful responses to questions propounded to them by Dr. Hatfill's attorneys" for the purpose of identifying the government employees who leaked investigative information about Hatfill. JA 730-31.<sup>1</sup>

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<sup>1</sup> For jurisdictional reasons, Hatfill's motion to compel further disclosure by the sixth reporter was filed in the Southern District of New York. Judge Hellerstein of that court granted Hatfill's motion to compel, finding that "[f]or the reasons cited by Judge Walton, . . . Plaintiff has satisfied [the Second Circuit's] test for overcoming the journalists' qualified privilege under the First Amendment." *Hatfill v. Gonzales*, No. M8-85 (AKH), mem. op. at 3 (S.D.N.Y. Sept. 7, 2007) (granting Hatfill's motion to compel against non-party Brian Ross).

### **Locy's 2007 Testimony**

Hatfill then deposed Locy a second time. She again refused to answer questions that would identify her anthrax sources at the Justice Department. JA 743-45 (188:21-190:12). Moreover, she committed herself to this course of action despite the admission that *she did not even know whether any of her former DOJ or FBI sources still objected* to her disclosing their identity, because she had “just begun the process of reaching out to people.” JA 755-56 (200:22-201:19). Even after reading FBI official Debra Weierman’s sworn testimony waiving any promise of confidentiality from a reporter, Locy refused to answer the question “whether Ms. Weierman was a source you used in your reporting on the anthrax investigation?” JA 760-62 (205:21-207:21).

Locy’s determination to hide the identities of these malfeasant public officials was so strong that she also refused to answer questions about her contacts with four of her former sources in the days preceding the deposition. Locy revealed that she had “begun the process of reaching out to people” on the Friday before her Monday deposition who were “sources” on “various stories.” JA 747-49 (192:16-194:5). She testified that “[t]hree of the four are FBI,” JA 748 (193:2-3), yet refused to reveal whether they were current or former FBI officials. JA 754 (199:4-19). She refused to disclose anything about where the fourth person worked and, in particular, whether that person was affiliated with DOJ. JA 748-49

(193:4-194:5). She testified that she “ha[d] no waivers,” JA 747 (192:9-10), but invoked the attorney work-product doctrine and refused to disclose whether she had even *asked* for such waivers -- or anything else about her communications with these four people. JA 750-51 (195:14-196:8).

It was on this record of non-compliance that the district court held Locy in contempt of court. In its opinion, the district court reaffirmed its earlier determination “that the identity of the individuals who leaked information in violation of the Privacy Act is ‘clearly central to [Dr. Hatfill’s] Privacy Act claims.’” JA 1038 (alteration in original). Turning to the question of whether to stay the sanctions it was imposing, the district court noted that the injury to Locy in the absence of a stay was counterbalanced by Hatfill’s interest in obtaining the identities of Locy’s sources before memories fade further, and in time for a trial in December 2008 -- more than five years after his complaint was filed. JA 1044-45, 1048. Finally, the district court prohibited Locy from accepting reimbursement for any monetary sanctions imposed by the court, reasoning that the very purpose of civil contempt sanctions is to induce compliance and that, “because Ms. Locy is the only person who has the ability to comply with the Court’s order, she alone should be required to bear the financial burden of her choice not to do so.” JA 1049-50.

This Court stayed the district court's order at Locy's request and expedited its consideration of the appeal at Hatfill's request.

### **SUMMARY OF ARGUMENT**

Agents of the Department of Justice violated the Privacy Act and rendered Hatfill a pariah by leaking damaging information to reporters, including Locy, who published that damaging information while concealing the identities of her government sources. Under settled law, it is clear that Locy may not protect the identity of those government leakers and this Court should not accept Locy's invitation to change the law. Nor should the Court accept her challenges to the terms of the district court's sanctions.

I. Under the two-prong test applied in *Lee v. Dep't of Justice*, 413 F.3d 53, *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005), it is clear that the district court properly ordered Locy to reveal the names of her sources. Locy does not challenge the district court's conclusion that Hatfill has exhausted all reasonable alternatives. With respect to the requirement that "the information sought must go to 'the heart of the matter,'" 413 F.3d at 59 (internal citations omitted), this case is on all fours with *Lee* because, if Hatfill "cannot show the identities of the leakers," his "ability to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised." *Id.* at 60.

There is no merit to Locy's argument that the district court's order is overbroad because it calls for the disclosure of ten or twelve names, although there may be as few as five government agents who leaked information to her concerning Hatfill. That is the most narrowly tailored remedy available in light of Locy's decision to destroy her notes and her refusal even to answer questions such as what she means by a "top FBI source." Moreover, the district court has ensured that no one other than Hatfill's lawyers will learn the identity of any anonymous source who did not leak information relating to Hatfill.

Locy argues that Hatfill ought to prevail in any event because it is absolutely clear, even without their identities specified, that multiple government agents leaked information about Hatfill in violation of the Privacy Act. We also believe it is clear, but we anticipate that the government will vigorously maintain that it is entitled to know the identity of the leakers in order to defend itself. And this Court's opinion in *Lee* recognizes that a Privacy Act plaintiff's ability to prove willfulness and intent may be "compromised" if he cannot show the identity of the leakers. *See* 413 F.3d at 60. Moreover, the district court, which will be the factfinder in this Privacy Act case, has made clear that it believes Hatfill needs to identify individual leakers. JA 404-05. In these circumstances, and given the inherent unpredictability of what hostile witnesses such as purported leakers may

ultimately say in court as well as the fact that each additional leak damaged Hatfill, he needs to identify as many leakers as possible.

II. This Court has previously declined invitations to add a third prong to the test applied in *Lee* -- a prong requiring a balancing test pursuant to which a district court must balance the interest in obtaining truthful evidence against the interest in permitting reporters to shield the identity of anonymous source. *See, e.g., Lee*, 428 F.3d at 301 (Tatel, J., dissenting from denial of rehearing en banc) (noting that the court had not balanced the public and private interests at stake). The Court should decline Locy's invitation as well.

As an initial matter, whatever the merits of the proposition generally, this is surely the wrong case in which to change the law because, under findings already made by the district court, Locy would not prevail even if the privilege were expanded. The district court considered the interest in obtaining truthful evidence and found it compelling because permitting reporters to shield leakers would "erect a potentially insurmountable hurdle for a Privacy Act litigant seeking to hold the government accountable for leaks condemned by the Act." JA 720. And as Locy emphasizes in her brief, the district court made abundantly clear that it sees no substantial interest in encouraging leaks, such as those at issue, that violate the Privacy Act. *See, e.g.,* JA 980-01 ("these people ... should not have been talking to her in the first place" and it is desirable to "deter them from leaking this type of

information so that what allegedly happened to Dr. Hatfill doesn't occur").

Plainly, if directed to conduct the balancing requested by Locy, the district court would order disclosure -- just as in *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 981, 984-85, 1003 (D.C. Cir. 2005), where the judges disagreed on the appropriate legal standard but agreed that disclosure was warranted under the facts at issue.

Moreover, such a result should be the rule in Privacy Act cases. Congress has distinguished between leaks that are condemned by the Privacy Act and leaks that are protected by the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), and as the district court stated the Privacy Act is plainly intended to deter leaks involving disclosure of personal information protected by that Act. JA 981. Therefore, Congress has already done the balancing and concluded that the government ought to be liable for leaks such as those at issue. It would gut the Privacy Act if victims of such leaks are not permitted to obtain the evidence they need to establish violations of the Act.

