
In the Supreme Court of the United States

CATHERINE HERRIDGE,
Third-Party Applicant,

v.

YANPING CHEN,
Respondent.

FEDERAL BUREAU OF INVESTIGATION, et al.,
Defendants-Appellees

APPENDIX TO APPLICATION FOR STAY OF
MANDATE PENDING FILING AND DISPOSITION OF A
PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION, *et al.*,

Defendants.

Case No. 18-cv-3074 (CRC)

MEMORANDUM OPINION AND ORDER

In 2017, Fox News Network aired a series of investigative reports about Plaintiff Yanping Chen. The thrust of the stories, principally authored by journalist Catherine Herridge, was that Ms. Chen had concealed her former membership in the Chinese military on her U.S. immigration forms and might have been using a professional school she founded in Virginia to funnel valuable information about the American military to the Chinese government. The reports also contained materials—including photographs and images of internal government documents—that Chen alleges were leaked by government personnel to Herridge and Fox, in violation of the Privacy Act. After extensive discovery and several opinions by this Court, Chen has been unable to identify the source of the alleged leak. She thus issued subpoenas to Herridge and Fox, seeking to compel them to reveal their confidential source or sources. Asserting the First Amendment’s qualified privilege for journalists, and urging the Court to adopt a federal common law newsgathering privilege, Herridge and Fox moved to quash the subpoenas.

The Court recognizes both the vital importance of a free press and the critical role that confidential sources play in the work of investigative journalists like Herridge. But applying the binding case law of this Circuit, the Court concludes that Chen’s need for the requested evidence

overcomes Herridge’s qualified First Amendment privilege in this case. The identity of Herridge’s source is central to Chen’s claim, and despite exhaustive discovery, Chen has been unable to ferret out his or her identity. The only reasonable option left is for Chen to ask Herridge herself.

I. Background

As it has already detailed the factual and procedural background of this case in several previous opinions, the Court provides only a brief summary here. See Chen v. FBI, 435 F. Supp. 3d 189 (D.D.C. 2020); Chen v. FBI, Case No. 20-mc-107 (CRC), 2020 WL 7668880 (D.D.C. Dec. 24, 2020); Chen v. FBI, Case No. 20-mc-107 (CRC), 2021 WL 6125379 (D.D.C. Nov. 23, 2021); Chen v. FBI, Case No. 22-mc-0074 (CRC), 2022 WL 17851618 (D.D.C. Oct. 18, 2022). Plaintiff, Dr. Yanping Chen, founded the University of Management and Technology (“UMT”), an educational institution that attracted a substantial number of military servicemembers who attended with tuition assistance from the Department of Defense (“DOD”). Compl. ¶¶ 13, 42. Beginning in 2010, Chen, a naturalized U.S. citizen, became the focus of an FBI investigation concerning statements she made on certain immigration forms about her work in China in the 1980s. Id. ¶ 15. As a part of that investigation, the FBI executed search warrants for Chen’s home and the main office of UMT, seizing materials during both searches. Id. ¶¶ 18, 20.

Prosecutors eventually informed Chen that no charges would be filed against her, but about a year later, Fox News Network (“Fox”) ran a series of television segments and news articles about her. The articles, authored by then-Fox reporter Catherine Herridge, focused on Chen’s alleged ties to the Chinese military and former role as a colonel in the People’s Liberation Army. Id. ¶¶ 22, 25–31; see Catherine Herridge, Fox News Investigation: DoD-Funded School at Center of Federal Probes over Suspected Chinese Military Ties, Fox News (Feb. 24, 2017), <https://www.foxnews.com/politics/fox-news-investigation-dod-funded-school-at-center-of-federal->

probes-over-suspected-chinese-military-ties. The reporting also included family photographs of Chen; excerpts from Chen's immigration forms; and a snippet from what appears to be an FBI memorandum summarizing an interview conducted for the investigation. Compl. ¶¶ 25–31.

