

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3 SOUTHERN DIVISION

4 THE HON. CORMAC J. CARNEY, JUDGE PRESIDING

5
6 UNITED STATES OF AMERICA,)
)
7 PLAINTIFF,)
)
8 VS.) NO. SACR 05-293-CJC
)
9 CHI MAK, ET AL,)
) DEFENDANT.)
10 _____)
11
12

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS
14 SANTA ANA, CALIFORNIA
15 THURSDAY, JULY 24, 2008
16 9:00 A.M.
17
18
19

20 MARIA BEESLEY-DELLANEVE, CSR 9132
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 4 950 PENNSYLVANIA AVENUE N.W.
 SUITE 6150
 WASHINGTON, DC 20530
 202-514-3225
 5
 6
 7
 8 FOR THE MOVANT GERTZ: DRINKER BIDDLE & REATH
 BY: CHARLES LEEPER, ESQ.
 9 ALLEN FARBER, ESQ.
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 12 FOR THE DEFENDANT CHIU: LAW OFFICES OF STANLEY GREENBERG
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1 SANTA ANA, CALIFORNIA; THURSDAY, JULY 24, 2008
 2 9:00
 3 -OOO-
 4 THE CLERK: ITEM ONE, SACR 05-00293-CJC. USA VERSUS CHI
 5 MAK, ET AL.
 6 COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE RECORD.
 7 MR. LEEPER: GOOD MORNING, YOUR HONOR. MY NAME IS
 8 CHARLES LEEPER AND TO MY FAR RIGHT IS OUR CLIENT WILLIAM GERTZ.
 9 MR. FARBER: I'M ALLEN FARBER, YOUR HONOR.
 10 THE COURT: HELLO, MR. FARBER; HELLO, MR. LEEPER; AND
 11 HELLO, MR. GERTZ.
 12 MR. BRATT: GOOD MORNING, YOUR HONOR. JAY BRATT ON
 13 BEHALF OF THE UNITED STATES.
 14 THE COURT: HELLO, MR. BRATT.
 15 MR. GREENBERG: GOOD MORNING, YOUR HONOR. STANLEY
 16 GREENBERG ON BEHALF OF REBECCA CHIU. SHE IS PRESENT IN THE REAR
 17 OF THE COURTROOM. AND I'M NOT SURE IF I'M SITTING WHERE YOU WANT
 18 ME TO SIT OR NOT.
 19 THE COURT: YOU ARE SITTING WHERE I WOULD LIKE YOU TO
 20 SIT. THAT'S PERFECT.
 21 THIS HEARING IS PART OF THE COURT'S INVESTIGATION INTO A
 22 LEAK OF A MATTER THAT OCCURRED BEFORE THE GRAND JURY. BASED ON
 23 MR. BRATT'S REPRESENTATION TO ME, THE GOVERNMENT DID AN EXTENSIVE
 24 INVESTIGATION INTO THE SOURCE OF THAT LEAK AND THEY CONCLUDED "WE
 25 DON'T KNOW WHO DID IT." ONCE I GOT THAT REPORT, I THEN ISSUED THE

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1 SUBPOENA FOR MR. GERTZ.
 2 AND I APPRECIATE YOU, MR. GERTZ, COMING. I ALSO
 3 RECEIVED THE DECLARATION THAT YOU SUBMITTED TO ME YESTERDAY. AND
 4 I HAVE GONE THROUGH IT AND IT WAS VERY INFORMATIVE.
 5 WHAT MY INTENT IS, IS TO HAVE MR. GERTZ TAKE THE WITNESS
 6 STAND. I'M GOING TO ASK HIM TO CONFIRM THAT HE DOES NOT INTEND TO
 7 REVEAL HIS CONFIDENTIAL SOURCES VOLUNTARILY. ONCE HE CONFIRMS
 8 THAT, THEN I WILL ASK HIM A FEW QUESTIONS ABOUT SOME OF HIS
 9 STATEMENTS AND OPINIONS IN THE DECLARATION THAT HE SUBMITTED,
 10 PARTICULARLY WHY THE CHI MAK CASE WAS NEWSWORTHY FROM HIS
 11 STANDPOINT, WHY HE BELIEVES HE NEEDS TO MAINTAIN THE
 12 CONFIDENTIALITY OF HIS SOURCES, AND WHY HE NEEDED HIS CONFIDENTIAL
 13 SOURCES TO DO HIS INVESTIGATIVE REPORTING ON THIS CASE.
 14 AFTER HE HAS ANSWERED THOSE QUESTIONS, I WILL ALLOW
 15 LIMITED -- AND I EMPHASIZE "LIMITED" -- QUESTIONS BY THE
 16 ATTORNEYS, ALL SIDES. AND THEN AFTER THAT, WE CAN THEN DISCUSS
 17 WHERE WE GO FROM HERE AND WHETHER I NEED TO DECIDE WHETHER TO
 18 ISSUE AN ORDER THAT HE REVEAL HIS SOURCES OR NOT.
 19 ANY OBJECTIONS?
 20 MR. LEEPER: WELL, IT'S NOT IN THE NATURE -- FIRST OF
 21 ALL, CHARLES LEEPER, FOR THE RECORD. IT'S NOT IN THE NATURE OF AN
 22 OBJECTION, YOUR HONOR, BUT I WOULD ASK THE COURT'S PERMISSION TO
 23 HEAR ME FIRST ON THE FUNDAMENTAL QUESTION OF WHETHER ANY 6(E)
 24 INFORMATION WAS REVEALED IN THIS MATTER. MAY I APPROACH THE
 25 PODIUM?

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1 THE COURT: YOU MAY, MR. LEEPER. AND PLEASE DON'T TAKE
2 THIS AS I'M TRYING TO BE RUDE TO YOU, BUT I JUST FEEL IN
3 TRANSPARENCY I NEED TO BE CANDID. I FEEL WHETHER THERE IS A 6(E)
4 VIOLATION OR NOT, THAT TRAIN HAS LEFT. FROM MY STANDPOINT, I HAD
5 A MOTION, A GOOD FAITH MOTION BROUGHT BY THE DEFENSE, PARTICULARLY
6 IT WAS MR. GREENBERG WHO SAID THERE WAS A 6(E) VIOLATION THAT
7 OCCURRED IN THE CASE. HE MADE A PRIMA FACIE SHOWING, BECAUSE IF
8 YOU LOOK AT THE MAY 16, 2006 ARTICLE BY MR. GERTZ, I DO BELIEVE IT
9 REVEALS MATTERS THAT THE U.S. ATTORNEY PRESENTED TO THE GRAND
10 JURY. IT PREDICTED WITH 100 PERCENT ACCURACY THE NEW CHARGES THAT
11 WOULD BE BROUGHT.
12 ONCE THAT PRIMA FACIE SHOWING WAS MADE BY MR. GREENBERG
13 ON BEHALF OF MS. CHIU AND THE OTHER DEFENDANTS, THEN THE
14 GOVERNMENT HAD TO RESPOND TO IT. THE GOVERNMENT DID AN
15 INVESTIGATION. AND I ASSUME, MR. LEEPER, THEY -- I ASSUME THEY
16 ACTUALLY LOOKED AT WHAT WAS PRESENTED TO THE GRAND JURY AND THEN
17 THEY CAME BACK AND TOLD ME THERE WAS A VIOLATION OF 6(E). BASED
18 ON THAT RECORD, I THEN MADE A FINDING THAT THERE WAS A 6(E)
19 VIOLATION.
20 MR. LEEPER: CERTAINLY I DON'T CONSIDER IT RUDE THAT
21 YOUR HONOR HAS INFORMED US ALL THAT THE TRAIN HAS LEFT THE
22 STATION, BUT IN TURN I WOULD HOPE YOUR HONOR WOULD NOT CONSIDER IT
23 RUDE OF ME IF I ASK TO SIMPLY RAISE A COUPLE OF MATTERS, INCLUDING
24 SOME SIGNIFICANT DEVELOPMENTS THAT HAVE OCCURRED SINCE WE FILED
25 OUR MOTION TO QUASH, THAT, IN OUR VIEW, SHOULD CAUSE THE COURT TO

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1 RECONSIDER ITS DETERMINATION.
2 I THOUGHT IT WAS RATHER SIGNIFICANT THAT YOUR HONOR SAID
3 THAT HE ASSUMED THAT THE GOVERNMENT HAD LOOKED AT WHAT OCCURRED
4 BEFORE THE GRAND JURY. AND I'M GOING TO TRY TO SHOW YOU TODAY
5 THAT THAT ASSUMPTION IS NOT AT ALL WELL-FOUNDED.
6 THE FIRST SIGNIFICANT DEVELOPMENT THAT OCCURRED SINCE WE
7 FILED OUR MOTION TO QUASH ON JUNE 5 IS THAT YOUR HONOR ENTERED AN
8 ORDER ON JUNE 25, AN ORDER UNDER 6(E)3(E), I BELIEVE. THE ORDER
9 IS UNDER SEAL. NEVER SEEN IT. THE APPLICATION TO UNSEAL THE
10 GRAND JURY TRANSCRIPTS IS ALSO UNDER SEAL. I HAVE NEVER SEEN IT.
11 BUT WE'RE ASSUMING THAT MR. BRATT FILED THAT APPLICATION AFTER WE
12 FILED OUR MOTION TO QUASH, BECAUSE HE PLANNED TO SUBMIT TO THE
13 COURT, AND PERHAPS SHARE WITH US, THESE TRANSCRIPTS OF THE GRAND
14 JURY PROCEEDINGS THAT WOULD SHOW WHETHER OR NOT THE MATTERS
15 REPORTED IN MR. GERTZ' ARTICLE DID, IN FACT, OCCUR BEFORE THE
16 GRAND JURY.
17 YOUR HONOR ISSUED THE ORDER. YOU GAVE HIM PERMISSION TO
18 MAKE THE DISCLOSURE. AND WE THINK THAT THE FACT THAT HE HAS NOT
19 MADE THAT SUBMISSION TO THE COURT IS CONSPICUOUS. IN FACT, WE
20 THINK IT'S A FAIR INFERENCE TO DRAW FROM THESE CIRCUMSTANCES THAT
21 MR. BRATT AND HIS INVESTIGATORS, WHEN THEY MET WITH YOUR HONOR ON
22 APRIL 21 OF THIS YEAR AND REPORTEDLY MADE THE CONCESSION THERE HAD
23 BEEN A 6(E) VIOLATION, THAT THEY HAD NOT HAD ACCESS TO THOSE GRAND
24 JURY TRANSCRIPTS AT THAT TIME.
25 MY BELIEF IN THAT REGARD IS REINFORCED BY THE SECOND

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1 SIGNIFICANT DEVELOPMENT THAT HAS OCCURRED IN THIS CASE SINCE WE
2 FILED OUR MOTION TO QUASH ON JUNE 5. ON JULY 10, THE COURT
3 REPORTER RELEASED A NUMBER OF ADDITIONAL TRANSCRIPT OF PROCEEDINGS
4 IN THE MAK CASE, INCLUDING THE TRANSCRIPT OF A PROCEEDING THAT
5 OCCURRED BEFORE THE COURT ON NOVEMBER 17, 2006.
6 WHEN WE GOT THE TRANSCRIPT, WE LEARNED THAT AT THAT
7 HEARING A NUMBER OF MOTIONS WERE ARGUED, INCLUDING A MOTION FOR
8 DISCOVERY ASSOCIATED WITH THE ORIGINAL COMPLAINT THAT THE
9 DEFENDANTS HAD FILED REGARDING MR. GERTZ'S ARTICLE. AND WHEN WE
10 RECEIVED THE TRANSCRIPT, WE DISCOVERED THAT ASSISTANT UNITED
11 STATES ATTORNEY GREG STAPLES HAD MADE A NUMBER OF REPRESENTATIONS
12 TO THE COURT REGARDING THE CONTENT OF MR. GERTZ'S ARTICLE AND
13 WHETHER OR NOT THE MATTERS REPORTED IN THAT ARTICLE HAD OCCURRED
14 BEFORE THE GRAND JURY.
15 NOW, I DON'T KNOW MR. STAPLES. NEVER MET HIM, HAVE
16 NEVER SPOKEN TO HIM, BUT I THINK I CAN STATE WITHOUT FEAR OR
17 CONTRADICTION THAT MR. STAPLES KNOWS MORE ABOUT WHAT MATTERS
18 ACTUALLY OCCURRED BEFORE THE GRAND JURY IN THIS MAK INVESTIGATION
19 THAN ANY OTHER PERSON ON THE FACE OF THE EARTH.
20 IN THAT TRANSCRIPT, YOUR HONOR -- WHAT I WOULD LIKE TO
21 DO IS TO DISPLAY EXCERPTS OF THAT TRANSCRIPT WHERE MR. STAPLES
22 MADE THESE REPRESENTATIONS. AND I WILL HAND UP TO THE COURT AND
23 TO MR. BRATT COPIES OF THESE TRANSCRIPTS BECAUSE I'M AFRAID THAT
24 MY ABILITY TO MANAGE THIS ELMO IS LIMITED.
25 MR. BRATT: BEFORE HE DOES SO, MAY I ADDRESS A THRESHOLD

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1 ISSUE WITH THE COURT?
2 THE COURT: YOU CAN.
3 MR. BRATT: THANK YOU, YOUR HONOR. AS YOU KNOW, YOUR
4 HONOR, WE FILED OR SUBMITTED TO THE COURT A LETTER RIGHT BEFORE
5 THE BEGINNING OF TODAY'S PROCEEDINGS. AND THE GOVERNMENT HAS
6 ASKED THE COURT, BASED ON OTHER DEVELOPMENTS, THAT THE COURT AND
7 ITS ONGOING INVESTIGATION, THAT THE COURT NOT GO FORWARD TODAY
8 WITH THIS PROCEEDING. AND BEFORE WE GET INTO SOME OF THE
9 ARGUMENTS AND SOME OF THE POSSIBLE TESTIMONY, THE GOVERNMENT DID
10 WANT TO RAISE THAT WITH THE COURT.
11 THE COURT: AND THIS LETTER IS ANOTHER EX PARTE
12 SUBMISSION; YOU HAVEN'T GIVEN IT TO THE OTHER SIDE?
13 MR. BRATT: I HAVE NOT AS YET. MY INTENTION IS TO DO
14 SO. OTHER PEOPLE HAVE TO PASS ON CERTAIN THINGS THAT MAY HAVE TO
15 BE REDACTED FROM IT FOR 6(E) REASONS.
16 I HAVE ADVISED MR. LEEPER AND MR. FARBER AS TO WHAT THE
17 DEVELOPMENT IS AND THE COURSE THE GOVERNMENT WOULD BE TAKING HERE.
18 THE COURT: I HAVE REVIEWED YOUR LETTER, MR. BRATT, AND
19 I HAVEN'T REVIEWED IT CAREFULLY TO SEE WHAT MATTERS MAY BE BEFORE
20 THE GRAND JURY TO KEEP IT UNDER SEAL, BUT THE REQUEST TO STAY THE
21 PROCEEDINGS IS DENIED. I FEEL THIS HAS BEEN OUTSTANDING FOR A
22 LONG PERIOD OF TIME, AND I NEED TO BRING MY INVESTIGATION TO A
23 CONCLUSION. AND I DON'T FEEL ANYTHING THAT I'M DOING SHOULD
24 IMPACT ANYTHING THAT YOU POSSIBLY COULD BE RAISING IN ANOTHER
25 PROCEEDING.