It would make no sense to create a privilege under Rule 501 that effectively repealed the protections of the Privacy Act. Bills seeking to establish a statutory reporters' privilege have been introduced, but not enacted, repeatedly over the last few years -- which cuts sharply against the expansion of the existing two-prong test by the courts. And the 49 state laws cited by Locy vary widely and do not provide

any basis on which to go beyond the existing test. Moreover, no state law can or should be permitted to override Congress's decision, embodied in the Privacy Act, that leaks such as those at issue are unlawful and ought not be encouraged.

In short, an expanded privilege that would allow reporters to conceal evidence of illegal disclosures would deprive courts of valuable evidence and seriously undermine the protections of the Privacy Act. Any such privilege would encourage the increasingly popular practice of government officials using reporters to anonymously circulate damaging information about individuals -- a practice that is both contrary to the Privacy Act and the opposite of whistleblowing, which exposes rather than protects wrongdoing by government officials.

III. The object of civil contempt sanctions is to compel compliance with the court's order and the sanction at issue is permissibly designed to achieve compliance. Locy misunderstands the difference between civil and criminal contempt, and appears to believe that a civil contempt sanction should be designed to permit her to disobey the court's order without serious penalty. But that is not so and the orders at issue skillfully encourage compliance in a way that other sanctions, such as imprisonment (which would make her a martyr) or fines that could be paid by media companies, would not. The key point is that Locy has thus far incurred no sanction and need incur none by obeying the district court's orders after this Court affirms them.

## **STANDARD OF REVIEW**

The scope of review in an appeal from a discovery order is “narrowly circumscribed” -- the reviewing court’s “function on appeal is solely to determine whether the trial court abused its discretion in entering the challenged order.” *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981). This court “may review legal rulings of the trial court *de novo* but . . . will defer to the sound discretion of the trial court where the balancing of the relevant factors is involved.” *Lee*, 413 F.3d at 59.

In reviewing the district court’s contempt order, this court “determine[s] whether the District Court abused its discretion in finding ‘clear and convincing evidence’ that [Locy] violated the Discovery Order.” *Lee*, 413 F.3d at 59 (citing *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980)).

## **ARGUMENT**

### **I. The District Court Properly Exercised Its Discretion to Compel Locy to Reveal the Names of Her Sources.**

Locy first challenges the district court’s August 13, 2007, order compelling disclosure of her sources. The district court properly exercised its discretion and ordered disclosure only after finding that the conditions specified in *Lee* -- the recent and controlling decision of this court -- had been met.

In *Lee*, also a Privacy Act case, the court determined that “*Zerilli* provides for a non-party journalist’s qualified privilege in a civil action such as this one, where testimony of journalists is sought because government officials have been accused of illegally providing the journalists with private information.” *Lee*, 413 F.3d at 59. Citing *Zerilli* and *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), the court noted “the two guidelines determining when a court can compel a non-party journalist to testify about a confidential source. First, the information sought must go to ‘the heart of the matter.’ Second, the litigant must exhaust ‘every reasonable alternative source of information.’” 413 F.3d at 59 (internal citations omitted).

The court also expressly warned:

When applying this analysis, however, the court must keep in mind that this privilege is not absolute. The Supreme Court has noted in the context of privilege in grand jury cases that it “cannot 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.” The same principle applies here; the protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is.

*Id.* at 59-60 (internal citations omitted).

Locy does not challenge the district court’s finding that Hatfill exhausted all reasonable alternatives, nor could she. Instead, she claims that the evidence she is withholding from Hatfill does not go to “the heart of the matter” (or in Locy’s preferred formulation, that the evidence is not “crucial” to Hatfill’s success).

However, the district court's application of *Carey*, *Zerilli*, and *Lee* to the facts of this case was not just a reasonable exercise of discretion, but a compelling one.

The district court correctly saw that Hatfill's need for the information is very similar to the plaintiff's need for information in *Lee*. As this court said in *Lee*, "the relevant information is the identity of the individuals who may have leaked information in violation of the Privacy Act. If he cannot show the identities of the leakers, [a Privacy Act plaintiff's] ability to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised." *Id.* at 60.

"Insofar as the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority of leaks will likely be unprovable without evidence from either leaker or leakee." *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 997 (D.C. Cir. 2005) (Tatel, J., concurring in judgment).

Despite the obvious parallel to *Lee*, Locy tries a variety of arguments to avoid the conclusion that her evidence does indeed go to the heart of Hatfill's claims. First, she argues that the court's order is overbroad. This argument is both factually unsupported and legally untenable. Factually, Locy asserts that "at most, only a 'subset' of Locy's sources provided information upon which Hatfill bases part of his Privacy Act claim," Br. 27, but she offers no citation for that assertion and the district court stated on the record that "[w]e don't know that." JA 957. Nowhere, to our knowledge, has Locy testified about any source who definitely did

*not* provide information about Hatfill, and if she did know of such a source she would not have to divulge his identity. Furthermore, even putting aside Locy's memory problems, the protective order the district court incorporated into its ruling made crystal clear that if discovery managed to "eliminate those who did not implicate Dr. Hatfill," their identities "will remain confidential to all other than Dr. Hatfill and his attorneys." JA 1040.

Moreover, as the district court noted in its memorandum opinion, the overbreadth of which Locy complains is a consequence of her own deliberate refusal to narrow the universe of possible sources. JA 1039-40. Even leaving aside Locy's decision to destroy her notes, she might have narrowed the universe of leakers by inquiring to see if any of the sources in question consented to being identified; or by honoring the written waivers collected from over 100 government employees; or by defining what she meant by a "high-ranking FBI official" or a "top FBI source," two descriptors that she admitted were more specific than the others she used. But Locy refused to answer all these questions and many more that might have reduced the alleged overbreadth of the district court's order. *See* pages 9-10 and 12-13, *supra*. Locy should be estopped from complaining about a situation for which she alone is responsible.

Second, Locy argues that she simply does not have any useful information for Hatfill's case because of her memory loss. This seriously understates the

usefulness of the information she is withholding. For one thing, there is absolutely nothing “speculative” about deposing ten or twelve people to find the five or more whom *we know* violated the Privacy Act. Indeed, if the shoe were on the other foot, and the *government* gave Hatfill a list of twelve officials to depose in order to find five leakers, one suspects Locy and her media friends would *insist* that deposing all twelve was *absolutely necessary as a matter of exhaustion* before any discovery could be had from reporters. *Cf. Lee*, 413 F.3d at 60-61 (noting and very firmly rejecting reporters’ argument that 60 or 65 depositions might be required in order to demonstrate exhaustion under *Zerilli*).

Ideally, of course, Locy would remember (and divulge) exactly who told her information about Hatfill, so that the number of depositions and the number of leakers would be exactly equal. Unfortunately, discovery is not always that efficient, and Locy swears she cannot provide more accurate information.<sup>2</sup> It is

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<sup>2</sup> Locy repeatedly suggests that the district court determined that her professed lack of memory was genuine. Br. 18, 32, 39. It would be more accurate to say that the district court expressly recognized that it would quickly become impossible for trial courts to obtain the testimony they need if witnesses could simply evade court orders by feigning lack of memory:

The Court: I mean I am not suggesting that Ms. Locy would not be truthful but it would be very convenient for reporters in this situation to just say, “I don’t recall,” and as a result of saying that, they are off the hook.

hardly a fishing expedition or a shot in the dark to look for the people who leaked about Hatfill among a group of about a dozen individuals who *definitely* leaked about the anthrax investigation generally, and of whom at least five *definitely* leaked about Hatfill. Indeed, if Locy cannot provide a list of the sources who leaked about Hatfill, then the small group of people who *definitely* leaked to Locy about the anthrax investigation and *may* have leaked about Hatfill would seem, though somewhat broader, to be the narrowest practical alternative.