Believing that someone in the government leaked these materials to Herridge and Fox, in December 2018, Chen filed this Privacy Act lawsuit against the FBI, the Department of Defense (“DOD”), and two other federal agencies. Compl. ¶ 23. Since then, Chen has endeavored to suss out the identity of the potential leaker, including by serving scores of document requests, interrogatories, and requests for admission, taking eighteen depositions of current and former government employees, issuing over a dozen third-party subpoenas, and obtaining declarations from 22 government personnel who had a connection to the FBI's investigation. Opp. to Herridge Mot. at 2. Through that discovery, Chen has developed a theory for how Herridge and Fox obtained the allegedly leaked materials: that they came from an internal FBI PowerPoint presentation created by the lead agent on Chen's case. *Id.* at 1. She has also homed in on a few individuals who, she thinks, may have leaked that PowerPoint—namely FBI special agent Timothy Pappa (who created the PowerPoint), alleged FBI-informant Stephen Rhoads (who was an on-the-record source for Herridge's reporting), and a few other government agents who, at one time or another, might have possessed the PowerPoint. *Id.* at 10–11. Despite her efforts, Chen has been unable to obtain direct evidence that any of them, or any other person, was responsible for the alleged leak.

Accordingly, Chen now seeks to pursue the one seemingly surefire method to discover how Herridge and Fox obtained the materials in question: to ask them herself. Chen served Fox and Herridge with deposition subpoenas in May and June of 2022, respectively. *See* Notice of Filing Dep. Subpoena (Herridge deposition subpoena); Fox Mot. to Quash (“Fox Mot.”), Ex. H. (Fox deposition subpoena). She also served both with subpoenas for documents and

communications relating to the materials in question. See Herridge Mot. to Quash (“Herridge Mot.”), Ex. L (Herridge document subpoena); Fox Mot., Ex. G (Fox document subpoena).

Among other things, the document subpoenas ask Herridge and Fox to produce “all Private Documents and Information in your possession” and to produce documents or communications “sufficient to identify the individual(s) that transmitted or provided the Private Documents and Information to you.” Herridge Mot., Ex. L, Schedule A at 6–7. The subpoenas define “Private Documents and Information” to include “any and all documents and information concerning Dr. Chen and/or the University that were provided to or obtained by you from a third party and that were presented in, referred to, or considered in relation to the” Fox reporting on Chen, including in particular the photographs depicting her, FBI and immigration documents relating to her, and any “PowerPoint presentation, compilation, and/or report concerning” her. Id. at 3.

Herridge and Fox moved to quash the subpoenas, relying primarily on the qualified First Amendment journalist’s privilege. Specifically, Herridge and Fox contend that Chen’s subpoenas are overbroad, that she has not sufficiently exhausted alternative avenues to identify the alleged leaker, and, more broadly, that the public interest in maintaining the confidentiality of journalists’ sources outweighs Chen’s personal interest in her Privacy Act suit. Additionally, Herridge and Fox urge the Court to apply a common law newsgathering privilege to quash the subpoenas. Having held a hearing, the Court will now address the motions.

II. Legal Standards

The Court “must quash or modify a subpoena” that “requires disclosure of privileged or other protected matter, if no exception or waiver applies.” Fed. R. Civ. P. 45(d)(3)(A). “The individual or entity seeking relief from subpoena compliance bears the burden of demonstrating that a subpoena should be modified or quashed.” U.S. Dep’t of the Treasury v. Pension Benefit Guar. Corp., 301 F.R.D. 20, 25 (D.D.C. 2014) (quoting Sterne Kessler Goldstein & Fox, PLLC v.

Eastman Kodak Co., 276 F.R.D. 376, 379 (D.D.C. 2011)). As relevant here, a “party asserting the reporter’s privilege . . . bears the burden of showing that it applies in a particular case.” U.S. Commodity Futures Trading Comm’n v. McGraw-Hill Cos., 507 F. Supp. 2d 45, 50 (D.D.C. 2007). If the information sought by the subpoena falls within the privilege as a threshold matter, the party seeking the information may nevertheless compel compliance with the subpoena by showing that the balance of factors set forth in Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981), warrants disclosure. See Lee v. Dep’t of Justice, 413 F.3d 53, 59–60 (D.C. Cir. 2005); Hutira v. Islamic Republic of Iran, 211 F. Supp. 2d 115, 119 n.4 (D.D.C. 2002) (“Courts engage in the [Zerilli] balancing test . . . only after the reporter . . . has demonstrated that the privilege applies.” (citing Shoen v. Shoen, 5 F.3d 1289, 1296 (9th Cir. 1993))); Goldberg v. Amgen, Inc., 123 F. Supp. 3d 9, 15 (D.D.C. 2015) (“In other words, if the privilege applies, [the requesting party] bears the burden of abrogating it.”).