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1 MR. BRATT: THE OTHER ISSUE THAT WE ADDRESS IS THE ONE
2 THAT WAS ALLUDED TO IN THE DECLARATION THAT THE COURT HAS MADE
3 PUBLIC, AND THAT IS THAT THE DEPARTMENT FEELS, AND THE REASON FOR
4 THE CHANGE OF POSITION WITH RESPECT TO OUR PARTICIPATION IN THIS
5 PROCEEDING, IS THAT THE DEPARTMENT DOES FEEL THAT THERE ARE
6 SERIOUS SEPARATION OF POWERS ISSUES WITH THE COURT CONDUCTING A
7 PROCEEDING SUCH AS THIS ONE, PARTICULARLY IN LIGHT OF NEW
8 DEVELOPMENTS. AND THAT IS THE ISSUE THAT THE GOVERNMENT IS
9 PRIMARILY CONCERNED ABOUT AND IT'S WHY IT'S REQUESTED THE STAY.
10 THE COURT: I UNDERSTAND THAT, BUT I ASKED YOU TO THE
11 PROM AND YOU SAID YOU WOULD GO AND YOU LEFT ME AT THE DANCE.
12 MR. BRATT: THE SECOND THING THAT I WOULD THEN LIKE TO
13 REQUEST IS IF THE COURT WOULD STAY THE PROCEEDINGS FOR A SHORT
14 PERIOD OF TIME FOR ME TO NOTIFY THE PEOPLE IN WASHINGTON SO THAT
15 THEY MAY CONSIDER SEEKING APPELLATE RELIEF?
16 THE COURT: NO. THAT REQUEST IS DENIED.
17 MR. BRATT: MAY I BE EXCUSED FROM THE COURTROOM TO
18 ADVISE THEM OF YOUR DECISION?
19 THE COURT: YOU MAY, SIR.
20 MR. BRATT: THANK YOU.
21 MR. LEEPER: THANK YOU FOR LETTING US BE HEARD, YOUR
22 HONOR.
23 ON PAGE 55 OF THIS NOVEMBER 17 TRANSCRIPT -- EXCUSE ME,
24 ON PAGE 54, MR. STAPLES IS ADDRESSING THE ARGUMENTS THAT THE MAK
25 DEFENDANTS HAVE MADE. AND AT LINE 12 HE SAYS, "THEY CANNOT SHOW

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1 THAT ANYTHING THAT WAS IN ANY OF THOSE ARTICLES WAS SOMETHING THAT
2 OCCURRED BEFORE A GRAND JURY. CRITICALLY, THE ARTICLE THEY REFER
3 TO CAME OUT IN JUNE. WE ACTUALLY KNOW IT CAME OUT IN MAY. AND
4 THERE WAS A SUPERSEDING INDICTMENT WHICH CAME OUT WHICH HAD NONE
5 OF THOSE CHARGES IN IT, REFERRING TO THE FIRST SUPERSEDING
6 INDICTMENT.
7 WHAT DOES THAT TELL YOU ABOUT WHAT WAS PRESENTED TO THE
8 GRAND JURY? THAT INDICTMENT ADDED BILLY AND FUK ON F.E.R.A.
9 CHARGES. THE CHARGES THAT WERE DISCUSSED, ULTIMATELY SOME OF THEM
10 WERE FILED IN THE MOST RECENT SUPERSEDING INDICTMENT, BUT THIS
11 ISSUE OF TIMING AND ALL, THAT -- THAT SIMPLY IS INCORRECT."
12 AND THAT OVER ON THE NEXT PAGE, YOUR HONOR, PAGE 55, THE
13 COURT ASKS MR. STAPLES A QUESTION. AT LINE 15, "HOW ABOUT
14 MR. EARLY'S ARGUMENT THAT I NOW HAVE AN OBLIGATION, GIVEN THE
15 ALLEGATION THAT WAS THERE SOME INFORMATION LEAKED FROM THE GRAND
16 JURY, THAT I HAVE TO DO SOMETHING?"
17 AND IN RESPONSE MR. STAPLES MAKES THE FOLLOWING
18 REPRESENTATION. "WELL, I DON'T AGREE THAT HE HAS MADE THAT PRIMA
19 FACIE SHOWING WHAT OCCURS BEFORE THE GRAND JURY THAT IS SECRET.
20 AND HE'S NOT MADE A CASE THAT WHAT APPEARED IN THOSE ARTICLES IS
21 SOMETHING THAT ACTUALLY OCCURRED BEFORE THE GRAND JURY. NOW, IF
22 THE COURT WOULD LIKE, WE CAN SUBMIT THE GRAND JURY TRANSCRIPT TO
23 YOU IN CAMERA AND YOU CAN SEE THAT FOR YOURSELF, BUT DISCUSSIONS
24 BETWEEN PROSECUTORS ABOUT CHARGES THEY MAY BRING OR NOT BRING
25 CERTAINLY DO NOT OCCUR BEFORE THE GRAND JURY. WE DON'T GO INTO

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1 THE GRAND JURY AND SAY WELL, WHAT DO YOU THINK, GRAND JURY? HOW
2 ABOUT ESPIONAGE? THAT'S NOT THE WAY IT WORKS. WHAT APPEARED IN
3 THOSE ARTICLES, THERE IS NO WAY TO TELL THAT IT WAS MATTERS
4 OCCURRING BEFORE A GRAND JURY. IN FACT, THE EVIDENCE IS TO THE
5 CONTRARY."
6 THE COURT THEN OBSERVES, "WELL, THAT'S WHAT I WAS GOING
7 TO SAY. ISN'T THAT WHAT YOU STARTED OFF SAYING? THAT THE
8 INFORMATION THAT OCCURRED IN THE ARTICLES, IF IT HAD ANY
9 RELEVANCE, IT DEALS WITH THE LATEST SUPERSEDING INDICTMENT?"
10 AND MR. STAPLES REPLIES, "RIGHT. BUT THE VERY FACT THAT
11 THEY KEEP HAMPERING ON THAT WELL, YOU KNOW, THEY'RE GOING TO
12 CHARGE ESPIONAGE AND THE FACT THAT WE HAVEN'T, WHAT COULD BE
13 CLEARER THAT WAS NOT PRESENTED TO THE GRAND JURY? IT'S NOT A
14 MATTER OCCURRING BEFORE THE GRAND JURY."
15 YOUR HONOR, I WOULD ASK THAT WE MARK GERTZ EXHIBIT 1
16 TODAY THIS TRANSCRIPT. AND WHAT I HAVE INCLUDED IN THE PROPOSED
17 EXHIBIT IS THE COVER PAGE, PAGE 1, PAGES 53 THROUGH 58, SO THAT
18 YOU HAVE THE CONTEXT OF THE EXCHANGE BETWEEN YOURSELF AND MR.
19 STAPLES, AND THEN, OF COURSE, THE REPORTER'S CERTIFICATE.
20 THE COURT: IT WILL BE MADE PART OF THE RECORD.
21 (EXHIBIT 1 MARKED FOR I.D.)
22 MR. LEEPER: THANK YOU. YOUR HONOR, THESE
23 REPRESENTATIONS BY ASSISTANT UNITED STATES ATTORNEY STAPLES, AN
24 OFFICER OF THE COURT, BACKED UP BY AN OFFER TO PROVIDE THE COURT
25 WITH THE ACTUAL GRAND JURY TRANSCRIPTS, IN OUR POSITION, IN OUR

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1 VIEW FULLY REBUTS ANY SHOWING THAT THE MAK DEFENDANTS MAY HAVE
2 MADE REGARDING THE CONTENT OF MR. GERTZ'S ARTICLE. AND I CAN'T
3 IMAGINE THAT MR. BRATT AND HIS INVESTIGATORS HAD ACCESS TO THIS
4 TRANSCRIPT AT THE TIME THEY MADE THE REPRESENTATIONS TO THE COURT
5 THAT THEY DID ON APRIL 21.
6 WE CAN'T LOSE SIGHT OF THE FACT, YOUR HONOR, THAT THE
7 MAK SHOWING IN THIS CASE IS LIMITED TO THE ARTICLE ITSELF. THAT
8 IS THE ONLY SHOWING THAT THEY EVER MADE. WHAT WE HAVE DONE IS WE
9 HAVE TAKEN THE ACTUAL STATEMENTS IN THE ARTICLE. AS THE COURT OF
10 APPEALS IN THE LANCE CASE, FOR EXAMPLE, TELLS US WE MUST DO, WE
11 MUST PARSE THEM -- MAY I APPROACH?
12 THE COURT: YOU MAY, SIR.
13 MR. LEEPER: I HAVE HANDED TO THE COURT A CHART THAT WE
14 PREPARED. I WOULD ASK THAT WE MARK THIS AS GERTZ EXHIBIT 2.
15 (EXHIBIT 2 MARKED FOR I.D.)
16 MR. GREENBERG: COULD I GET A COPY?
17 MR. LEEPER: I BEG YOUR PARDON. AND I SHOULD HAVE GIVEN
18 YOU A COPY OF THE TRANSCRIPT.
19 MR. GREENBERG: I DON'T NEED THE TRANSCRIPT.
20 MR. LEEPER: WHAT WE HAVE DONE, YOUR HONOR, AS THE LANCE
21 COURT INSTRUCTS, WE HAVE PARSED THE ARTICLE TO SEE WHETHER OR NOT
22 IT MEETS THE TWO REQUIREMENTS. AND THE TWO REQUIREMENTS AS STATED
23 IN LANCE AND MANY OTHER CASES IS FIRST, THAT THERE MUST BE A CLEAR
24 INDICATION THAT THE MEDIA REPORTS DISCLOSE INFORMATION ABOUT
25 MATTERS OCCURRING BEFORE THE GRAND JURY. AND SECONDLY, THE

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1 ARTICLE MUST INDICATE THE SOURCE OF THE INFORMATION REVEALED TO BE
2 ONE OF THOSE PROSCRIBED BY RULE 6(E).
3 WE CAN MAKE SOME GENERAL OBSERVATIONS ABOUT THESE
4 STATEMENTS. THERE ARE EIGHT OF THEM IN THE ARTICLE THAT DEAL WITH
5 THE INVESTIGATION. NO SOURCE AT ALL IS IDENTIFIED IN FOUR OF
6 THEM. IN OTHER WORDS, THERE IS NO ATTRIBUTION TO A GOVERNMENT
7 OFFICIAL AS A SOURCE. WE CAN ALSO SEE THAT AS TO FIVE OF THE
8 STATEMENTS, THERE IS NO REFERENCE AT ALL TO THE GRAND JURY. NO
9 USE OF THE TERM "INDICTMENT." CERTAINLY NO USE OF THE TERM "GRAND
10 JURY" ITSELF. WE CAN ALSO SEE AS TO FIVE OF THE EIGHT EVENTS
11 DESCRIBED IN THESE STATEMENTS, THEY DIDN'T OCCUR AS DESCRIBED.
12 THE SOURCES THAT MR. GERTZ RELIES ON REPORTED, OR
13 PREDICTED, I SHOULD SAY, THAT THE CHARGES IN THE CASE WOULD BE
14 MADE PUBLIC WITHIN A WEEK. DIDN'T HAPPEN. NO SUPERSEDING
15 INDICTMENT WAS RETURNED IN THIS CASE UNTIL THREE WEEKS LATER. AND
16 WHEN IT WAS RETURNED, THE FIRST SUPERSEDING INDICTMENT HAD NONE OF
17 THESE CHARGES. NONE OF THEM IN THE NEW INDICTMENT.
18 THE COURT: RIGHT. IT WAS THE SECOND SUPERSEDING
19 INDICTMENT. BUT MR. LEEPER, YOU SERIOUSLY SUGGEST THAT MR. GERTZ
20 WAS ABLE TO PREDICT WITH 100 PERCENT ACCURACY WHAT THOSE MORE
21 SERIOUS CHARGES IN THE SECOND SUPERSEDING INDICTMENT WAS JUST
22 BASED ON JUDGMENT AS OPPOSED TO SOMEONE TELLING HIM WHAT WAS GOING
23 TO HAPPEN?
24 MR. LEEPER: I'M NOT SUGGESTING THAT AT ALL, YOUR HONOR,
25 BUT WHAT I'M SUGGESTING TO YOU IS THAT HIS SOURCE FOR THAT