In addition, the sheer number of sources whose names Locy is concealing is significant by any measure. To put it in some perspective, the total number of previously anonymous sources who have been identified as a result of the district court's August 13, 2007, order currently stands at *three*. JA 922, 938. Given that the persons identified as leakers will be reluctant and probably hostile witnesses at trial, it is hardly immaterial if Hatfill can double or even triple the number of named leakers he can call at trial. Locy asserts that her sources are unlikely to remember anything about what they told her -- a *truly* speculative argument -- but

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I am not suggesting anything sinister, but I mean that would be an easy way to avoid the consequences of the state of the law at the time.

JA 958 (11:1-10). The Court then took care to describe Locy's memory failure as "purported" in the contempt memorandum opinion and to assume rather than find her to be truthful. JA 1036, 1039. Given that her factual representations are made on the cold record of a written declaration rather than via live testimony, the court simply had no basis on which to make the credibility determination Locy suggests it made.

some failures of memory are more convincing than others, and Hatfill is certainly allowed to examine the witnesses to find out whether they can shed further light on his case.

Third, Locy argues that Hatfill has “conceded” that her evidence does not go to the heart of the matter by asking for a trial date in 2008 after five years of litigation. Hatfill’s request for a trial date “conceded” no such thing. As anyone who looks beyond Locy’s selective quotations will learn, counsel for Hatfill expressly told the district court:

There are disclosures for which we do not have the leaker.

. . .

We would choose to go to trial without the evidence rather than endure a very long wait through the appellate courts. I mean there is, of course, the D.C. Circuit appeal. The reporters have already signaled that they would ask the court for en banc rehearing of an adverse opinion there.

I believe that after an adverse opinion from the D.C. Circuit, there are ninety days before you even submit a cert petition. And if you hit the calendar . . . just right at the Supreme Court[, it] could be a very long time before there are no more courts for them to run to.

They have made it clear at every opportunity that they will not -- and I don’t want to speak about all the reporters, but the reporters who are at issue in this contempt motion -- they will not obey any adverse ruling. They will always appeal until there is nobody left to appeal to.

. . . I mean it is their strategy in dealing with cases like this, and we are not prepared to forgo a right to trial anytime this decade in order to wait and see how those appeals play out.

We are entitled to this evidence. We should have the evidence. We hope that the Court will get the evidence for us, but we believe we are entitled to a trial this year and that we should set a trial date and work backwards from that.

JA 925-27. To call this a concession that the evidence is cumulative or unnecessary is simply false.

Furthermore, to the extent that Locy bases her claims about “cumulative” evidence on the fact that other witnesses have already provided testimony that might just as easily have come from her, her argument should receive no consideration whatsoever. To excuse Locy’s contempt on such grounds would perversely reward discovery holdouts, allowing the most recalcitrant witnesses to benefit unfairly from the obedience of others. Hatfill’s case involves hundreds of leaks, scores of which have been traced back to FBI and DOJ officials. There is surely no principled reason to let some of the illegal leakers remain anonymous precisely *because* other leakers have been identified publicly. By the same logic, there is no principled reason to reward Locy’s intransigence precisely *because* other reporters took their obligation to give truthful evidence more seriously. *Cf. Lee*, 413 F.3d at 60 (“Several Appellants argue that their testimony would be duplicative if others are forced to testify, but this argument fails both because each may have different sources and because such an argument could be used to excuse all journalists’ testimony whenever there is a leak to more than one person.”).

Finally, Locy argues that the names of her sources do not “go to the heart of the case” under *Lee* because she has already testified that the disclosures came from FBI or DOJ personnel, and “that may very well be enough for Hatfill to establish his Privacy Act claim.” Br. 35 (citing *Lee*, 416 F.3d at 60). Hatfill agrees with this construction of the Privacy Act and will continue to urge it upon the district court.<sup>3</sup> He too is optimistic about his chance of prevailing on his claims. But neither Locy nor any other reporter can absolve herself of her duty to testify simply by offering cheerful encouragement to the party issuing the subpoena. Moreover, in *Lee* the court stated that, if a Privacy Act plaintiff “cannot show the identities of the leakers,” his “ability to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised.” *Id.* at 60. Accordingly, the district court was not without support for its conclusion that Hatfill needs to know the identities of the leakers.<sup>4</sup>

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<sup>3</sup> Hatfill’s Privacy Act claims are against the two defendant *agencies*, and the statute requires Hatfill to prove only that “the *agency* acted in a manner which was intentional or willful.” 5 U.S.C. § 552a(g)(4) (emphasis added). Because people who *receive* unlawful disclosures are at least sometimes in a position to assess and testify about the mental states of the persons who make them, it is indeed possible for a plaintiff to make out a Privacy Act claim without knowing the leaker’s identity. For example, if the *Washington Post* were to receive a classified document by fax, and the fax header indicated that the document was sent by a fax machine at the FBI, a reasonable trier of fact could certainly find that *someone* at the FBI intentionally disclosed the document, even if the sender’s identity remained secret forever.

<sup>4</sup> Locy and her *amici* are also wrong in their alternative argument suggesting various reasons why Hatfill must ultimately lose his case even with her testimony.

The he's-going-to-win-anyway argument is particularly strained in this case, because the judge who will be the factfinder in Hatfill's trial has already stated that Hatfill may lose if he does not put on proof of individual identities. JA 404-05. Thus, in this particular case, we already know the evidence is potentially case-dispositive. Locy might wish -- and so might we -- that there were some way to find out whether the evidence is *actually* case-dispositive -- such as by trying the case once without her evidence while reserving the right to come back for a second bite at the apple if and only if we failed the first time. But courts do not work that

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In particular, the suggestion that information gathered by the government during a criminal investigation is not covered by the Privacy Act (Locy Br. 36-38; *Amici* Br. 5-11) is contradicted by numerous cases in this and other circuits. *See, e.g., Lee*, 413 F.3d at 55 (alleging information leaked to press concerning investigation of plaintiff for espionage); *Chung v. Dep't of Justice*, 333 F.3d 273 (D.C. Cir. 2003) (alleging information leaked to press concerning plaintiff's involvement in investigation into violations of federal election laws by agents of the Chinese government); *Bartel v. FAA*, 725 F.2d 1403, 1405 (D.C. Cir. 1984) (alleging disclosure of results of investigation concerning plaintiff's violation of the Privacy Act); *Zerilli*, 656 F.2d at 706 (alleging DOJ leaked to press transcripts of electronic surveillance obtained by FBI in course of criminal investigation of organized crime); *Scarborough v. Harvey*, 493 F. Supp. 2d 1, 4-5, 9 (D.D.C. 2007) (alleging disclosure of information concerning investigation of plaintiff for fraud); *Jacobs v. Nat'l Drug Intelligence Ctr.*, 423 F.3d 512, 513 (5th Cir. 2005) (alleging information leaked to press suggesting plaintiff was involved in a Mexican money-laundering and drug-trafficking organization); *Orekoya v. Mooney*, 330 F.3d 1, 6 (1st Cir. 2003) (holding that disclosure of information from FBI files about the plaintiff's prior arrest is actionable under the Privacy Act); *Britt v. Naval Investigative Serv.*, 886 F.2d 544 (3d Cir. 1989) (remanding case to determine whether disclosure of investigative information about the plaintiff, including "accounts of persons interviewed, results of the execution of any searches, and a record of all physical evidence seized," was willful and intentional).

way, nor should they. At least in this case, evidence of individual source identities *is* crucial, because it may well be case-dispositive.