III. Analysis

Herridge and Fox primarily invoke the First Amendment journalist’s privilege. The Court therefore begins by assessing whether Chen has overcome that privilege, which she does not dispute applies in the first instance. The Court then assesses whether a federal common law newsgathering privilege may also warrant quashing the subpoenas.

A. First Amendment Journalist’s Privilege

The D.C. Circuit’s opinion in Zerilli provides the test for applying “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. As a threshold matter, the parties agree that the Zerilli test governs this case and that the test begins, at least, by considering whether the information Chen seeks goes to “the heart of the matter” and whether Chen has exhausted “every reasonable

alternative source of information.” *Id.* (quoting *Zerilli*, 656 F.2d at 713). They disagree, however, about whether the *Zerilli* test ends with those two considerations or, instead, requires (or at least permits) the Court to balance a host of other factors bearing on the parties’ interests and the stakes of the case. The Court therefore begins by clarifying the contours of the *Zerilli* inquiry before proceeding to apply the relevant factors.

1. The Zerilli Framework

Chen asserts that *Zerilli* established a “two-part test for determining when a Privacy Act plaintiff seeking information about the disclosure of her protected information is entitled to obtain that information from a non-party reporter.” *Opp. to Herridge Mot.* at 14. Those two elements, she says, are (1) whether the information sought is “central” to her claim and (2) whether she has exhausted other reasonable avenues of obtaining the information before seeking it from the journalist. *Id.* *Herridge and Fox* counter that the “[a]nalysis under *Zerilli* does not abruptly end with a mechanical assessment” of those two factors but rather requires “a broad balancing analysis,” weighing such considerations as the plaintiff’s personal interest in damages, her likelihood of success on the merits, the egregiousness of the government’s alleged misconduct, and the importance of journalism in the context of reporting on national security matters. *See Herridge Mot.* at 22–39. In the Court’s view, *Zerilli*, particularly as interpreted and applied in *Lee*, does not contemplate the kind of free-form, anything-goes analysis that *Herridge and Fox* seek. To be sure, *Zerilli* calls for a balancing test and counsels that, properly applied, the test should result in the privilege “prevail[ing] in all but the most exceptional cases.” 656 F.2d at 712. But, as the Court will explain, *Zerilli* also channeled district courts’ discretion by identifying the specific factors that weigh in the balance.

As here, *Zerilli* concerned the application of the First Amendment reporter’s privilege to a Privacy Act suit brought against government officials accused of leaking sensitive information

about the plaintiffs—transcripts of incriminating conversations obtained during an FBI investigation—to the Detroit News. Id. at 707–08. In affirming the district court’s denial of the plaintiffs’ motion to compel the reporter to reveal his source for the transcripts, the D.C. Circuit first reiterated its previous conclusion that “to determine whether the privilege applies courts should look to the facts of each case, weighing the public interest in protecting the reporter’s sources against the private interest in compelling disclosure.” Id. at 712 (citing Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974)). “In general,” Zerilli explained, courts must “be mindful of the preferred position of the First Amendment and the importance of a vigorous press.” Id. Accordingly, the rules governing compelled disclosure of confidential sources must “minimize impingement upon the reporter’s ability to gather news.” Id. Zerilli further predicted that, properly applying those rules, “the civil litigant’s interest in disclosure should yield to the journalist’s privilege” in “all but the most exceptional cases.” Id.

Zerilli did not, however, end the analysis with that “general” guidance; rather, it proceeded to identify a “number of more precise guidelines” that “can be applied to determine how the balance should be struck in a particular case.” Id. at 712–13. First, the court explained that the “civil litigant’s need for the information he seeks” must be “of central importance,” that is, go to “the heart of the matter” and be “crucial to his case.” Id. at 713 (quoting Carey, 492 F.2d at 636). If the requested information is of central importance, “then the argument in favor of compelled disclosure may be relatively strong.” Id.