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1 INFORMATION WAS PROVIDING FACTS, NOT ABOUT WHAT OCCURRED BEFORE
2 THE GRAND JURY. AGAIN, LET US NOT LOSE SIGHT OF WHAT THE TEST IS.
3 THE TEST FOR A PRIMA FACIE SHOWING IS THAT THE MATTER IN SHOWING
4 MUST BE ONE OCCURRING -- PRESENT TENSE, NOW. AND WE HAVE CITED
5 AUTHORITY IN OUR BRIEF FOR THAT PROPOSITION -- OCCURRING BEFORE
6 THE GRAND JURY.
7 THE COURT: RIGHT. NOT THE INTERNAL DELIBERATIONS OF
8 THE DEPARTMENT OF JUSTICE OR THE U.S. ATTORNEY'S OFFICE.
9 MR. LEEPER: SO OUR POSITION IS THAT THE INDIVIDUAL WHO
10 SPOKE TO MR. GERTZ WAS PREDICTING WHAT THE CHARGES WOULD BE BASED
11 ON RECOMMENDATIONS THAT WERE MADE BY THE LINE ASSISTANTS. AND
12 THAT PREDICTION DIDN'T COME TRUE.
13 IT CERTAINLY WAS NOT OCCURRING BEFORE THE GRAND JURY AT
14 MAY 16, 2006, WHICH IS THE MEASURE, THE PROPER MEASURE. THE BEST
15 EVIDENCE OF WHAT WAS OCCURRING BEFORE THE GRAND JURY, AS WE NOW
16 HAVE IT ON THIS RECORD ON MAY 16, IS WHAT WAS SHOWN IN THE FIRST
17 SUPERSEDING INDICTMENT THAT WAS RETURNED ON JUNE 6.
18 NOW, WE HAVE BETTER EVIDENCE. THERE IS BETTER EVIDENCE,
19 YOUR HONOR. IT'S EVIDENCE THAT'S BEEN OBTAINED BY MR. BRATT.
20 IT'S EVIDENCE THAT'S BEEN OBTAINED BY DINT OF YOUR HONOR SIGNING
21 THAT 6(E) ORDER. IT'S THE ACTUAL TRANSCRIPTS, BUT HE'S NOT
22 PRODUCED THOSE. IF THIS WERE A JURY TRIAL, I WOULD BE ASKING YOUR
23 HONOR FOR A MISSING EVIDENCE INSTRUCTION, BECAUSE HE HAS CONTROL
24 OVER THAT. WE DON'T HAVE ACCESS TO IT.
25 SO WHAT DO WE HAVE TO RELY ON? WE HAVE TO RELY ON THIS

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1 MAN'S REPRESENTATIONS TO THE COURT. I HAVE NEVER MET MR. STAPLES,
2 BUT I ASKED EARLIER WHETHER HE WAS PRESENT IN THE COURTROOM TODAY,
3 AND HE WAS POINTED OUT TO ME. AND I THINK THOSE REPRESENTATIONS,
4 BACKED UP BY THE OFFER TO PROVIDE YOUR HONOR WITH THOSE
5 TRANSCRIPTS, ARE MORE THAN ENOUGH TO REBUT THE SUGGESTION, AND
6 THAT'S ALL THAT IT'S BEEN IN THE FACE OF THE ARTICLE, THAT THERE
7 HAS BEEN A DISCLOSURE OF GRAND JURY INFORMATION.
8 I SAID THAT I HAD SOME GENERAL OBSERVATIONS. I WOULD
9 LIKE TO MAKE SOME SPECIFIC OBSERVATIONS ABOUT THIS ARTICLE.
10 IF YOU LOOK AT THE SECOND BOX THERE ON THE LEFT, THE
11 SECOND STATEMENT THAT WE HAVE PROVIDED THERE, WHICH MAKES
12 REFERENCE TO THE FACT THAT, "THE CHARGES WILL INCLUDE A NEW
13 INDICTMENT AGAINST CHI MAK, TAI MAK, MRS. CHIU, AND A FOURTH MAK
14 RELATIVE." THAT'S ONE OF THE STATEMENTS THAT YOUR HONOR CITED IN
15 HIS MAY 1 ORDER AS A BASIS FOR CONCLUDING THAT THERE HAD BEEN A
16 6(E) VIOLATION. SO, TOO, THE NEXT STATEMENT. "ALL FOUR WILL BE
17 CHARGED WITH CONSPIRACY TO EXPORT DEFENSE ARTICLES AND ATTEMPTED
18 UNLAWFUL EXPORT OF DEFENSE ARTICLES." THE SECOND STATEMENT YOUR
19 HONOR CITED ON MAY 1.
20 AND THEN THE THIRD ONE FROM THE BOTTOM, YOUR HONOR, "TAI
21 MAK WILL ALSO BE CHARGED WITH AIDING AND ABETTING AND POSSESSION
22 OF PROPERTY TO AID A FOREIGN GOVERNMENT." THAT'S THE THIRD
23 STATEMENT THAT YOUR HONOR CITED IN ITS MAY 1 ORDER. NOT ONE OF
24 THOSE THREE STATEMENTS IS ATTRIBUTED TO A GOVERNMENT SOURCE IN MR.
25 GERTZ'S ARTICLE.

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1 IT FAILS ONE OF THE TWO TESTS. WITHOUT QUESTION, IT
2 FAILS THE TEST THAT THE PERSON WHO PROVIDED THAT INFORMATION WAS
3 PROSCRIBED FROM DOING SO BY RULE 6(E).
4 THE FIRST STATEMENT, AND JUST TO DRAW THE CONTRAST,
5 LET'S LOOK AT THE FIRST STATEMENTS. "FEDERAL PROSECUTORS ARE
6 EXPECTED TO ADD NEW CHARGES," AND SO ON. THAT IS ATTRIBUTED TO
7 U.S. GOVERNMENT OFFICIALS, BUT THAT STATEMENT REVEALS NO MORE THAN
8 WHAT WAS REVEALED BY MR. STAPLES ON MAY 8, 2006 ON A STATUS
9 HEARING BEFORE YOUR HONOR WHERE YOU WERE ASKING MR. STAPLES WHERE
10 IS THIS CASE GOING TO GO. "WHAT KIND OF CASE ARE WE GOING TO HAVE
11 TO TRY HERE?"
12 YOU RETURNED THE ORIGINAL INDICTMENT IN NOVEMBER OF THE
13 PRECEDING YEAR. "ARE WE GOING TO GO TO TRIAL ON THESE CHARGES OR
14 ARE YOU CONTEMPLATING NEW CHARGES?" AND MR. STAPLES SAID WITHOUT
15 HESITATION, "YES, YOUR HONOR, WE ARE. AND THEY WILL BE MORE
16 SERIOUS."
17 SO WITH THE EXCEPTION OF THE REFERENCE TO ESPIONAGE IN
18 THAT FIRST STATEMENT -- AND WE ALL KNOW THAT'S A WILD CARD HERE
19 BECAUSE EVEN IN THE SECOND SUPERSEDING INDICTMENT WE NEVER HAD
20 ESPIONAGE, SO WE KNOW THAT'S NOT A MATTER OCCURRING BEFORE THE
21 GRAND JURY -- WITH THE EXCEPTION OF THAT REFERENCE, THIS FIRST
22 STATEMENT REVEALS NO MORE THAN WHAT MR. STAPLES REVEALED IN THE
23 COURTROOM TO YOUR HONOR ON MAY 8. IT'S NOT A MATTER OCCURRING
24 BEFORE THE GRAND JURY, YOUR HONOR.
25 SO ONE HAS TO WONDER WHETHER MR. BRATT AND HIS

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1 INVESTIGATORS HAD THAT MAY 8 STATUS HEARING TRANSCRIPT AT THE TIME
2 THAT THEY MET WITH YOUR HONOR ON APRIL 21 AND CONCEDED THAT THERE
3 HAD BEEN A 6(E) VIOLATION. I SUGGEST TO YOU THEY DID NOT. I
4 SUGGEST TO YOU THEY WERE NOT AWARE OF THE FACT THAT MR. STAPLES
5 HAD PUBLICLY STATED THAT THERE WOULD BE A SUPERSEDING INDICTMENT
6 AND THAT IT WOULD INCLUDE MORE SERIOUS CHARGES.
7 SO FOR THESE REASONS, YOUR HONOR, WE THINK THAT THE
8 LANGUAGE FROM LANCE, WHICH YOUR HONOR RELIED UPON AND QUOTED IN
9 HIS MAY 1 ORDER, THE LANGUAGE THAT SAYS THAT THE ARTICLE
10 "EXPRESSLY IDENTIFIED THE NATURE OF THE CRIMES WHICH WOULD BE
11 CHARGED AND THE NUMBER OF PERSONS WHO WOULD BE CHARGED," THAT'S IN
12 APPOSITE ON THESE FACTS, BECAUSE THERE IS NO ATTRIBUTION TO A
13 GOVERNMENT INDIVIDUAL OR ANY OTHER PROSCRIBED PERSON, PROSCRIBED
14 BY RULE 6(E), THERE IS NO ATTRIBUTION IN THESE STATEMENTS THAT
15 REFER TO SPECIFIC CHARGES.
16 AND WITH RESPECT TO THE MATTER OF WHETHER THERE WOULD BE
17 A SUPERSEDING INDICTMENT, THAT'S PUBLIC INFORMATION. MR. STAPLES
18 TOLD YOU AS MUCH ON MAY 8.
19 THERE ARE TWO REASONS, YOUR HONOR, WHY THERE IS NO NEED
20 FOR YOU FOR CONDUCT FURTHER INQUIRY. BELIEVE ME, WE APPRECIATE
21 THE OPPORTUNITY TO BE HEARD TODAY AND APPRECIATE THAT THE COURT
22 DID NOT STAY THIS PROCEEDING BECAUSE THIS IS OUR FIRST OPPORTUNITY
23 TO DEMONSTRATE THAT THE INFORMATION AT ISSUE WAS NOT SUBJECT TO
24 RULE 6(E), BUT AS TO THE MATTER WHETHER YOUR HONOR NEEDS TO
25 CONDUCT A FURTHER INQUIRY, INCLUDING PUTTING MR. GERTZ ON THE

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1 STAND, I WOULD SUGGEST TO YOU THAT, FIRST, THERE HAS BEEN NO PRIMA
2 FACIE SHOWING OF A RULE 6(E) VIOLATION FOR THE REASONS WE JUST
3 DISCUSSED, BUT THERE IS A SECOND AND INDEPENDENT REASON. AND THAT
4 IS, THERE IS NO VIABLE MOTION. THERE IS NO THREAT TO FAIR TRIAL
5 RIGHTS. THERE IS NO ONGOING VIOLATION WHICH WOULD JUSTIFY THE
6 COURT EXERCISING ITS SUPERVISORY AUTHORITY.
7 AS WE EXPLAINED IN OUR MOTION TO QUASH, I BELIEVE IT'S
8 AT PAGE 18 AND 19, ALL FOUR OF THE MAK DEFENDANTS INCLUDING THIS
9 GENTLEMAN'S CLIENT, MR. GREENBERG, INCLUDING MR. EARLY'S CLIENT,
10 ENTERED GUILTY PLEAS, AND THE GUILTY PLEAS INCLUDED A PROVISION BY
11 WHICH THEY ABANDONED, THEY WITHDREW AND ABANDONED ALL PENDING
12 MOTIONS.
13 SO THERE IS NO VIABLE MOTION THAT THOSE FOUR DEFENDANTS
14 HAVE BEFORE YOUR HONOR THAT WOULD JUSTIFY THE EXERCISE OF YOUR
15 SUPERVISORY AUTHORITY TO ROOT OUT THE ORIGINS OF THESE STATEMENTS.
16 AS FAR AS THE DEFENDANT WHO WENT TO TRIAL, CHI MAK, YOUR
17 HONOR OBSERVED IN YOUR NOVEMBER 2006 RULING THAT THE MOTION THAT
18 THE DEFENDANTS FILED DID NOT IMPLICATE ANY FAIR TRIAL RIGHTS; THAT
19 ANY SUCH POTENTIAL PREJUDICE TO THE ABILITY OF MR. MAK -- CHI MAK
20 OR THE OTHERS TO GET A FAIR TRIAL COULD BE RESOLVED THROUGH THE
21 APPLICATION OF REMEDIAL MEASURES DURING VOIR DIRE. THAT'S WHAT
22 YOUR HONOR DID.
23 THE DEFENSE, MR. CHI MAK'S LAWYER, THE GOVERNMENT, THEY
24 AGREED ON A FORM OF JURY QUESTIONNAIRE. THAT JURY QUESTIONNAIRE
25 WAS USED. A JURY WAS PICKED SATISFACTORY TO MR. CHI MAK. HE GOT