In addition, Hatfill was separately injured by each of dozens of leaks, but has been able to identify the leakers of only a small subset of those leaks. And while Hatfill views each of the leaks as damaging, the finder of fact may not see each of them the same way, particularly if some witnesses who leaked describe their statements as not being accurately reported. For these reasons as well, Hatfill should be permitted to depose each leaker who disclosed information to Locy about the anthrax investigation.

**II. The District Court Correctly Refused to Create a Common-Law Privilege to Excuse Locy from Testifying by Grafting a Third Prong onto the Test Applied in *Lee*.**

Hedging against an adverse decision under the standard enunciated in *Carey*, *Zerilli*, and *Lee*, Locy urges this Court to reverse anyway, “by reason of the common law reporter’s privilege.” Br. 44. Apparently Locy believes such a privilege would be just like the existing standard under *Lee*, except that it would have an additional, third prong: a balancing test, with disclosure ordered only if the judge to whom the matter happens to be assigned thinks the ostensibly private interest in disclosure outweighs the ostensibly public interest in concealing the sources’ identities. *Id.* at 53-54. As an initial matter, this is plainly the wrong case in which to implement any such departure from existing law because, under the

findings made by the district court, Locy would not prevail even if the privilege were expanded as she desires. JA 717-25. Moreover, that should be the result in Privacy Act cases generally -- Congress has already performed the “balancing” in such cases and concluded that the government should be liable for leaks like those at issue here. It would make no sense to create a privilege under Rule 501 that effectively repealed the protections of the Privacy Act.

A. **The District Court Has Already Found that a “Common Law” Reporter’s Privilege Would Not Excuse Locy from Testifying under the Facts of this Case.**

In one of the orders Locy challenges, the district court followed this Court’s precedents and refused to recognize the existence of a new “common law” reporter’s privilege. JA 717-21. The court carefully applied the four-factor analysis recognizing new privileges set forth by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 10-15 (1996), and summarized by this Court in *In re Duces Tecum Issued to Commodity Futures Trading Comm’n*, 439 F.3d 740, 750 (D.C. Cir. 2006), but was “unpersuaded that the reporters have satisfied these prerequisites.” JA 719. The court particularly emphasized that the “evidentiary benefit,” 518 U.S. at 11, of rejecting a broad “reporter’s privilege” is very great here “because affording supremacy to a reporter’s privilege” in the “context of an actionable Privacy Act violation claim” would “erect a potentially insurmountable

hurdle for a Privacy Act litigant seeking to hold the government accountable for leaks condemned by the Act.” JA 720.

The district court did not stop there, however -- it also correctly pointed out that while the three panel members of *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D. C. Cir. 2005), were “not of one mind on the existence of a common law privilege,” the approaches of all three judges’ supported rejecting any common law privilege in this case. Judge Sentelle found that “creation of a reporter’s privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision” and that it should be “address[ed] . . . to the Article I legislative branch.” *Id.* at 981 (Sentelle, J., concurring). Judge Henderson found it unnecessary to rule on the issue of privilege, but expressed grave doubts about a “test that requires more than an evaluation of the essentiality of the information to the prosecution and the exhaustion of available alternative sources thereof,” *id.* at 984-85 (Henderson, J., concurring) -- both factors that are plainly satisfied here. And while Judge Tatel would have recognized a common law privilege, “it is not absolute and may be overcome by an appropriate showing” that the public interest required disclosure, *id.* at 973, as Judge Tatel found to be the case in *Miller* itself. *Id.* at 1003 (Tatel, J., concurring).

Here, the district court similarly found that “even assuming arguendo, that a qualified common law reporter’s privilege is recognizable in this Circuit, extending

the privilege to Privacy Act cases where a viable claim has been pled would be inappropriate. To rule otherwise would frustrate the fundamental purpose for the Privacy Act's adoption. JA 720-21. *See also* JA 1034 (“to the extent a federal common law privilege existed, it would not be absolute, and should not be recognized” in the context of a viable Privacy Act case). As a result, even if Locy were to convince this court to adopt a common law privilege similar to that advocated by Judge Tatel -- but criticized by Judges Sentelle and Henderson -- in *Miller*, the district court has *already performed* the balancing that would be required under that approach and *rejected* the application of such a qualified privilege in this case. Such balancing is, of course, within the sound discretion of the district court judge. *See Lee*, 413 F.3d at 59 (announcing that this Court would “defer to the sound discretion of the trial court where the balancing of the relevant factors is involved”).

**B. This Court Should Not Adopt a Novel Common-Law Reporter's Privilege.**

Federal Rule of Evidence 501 authorizes federal courts to “define new privileges by interpreting ‘common law principles . . . in the light of reason and experience.’” *Jaffee*, 518 U.S. at 8 (1996) (quoting Fed. R. Evid. 501). The Supreme Court has cautioned, however, that “exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *United States v. Nixon*, 418 U.S. 683, 710

(1974). Any new privilege must therefore “promote[] sufficiently important interests to outweigh the need for probative evidence.” *Trammel v. United States*, 445 U.S. 40, 51 (1980). In applying these principles, this Court has stated that a party seeking recognition of a new privilege under Rule 501 must “demonstrate with a high degree of clarity and certainty that the proposed privilege will effectively advance a public good.” *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998).

The *Branzburg* Court observed that as of 1972 the reporter’s privilege had “been almost uniformly rejected.” *Branzburg v. Hayes*, 408 U.S. 665, 685-86 (1972). *See also Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (characterizing *Branzburg* as a case “deal[ing] with the creation of privileges not recognized by the common law”). Developments over the last thirty-five years have made the case for a common-law privilege significantly *weaker* than it was at the time of *Branzburg*. In fact, overpowering considerations of logic and policy militate against any new evidentiary privilege, at least in Privacy Act cases.

**1. In Privacy Act Cases, Public and Private Interests Align in Favor of Disclosure.** Loey proposes to resolve reporter’s privilege cases by balancing “the public’s interest in avoiding the chilling of disclosure[]” against what she terms purely “private interests” in favor of disclosure. Br. 53. But her claim that the public interest generally favors hiding source identities from the public is incorrect.

Her unstated assumption is that all leaks are equally worthy of encouragement -- that one cannot usefully distinguish between *good* anonymous leaks, like “whistleblower” leaks, and *bad* anonymous leaks, like violations of the Privacy Act.

This is demonstrably untrue, and the best evidence that such a distinction can be drawn is that Congress has already drawn it. The Privacy Act of 1974 provides a private right of action for individuals like Hatfill, 5 U.S.C. § 552a(g), as well as criminal penalties for individuals who disclose confidential information about a private citizen, 5 U.S.C. § 552a(i). By contrast, the Whistleblower Protection Act of 1989 protects federal employees who disclose information about violations of law, gross mismanagement or waste, abuses of authority, or threats to public health or safety. 5 U.S.C. § 2302(b)(8). Federal law thus expressly prohibits certain leaks (the ones at issue here) and expressly encourages other leaks (which no one seriously contends are at issue in the leaks about the investigation of Hatfill).