Zerilli then added a second consideration—the “efforts made by the litigants to obtain the information from alternative sources”—which the court explained was “also of central importance.” Id. “Even when the information is crucial to a litigant’s case, reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information.” Id. That reasonable exhaustion requirement, the

court added, would reflect the “values resident in the protection of the confidential sources of newsmen.” Id. (quoting Carey, 492 F.2d at 638).

Last, Zerilli explained that courts must mind the distinction “between civil cases in which the reporter is a party, as in a libel action, and cases in which the reporter is not a party.” Id. at 714. If “the journalist is a party, and successful assertion of the privilege will effectively shield him from liability,” that fact will “weigh somewhat more heavily in favor of disclosure,” as application of the privilege in such circumstances, particularly in libel cases, “would effectively prevent recovery” most of the time. Id. Even so, the court emphasized that this third factor must be balanced against the “other relevant factors” recounted in the opinion—such as whether the information sought is crucial for the plaintiff’s case—to determine whether “the privilege should prevail.” Id.

“Applying *these* guidelines to the facts of the case,” Zerilli concluded that the district court did not abuse its discretion by upholding the assertion of the First Amendment privilege. Id. (emphasis added). Although the suit was “not frivolous” and the information sought was “crucial” to the case, Zerilli held that the plaintiffs had “not fulfilled their obligation to exhaust possible alternative sources of information,” noting in particular the plaintiffs’ failure to depose individuals the Government identified as either possessing or knowing a great deal about the allegedly leaked transcripts. Id. at 714–15 (citing failure to depose “the four employees who had the greatest knowledge about the logs”). Zerilli thus prescribed a balancing test, but it did not give district courts free rein to populate that test with whatever factors they please. Rather than judge in the abstract “the civil litigant’s interest” against “the public interest in protecting a newspaper’s confidential sources,” Zerilli instructed courts to weigh three “more precise guidelines” of “central importance” to the balancing analysis. Id. at 712–713.

That courts must tailor the balancing test to those central factors identified in Zerilli is confirmed by the D.C. Circuit's subsequent application of the analysis in Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005). There, as here, the court considered the application of the First Amendment reporter's privilege to a Privacy Act claim stemming from an alleged leak by government personnel of sensitive personal information about the plaintiff. Id. at 55–56. After making hundreds of written discovery requests and deposing twenty government officials, the plaintiff finally issued subpoenas to the journalists who had published the information. Id. at 56. Applying Zerilli, the district court denied the journalists' motions to quash the subpoenas, and the D.C. Circuit affirmed in relevant part.¹ Id. at 55, 57.

Zerilli, Lee explained, “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.” Id. at 59. After acknowledging Zerilli’s consideration of the distinction between cases in which the reporter is a party and those in which the reporter is not a party, id. 57 n.1, Lee proceeded to identify the two remaining “guidelines [for] determining when a court can compel a non-party journalist to testify about a confidential source”—namely, whether the information sought goes to “the heart of the matter” and whether the litigant has exhausted “every reasonable alternative source of information,” id. at 59 (quoting Zerilli, 656 F.2d at 713).

Emphasizing that “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

¹ The Circuit vacated the district court’s contempt order as to one of the reporters not based on the Zerilli analysis but rather because it found no clear and convincing evidence that that reporter had actually violated the district court’s discovery order requiring the journalists to truthfully answer questions regarding the identities of the alleged leakers. Id. at 56, 63–64.

may feel the information is,” Lee applied “the factors laid out in Zerilli” to find that the district court “did not abuse its discretion in requiring the journalists to testify.” Id. at 60. Without the “identities of the leakers,” the court reasoned, the plaintiff’s ability “to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised.” Id. As to exhaustion, Lee observed that “the number of depositions necessary for exhaustion must be determined on a case-by-case basis” and concluded that, although the plaintiff “did not depose every individual who conceivably could have leaked the information,” such absolute exhaustion is not necessary. Id. at 61. Requiring exhaustion of “every individual who could have had any kind of access to the information regardless of other evidence that the deponents on whom [the plaintiff] focused were in fact the sources of the leaks,” the court continued, would impose an “unreasonable burden of discovery” on Privacy Act plaintiffs. Id.