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1 HIS DAY IN COURT. IN HIS POST-TRIAL MOTIONS HE NEVER RAISED THE
2 GERTZ ARTICLE OR ANY OTHER PRETRIAL PUBLICITY AS A REASON FOR
3 OVERTURNING HIS CONVICTION. SO HE, TOO, HAS ABANDONED THIS ISSUE.
4 LET ME SAY A WORD ABOUT THE BARRY CASE, BECAUSE YOUR
5 HONOR HAS CITED IT IN BOTH ITS NOVEMBER 20 ORDER AND THE MAY 1
6 ORDER, BARRY AGAINST THE UNITED STATES, AS A CASE THAT REQUIRES,
7 THAT HOLDS THAT IN THESE CIRCUMSTANCES, THE COURT MUST CONDUCT AN
8 INVESTIGATION.
9 FIRST OF ALL, BARRY IS NOT ABOUT WHETHER OR NOT A COURT
10 SHOULD REQUIRE A REPORTER TO REVEAL HIS SOURCES. BARRY WAS ABOUT
11 WHETHER THE TRIAL COURT IN THAT CASE ERRED BY NOT REQUIRING THE
12 GOVERNMENT TO SHOW CAUSE TO HAVE THE PROSECUTORS AND THE AGENTS IN
13 THAT CASE COME FORWARD WITH SWORN STATEMENTS AND SHOW CAUSE THAT
14 THEY WERE NOT THE SOURCE OF THE STATEMENTS, NEWS ARTICLES THAT
15 WERE AT ISSUE IN THAT CASE.
16 I AM PERSONALLY VERY FAMILIAR WITH THE BARRY CASE
17 BECAUSE I HAD THE GOOD FORTUNE, OR MISFORTUNE, DEPENDING ON YOUR
18 POINT OF VIEW, OF BEING ONE OF THE ASSISTANT UNITED STATES
19 ATTORNEYS WHO WAS REQUIRED TO SHOW CAUSE THAT I AND MY COLLEAGUES
20 WERE NOT RESPONSIBLE FOR THE LEAKS THAT WERE AT ISSUE IN THAT
21 CASE.
22 MAYOR BARRY AND HIS DEPUTIES WERE THE SUBJECT OF A LONG-
23 RUNNING INVESTIGATION. IT WAS AN INVESTIGATION WHERE THE GRAND
24 JURY WAS USED AS THE PRINCIPAL INVESTIGATIVE TOOL. IT SUBPOENAED
25 DOCUMENTS. IT SUBPOENAED WITNESSES. IT HEARD TESTIMONY FROM

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1 WITNESSES INCLUDING MAYOR BARRY, AND IT RETURNED A NUMBER OF
2 INDICTMENTS AGAINST MAYOR BARRY'S SUBORDINATES, HIS DEPUTIES.
3 BEFORE HE WAS INDICTED, MAYOR BARRY FILED A MOTION WITH
4 THE DISTRICT COURT. AND HE APPENDED TO IT ARTICLES THAT HAD BEEN
5 PUBLISHED OVER A THREE-YEAR PERIOD. AND HE SAID, "YOUR HONOR,
6 THESE CONTINUING LEAKS ARE INTERFERING WITH MY ABILITY TO GOVERN
7 IN THE DISTRICT OF COLUMBIA."
8 SO THE RELIEF HE REQUESTED WAS REALLY THREEFOLD. FIRST,
9 THESE PROSECUTORS AND AGENTS THAT HAVE BEEN CHASING ME ALL THESE
10 YEARS, THEY HAVE TO SHOW CAUSE THAT THEY'RE NOT RESPONSIBLE FOR
11 THESE LEAKS. SECOND, I'M ENTITLED TO INJUNCTIVE RELIEF. YOU NEED
12 TO ENJOIN THESE ACTIONS BY THESE PROSECUTORS AND AGENTS BECAUSE
13 AGAIN, IT'S INTERFERING WITH MY ABILITY TO GOVERN. AND THIRD, I
14 WANT THE COURT TO HOLD THESE INDIVIDUALS IN CONTEMPT.
15 SO IT WAS IN THAT VERY DIFFERENT CIRCUMSTANCE WHERE THE
16 D.C. CIRCUIT SAID THAT THE DISTRICT COURT HAD ERRED IN NOT
17 REQUIRING THE PROSECUTORS TO COME FORWARD WITH SWORN STATEMENTS
18 STATING WHETHER OR NOT THEY WERE THE SOURCE OF THESE DISCLOSURES.
19 AND WHAT WAS FOUND SIGNIFICANT BY THE D.C. CIRCUIT? THE FACT THAT
20 THE MAYOR HAD ASKED FOR INJUNCTIVE RELIEF. THE FACT THAT THESE
21 WERE ONGOING VIOLATIONS. HE WAS ABLE TO TRACE THESE ARTICLES FROM
22 THE VERY BEGINNING OF THE INVESTIGATION RIGHT UP UNTIL THE EVE OF
23 FILING HIS MOTION.
24 ONE OF THE ARTICLES -- IN FACT, IT'S THE ARTICLE THAT
25 THE D.C. CIRCUIT FOUND MADE OUT THE PRIMA FACIE SHOWING OF A

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1 VIOLATION, WAS AN ARTICLE THAT RECOUNTED MARION BARRY'S TESTIMONY
2 IN THE GRAND JURY ABOUT COCAINE USE. AND IT WAS ATTRIBUTED TO
3 GOVERNMENT SOURCE. NOW THAT'S A PRIMA FACIE SHOWING.
4 HERE, WE HAVE A SINGLE NEWS ARTICLE. ONE ARTICLE. WE
5 HAVE NO DEFENDANT WHO'S EVER SOUGHT INJUNCTIVE RELIEF. WE HAVE NO
6 ALLEGATION OF ANY ONGOING VIOLATIONS WHATSOEVER. CERTAINLY, MR.
7 GREENBERG IN HIS ORIGINAL MOTION DIDN'T ASK THAT MR. STAPLES AND
8 HIS COLLEAGUES BE HELD IN CONTEMPT.
9 SO THIS CASE WE FEEL, OUR CASE HERE, IS MUCH MORE LIKE
10 THE WILKES CASE THAT WAS DECIDED BY JUDGE BYRNE. THAT, TOO, WAS A
11 POST-TRIAL CASE WHERE A CHALLENGE WAS MADE TO ARTICLES THAT HAD
12 RUN. NO REQUEST FOR INJUNCTIVE RELIEF. NO REQUEST FOR CONTEMPT
13 CITATIONS. NO ALLEGATION OF ONGOING VIOLATIONS THERE.
14 AND JUDGE BYRNE SAID, YOU KNOW, (A), THE INTEREST IN
15 GRAND JURY SECRECY IS GREATLY REDUCED IN THE POST-INDICTMENT
16 SITUATION. IT'S NOT ELIMINATED BY ANY MEANS, BUT IT'S GREATLY
17 REDUCED. AND SECONDLY, THERE ARE NO FAIR TRIAL RIGHTS THAT ARE
18 STILL LIVE BECAUSE I HAVE RESOLVED THOSE. I FOUND THAT MR. WILKES
19 HAD A FAIR TRIAL; THAT WE USED THE VOIR DIRE PROCESS TO ROOT OUT
20 ANY PRETRIAL PUBLICITY. AND IN LIGHT OF THAT, HE HAS NO VIABLE
21 CLAIM THAT THESE STATEMENTS IN THIS ARTICLE CAUSED HIM INJURY, AND
22 THEREFORE, IN MY DISCRETION I WILL NOT AUTHORIZE MY SUPERVISORY
23 AUTHORITY, JUDGE BYRNE SAID, TO CONDUCT A FURTHER INVESTIGATION.
24 THAT'S WHERE WE THINK WE ARE HERE, YOUR HONOR,
25 NOTWITHSTANDING THE FACT THAT YOU FOUND IN THE MAY 1 ORDER THAT

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1 THERE HAD BEEN A SHOWING, A PRIMA FACIE SHOWING SUFFICIENT TO
2 TRIGGER YOUR OBLIGATION TO PROCEED. I SUGGEST TO YOU
3 RESPECTFULLY, BOTH TO YOU AND TO MR. BRATT, THAT YOU DID NOT HAVE
4 ALL OF THE INFORMATION THAT YOU DESERVED TO HAVE IN APRIL OF THIS
5 YEAR WHEN THAT ORDER ISSUED. YOU DID NOT HAVE ACCESS TO THE GRAND
6 JURY TRANSCRIPT. YOU DID NOT HAVE IN MIND THE FACT THAT AN
7 OFFICER OF THE COURT HAD MADE A REPRESENTATION AND OFFERED TO
8 PROVIDE TRANSCRIPTS TWO YEARS EARLIER IN A BUSY DAY WHERE FIVE
9 OTHER MOTIONS WERE BEING ARGUED THAT MET THE FORCE DIRECTLY OF THE
10 MINIMAL ALLEGATIONS IN MR. GREENBERG'S MOTION.
11 SO OUR PRINCIPAL POSITION IS, YOUR HONOR, THAT YOU NEED
12 NOT CONDUCT A FURTHER INVESTIGATION BECAUSE NO PRIMA FACIE SHOWING
13 OF A VIOLATION HAS BEEN MADE. FURTHER HEARING IS UNNECESSARY, AND
14 PERHAPS EQUALLY IMPORTANTLY IT'S UNNECESSARY FOR YOU TO REACH WHAT
15 IS ADMITTEDLY A CONSTITUTIONAL QUESTION.
16 JUDGE KLEINFELD, IN THE SHOEN VERSUS SHOEN CASE, IN HIS
17 CONCURRING OPINION SAID, AND I QUOTE, "FUNDAMENTAL PRINCIPLES OF
18 JUDICIAL RESTRAINT REQUIRE FEDERAL COURTS TO CONSIDER
19 NONCONSTITUTIONAL GROUNDS FOR DECISION PRIOR TO REACHING
20 CONSTITUTIONAL QUESTIONS." AND THEN HE ADDED, QUOTING FROM A 9TH
21 CIRCUIT CASE CALLED ERICKSON, QUOTE, "A FEDERAL COURT SHOULD
22 DECIDE CONSTITUTIONAL QUESTIONS ONLY WHEN IT IS IMPOSSIBLE TO
23 DISPOSE OF THE CASE ON SOME OTHER GROUNDS."
24 WE BELIEVE THAT WE HAVE PROVIDED YOUR HONOR TODAY WITH
25 THE BASIS FOR CONCLUDING THAT THIS CASE CAN AND SHOULD BE DISPOSED

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1 OF ON THE GROUND THAT THERE HAS BEEN NO PRIMA FACIE SHOWING. BUT
2 IF YOU CHOOSE TO REACH THE FIRST AMENDMENT QUESTION, THEN YOU MUST
3 GRAPPLE, I RESPECTFULLY SUGGEST, WITH THE RULE IN THE 9TH CIRCUIT
4 THAT REQUIRES THE PROPONENT OF DISCLOSURE TO SHOW COMPELLING NEED
5 FOR THE INFORMATION REGARDING THE CONFIDENTIAL SOURCES THAT
6 OUTWEIGHS THE PUBLIC'S INTEREST IN A FREE PRESS. THERE SHOULD BE
7 NO QUESTION BUT THAT THAT'S THE RULE IN THIS CIRCUIT.
8 AND WE ALSO BELIEVE THAT THE LAW IS CLEAR IN THIS
9 CIRCUIT THAT THE PROPONENT OF DISCLOSURE CANNOT SATISFY THAT
10 COMPELLING NEED REQUIREMENT WITHOUT HAVING EXHAUSTED ALL
11 REASONABLE ALTERNATIVES FOR THAT INFORMATION. AND THAT MEANS
12 RATHER THAN PUTTING MR. GERTZ UP ON THE STAND TODAY AS THE FIRST
13 STEP, THAT THERE ARE OTHER STEPS THAT MUST BE TAKEN BY THE COURT
14 FIRST IF YOU CHOOSE TO REACH THE CONSTITUTIONAL QUESTION.
15 THE COURT: LET ME STOP YOU THERE, BECAUSE PRIOR TO YOU
16 SUBMITTING THE DECLARATION FROM MR. GERTZ YESTERDAY, I DIDN'T HAVE
17 AN EVIDENTIARY RECORD BEFORE ME. NOW YOU SUBMITTED THAT
18 DECLARATION WHERE I CAN EVALUATE MR. GERTZ'S CONSTITUTIONAL
19 INTEREST, THE FREEDOM OF THE PRESS, AGAINST THE INTEREST AND
20 SECRECY OF THE GRAND JURY. AND I WANT TO PROCEED VERY CAUTIOUSLY.
21 I HAVE NOT MADE A DECISION -- I WANT TO MAKE IT CLEAR -- I HAVE
22 NOT MADE A DECISION THAT I'M GOING TO ORDER HIM TO REVEAL HIS
23 CONFIDENTIAL SOURCES.
24 I'M PROCEEDING VERY CAUTIOUSLY AND CONSERVATIVELY, BUT
25 NOW SINCE THE DECLARATION IS PART OF THE RECORD, IN FAIRNESS TO