The fact that Congress has made this distinction, prescribing punishment for some leakers and protection for others, should make this Court “especially reluctant to recognize a privilege” that ignores the distinction. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). In *University of Pennsylvania*, the Supreme Court refused to recognize a common-law privilege for a university to

exclude peer review materials from an EEOC subpoena, in large part because Congress had considered both the general issue of confidentiality in Title VII cases and the particular issue of applying Title VII to universities. *Id.* at 189-92. The degree of confidentiality provided by Congress did not go as far as the university thought proper, but the Court refused “to strike the balance differently from the one Congress adopted.” *Id.* at 192. Here too, a common-law evidentiary “reporter’s privilege” covering *all* leaks or all “newsgathering” is much too blunt an instrument to accommodate the variety of public policy considerations involved. Like Congress, the courts can and should distinguish good leaks from bad, and there is no question as to which side of the line the leaks in this case are on.

Locy further argues that “[t]o the extent that confidential sources are not protected, they will be less likely to come forward in the first place.” Br. 51. She cites *Jaffee* for the proposition that without the privilege she seeks, “much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being” in the first place. *Id.* (quoting *Jaffee*, 518 U.S. at 11-12). But, again, Locy seems unable to distinguish between good leaks and bad ones. From a broad societal perspective, it would be a very good thing if the kind of “evidence” at issue in this case -- calculated disclosures of confidential information by the government through the media in violation of the Privacy Act -- were never to “come into being” in the first place. As a society, we simply should not want our

government to be able to use private information protected by federal law to mount attacks on innocent citizens through the media. To the contrary, we should want to provide an incentive to *stop* such attacks from “com[ing] into being.”

In short, in Privacy Act cases the evidence -- the unlawful communications from government officials to the press -- *are themselves the vehicle for the criminal violation*. Putting a stop to the communications puts a stop to the violations. Of course, it is too late for that in this case -- here, the evidence already exists and it must be obtained to permit redress of the Privacy Act violations. To exclude the evidence at this stage would eviscerate the Privacy Act.

**2. Congress Has Repeatedly Rejected Federal Shield Legislation.** In just the past three years, multiple versions of a proposed “Free Flow of Information Act” died in both houses of Congress. *See, e.g.*, Free Flow of Information Act of 2006, S.2831, 109th Cong. § 1-10 (2006); Free Flow of Information Act of 2005, S.1419, 109th Cong. § 1-5 (2005); Free Flow of Information Act of 2005, S.340, 109th Cong. § 1-7 (2005); Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. § 1-5 (2005); Free Flow of Information Act of 2005, H.R. 581, 109th Cong. § 1-7 (2005). New versions of the legislation are currently pending in Congress, but the Executive Branch has strongly condemned the legislation and threatened a veto. *See* <http://www.usdoj.gov/opa/media-shield.htm>. Given the very recent and active legislative history on the subject, Locy’s claim that the federal government

has made a clear policy choice in favor of a reporter's privilege -- beyond that which has evolved in federal courts -- is unsupportable. In fact, the legislative activity points in the opposite direction.

**3. State Shield Laws Do Not Support Adopting a Federal Common-Law Privilege.** Locy tries to draw support for a common law privilege from state shield laws, but those laws actually undermine her position. As Judge Sentelle wrote in *Miller*, “[t]he state legislatures have dealt with this vexing question . . . in a variety of ways.” 397 F.3d at 980 (Sentelle, J., concurring). Notably, few of the statutes even mention the admissibility of evidence; rather, they are (as advertised) “shield” statutes that create rules of discovery rather than rules of admissibility.<sup>5</sup> Indeed, some offer no more than procedural protection; Arizona’s statute merely requires that an additional affidavit be attached to any subpoena issued to a media witness, in order to aid the court in ruling on the subsequent motion to quash.<sup>6</sup> But the only state laws that matter under Rule 501 are those that create a “comparable”

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<sup>5</sup> See, e.g., D.C. Code § 16-4702 ((focusing exclusively on subpoena power). Connecticut’s statute is one of the few that actually addresses admissibility of evidence obtained from someone other than the reporter, and even that statute only addresses the admissibility of evidence “obtained in violation of” the shield provisions, Conn. Gen. Stat. Ann. § 52-146t(h) -- something that presumably would happen only if the government lawfully seized evidence that happened to expose a source.

<sup>6</sup> Ariz. Rev. Stat. Ann. § 12-2214. As anxious as they are for a “common law” reporter’s privilege from this court, one suspects media litigants would not be satisfied if this court adopted a federal common-law version of Arizona’s “shield law.”

privilege -- that is, an evidentiary privilege of the type that is governed by Rule 501. Many of the state laws that are supposed to show consensus are not even vaguely “comparable” to what Locy and her *amici* seek here.

Second, even if one overlooks the distinction between “shield” laws and rules of evidence, state shield laws are in obvious and material conflict about the degree of protection they offer. It apparently matters, for example, whether the case is civil or criminal,<sup>7</sup> whether the reporter is a party or a non-party,<sup>8</sup> and whether the action is for libel or some other cause of action,<sup>9</sup> and even whether the witness writes for a newspaper or a magazine.<sup>10</sup> Some state shield laws provide absolute protection from compelled disclosure while others are qualified.<sup>11</sup> Some include a public-interest balancing factor and others do not.<sup>12</sup> Some expressly abrogate the privilege when the reporter is an eyewitness to criminal or tortuous

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<sup>7</sup> *See, e.g.*, Minn. Stat. § 595.024; La. Rev. Stat. Ann. § 45:1459(D)(1).

<sup>8</sup> *See, e.g.*, Ga. Code § 24-9-30; R.I. Gen. Laws § 19-19.1-3(b)(1).

<sup>9</sup> *See, e.g.*, Minn. Stat. § 595.025; 735 Ill. Comp. Stat. 5/8-904; 5/8-907(2); Tenn. Code Ann. § 24-1-208(b).

<sup>10</sup> *See, e.g.*, Ala. Code § 12-21-142; *Price v. Time, Inc.*, No. CV-03-S-1868-S, 2003 U.S. Dist. LEXIS 24586 at \*19 (N.D. Ala. Dec. 8, 2003) (“[T]he court concludes that the Alabama statutory privilege against disclosure of a source does not extend to persons ‘engaged in, connected with or employed on’ a magazine.), *aff’d* 416 F.3d 1327 (11th Cir. 2005) (concluding that a reporter for a magazine was not protected by the shield law applicable to “any newspaper”).

<sup>11</sup> Compare N.Y. Civ. Rights Law § 79-h (absolute) with Conn. Gen. Stat. Ann. 52-146t(d) (qualified).

<sup>12</sup> *See, e.g.*, Ga. Code § 24-9-30; N.C. Gen. Stat. § 8-53.11.

conduct.<sup>13</sup> State legislatures (and in sixteen states, state judges) seem to have tried to make rules that fit certain fact patterns and not others. And this is significant, because one of the fact patterns that is not addressed by *any* of the state statutes or state judicial decisions is the one currently before this Court: illegal leak cases under the Privacy Act. Media advocates typically try to minimize the significance of these differences, but the Court should not permit the lack of consensus on this topic to be obscured by breezy generalities. Stating that 49 states have shield laws is a bit like stating that 50 states have flags: The states do all have flags, but they do not look so much alike that it would make sense to adopt the consensus design as our federal flag.<sup>14</sup> The same is true of the shield laws.