Like Zerilli, then, Lee did not apply a free-form balancing of interests but rather struck the balance between private and public interests by reference to the specific factors identified in Zerilli—the centrality of the requested discovery and the exhaustion of reasonable alternatives. To be sure, the Court does not read Lee and Zerilli to *prohibit* district courts from considering additional factors. For instance, as Herridge points out, Zerilli also observed at the outset of its balancing analysis that “appellants’ suit” there was “not frivolous.” Zerilli, 656 F.2d at 714; see Herridge Reply at 9. One of Zerilli’s chief sources for its balancing test, Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), likewise noted that “the facts disclosed by the record” there were “inadequate to support a conclusion that” the plaintiff’s likelihood of ultimate success on the merits was so remote “that no purpose would be served by disclosure of the identity of the sources.” Id. at 638. These comments are fairly read to contemplate some limited consideration of the merits of a Privacy Act plaintiff’s underlying claim, at least insofar as requiring disclosure

in a frivolous suit would serve “no purpose.”² But consideration of a lawsuit’s patent futility is a far cry from the full-blown preview of summary judgment briefing that Herridge and Fox seek here. Moreover, Carey itself cautioned against such an extensive interrogation of the merits at this stage of a case, observing that there had “been no motion by appellant for summary judgment” and “thus no showing of facts bearing upon the likelihood” of plaintiff’s success on the merits, and emphasizing that the court did not “intimate any opinion as to” whether the plaintiff “will ultimately prevail.” Id. at 637–38. In any case, whether or not Carey and Zerilli suggest that some consideration of the merits in frivolous cases might be permitted, Lee’s affirmance of the district court based on balancing centrality and exhaustion alone suggests that those factors will be dispositive in the mine-run of cases.

Reading Zerilli and Lee to require a balancing test focused primarily, even if not exclusively, on centrality and exhaustion (and, where applicable, whether the journalists are parties or non-parties) also accords with the approach of other courts in this district. Take Hatfill v. Gonzales, 505 F. Supp. 2d 33 (D.D.C. 2007). Although the court there rejected “[a]s an initial matter” the non-party journalists’ arguments that “the disclosures at issue” did not violate the Privacy Act, id. at 37–39, it then explained that Lee provided “direct and unequivocal guidance and instruction” for the plaintiff’s motion to compel responses from the journalists, holding that the plaintiff had “satisfied both prongs of the Zerilli guidelines necessary to defeat the journalists’ qualified privilege,” id. at 40–43. In later rejecting the journalists’ request that the court recognize a federal common law reporters’ privilege, the court concluded that requiring courts to balance the

² Indeed, some consideration of the merits of a plaintiff’s case may also factor into the analysis of the centrality of the sought-after information; if an obvious flaw will prevent a plaintiff from succeeding on her Privacy Act claim, then it might be said that the leaker’s identity does not go to “the heart of the matter.” Zerilli, 656 F.2d at 713 (quoting Carey, 492 F.2d at 636).

private interest, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value—the same considerations invoked by Herridge and Fox here—would be “inherently unworkable,” putting courts in the position of judging “the newsworthiness of” a reporter's story. Id. at 46–47 & n.8 (quoting Lee v. Dep't of Justice (Lee II), 401 F. Supp. 2d 123, 139 (D.D.C. 2005)). Herridge correctly observes that there is some variation in how other courts have categorized or numbered the relevant factors. But the weight of authority is that Zerilli and Lee set forth the applicable considerations and did not give trial courts free rein to consider private and public interests in disclosure in the abstract. See, e.g., Tripp v. Dep't of Def., 284 F. Supp. 2d 50, 55 (D.D.C. 2003) (describing factors to be considered as centrality, exhaustion, “whether the journalist” is a party, and “whether the information sought is confidential or non-confidential in nature”); Hutira, 211 F. Supp. 2d at 119, 121–22 & n.8 (listing centrality and exhaustion as primary considerations, although exhaustion was dispositive, and noting that “the Court was unable to find any case in this circuit that suggests that it should appraise the underlying civil action so as to decide whether it is worth abrogating the privilege”); Goldberg, 123 F. Supp. 3d at 16 (“Courts must consider two main factors in deciding whether to compel a journalist to provide evidence.”); id. at 17 (evaluating “the two Zerilli factors”); In re Subpoena to Goldberg, 693 F. Supp. 2d 81, 85 (D.D.C. 2010) (explaining that Zerilli “articulated a three-part test to determine the appropriate balance between the litigant's interest in the information and the public's interest,” composed of centrality, exhaustion, and party-non-party status); McGraw-Hill Cos., 507 F. Supp. at 50 (“The balancing test requires evaluation of two factors: (1) the need for the information and (2) whether the party seeking the information has exhausted all reasonably available alternative sources.”).³