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1 WHOEVER WANTS TO ASK QUESTIONS OF MR. GERTZ, GIVEN THAT HE
2 SUBMITTED A DECLARATION ON THOSE ISSUES, I THINK WE NEED TO HAVE
3 HIM TAKE THE STAND, CONFIRM THE STATEMENTS, AND THEN RESPOND TO
4 ANY LIMITED QUESTIONS ON THE AREAS RAISED IN HIS DECLARATION.
5 MR. LEEPER: LET ME TELL YOU WHAT OUR THINKING WAS IN
6 THAT REGARD, YOUR HONOR. I APPRECIATED EARLIER THAT YOU LET ME
7 KNOW RIGHT UP FRONT WHAT YOUR INCLINATION WAS ON THE 6(E) ISSUE.
8 OUR THINKING ON THE TIMING OF THAT DECLARATION WAS THAT THE LAW IN
9 THE 9TH CIRCUIT IS SO CLEAR, THAT BEFORE THE REPORTER IS REQUIRED
10 TO STAY SAY WORD ONE, THE PROPONENT OF THE DISCLOSURE MUST EXHAUST
11 ALL REASONABLE ALTERNATIVES FOR THE INFORMATION. AND LIKEWISE, IT
12 WAS SO CLEAR THAT THOSE ALTERNATIVES HADN'T BEGUN TO BE SATISFIED
13 OR PURSUED BY MR. BRATT AND HIS INVESTIGATORS BECAUSE THERE IS NO
14 SWORN TESTIMONY THAT'S BEEN PRESENTED TO YOUR HONOR, NOT EVEN
15 AFFIDAVITS.
16 WE FELT THAT THAT WAS SUCH A SHORTFALL IN THE
17 EVIDENTIARY SHOWING AS THE RECORD THEN EXISTED, THAT IT WAS
18 UNNECESSARY FOR US, AT THIS JUNCTURE, TO PROVIDE A DECLARATION OF
19 THE KIND THAT WE DELIVERED TO YOUR HONOR. NOW, WHEN YOUR HONOR
20 ISSUED THAT ORDER LAST WEEK MAKING IT CLEAR THAT YOUR HONOR HAD AN
21 EXPECTATION OF HAVING SOMETHING TO SUPPORT MR. GERTZ'S POSITION
22 NOTWITHSTANDING THE EXHAUSTION REQUIREMENTS, THEN WE FELT THAT WE
23 OUGHT TO ADDRESS THE COURT'S CONCERNS.
24 THE COURT: AND I APPRECIATE IT. YOU DID THAT. I DON'T
25 WANT TO SUGGEST TO YOU NO GOOD DEED GOES UNPUNISHED THAT YOU

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1 SUBMITTED THAT. AND I WAS GOING TO BE IN A POSITION TO RESPOND TO
2 YOUR, I THOUGHT, VERY GOOD ARGUMENT THAT BEFORE MR. GERTZ HAS TO
3 EVEN THINK ABOUT REVEALING HIS SOURCES, WHAT EFFORTS DID THE
4 GOVERNMENT MAKE TO EXHAUST ALTERNATIVE WAYS TO GET THAT
5 INFORMATION.
6 I AGREE WITH YOU. AND IT WAS MY UNDERSTANDING THAT WHEN
7 I ISSUED THE SUBPOENA, THE GOVERNMENT WAS GOING TO HAVE THE AGENTS
8 WHO CONDUCTED THE INVESTIGATION HERE GIVE TESTIMONY AS TO THAT
9 INVESTIGATION. AND YOU HAVE THE RIGHT TO CROSS-EXAMINE THEM, BUT
10 THEN AS WE ALL KNOW, I WAS TOLD BY MR. BRATT THAT THE GOVERNMENT
11 HAS RECONSIDERED ITS DECISION ON WHETHER TO PARTICIPATE.
12 SO YOU DON'T HAVE THAT EVIDENCE. AND I HEAR YOU LOUD
13 AND CLEAR. AND THAT MIGHT BE VERY GOOD GROUNDS FOR NOT ORDERING
14 MR. GERTZ TO REVEAL HIS CONFIDENTIAL SOURCES, BUT I RESPECTFULLY
15 DISAGREE WITH YOU THAT THAT MEANS I CLOSE UP THE TENT AND WE'RE
16 DONE. I FEEL, GIVEN I MADE THE FINDING OF A 6(E) VIOLATION, THE
17 RULE OF LAW REQUIRED THAT I, AT LEAST, HAVE MR. GERTZ COME HERE
18 AND EXPLAIN TO US WHY HE IS NOT GOING TO REVEAL HIS CONFIDENTIAL
19 SOURCES.
20 MR. LEEPER: WELL, OF COURSE, WE ARE ASKING THE COURT TO
21 RECONSIDER THAT DETERMINATION THAT WAS MADE ON MAY 1 WITH THE
22 BENEFIT OF THIS ADDITIONAL INFORMATION. AND I UNDERSTAND IF YOUR
23 HONOR FEELS, NONETHELESS, THAT THE COURT NEEDS TO REACH THE FIRST
24 AMENDMENT ISSUE. YOU ARE SITTING UP THERE, I'M STANDING DOWN
25 HERE, AND I'LL DO WHAT YOUR HONOR WOULD LIKE US TO DO. BUT THEN

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1 THERE IS A SEPARATE HURDLE. THE FIRST AMENDMENT BOX, IF YOU WILL,
2 HAS A SEPARATE HURDLE IN IT, A HURDLE THAT HAS TO BE MOUNTED BY
3 THE PROPONENT OF DISCLOSURE, WHICH IS THEY HAVE GOT TO DEMONSTRATE
4 FIRST THAT THERE HAS BEEN A COMPLETE VETTING OF ALL ALTERNATIVE
5 SOURCES AND THE INFORMATION IS NOT AVAILABLE FROM THOSE
6 ALTERNATIVE SOURCES.
7 SO IT'S A CONDITION PRECEDENT, IN OUR VIEW, TO YOUR
8 HONOR REQUIRING ANYTHING FROM MR. GERTZ. WE PROVIDED THE
9 DECLARATION BECAUSE WE FELT THAT THAT RESPONDED TO A CONCERN THAT
10 YOUR HONOR HAD, BUT IT WOULD BE OUR POSITION THAT INASMUCH AS MR.
11 BRATT HASN'T SHOWN UP HERE TODAY WITH A FISTFUL OF SWORN
12 STATEMENTS FROM THE LINE PROSECUTORS AND ALL THE BOSSES ALL THE
13 WAY UP, AND AGENTS WHO HAD ACCESS TO THIS INFORMATION, THAT YOUR
14 HONOR CANNOT, UNDER 9TH CIRCUIT LAW, TAKE THE NEXT STEP AND
15 REQUIRE SOMETHING FROM MR. GERTZ, BECAUSE AS I SAY, IT'S A
16 CONDITION PRECEDENT.
17 THE COURT: I'M NOT SURE YOU AND I HAVE A DISAGREEMENT
18 AS FAR AS ORDERING HIM TO REVEAL HIS SOURCES. BUT IF YOU ARE
19 SAYING HE DOESN'T EVEN HAVE TO TAKE THE WITNESS STAND TO CONFIRM
20 THE STATEMENTS AND OPINIONS HE MADE IN HIS DECLARATION THAT HE
21 SUBMITTED TO ME, THEN I DISAGREE.
22 MR. LEEPER: WE ARE PREPARED TO HAVE HIM CONFIRM THOSE
23 STATEMENTS, YOUR HONOR, BUT WE DO NOT BELIEVE THAT GIVEN THE STATE
24 OF THE RECORD AND THE BURDENS THAT EXIST AND THAT HAVE NOT BEEN
25 SATISFIED, THAT HE SHOULD BE SUBJECTED TO CROSS-EXAMINATION. AND

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1 OUR POSITION IS DRIVEN BOTH BY THE LAW ON THE FIRST AMENDMENT
2 ISSUES AND FURTHER, FRANKLY, BY THESE SURPRISES THAT KEEP COMING
3 OUT OF THE CLOSET.
4 IT SEEMS THERE IS NO END TO THE SURPRISES THAT WE GET IN
5 THIS SHORT-LIVED CASE IN WHICH I HAVE BEEN INVOLVED FOR JUST A
6 COUPLE OF MONTHS. WE COME TO COURT TODAY AND WE LEARN THAT MR.
7 BRATT IS GOING TO ISSUE A GRAND JURY SUBPOENA TO MR. GERTZ. WE
8 HAVEN'T SEEN THIS COMMUNICATION THAT'S BEEN SUBMITTED TO YOUR
9 HONOR. IT'S YET ANOTHER EX PARTE SUBMISSION. WE HAVE HEARD -- WE
10 SAW REFERENCE IN AN EARLIER ORDER THAT MR. BRATT AT ONE TIME HAD
11 SAID THAT HE WAS LOOKING INTO THE DISCLOSURE OF CLASSIFIED
12 INFORMATION.
13 SO BUT FOR THAT DEVELOPMENT, YOUR HONOR, I WOULD FEEL A
14 LOT MORE COMFORTABLE WITH MR. GERTZ GETTING UP ON THE STAND AND
15 BEING SUBJECTED TO CROSS-EXAMINATION BY YOU OR BY THIS GENTLEMAN
16 OVER HERE. BUT WITH THE NEWS THAT THERE IS A GRAND JURY -- NOT AN
17 INVESTIGATION THAT'S UNDER WAY, BUT ONE THAT'S BEEN THREATENED,
18 THE PROVERBIAL SHOT ACROSS OUR BOW, THEN I HAVE ANOTHER PRIVILEGE
19 THAT I WOULD BE TALKING WITH YOUR HONOR ABOUT HERE. I DON'T WANT
20 TO GET TO THAT YET BECAUSE WE HAVEN'T REACHED THAT STAGE, AND
21 THAT'S A PRIVILEGE THAT SHOULD BE EXERCISED SELECTIVELY AND
22 CAREFULLY.
23 THE COURT: YOU'RE VERY WELL-REASONED IN YOUR POSITION.
24 I'M SENSITIVE TO IT AND TO A LARGE EXTENT I AGREE WITH YOU. I
25 DON'T KNOW IF THIS GIVES YOU ANY COMFORT, REGARDLESS OF WHETHER

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1 IT'S A QUESTION THAT I ASK OR MR. GREENBERG ASKS, I'M NOT GOING TO
2 ORDER MR. GERTZ TO ANSWER MY QUESTIONS. I'M GOING TO SEE IF HE
3 WILL DO IT VOLUNTARILY. AND I'M LIMITING MR. GREENBERG'S INQUIRY
4 AS WELL AS MY INQUIRY TO THE STATEMENTS AND VIEWS IN HIS
5 DECLARATION. BECAUSE I AGREE WITH YOU THAT BEFORE WE GO BEYOND
6 THE SCOPE OF THAT, I NEED TO MAKE SURE THAT WE EXHAUSTED OTHER
7 AVENUES TO TRY TO GET THE INFORMATION.
8 MR. LEEPER: ABOUT MR. GREENBERG, AND I HATE TO SINGLE
9 HIM OUT, I'M WONDERING WHY HE HAS STANDING TO PUT ANY QUESTIONS TO
10 MR. GERTZ INASMUCH AS HE SIGNED A PLEA AGREEMENT AND YOUR HONOR
11 ACCEPTED IT IN OPEN COURT HERE; WHERE ON BEHALF OF HIS CLIENT HE
12 WITHDREW THE VERY MOTION THAT FIRST BROUGHT THIS MATTER TO YOUR
13 HONOR'S ATTENTION.
14 SO I WOULD ASK THE COURT TO REFLECT ON THAT IN DECIDING
15 WHETHER, IN FACT, MR. GREENBERG OUGHT TO BE GIVEN THE RIGHT TO
16 QUESTION MR. GERTZ OR WHETHER THAT QUESTIONING OUGHT TO BE DONE
17 ONLY BY YOUR HONOR.
18 THE COURT: MR. LEEPER, I REALLY DO APPRECIATE YOU
19 RAISING ALL THESE ISSUES BECAUSE BELIEVE IT OR NOT, I'M A BIG, BIG
20 PROPONENT OF DUE PROCESS. I BELIEVE THE APPEARANCE OF PROPRIETY
21 IS AS IMPORTANT AS THE ULTIMATE DECISION. AND I, TOO, SHARE SOME
22 OF YOUR CONCERNS THAT THE WAY THIS PROCESS HAS COME OUT, IT LOOKS
23 BAD ON OCCASION. SO I WANT TO GET EVERYTHING OUT IN THE OPEN.
24 I'M GLAD YOU ARE RAISING SOME OF THOSE ISSUES, BUT WITH
25 RESPECT TO YOUR COMMENT ABOUT MR. GREENBERG IS HE, FROM DAY ONE,

1 WAS VERY, VERY UPSET ABOUT THE INFORMATION AND THE ADVERSE
2 PUBLICITY THAT WAS HAPPENING TO MS. CHIU AND TO THE OTHER
3 DEFENDANTS. HE WAS BEFORE ME WITH MS. CHIU. SHE ENTERED A GUILTY
4 PLEA PURSUANT TO A PLEA AGREEMENT, BUT PART OF THAT PLEA
5 AGREEMENT -- MR. GREENBERG, YOU'LL CORRECT ME IF I'M WRONG -- I
6 HAVE TO APPROVE AND IMPOSE THE SENTENCE CONTEMPLATED IN THE
7 AGREEMENT BECAUSE IF I DON'T, SHE CAN WITHDRAW HER GUILTY PLEA.

8 AM I RIGHT?

9 MR. GREENBERG: YOU ARE EXACTLY CORRECT. HER CONVICTION
10 IS NOT YET FINAL AND IF YOU DO THAT OR DON'T DO IT, WE'RE BACK TO
11 SQUARE ONE WITH HER.

12 THE COURT: AND I HAVE NOT SENTENCED HER. SO THE SHORT
13 ANSWER IS SHE IS STILL BEFORE ME AND HER CONVICTION IS NOT FINAL
14 UNTIL I SENTENCE HER. IT'S NOT A NATIONAL SECRET, I HAVE
15 THOROUGHLY CONSIDERED THAT AGREEMENT AND I HAVE, I THINK, ABOUT AS
16 GOOD OF INFORMATION ABOUT THE FACTS OF THE CASE. I'M ABOUT AS
17 PREPARED TO IMPOSE A SENTENCE FOR HER AS I HAVE BEEN WITH ANY
18 DEFENDANT THAT'S BEEN BEFORE ME.

19 I DON'T ANTICIPATE GOING AGAINST THE PLEA AGREEMENT AND
20 WHAT THE GOVERNMENT AND MS. CHIU AGREED TO, BUT TECHNICALLY, SHE
21 IS STILL BEFORE ME. HER CASE IS NOT GONE. THAT'S WHY WE DON'T
22 HAVE THE OTHER DEFENDANTS HERE.