Finally, given the degree of context-sensitivity displayed in state shield laws, it seems only fair to observe that these state-law protections for journalists have each been created for use in state courts, in cases decided under state law -- not under the Privacy Act or any other federal statute. Particularly in light of the fact that Congress has drawn distinctions in federal law between good leaks and bad leaks, it would be inappropriate for this Court to base a federal evidentiary privilege on a state-level consensus, even if such a consensus were actually to exist.

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<sup>13</sup> See, e.g., N.C. Gen. Stat. 8-53.11(d).

<sup>14</sup> And, as noted above, the federal government already has a judicially recognized “shield law” under *Carey*, *Zerilli*, and *Lee*.

Writing in *Miller*, Judge Sentelle correctly concluded that the diversity of state shield laws raises more questions than it answers:

Should the privilege be absolute or limited? If limited, how limited? .... [T]he state statutes provide a variety of answers to that policy question. Therefore, if such a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal, doesn't that decision smack of legislation more than adjudication?

397 F.3d at 981 (Sentelle, J., concurring). As Judge Sentelle suggests, Locy's arguments for a federal privilege relying on state shield laws might support adoption of some kind of limited federal statute by the legislature, but cannot justify the kind of sweeping judicial pronouncement she seeks in this case.

***4. Two Centuries of Experience Demonstrate that No Evidentiary Privilege Is Necessary.*** Rule 501 itself tells us that we are to interpret the common law “in the light of reason and experience.” Fed. R. Evid. 501. Reason and experience, however, tell us not to “fix” a test that is not broken. For over thirty years, federal courts across the country have consistently applied standards that do not materially differ from the standards set forth in *Carey*, *Zerilli*, and *Lee*. As a matter of the “evolutionary development of testimonial privileges,” *Trammel*, 445 U.S. at 47, it seems clear that the *Carey-Zerilli-Lee* test is the remarkably stable result of common-law elaboration, with a far better claim to be considered a

“common law privilege” than anything proposed under Rule 501 by media witnesses who just want a broader exemption from the duty to testify.

Reason also tells us that freedom of the press in this country cannot possibly depend on the creation of a new privilege that the press managed to do without for the last 200 years. *Jaffee* suggests that creation of a new privilege under Rule 501 may be appropriate where the privilege is “rooted in the *imperative need* for confidence and trust,” 518 U.S. at 10 (citations omitted; emphasis added). But the argument that our desire for robust reporting on public affairs creates an “imperative need” for an evidentiary reporter’s privilege is unavoidably an empirical one, and the empirical evidence is fatal to Locy’s argument. It is an established fact that our free press has flourished for well over 200 years in the absence of any reporter’s privilege, and that fact makes any argument based on “imperative need” prohibitively difficult to swallow. Again, as the Supreme Court stated in *Branzburg*, “the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. . . . The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.” 408 U.S. at 698-99. Self-serving predictions of imminent catastrophe should always be viewed skeptically, but we should be particularly skeptical of self-serving predictions that catastrophe will occur unless we radically alter the unbroken practice of the last 200 years.

## ***5. More Anonymous Reporting Does Not Mean More Government***

***Accountability.*** Locy's *amici* write (rather rhapsodically) about the media's role in making "important public revelation[s] -- be it Watergate, the Pentagon Papers, or Abu Ghraib" -- through reliance on confidential sources. As discussed above, however, this case has nothing to do with the media shining a light on government wrongdoing. Here, the media *facilitated* government wrongdoing by agreeing to keep the identities of the perpetrators of unlawful acts a secret. That does not lead to *more* government accountability -- to the contrary, keeping the identities of government officials secret in an ever-broadening array of circumstances leads to *less* accountability.

Indeed, it is worth noting just how commonplace it has become for the press to agree to keep secret the identities of government officials when there is no conceivable need for such secrecy. For example, a number of reporters traveling together aboard Air Force Two agreed to identify only as an anonymous "senior administration official" the person who said this:

Let me just make one editorial comment here. I've seen some press reporting says, "Cheney went in to beat up on them, threaten them." That's not the way I work. I don't know who writes that, or maybe somebody gets it from some source who doesn't know what I'm doing, or isn't involved in it. But the idea that I'd go in and threaten someone is an invalid misreading of the way I do business.

JA 419. Plainly, the culture of officials requesting anonymity and reporters granting it is now so engrained that it extends to situations in which it is patently

absurd. Other evidence in the record before the district court also shows how routine this charade of official, pre-arranged leaking has become. *See* JA 407-17.

Of course, the absurdity involved does not mean that courts or anyone else should try to prevent reporters from quoting sources anonymously *in their reports*. If reporters promise to call the Vice President a “senior administration official” because he wants them to, they may appear ridiculous, but they do little harm to the republic. But courts should not extend this absurdity into the courtroom. Under Locy’s argument for a “common law” privilege, a court would be directed to assume the existence of some public interest *against* the use of Vice President Cheney’s name in reporting what Vice President Cheney said above simply because reporters were docile enough to pass the news along on those terms.<sup>15</sup> It is difficult even to imagine how that assumption could possibly be justified.

Under current law, an agreement about an attribution in a news report simply does not trump a valid subpoena. Whether a reporter privately agrees to describe the Vice President as a “senior administration official” or not, it cannot possibly be thought that such a promise makes the Vice President’s true identity too secret to be uttered in a court of law. Locy’s efforts to push the law in that direction should be rejected.

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<sup>15</sup> *See* Mark Silva and Bay Fang, *Cheney Greeted with Illustration of Taliban Power*, Chicago Tribune (Feb. 28, 2007) (attributing Vice President’s “anonymous” remarks in JA 419 to a “senior administration official traveling with Cheney”).

**6. Reporters' Private Promises of Confidentiality Do Not Trump All Other Societal Interests.** Locy's *amici* also attempt to justify a common law reporter's privilege by pointing to the functional importance of a free press in our society. *See, e.g., Amici* Br. 16-17. But freedoms of speech and press belong to everyone, and one can agree on their importance without agreeing that everyone who exercises these freedoms should possess a legal right to override other important social interests. The presumption of innocence is also important to our society, as is personal privacy, as is the protection of reputation. The assumption that a reporter's private promises are more important than these other interests is highly problematic under established precedent.

*Branzburg* is far from the only Supreme Court decision to reject such a special privilege for journalists. In *Zurcher v. Stanford Daily*, the Court rejected the claim that the first amendment required extraordinary justification for the execution of search warrants at newspaper offices. 436 U.S. 547, 563-66 (1978). In *Herbert v. Lando*, a civil case in which there was no hint of criminal wrongdoing, the Court refused to recognize any special constitutional privilege for reporters to shield the editorial process from civil discovery. 441 U.S. 153, 174 (1979). *Cohen v. Cowles Media Co.* was a civil case in which a publisher sought constitutional protection for *breaking* a confidentiality promise of the sort the press here portrays as constitutionally unbreakable, and the Court rejected the claim that

the first amendment precluded a civil lawsuit for publication of the formerly-anonymous source's identity. 501 U.S. 663, 668-670 (1991).