³ Herridge cites Grunseth v. Marriott Corp., 868 F. Supp. 333 (D.D.C. 1994), as an example of a court looking beyond the factors identified in Zerilli to consider also the relative

Before applying the Zerilli test to the facts at hand, the Court emphasizes that restricting the test largely to the “precise guidelines” set forth in that case “does not leave journalists without protection.” Lee, 413 F.3d at 60. Herridge and Fox worry that if the Zerilli test mainly boils down to consideration of centrality and exhaustion, then Privacy Act plaintiffs “will eventually get access to confidential sources in *every* case,” contrary to Zerilli’s admonition that the privilege should prevail “in all but the most exceptional cases.” Herridge Mot. at 3 (quoting Zerilli, 656 F.2d at 712); see also id. at 23–24. Vigilant application of the centrality and exhaustion factors, however, should ensure that compelled disclosure will be the exception, not the rule. For one, ensuring that the requested information is central to a plaintiff’s claim, even in Privacy Act cases, will preclude overly broad subpoenas that reach further into the journalist’s privilege than is required. Moreover, it is no easy task to exhaust all reasonable alternative sources of information. Many of the cases cited above concluded that plaintiffs had failed to do just that. See, e.g., Hutira, 211 F. Supp. 2d at 121–22; Tripp, 284 F. Supp. 2d at 60–61; In re Subpoena to Goldberg, 693 F. Supp. 2d at 88. In the Court’s view, it is likely that, when forced to exhaust all reasonable alternatives, plaintiffs will often be able to identify the source of a journalist’s reporting without resort to the journalist. And even where the Zerilli factors favor disclosure, “the usual requirements of relevance, need, and limited burdens on the subpoenaed person still apply.” Lee,

“societal interest[s]” implicated by a request for disclosure of a journalist’s source, id. at 335–36 (after analyzing the three Zerilli factors, observing that the case did not involve “election fraud, or governmental corruption, or any other issue that affects the fundamental validity of the electoral process” but only the plaintiff’s demand for damages). Grunseth’s consideration of societal interests unmoored from the Zerilli factors, however, is inconsistent with both Lee’s analysis and the trend in this district. And as explained below, even if the Court were to analyze such considerations, Chen’s interest in enforcing the Privacy Act here implicates public interests to a greater degree than the gubernatorial candidate in Grunseth who sought to identify sources of a newspaper report that he had an extramarital affair. Id. at 334.

413 F.3d at 60. In short, the Court is less troubled by Herridge and Fox’s parade of horrors, particularly since there appears to have been no such widespread fallout since Lee.⁴

2. Centrality

The Court now turns to the first Zerilli factor: whether the information sought by Chen’s subpoenas goes to “the heart of” her Privacy Act claim. Lee, 413 F.3d at 59 (quoting Zerilli, 656 F.2d at 713). The document subpoena to Herridge consists of four requests:

REQUEST NO. 1:

Produce all Private Documents and Information in your possession, in the form in which you received them.

REQUEST NO. 2:

Produce all Documents and Communications comprising, reflecting, or relating to transmission or provision of the Private Documents and Information to you.

REQUEST NO. 3:

Produce Documents or Communications sufficient to identify the individual(s) that transmitted or provided the Private Documents and Information to you.

REQUEST NO. 4:

Produce all Communications between or among, you, on the one hand, and, on the other hand, Stephen Rhoads and/or Timothy Pappa.