23 MR. LEEPER: VERY WELL, YOUR HONOR. I UNDERSTAND THE
24 COURT'S REASONING.

25 THE LAST POINT I'LL RAISE IS THE REPORTER'S PRIVILEGE.

1 I WON'T BELABOR IT. IT'S A SEPARATE AND INDEPENDENT GROUND FOR
2 QUASHING THE SUBPOENA. WE COVERED IT VERY THOROUGHLY IN PAGES 27
3 TO 37 OF OUR MEMORANDUM IN SUPPORT OF OUR MOTION TO QUASH, BUT I
4 JUST WANTED TO ADD ANOTHER DEVELOPMENT, IF YOU WILL. CONGRESS IS
5 ON THE VERGE OF ENACTING A FEDERAL SHIELD LAW THAT WILL PROHIBIT
6 COMPELLED DISCLOSURE OF CONFIDENTIAL SOURCE EXCEPT IN EXTREMELY
7 LIMITED CIRCUMSTANCES INVOLVING PRESERVATION OF LIFE, THREATENED
8 DEATH, SERIOUS BODILY HARM AND SO FORTH.

9 THE HOUSE PASSED A VERSION OF THIS BILL CALLED THE FREE
10 FLOW INFORMATION ACT BY A 398 TO 21 VOTE. ON THE SENATE SIDE, THE
11 BILL CAME OUT OF CONFERENCE, AND IT'S SENATE BILL 2035. I SAY
12 CONFERENCE, EXCUSE ME. IT CAME OUT OF COMMITTEE BY A VOTE OF 15
13 TO 4. THE BILL WAS ON THE SENATE FLOOR AND IT IS SCHEDULED FOR A
14 VOTE NEXT WEEK BY THE SENATE.

15 THE SIGNIFICANCE OF THAT DEVELOPMENT IS NOT THAT IT
16 SHOULD FORESTALL YOUR HONOR. I'M NOT SAYING THAT I HAVE GOT AN
17 INVESTIGATION OR CONGRESS HAS SOMETHING THAT SHOULD PREVENT YOUR
18 HONOR FROM DOING WHAT YOU FEEL YOU NEED TO DO. BUT THE
19 SIGNIFICANCE OF IT IS THAT UNDER JAFFE AGAINST RICHMOND, A CASE WE
20 CITED IN OUR MOTION WHERE THE SUPREME COURT INSTRUCTED THAT TRIAL
21 COURTS SHOULD CONSIDER WHETHER OR NOT PRIVILEGES OTHER THAN THOSE
22 ALREADY ENUMERATED IN THE FEDERAL RULES OF EVIDENCE SHOULD BE
23 ADOPTED AS FEDERAL PRIVILEGES, SPECIFICALLY HELD THAT THE VIEWS OF
24 THE LEGISLATURE OUGHT TO BE TAKEN INTO ACCOUNT. IN THAT CASE, IT
25 WAS THE STATE LEGISLATURE.

1 HERE, BY THE WAY, JUST LAST WEEK I BELIEVE IT WAS, 41
2 ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL SUBMITTED A LETTER TO
3 THE SENATE EXPRESSING THEIR SUPPORT FOR SENATE BILL 2035. AND,
4 FRANKLY, I THINK THAT'S WHY IT'S BEEN MOVED UP IN THE QUEUE AND
5 IT'S GOING TO BE SCHEDULED FOR A VOTE NEXT WEEK. I BELIEVE THE
6 COURT CAN TAKE ACCOUNT OF THIS WIDELY-HELD VIEW BY STATE LAW
7 ENFORCEMENT OFFICERS AS WELL AS MEMBERS OF CONGRESS, AS WELL AS
8 THE SENATORS WHO VOTED FOR IT IN COMMITTEE IN DECIDING WHETHER OR
9 NOT THE REPORTER PRIVILEGE IS ONE OF THOSE PRIVILEGES THAT, UNDER
10 FEDERAL RULE OF EVIDENCE 501, OUGHT TO BE ELEVATED TO THE STATUTE
11 OF A FEDERAL PRIVILEGE.

12 AND WITH THAT, YOUR HONOR, I'M, OF COURSE, AVAILABLE TO
13 RESPOND TO ANY QUESTIONS THAT THE COURT HAS, BUT OTHERWISE I WILL
14 SIT DOWN AND WE'LL PROCEED HOWEVER YOUR HONOR WOULD LIKE US TO
15 PROCEED.

16 THE COURT: I GREATLY APPRECIATE, AGAIN, YOUR ARGUMENTS.
17 I AM INTENDING TO PROCEED, BUT GIVEN ALL THE ISSUES YOU RAISED, I
18 WANT TO MAKE SURE MR. GREENBERG HAS A CHANCE TO RESPOND TO ANY OF
19 THEM BECAUSE HE WAS MENTIONED CONSTANTLY.

20 AND I SEE MR. STAPLES IN THE AUDIENCE. YOUR NAME WAS
21 MENTIONED CONSTANTLY. I KNOW YOU ARE NOT PART OF -- THE
22 GOVERNMENT IS NOT OFFICIALLY PARTICIPATING IN THIS PROCEEDING.

23 I DON'T KNOW, MR. STAPLES, IF THERE IS ANYTHING YOU
24 WOULD LIKE TO SAY IN REBUTTAL BECAUSE YOUR NAME WAS MENTIONED.

25 MR. STAPLES: THERE IS MUCH I WOULD LIKE TO SAY, YOUR

1 HONOR, BUT I'M RECUSED.

2 THE COURT: MR. GREENBERG?

3 MR. GREENBERG: I DIDN'T REALLY INTEND TO SAY MUCH, BUT
4 IN VIEW OF THE ARGUMENTS THAT WERE MADE I WOULD LIKE TO BRIEFLY
5 ROUND OUT THE RECORD, IF YOU'LL PERMIT ME.

6 I HAVE TO MAKE ONE COMMENT ON THE ERGONOMICS OF THIS
7 COURTROOM. I'M USUALLY ON THIS SIDE OF THE COURTROOM, AND SITTING
8 HERE I DIDN'T REALIZE HOW SMART YOUR HONOR WAS. I SUDDENLY FOUND
9 I AGREED WITH EVERYTHING YOU SAY.

10 ANYHOW, I READ THE MOTION TO QUASH THE GERTZ
11 DECLARATION. I SAW THE DIAGRAM. TO ME, THESE FABULOUS
12 PRESENTATIONS, IT'S NOTEWORTHY FOR WHAT IT FAILS TO ADDRESS, ALL
13 OF IT, WHICH IS THE MAIN ISSUE IN THE CASE. IT'S LIKE FAULKNER'S
14 NOVEL, FULL OF SOUND AND FURY BUT SIGNIFYING NOTHING. IT REALLY
15 FAILED TO ADDRESS THE ISSUE, AND THAT'S WHAT THE TESTIMONY NEEDS
16 TO DO.

17 AS FAR AS RELYING ON MR. STAPLES' TESTIMONY, THERE WAS A
18 SUBSEQUENT REPRESENTATION BY THE GOVERNMENT THAT THERE WAS A 6(E)
19 VIOLATION. SO WHAT MR. STAPLES MAY HAVE SAID OR NOT SAID AT ONE
20 POINT IN TIME, TREAT IT HOWEVER YOU LIKE, BUT AS YOU SAID, THE
21 TRAIN HAS ALREADY LEFT THE STATION. AND I'M INCLINED TO AGREE
22 WITH YOU BASED ON THE RECORD THAT WE HAVE IN THIS CASE.

23 AS FAR AS SHOWING THAT THE THINGS THAT MR. GERTZ
24 PUBLISHED TURNED OUT NOT TO BE TRUE, I DON'T THINK HE SHOULD GET
25 BROWNIE POINTS FOR PUBLISHING INFORMATION THAT TURNS OUT TO BE

1 INCORRECT. IT SHOULDN'T HAVE BEEN DISCLOSED TO HIM IN THE FIRST
 2 PLACE.
 3 THE CRIMINAL JUSTICE SYSTEM, THE GRAND JURY SYSTEM NOT
 4 ONLY PROSECUTES THE GUILTY, IT'S DESIGNED TO PROTECT THE INNOCENT.
 5 AND BY PUBLISHING THINGS THAT TURN OUT TO BE FALSE, THAT CAN HAVE
 6 JUST AS DELETERIOUS EFFECT. AND YOU HAVE TO LOOK NO FURTHER THAN
 7 WHAT JUST HAPPENED WITH THE STEVEN HATFIELD CASE; THE DOCTOR
 8 SUSPECT OF THE ANTHRAX VIOLATIONS WHO WAS PAID MILLIONS OF DOLLARS
 9 OF TAXPAYERS' MONEY BECAUSE PEOPLE IN THE GOVERNMENT, SOURCES
 10 PROBABLY SIMILAR TO THOSE MR. GERTZ RELIED ON, LEAKED INFORMATION
 11 THAT WAS NOT TRUE.
 12 THE SAME THING HAPPENED WITH THE SECURITY GUARD IN THE
 13 OLYMPIC GAMES IN ATLANTA. I THINK HIS NAME IS RICHARD JEWEL,
 14 MAYBE, IF I RECALL CORRECTLY. HE ALSO GOT PAID MILLIONS OF
 15 DOLLARS OF TAXPAYERS' MONEY FOR INAPPROPRIATE LEAKS OF WHAT WAS
 16 GOING ON IN FRONT OF THE GRAND JURY.
 17 SO I DON'T THINK HE GETS BROWNIE POINTS FOR BEING WRONG.
 18 AND FINALLY, AS YOU POINTED OUT, I WAS SURPRISED TO
 19 RECEIVE HIS DECLARATION. I MEAN, NOBODY ORDERED HIM TO FILE IT.
 20 HE DIDN'T HAVE TO. HAVING DONE SO, HE SHOULD BE QUESTIONED.
 21 THE COURT: ALL RIGHT.
 22 MR. LEEPER: CAN I ADDRESS ONE POINT HERE, THE BROWNIE
 23 POINT? YOUR HONOR, FIRST OF ALL, MR. GERTZ WASN'T WRONG. HE
 24 RECEIVED INFORMATION FROM SOURCES AND HE REPORTED IT. BUT SECOND
 25 OF ALL, HAVE WE LOST SIGHT OF WHAT THE GROUND RULES ARE TODAY? I

1 A NO, SIR.
 2 Q TELL ME WHY NOT.
 3 A WELL, YOUR HONOR, THE UNITED STATES SUPREME COURT RECOGNIZED
 4 IN OHIO VERSUS REINER THAT THE FIFTH AMENDMENT TO THE CONSTITUTION
 5 PROTECTS THE INNOCENT WHO MIGHT BE ENSNARED BY AMBIGUOUS
 6 CIRCUMSTANCES. THEREFORE, I ACCEPT THE ADVICE OF MY COUNSEL AND
 7 RESPECTFULLY DECLINE TO ANSWER ON THE BASIS OF MY FIFTH AMENDMENT
 8 RIGHTS.
 9 Q TELL ME, IN YOUR DECLARATION YOU HAD INDICATED THAT YOU USED
 10 CONFIDENTIAL SOURCES TO REPORT ON THIS CASE; CORRECT?
 11 A AGAIN, YOUR HONOR, THE UNITED STATES SUPREME COURT RECOGNIZED
 12 IN OHIO VERSUS REINER THAT THE FIFTH AMENDMENT TO THE CONSTITUTION
 13 PROTECTS THE INNOCENT WHO MIGHT BE ENSNARED BY AMBIGUOUS
 14 CIRCUMSTANCES. THEREFORE, I ACCEPT THE ADVICE OF MY LEGAL COUNSEL
 15 AND RESPECTFULLY ON THE BASIS OF MY FIFTH AMENDMENT RIGHTS.
 16 Q VERY WELL. TELL ME, WHY DID YOU THINK THIS CASE WAS
 17 NEWSWORTHY?
 18 A YOUR HONOR, THE SUPREME COURT RECOGNIZED IN OHIO VERSUS
 19 REINER THAT THE FIFTH AMENDMENT TO THE CONSTITUTION PROTECTS THE
 20 INNOCENT WHO MIGHT BE ENSNARED BY AMBIGUOUS CIRCUMSTANCES.
 21 THEREFORE, I ACCEPT THE ADVICE OF MY LEGAL COUNSEL AND
 22 RESPECTFULLY DECLINE TO ANSWER ON THE BASIS OF MY FIFTH AMENDMENT
 23 RIGHTS.
 24 Q YOU ARE NOT GOING TO ANSWER ANY OF MY QUESTIONS, ARE YOU?
 25 A YOUR HONOR, I'D JUST REPEAT WHAT I SAID.