Other first amendment decisions are to the same effect. As noted above, in *University of Pennsylvania* the Court, citing *Branzburg* and *Herbert*, had no difficulty rejecting the claim that universities should be permitted to exclude peer review materials from an EEOC subpoena, principally on the ground that compliance with discovery demands is at most an "extremely attenuated" burden on first amendment freedoms. 493 U.S. at 199-201. The answer here is the same as the answer in *University of Pennsylvania* and *Branzburg*: Freedom of the press is *simply not infringed* by enforcement of a general obligation to obey subpoenas. The Court has emphatically and repeatedly declared that incidental effects on protected activity are insufficient to justify special journalistic exemptions from generally applicable law.<sup>16</sup>

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<sup>16</sup> See also *Calder v. Jones*, 465 U.S. 783, 788-91 (1984) (applying the "minimum contacts" test for personal jurisdiction to a reporter, despite first amendment objection); *Zemel v. Rusk*, 381 U.S. 1, 16 (1965) (applying ban on travel to Cuba to the media, despite first amendment objection); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 192-94 (1946) (applying Fair Labor Standards Act to the media, despite first amendment objection); *Associated Press v. United States*, 326 U.S. 1, 7 (1945) (applying Sherman Act to the media, despite first amendment objection); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (applying National Labor Relations Act to the media, despite first amendment objection); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (holding that media companies are subject to nondiscriminatory forms of taxation, despite first amendment objection).

**III. The District Court Properly Ordered Locy to Comply or Pay *Per Diem* Sanctions Personally.**

Locy also challenges the terms of the contempt order, claiming that the sanctions imposed by the district court were impermissibly punitive and that the court's insistence that Locy pay all fines personally failed to take adequate account of her limited financial means. The district court wisely exercised its discretion here.

**A. The District Court's Contempt Order Was Not Punitive.**

Locy first argues that the district court's order constitutes punishment for having a bad memory. Br. 38-39. This argument is frivolous. The district court did not order Locy to remember the things she says she forgot; he ordered her to disclose the things she admit she remembers. Specifically, she has been ordered to disclose the names of the FBI and DOJ officials who anonymously leaked information to her about the anthrax investigation, even if she cannot remember exactly what information they leaked. Locy may well disagree with the district court's determination that the disclosure of those names is required under *Carey*, *Zerilli*, and *Lee*, but that was the court's order and it is unmistakably forward-looking. The assertion that "the contempt order sanctioned her for a lack of recollection" (Br. 40) is simply wrong.

There is, of course, a question of incentives here, as there is with many legal rulings, and it is fair to say that the district court's order quite rightly gives

reporters certain incentives to have good memories instead of bad ones. If protection of an anonymous source's identity during subsequent litigation requires reporters to demonstrate that the source deserves to be protected, then we can reliably predict that journalists will tend to have good memories, and probably good notes as well. If, on the other hand, poor memories and missing notes suffice to close down all further discovery about source identities, then we can predict just as reliably that memories and note-taking will become even worse. Memories might even suffer steep and irreversible declines shortly after the filing of legal process.

Locy, in the standard legal metaphor, holds the keys to her own cell. She need only testify truthfully about the FBI and DOJ officials who leaked information to her about the anthrax investigation, and her involvement in this case will be at an end.

**B. The District Court's Contempt Sanctions Are Not Excessive.**

Locy's second challenge to the contempt order is that the *per diem* sanction of up to \$5,000 per day -- a sanction she calls a "fine" -- was so excessive as to constitute an abuse of discretion. Locy argues that that the *per diem* sanction here is excessive both in relation to her conduct and in relation to her financial means. But Locy's use of the word "fine" and the figure of \$5,000 point to the sentinel weakness in her argument: She need not pay a dime if she obeys the order.

Locy's argument that the "fine" is excessive in relation to the nature of the conduct in which she engaged misses the point of civil contempt sanctions completely. The point of civil contempt sanctions is to compel the contemnor to comply with the law by "exert[ing] a constant coercive pressure." *Int'l Union v. Bagwell*, 512 U.S. 821, 829 (1994). Where a court employs a *per diem* sanction, it is not supposed to represent a fair price for the privilege of continuing to disobey; it is supposed to end the disobedience promptly. That is the fundamental problem with Locy's reliance on *criminal* contempt cases like *Douglass v. First Nat'l Realty Corp*, 543 F.2d 894 (D.C. Cir. 1976). She argues that \$5,000 is excessive "even for criminal contempt, unless the contemnor has the protection of a jury trial," Br. 42 n.9, and the implication is that if it is excessive for criminal contempt it *must* be excessive for civil contempt. But that sort of *a fortiori* argument is misplaced here because criminal contempt is about *past* misconduct which the contemnor cannot cure. *See Douglass*, 543 F.2d at 897-98. The district court's order, by contrast, offered Locy ample opportunity to cure. In that sense, the district court did not impose any penalty at all; the court simply ordered Locy to comply and set the *per diem* at a level high enough to let her know the court is serious.

Indeed, all the attention Locy pays to the \$5,000 figure highlights this aspect of the order. Locy has openly disobeyed the district court's order for six months

already at the time of this writing, yet the court granted her four days to bring herself into compliance with *no* monetary sanction, then seven days at \$500 per day, then seven more days at \$1,000 per day, before the \$5,000 sanction kicks in. She can therefore pay a *per diem* amount of *zero* if she wants, even now. Of course, she may choose to continue disobeying, in which case the district court should employ other sanctions to persuade her to respect the rule of law. But the total amount she ultimately pays will be entirely within her control. If she is ever “fined” \$5,000, she will have fined herself.

For similar reasons, Locy’s personal financial position is not relevant here. She argues that she cannot afford the sanctions, but the sanctions are not designed to be affordable; indeed, they are not designed to be paid. Locy’s position seems to be that, because her financial means are modest, *Hatfill* should pay the price through loss of evidence. But why should a party already injured by her sources’ illegal disclosures have to do without relevant evidence so that she can enjoy the luxury of clinging to a legal position the court has rejected?

The reality in these cases is that it is actually enormously costly to get evidence from reporters, because the reporters typically fight at every step of the process without the slightest intention of complying with any contrary rulings. Here, for example, there was an early motion to quash by Gannett, then assertion of privilege at a first deposition of Locy, then opposition to a motion to compel,

then re-assertion of the rejected privilege at a second deposition of Locy, then opposition to the contempt motion, and now finally this appeal, which generated two emergency procedural motions the week after it was filed. It is safe to say that there is a strong disincentive for civil litigants to seek this sort of evidence unless they really need it. In fact, the problem of modest means that should concern this Court is that the litigation tactics of big-spending media conglomerates will price many litigants out of a *de facto* market for the truthful and complete testimony that even media litigants are at least theoretically obligated to provide as incidents of their citizenship. The district court, recognizing the strong likelihood that Locy would continue to defy him, set the *per diem* sanction high. By all indications, it may need to be higher. But whatever happens to the *per diem* amount in the future, the amount Locy pays depends only on whether she complies at first or at last.

C. **The District Court Properly Prohibited Third-Party Reimbursement.**

Finally, Locy, supported by her *amici*, criticizes the district court for prohibiting the acceptance of any reimbursement for any *per diem* sanction she elects to pay. Br. 43; *Amici* Br. 21-23. The main point already made above -- that Locy has it within her power to pay nothing -- really should be an adequate answer to this argument as well. The fact that Locy was not an employee of Gannett when

she chose to disobey the court's order is another fully adequate response. *See* JA 1049.