1 KNOW YOUR HONOR HASN'T, I CERTAINLY HAVEN'T. I WONDER WHETHER
 2 COUNSEL HAS. WE'RE HERE TO DECIDE WHETHER THE REQUIREMENTS IN THE
 3 9TH CIRCUIT REGARDING PROCEEDINGS APPLICABLE TO DISCLOSURE OF
 4 GRAND JURY INFORMATION HAD BEEN MET. IF COUNSEL THINKS HIS CLIENT
 5 HAS ENOUGH TO FILE A CIVIL SUIT LIKE MR. HATFIELD DID BECAUSE HE
 6 THINKS MR. GERTZ WAS WRONG, THAT'S OBVIOUSLY HIS PRIVILEGE TO DO
 7 SO. BUT WE'RE NOT ASKING FOR BROWNIE POINTS. WE'RE ASKING FOR
 8 COMPLIANCE WITH THE LAW. THANK YOU.
 9 THE COURT: I UNDERSTAND.
 10 MR. GERTZ, WOULD YOU BE KIND ENOUGH, SIR, TO TAKE THE
 11 WITNESS STAND. JUST STAND RIGHT BEHIND MY COURT REPORTER, RAISE
 12 YOUR RIGHT HAND, WE'LL SWEAR YOU IN AND I'LL PUT YOU IN THE
 13 WITNESS STAND.
 14 WILLIAM GERTZ, DEFENDANT'S WITNESS, SWORN
 15 THE CLERK: PLEASE STATE YOUR FULL NAME AND SPELL YOUR
 16 LAST NAME FOR THE RECORD.
 17 THE WITNESS: WILLIAM DAVIS GERTZ, G-E-R-T-Z.
 18 CROSS-EXAMINATION
 19 BY THE COURT:
 20 Q GOOD MORNING AGAIN, MR. GERTZ. YOU HAVE HEARD ALL THE
 21 COMMENTS THAT I HAVE MADE AND COUNSEL HAVE MADE. I DID RECEIVE
 22 YOUR DECLARATION. I HAVE THAT IN FRONT OF ME.
 23 THE FIRST QUESTION I WANT TO ASK YOU, I WANT TO CONFIRM,
 24 ARE YOU GOING TO VOLUNTARILY REVEAL YOUR CONFIDENTIAL SOURCES THAT
 25 YOU USED FOR YOUR MAY 16, 2006 ARTICLE?

1 Q NOT NECESSARY. I GET THE PICTURE.
 2 THE COURT: MR. GREENBERG, IF YOU WANT TO GO THROUGH THE
 3 EXERCISE AND TRY TO ASK A FEW QUESTIONS, SEE IF YOU GET ANY
 4 ANSWERS, PLEASE FEEL FREE TO DO SO.
 5 MR. GREENBERG: YOU BET.
 6 CROSS-EXAMINATION
 7 BY MR. GREENBERG:
 8 Q DO I UNDERSTAND, MR. GERTZ, YOU ARE EXERCISING YOUR RIGHTS
 9 UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION?
 10 A THE UNITED STATES SUPREME COURT RECOGNIZED IN OHIO VERSUS
 11 REINER THAT THE FIFTH AMENDMENT TO THE CONSTITUTION PROTECTS THE
 12 INNOCENT WHO MIGHT BE ENSNARED BY AMBIGUOUS CIRCUMSTANCES.
 13 THEREFORE, I ACCEPT THE ADVICE OF MY COUNSEL AND RESPECTFULLY
 14 DECLINE TO ANSWER ON THE BASIS OF MY FIFTH AMENDMENT RIGHTS.
 15 THE COURT: MR. GREENBERG, COULD I SAY SOMETHING TO YOU?
 16 BECAUSE IN MATTER OF FAIRNESS TO THE PROCEEDING AND, PARTICULARLY
 17 IN FAIRNESS TO THE WITNESS, I DID RECEIVE AN EX PARTE LETTER THAT
 18 I HAVEN'T HAD A CHANCE TO GO THROUGH FROM MR. BRATT. AND IN THAT
 19 LETTER, AND MR. LEEPER REFERRED TO IT, THE GOVERNMENT IS
 20 CONSIDERING, IT LOOKS LIKE, GOING TO ISSUE A GRAND JURY SUBPOENA
 21 TO MR. GERTZ IN CONNECTION WITH A GRAND JURY. I DON'T KNOW
 22 WHETHER IT'S HERE OR BACK EAST. BUT YOU WILL RECALL FROM THE CASE
 23 THAT THERE WERE TWO ISSUES THAT THE GOVERNMENT WAS INVESTIGATING;
 24 NOT ONLY THE 6(E) GRAND JURY LEAK THAT I WAS CONCERNED ABOUT, BUT
 25 ALSO POTENTIAL LEAK OF CLASSIFIED INFORMATION.

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1 AND APPARENTLY THE GOVERNMENT IS INTENDING TO PROCEED
2 AGGRESSIVELY ON THE CLASSIFIED INFORMATION LEAK. SO THE WAY I'M
3 TAKING IT, IN FAIRNESS TO THIS WITNESS, IT MIGHT SEEM LIKE, GOSH,
4 I SUBMITTED A DECLARATION. I'M JUST ASKING HIM QUESTIONS ABOUT
5 WHAT HE SUBMITTED IN HIS DECLARATION, BUT HE WAS JUST HIT WITH
6 NEWS THIS MORNING THAT NOW HE IS THE SUBJECT OF A GRAND JURY
7 INVESTIGATION.
8 BY MR. GREENBERG:
9 Q MR. GERTZ, DO YOU INTEND TO GIVE THE SAME ANSWER FOR ALL THE
10 QUESTIONS I MIGHT ASK YOU?
11 A I DO.
12 Q WAS THAT DECISION MADE AFTER YOU SUBMITTED YOUR DECLARATION?
13 MR. LEEPER: OBJECTION, YOUR HONOR. THAT QUESTION IS
14 PROBING YET ANOTHER PRIVILEGE. IT'S THE ATTORNEY-CLIENT
15 PRIVILEGE.
16 MR. GREENBERG: I'M NOT ASKING ABOUT ANY COMMUNICATIONS.
17 I'M ASKING THE TIME OF WHEN HE MADE THE DECISION TO INVOKE THE
18 FIFTH AMENDMENT.
19 THE COURT: IF YOU WANT TO ANSWER THAT, SIR, YOU CAN.
20 THE WITNESS: I DO NOT.
21 BY MR. GREENBERG:
22 Q WAS THERE SOME REASON YOU DIDN'T INVOKE THE FIFTH AMENDMENT
23 WHEN YOU FILED YOUR DECLARATION?
24 MR. LEEPER: OBJECTION, YOUR HONOR. SAME BASIS.
25 THE COURT: AGAIN, IF YOU WANT TO ANSWER THAT, MR.

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1 GERTZ, YOU CAN.
2 THE WITNESS: I DO NOT.
3 BY MR. GREENBERG:
4 Q MR. GERTZ, WHEN YOU FILED YOUR DECLARATION, DID YOU HAVE SOME
5 UNDERSTANDING THAT BY VOLUNTARILY SUBMITTING A SWORN DECLARATION
6 TO THE COURT, YOU WERE, IN FACT, WAIVING YOUR FIFTH AMENDMENT
7 RIGHT?
8 A MR. GREENBERG, THE UNITED STATES SUPREME COURT RECOGNIZED IN
9 OHIO VERSUS REINER THAT THE FIFTH AMENDMENT TO THE CONSTITUTION
10 PROTECTS THE INNOCENT WHO MIGHT BE ENSNARED BY AMBIGUOUS
11 CIRCUMSTANCES. THEREFORE, I ACCEPT THE ADVICE OF MY COUNSEL AND
12 RESPECTFULLY DECLINE TO ANSWER ON THE BASIS OF MY FIFTH AMENDMENT
13 RIGHTS.
14 Q MR. GERTZ, YOU ARE READING FROM A DOCUMENT; CORRECT? YOU CAN
15 ANSWER THAT.
16 A IT'S OBVIOUS.
17 Q AND IS THAT WHAT IS WRITTEN ON THE DOCUMENT, WHAT HAVE YOU
18 BEEN SAYING?
19 A I WOULD JUST REPEAT WHAT I SAID EARLIER.
20 MR. GREENBERG: MAY I TAKE A LOOK AT THAT DOCUMENT TO
21 SEE WHAT HE IS READING FROM?
22 MR. LEEPER: I WILL PROVIDE A COPY OF THE DOCUMENT TO
23 COUNSEL AND TO THE COURT.
24 MR. GREENBERG: I'D BE MORE INTERESTED IN SEEING THE
25 ACTUAL DOCUMENT THE WITNESS IS READING FROM.

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1 THE COURT: YOU MAY.
2 MR. GREENBERG: THANK YOU. YOUR HONOR, I WOULD ASK YOU
3 TO DO ONE OF TWO THINGS. EITHER MAKE A FINDING THAT THE WITNESS
4 HAS WAIVED HIS FIFTH AMENDMENT PRIVILEGE AND ORDER HIM TO ANSWER
5 THE QUESTIONS, OR IN THE ALTERNATIVE, STRIKE THE GERTZ DECLARATION
6 FROM THE RECORD SINCE WE HAVE NOT BEEN ALLOWED TO ASK ANY
7 QUESTIONS ABOUT IT. AND AS I NOTED BEFORE, I THINK IT'S CRITICAL
8 BECAUSE WHILE IT SAYS A LOT OF THINGS, IT DOESN'T ADDRESS THE MOST
9 IMPORTANT ISSUES IN THE CASE, IN MY VIEW.
10 THE COURT: ALL RIGHT. I DO BELIEVE THAT THERE ARE
11 FIFTH AMENDMENT ISSUES THAT MR. GERTZ HAS, AND SO I'M NOT GOING TO
12 MAKE THE FINDING THAT HE WAIVED THE PRIVILEGE IN THAT REGARD,
13 ESPECIALLY IN LIGHT OF FACT THAT THE GOVERNMENT JUST INFORMED HIM
14 THIS MORNING AND INFORMED ME THAT THEY ARE GOING TO BE SUBPOENAING
15 HIM FOR GRAND JURY INVESTIGATION INTO A LEAK OF CLASSIFIED
16 INFORMATION.
17 YOUR OTHER REQUEST TO STRIKE THE DECLARATION, I'M NOT
18 INCLINED TO DO THAT AT THIS POINT, ALTHOUGH I DO UNDERSTAND AND
19 APPRECIATE YOUR FRUSTRATION AND YOUR CONCERN, THAT IS, HERE IS A
20 MATTER THAT WAS SUBMITTED TO ME FOR THE DECISION I HAVE TO MAKE
21 AND I DON'T HAVE A CHANCE TO FAIRLY CROSS-EXAMINE A WITNESS ON IT.
22 MR. GREENBERG: I WOULD MAKE A SUGGESTION TO THE COURT.
23 THE COURT: PLEASE.
24 MR. GREENBERG: I WOULD LIKE TO HEAR FROM MR. BRATT
25 EXACTLY WHEN IT WAS, AFTER ALL THE TIME THAT'S PASSED, THAT THEY

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1 DECIDED TO SUBPOENA MR. GERTZ TO THE GRAND JURY AND GIVE HIM A
2 LETTER JUST WITHIN THE LAST -- I DON'T KNOW WHEN IT WAS FILED
3 BECAUSE I HAVEN'T SEEN IT -- 24, 48 HOURS AGO. BECAUSE I THINK
4 THE RESULTS OF WHAT HAS HAPPENED TODAY WITH MR. GERTZ INVOKING THE
5 FIFTH AMENDMENT WERE PRETTY PREDICTABLE GIVEN THAT LETTER. I
6 THINK MR. BRATT CERTAINLY COULD HAVE KNOWN IT, ALMOST CERTAINLY
7 DID KNOW WHAT WOULD HAPPEN.
8 IT STRIKES ME AS AN EXTRAORDINARY COINCIDENCE THAT IT
9 CAME ON THE EVE OF THIS. I HAVE A LITTLE UNDERSTANDING OF HOW THE
10 DEPARTMENT OF JUSTICE WORKS AND ITS BUREAUCRACY. AND IT'S NOT
11 BEFORE US, BUT GIVEN THE LENGTH OF TIME AND THE APPARENT EFFORT TO
12 INTERVIEW 500 PEOPLE AND THEY STILL COULDN'T FIND OUT.
13 THE COURT: I SHARE YOUR FRUSTRATIONS AND CONCERNS, BUT
14 I DON'T FEEL COMFORTABLE PUTTING THE U.S. ATTORNEY ON THE WITNESS
15 STAND.
16 MR. GREENBERG: I DON'T WANT TO PUT HIM ON THE STAND. I
17 WOULD LIKE YOU TO ASK IT TO HIM. IT JUST STRIKES ME AS AN
18 EXTRAORDINARY COINCIDENCE. EVERYBODY SEEMS TO BE TRYING TO KICK
19 THE CAN DOWN THE ROAD ON THIS ISSUE WITH THE HOPE THAT IT'S GOING
20 TO GO AWAY SOMEHOW. AND I APPLAUD YOUR HONOR FOR THE EFFORT TO
21 GET TO THE BOTTOM OF SOMETHING OBVIOUSLY VERY BAD.
22 ONE OF THE THINGS THAT MAY HAVE BEEN OVERLOOKED THAT I
23 DID NOT SEE QUOTED ON THE CHART THAT WAS PUT UP ON THE ELMO, THE
24 QUOTATIONS, WAS THE STATEMENT ABOUT INVESTIGATIONS. I'M NOT
25 QUOTING IT VERBATIM, BUT THERE IS A STATEMENT IN THERE TO THE

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1 EFFECT THAT INVESTIGATION SUBSEQUENT TO THE ARREST HAS REVEALED
2 NEW FACTS ABOUT THIS TECHNOLOGY SPIRING, OR SOMETHING TO THAT
3 EFFECT.
4 ANY INVESTIGATOR WORTH HIS WEIGHT IN GOLD WILL TELL YOU
5 THAT IS POTENTIALLY A VERY, VERY DAMAGING STATEMENT TO BE IN THE
6 PUBLIC THAT COULD INTERFERE WITH THE PROSECUTION OF THOSE WHO MAY
7 HAVE AFFECTED THE NATIONAL DEFENSE, SOMETHING MR. GERTZ PURPORTS
8 TO BE EXPERTISE IN AND CARE ABOUT. BECAUSE IF THERE ARE OTHER
9 SCHEMERS OUT THERE WHO READ THAT, THAT THEY HAVE REVEALED NEW
10 INFORMATION ABOUT OTHERS INVOLVED IN THE TECHNOLOGY RING, THAT
11 COULD CAUSE SOMEONE TO DESTROY EVIDENCE, GO INTO HIDING, FLEE OR
12 TAKE OTHER ACTION THAT COULD OBSTRUCT JUSTICE.
13 SO I APPLAUD YOUR HONOR FOR TRYING TO GET TO THE BOTTOM
14 OF A REALLY, REALLY IMPORTANT THING, BUT I THINK IT MIGHT BE
15 HELPFUL TO ASK MR. BRATT, WHY DID THIS TAKE SO LONG. WHY DID YOU
16 DECIDE TO DO THIS ON THE EVE OF THIS HEARING. IT FRANKLY, LOOKS
17 VERY SUSPICIOUS TO ME. I THINK THE DEPARTMENT OF JUSTICE MAY HAVE
18 AN INTEREST IN NEVER GETTING TO THE BOTTOM OF THIS THING.
19 THE COURT: I'LL TAKE THAT UNDER ADVISEMENT.
20 MR. GERTZ, YOU CAN STEP DOWN. THANK YOU, SIR.
21 WHY DON'T WE TAKE ONE ISSUE AT A TIME. LET ME GIVE YOU
22 MY RULING ON WHETHER I'M GOING TO ORDER MR. GERTZ TO REVEAL HIS
23 CONFIDENTIAL SOURCES. I'M NOT GOING TO REQUIRE HIM TO DO THAT. I
24 THINK IN THIS CASE, THE FREEDOM OF THE PRESS AND INVESTIGATIVE
25 REPORTER'S NEED TO PROTECT THE CONFIDENTIALITY OF HIS SOURCES

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1 OUTWEIGHS THE COURT'S INTEREST IN DETERMINING THE IDENTITY OF THE
2 PERSON WHO IMPROPERLY DISCLOSED TO MR. GERTZ THE ADDITIONAL
3 CHARGES THAT PROSECUTORS WERE PRESENTING TO THE GRAND JURY.
4 ALTHOUGH EVERY 6(E) VIOLATION IS A SERIOUS MATTER, THE
5 6(E) VIOLATION HERE DID NOT INTERFERE WITH THE FUNCTIONING OF THE
6 GRAND JURY OR, IN MY JUDGMENT, CAUSE HARM TO ANYONE.
7 MR. MAK AND THE OTHER DEFENDANTS ALL HAD THEIR GUILT
8 DETERMINED IN A FAIR AND JUST MANNER. NONE OF THEM SUFFERED UNDUE
9 EMBARRASSMENT FROM THE GRAND JURY LEAK SINCE THEY ALREADY HAD BEEN
10 INDICTED ON SIMILAR CHARGES. THE SAFETY OF A WITNESS OR A
11 DEFENDANT WAS NEVER THREATENED, NOR WAS THE FLIGHT OF A WITNESS OR
12 A DEFENDANT EVER A CONCERN.
13 IN CONTRAST, THE FREEDOM OF THE PRESS IS OF PARAMOUNT
14 INTEREST. THE PUBLIC DEPENDS ON REPORTERS LIKE MR. GERTZ TO
15 UNCOVER GOVERNMENT MISCONDUCT AND TO INFORM US ABOUT THE IMPORTANT
16 ISSUES THAT CONFRONT THE NATION. AS THOMAS JEFFERSON SO APTLY
17 STATED OVER 200 YEARS AGO, "OUR LIBERTY CANNOT BE GUARDED BUT BY
18 THE FREEDOM OF THE PRESS, NOR THAT BE LIMITED WITHOUT DANGER OF
19 LOSING IT."
20 IT IS UNDENIABLE THAT MR. GERTZ WAS PERFORMING A VITAL
21 PUBLIC SERVICE BY REPORTING ON THE CHI MAK CASE. MR. MAK WAS
22 CONVICTED OF LEADING A CONSPIRACY TO PASS SENSITIVE NAVAL
23 TECHNOLOGY TO CHINA. HE BETRAYED THE SACRED TRUST THE COUNTRY
24 PLACED IN HIM WITH OUR NATIONAL SECURITY AND, MORE IMPORTANTLY,
25 THE SAFETY OF THE MEN AND WOMEN OF OUR ARMED FORCES. THE PUBLIC

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1 NEEDED TO KNOW ABOUT MR. MAK, HIS CRIMES, AND THE THREAT THAT HE
2 AND CHINA POSED TO OUR NATIONAL SECURITY.
3 MR. GERTZ STATED IN HIS DECLARATION THAT HE COULD NOT
4 HAVE REPORTED ON THE CHI MAK CASE WITHOUT HIS CONFIDENTIAL
5 SOURCES, AND THAT THOSE SOURCES WOULD NEVER HAVE TALKED TO HIM IF
6 THEIR IDENTITIES WERE REVEALED. MR. GERTZ HAS BEEN AN
7 INVESTIGATIVE REPORTER SINCE 1985 AND IS HIGHLY REGARDED AS A
8 DEFENSE AND NATIONAL SECURITY REPORTER. INDEED, MR. GERTZ HAS
9 RECEIVED THE WESTERN JOURNALISM CENTER AWARD FOR INVESTIGATIVE
10 JOURNALISM IN 1999 AND THE DEFENDER OF THE NATIONAL INTEREST AWARD
11 IN 1998 FROM THE UNITED STATES BUSINESS AND INDUSTRIAL COUNCIL.
12 THE COURT GIVES SUBSTANTIAL WEIGHT TO HIS OPINIONS.
13 BASED ON THE RECORD BEFORE THE COURT, MR. GERTZ WILL NOT
14 BE ORDERED TO REVEAL HIS CONFIDENTIAL SOURCES.
15 MR. GREENBERG, I SHARE MANY OF YOUR FRUSTRATIONS ABOUT
16 THE WAY THIS INVESTIGATION HAS CONCLUDED. AND I DON'T KNOW IF MR.
17 BRATT IS OUTSIDE. THERE HE IS.
18 MR. BRATT, WOULD YOU PLEASE COME FORWARD, SIR. I DON'T
19 KNOW IF YOU HEARD THE QUESTIONS THAT MR. GREENBERG POSED AND
20 RECOMMENDED THAT I ASK YOU. I WANT TO MAKE SURE I GIVE YOU AN
21 OPPORTUNITY TO BE HEARD OR DEFEND YOURSELF AND DEFEND THE ACTIONS
22 OF THE GOVERNMENT. IS THERE ANY RESPONSE YOU WOULD LIKE TO SAY TO
23 ANY OF THAT, SIR?
24 MR. BRATT: I DID NOT HEAR IT, YOUR HONOR, ALTHOUGH I
25 CAN ASSUME WHAT HE WAS SAYING. AS I HAVE PREVIOUSLY STATED IN OUR

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1 FILINGS, I'M NOT AUTHORIZED TO PARTICIPATE IN THIS PROCEEDING. SO
2 I THINK I CANNOT ANSWER THOSE QUESTIONS AND DO NOT SEE -- WELL, AM
3 NOT IN A POSITION TO RESPOND TO ALLEGATIONS EVEN THOUGH I WANTED
4 TO.
5 THE COURT: VERY WELL. THE CLASSIFIED INFORMATION LEAK
6 IS NOT BEFORE ME. AND I STRONGLY BELIEVE IN THE SEPARATION OF
7 POWERS AND I JUST DON'T SEE ANY UPSIDE TO EXERCISING MY POWER AND
8 AUTHORITY TO GET INTO THAT NOW. I THINK IT WOULD BE IMPROPER. MY
9 OBLIGATION AND DUTY WAS TO DO THE BEST I COULD TO DETERMINE WHO
10 LEAKED THE 6(E) INFORMATION.
11 I DO BELIEVE THERE WAS A 6(E) VIOLATION. I BELIEVE IF
12 YOU LOOKED AT THAT ARTICLE IN CONTEXT AND NOT PARSE OUT ONE
13 SENTENCE HERE OR THERE, BUT IF YOU LOOK AT IT IN CONTEXT, IT'S
14 CLEAR TO ME THAT MR. GERTZ PREDICTED WITH 100 PERCENT ACCURACY THE
15 NEW CHARGES. AND YOU DON'T HAVE TO BE A SUPREME COURT JUSTICE OR
16 EDITOR IN CHIEF OF THE LAW REVIEW. THAT JUST DOESN'T HAPPEN BY
17 COINCIDENCE. SOMEONE WAS TALKING TO HIM. SOMEONE WAS TELLING HIM
18 WHAT THE GOVERNMENT WAS SPECIFICALLY PRESENTING TO THE GRAND JURY.
19 SO IT WAS A SERIOUS MATTER, SO SERIOUS THAT I FELT I DID
20 HAVE TO ISSUE A SUBPOENA FOR MR. GERTZ TO COME OUT HERE. I AM
21 GLAD THAT AT LEAST FOR MY RECORD PURPOSES THAT I HAD HIS
22 DECLARATION, AND THAT MR. BRATT DIDN'T GIVE ME THE LETTER THAT HE
23 GAVE ME THIS MORNING. AND AS I UNDERSTAND YOU ALREADY KNOW, THAT
24 MR. GERTZ MAY BE APPEARING BEFORE THE GRAND JURY ON THE CLASSIFIED
25 INFORMATION LEAK.

1 THAT MATTER IS NOT BEFORE ME. AND I UNDERSTAND AND
 2 RESPECT HIS DECISION. HE DOESN'T WANT TO ANSWER ANY QUESTIONS IN
 3 LIGHT OF THAT GRAND JURY SUBPOENA. SO THIS MATTER IS CONCLUDED.
 4 IS THERE ANYTHING FURTHER ANYBODY WOULD LIKE TO SAY?
 5 MR. GREENBERG?
 6 MR. GREENBERG: AGAIN, JUST BY WAY OF A -- LET ME
 7 JUST -- I WANT TO TAKE IT UP WITH MY CLIENT, YOUR HONOR, AND SEE
 8 IF THERE IS ANY INTEREST IN PURSUING IT. IF IT IS, REALLY, THE
 9 ONLY ISSUE WOULD BE WHAT WAS THE PRESSING NATIONAL INTEREST IN
 10 REPORTING THIS SUPERSEDING INDICTMENT WHEN IT WOULD BE A MATTER OF
 11 PUBLIC RECORD IN THREE OR FOUR DAYS. THAT'S REALLY MY ONLY ISSUE
 12 IN THE CASE.
 13 THE COURT: AND IT'S FUNNY, YOU AND I THINK A LOT OF
 14 LIKE. MAYBE IT'S BECAUSE YOU ARE ON THIS SIDE OF THE TABLE NOW.
 15 MR. GREENBERG: I THOUGHT YOU WERE SMART, BUT NOW I'M
 16 QUESTIONING IT AGAIN.
 17 THE COURT: I THINK IT'S UNFAIR TO TAKE THAT ONE ARTICLE
 18 AND SEPARATE IT FROM THE SEVERAL OTHER ARTICLES AND, I UNDERSTAND,
 19 THE BOOK THAT MR. GERTZ HAS WRITTEN ON THIS SUBJECT. HE WAS
 20 ASSIGNED TO THIS CASE. AS I FOUND, I THINK IT'S A VERY NEWSWORTHY
 21 CASE. AND HE HAS A DUTY AND OBLIGATION TO REPORT ON ANY
 22 DEVELOPMENT IN THE CASE, AND A DEVELOPMENT IN THE CASE IS NEW
 23 CHARGES, ESPECIALLY IF THERE ARE MORE SERIOUS CHARGES.
 24 SO I DON'T TAKE THAT ARTICLE IN ISOLATION AND ANALYZE IT
 25 AND SAY, WHAT IS THE BIG DEAL ABOUT NEW CHARGES? WHY CAN'T YOU

1 WAIT? I PUT IT IN THE CONTEXT HE IS ASSIGNED TO THIS CASE.
 2 ANYTHING THAT COMES UP, HE NEEDS TO REPORT ON. HE DOESN'T WANT TO
 3 GET SCOOPED BY SOMEONE ELSE.
 4 MR. GREENBERG: I AGREE. AND HE POINTED OUT THERE ARE
 5 HUNDREDS OF ARTICLES ABOUT ARREST, GUILTY PLEAS, TRIALS,
 6 SENTENCING AND INDICTMENTS. THOSE ARE ALL IN THE PUBLIC DOMAIN.
 7 THAT'S WHY THERE ARE HUNDREDS OF ARTICLES ABOUT THEM. BUT THERE
 8 IS A REASON THAT CONFIDENTIAL INVESTIGATIONS OF GRAND JURY MATTERS
 9 ARE SUPPOSED TO BE SECRET. AND I KNOW YOU KNOW THAT.
 10 ANYHOW, YOU HAVE RULED. I DON'T WANT TO BEAT A DEAD
 11 HORSE. THANK YOU.
 12 MR. LEEPER: THANK YOU FOR ADMITTING MY COLLEAGUE, ALLEN
 13 FARBER, AND ME TO THE BAR OF THIS COURT FOR PURPOSES OF THIS CASE.
 14 IT WAS A PRIVILEGE APPEARING BEFORE YOUR HONOR.
 15 THE COURT: THANK YOU.
 16 (WHEREUPON THE PROCEEDINGS WERE ADJOURNED.)
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 3 CERTIFICATE
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 5 I HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28,
 6 UNITED STATES CODE, THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT
 7 OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE
 8 ABOVE-ENTITLED MATTER.
 9
 10 DATE: JULY 24, 2008
 11
 12
 13 MARIA DELLANEVE, U.S. COURT REPORTER
 14 CSR NO. 9132
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