However, the evident interest of the news *organizations* in this aspect of the appeal prompts some further observations that should inform the review of the district court's order. *Because* the whole point of civil contempt sanctions is to induce compliance, there is a practical necessity for the district court to know who is paying when the amount of the sanction is set. The amounts chosen by the district court for inducing Locy's compliance would be laughable if Gannett undertook to pay them, and they would scarcely amount to a rounding error if the thirty-two news organizations and trade associations appearing here as *amici* all chipped in for a legal defense fund. That, of course, is exactly what Gannett and the other media companies involved here would like: laughable sanctions, which do nothing to get courts the evidence they need. The district court wisely rejected that path and imposed a sanction showing that the court has every intention of inducing Locy to stop thumbing her nose at the law.

If this court determines that Locy should have the right to accept reimbursement, then the district court will need to set the amount of the *per diem* sanctions much higher if they are to be equally likely to induce compliance. If, for example, Gannett were to advise this court that it wishes to assume financial responsibility for Locy's non-compliance, then this court could remand to the

district court for imposition of a contempt sanction that would be likely to have the same impact on Gannett that \$5,000 a day will have on Toni Locy. But neither Gannett nor the other media organizations funding this appeal should be permitted to have it both ways. They should not, that is, be able to put Locy up front at the time the monetary sanction is set and then complain if the court expects Locy herself to pay. The object of *all* civil contempt sanctions is compliance.

### **CONCLUSION**

The judgment of the district court should be affirmed.

Respectfully submitted,

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April 11, 2008

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**CERTIFICATE OF COMPLIANCE**

Certificate of Compliance With Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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DATED: April 11, 2008

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# **ADDENDUM**

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## PERTINENT STATUTES

### Privacy Act

The Privacy Act of 1974, codified as amended at 5 U.S.C. § 552a, provides in relevant part:

[5 U.S.C. § 552a](b) Conditions of disclosure. No agency shall disclose 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, unless disclosure of the record would be-- [identifying exceptions].

\* \* \*

(g) Civil remedies.

(1) Whenever any agency--

\* \* \*

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

\* \* \*

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$ 1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

### **Whistleblower Protection Act**

The Whistleblower Protection Act of 1989, codified at 5 U.S.C.

§ 2302(b)(8), provides in relevant part:

[5 U.S.C. § 2302](b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

\* \* \*

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;  
or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

# UNPUBLISHED DECISION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
STEVEN J. HATFILL, M.D.,

Plaintiff,

-against-

ALBERTO GONZALES, Attorney General of the  
United States, et al.,

Defendants,

BRIAN ROSS,

Non-Party Respondent

----- X  
ALVIN K. HELLERSTEIN, U.S.D.J.:

**MEMORANDUM AND  
ORDER GRANTING  
PLAINTIFF'S MOTION TO  
COMPEL TESTIMONY**

M8-85 (AKH) (Part I)

This motion arises out of a lawsuit pending in the United States District Court for the District of Columbia, Number 03-CV-1793, over which United States District Judge Reggie B. Walton is presiding. By his suit, Plaintiff Steven J. Hatfill ("Hatfill") alleges that government officials within the Department of Justice and the Federal Bureau of Investigation violated his rights under the Privacy Act of 1974 by leaking to members of the press government records associating Hatfill with an investigation into the source of anthrax attacks in 2001. Hatfill v. Gonzales, ---F. Supp. 2d ---, No. 03-1793 (RBW), 2007 WL 2296767, (D.D.C. Aug. 13, 2007); see 5 U.S.C. § 552a. Hatfill filed a motion in this Court to compel non-party respondent Brian Ross, a journalist with ABC, to identify two confidential government informants that he has thus far identified only as "Source A" and "Source B." Fed. R. Civ. P. 37(a).

On June 19, 2007, the parties, and nonparty Respondent Brian Ross, appeared for oral argument on Plaintiff's motion to compel. The defendants took no position on the merits of the motion, and argued only, as they do now, that it is necessary for the plaintiff to specifically identify the source of the illegal disclosure in order to prevail on a claim under the Privacy Act. I noted that the disposition of the motion required an evaluation of the materiality, relevance,

necessity, and criticality of the information sought, e.g., Gonzalez v. National Broadcasting Co., 194 F.3d 29, 33 (2d Cir. 1999), and that Judge Walton, presiding over the merits, was best-positioned to determine the criticality of identifying information in the context of an action for damages under the Privacy Act. I therefore recommended that Plaintiff test the necessity of the information he sought in this Court by motion for summary judgment before Judge Walton—if Plaintiff were to prevail on such a motion, the motion before me would be mooted. Accordingly, I denied the motion to compel without prejudice to renewal, if necessary, after further proceedings before Judge Walton. Order, June 27, 2007; Tr., 37–39, June 19, 2007.

On July 3, 2007, Judge Walton held a hearing on Hatfill’s motion to compel testimony from members of the press other than Brian Ross, those subject to the subpoena power of the District Court for the District of Washington D.C. At the hearing, counsel raised the possibility of delaying rulings upon cross-motions to compel discovery and quash subpoenas in favor of motions for summary judgment, apprising Judge Walton of the opinions I expressed on the record on June 19, 2007. For reasons beyond the scope of the motion before me, Judge Walton indicated that he would not postpone his discovery rulings. Tr., July 3, 2007. By memorandum opinion of August 13, 2007, Judge Walton granted Hatfill’s motion to compel further testimony from members of the Washington D.C. press. Judge Walton ruled that Hatfill had satisfied the criteria for overcoming the journalists’ qualified First Amendment privilege, and that the identity of the reporters’ sources is “clearly central to [Hatfill’s] Privacy Act claims.” Hatfill, 2007 WL 2296767 at \*7 (citing Lee v. Dep’t of Justice, 413 F.3d 53, 56 (D.C. Cir. 2005)).

Plaintiff renewed his motion to compel further testimony on August 20, 2007. Respondent, Brian Ross, again opposes. Respondent argues that the law of the Second Circuit regarding the qualified journalists’ privilege differs materially from the law in the D.C. Circuit. Respondent argues first that the qualified journalists’ privilege test requires, in addition to the

criteria set forth in National Broadcasting Co., a freestanding public interest analysis. Second, and to the extent that the First Amendment privilege does not protect disclosure in this case, respondent argues that the Second Circuit recognizes a common law evidentiary privilege that protects disclosure in this case. See Fed. R. Evid. 501; Jaffee v. Redmond, 518, U.S. 1, 8 (1996). Neither argument has merit.

In National Broadcasting Co., the Second Circuit set forth the “test” for overcoming the journalists’ privilege” in the context of a civil litigation:

The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists’ sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.”

194 F.3d at 33 (quoting In re Petroleum Prods. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982)). I reject Respondent’s argument that, in addition to the criteria of materiality, criticality, and (un)availability, a court must also undertake an analysis of “public interest.” For the reasons cited by Judge Walton, I hold that Plaintiff has satisfied this test for overcoming the journalists’ qualified privilege under the First Amendment.

Respondent’s argument regarding a common law privilege under Rule 501 of the Federal Rules of Evidence also lacks merit. The Second Circuit has explicitly declined to hold that such a privilege exists. New York Times Co. v. Gonzales, 459 F.3d 160, 169 (2d Cir. 2006). Even were such a privilege to exist, it would be overcome by the facts before me.

Accordingly, Plaintiff’s motion to compel further testimony as to the identities of Respondent Ross’s sources is granted.

SO ORDERED.

Dated: September 7, 2007  
New York, New York

  
ALVIN K. HELLERSTEIN  
United States District Judge

**CERTIFICATE OF SERVICE**

I certify that April 11, 2008, I served, via hand delivery, the required number of copies of this Brief for Appellee Steven J. Hatfill, M.D. upon the following:

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