Herridge Mot., Ex. L, Schedule A at 6–7. The phrase “Private Documents and Information,” in turn, is defined to include “any and all documents and information concerning Dr. Chen and/or the University that were provided to or obtained by you from a third party and that were presented in, referred to, or considered in relation to” Fox’s broadcasts and news stories that contained the allegedly leaked information about Chen. Id. at 3. The document subpoena to Fox includes four similar requests. Fox Mot., Ex. G, Schedule A at 7. Herridge and Fox contend that these

⁴ In his dissent from the denial of rehearing en banc in Lee, Judge Tatel expressed a concern similar to the one raised by Herridge and Fox, but they point to no evidence that the floodgates to journalists’ notepads have opened in the eighteen years since then. See Lee v. Dep’t of Justice, 428 F.3d 299, 301–02 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of reh’g en banc).

subpoenas are overbroad as written because they would require disclosure of every document or piece of information obtained from anyone relating to Chen or her university, whether or not the documents or information bear any relation to the alleged release of records protected under the Privacy Act. Herridge Mot. at 17.

The Court agrees with Herridge and Fox that, as drafted, the subpoenas sweep beyond the information that is central to Chen's case. "As in Zerilli, the relevant information is the identity of the individuals who may have leaked information in violation of the Privacy Act," and without that information, Chen's "ability to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised." Lee, 413 F.3d at 60. Read at their broadest, however, the subpoenas could require the disclosure of all of Herridge's sources who contributed information to her reporting, even if that information is not protected by the Privacy Act.

But this overbreadth does not doom Chen's requests. The Court has authority under Rule 45 to "quash or modify" a subpoena, Fed. R. Civ. P. 45(d)(3)(A), and "when appropriate," courts should "consider the possibility of modifying the subpoena rather than quashing" it, Est. of Klieman v. Palestinian Auth., 293 F.R.D. 235, 240 (D.D.C. 2013) (quoting Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 403 (D.C. Cir. 1984)). Here, Herridge and Fox's counsel suggested at oral argument that the centrality factor would not be an obstacle for Chen if the subpoenas are "cut down to focus only on the deposition for the . . . identity of the source or sources" who provided Herridge with the material purportedly covered by the Privacy Act, namely, the photographs of Chen, the FBI interview reports, the immigration or naturalization documents, and the PowerPoint presentation created by Agent Pappa. Hearing Transcript at 9; see also Herridge Mot., Ex. L, Schedule A at 3 (listing relevant documents). The Court thus finds that the centrality factor favors disclosure if, as discussed below, the Court quashes the other subpoenas but enforces Chen's deposition subpoena of Herridge.

3. *Exhaustion of Alternatives*

Next, Zerilli and Lee require that “reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information.” Zerilli, 656 F.2d at 713; accord Lee, 413 F.3d at 59. Although the exhaustion requirement is “very substantial,” “there are some limits to the obligation to pursue alternative sources.” Zerilli, 656 F.2d at 714. A Privacy Act plaintiff need not, for instance, “depose every individual who conceivably could have leaked the information” or “who could have had any kind of access to the information regardless of other evidence that the deponents on whom [she] focused were in fact the sources of the leaks and were denying it.” Lee, 413 F.3d at 61. To that end, litigants need not “be made to carry wide-ranging and onerous discovery burdens where the path is . . . ill-lighted.” Id. (alteration in original) (quoting Carey, 492 F.2d at 639). Nor does Zerilli “require proof positive that the knowledge exists nowhere else on earth but in the minds of the journalists and their anonymous confidants.” Lee v. U.S. Dep’t of Justice (Lee III), 287 F. Supp. 2d 15, 23 (D.D.C. 2003). The number of depositions or extent of other discovery required for “reasonable” exhaustion “must be determined on a case-by-case basis,” considering such factors as the efforts already undertaken, the burden of further discovery, and the likelihood that it would uncover the relevant information. Lee, 413 F.3d at 60–61.

Here, Chen’s request to compel disclosure of the leaker’s identity from Herridge and Fox has come at “the end, and not the beginning, of the inquiry.” Zerilli, 656 F.2d at 713 (quoting Carey, 492 F.2d at 638). Chen has served the defendants in this case with 67 requests for production of documents, 67 interrogatories, and 57 requests for admission. Opp. to Herridge Mot. at 2. She has taken eighteen depositions of current and former government employees, including four 30(b)(6) depositions of FBI employees, issued thirteen third-party subpoenas, and obtained 22 declarations from other government personnel who were either part of or aware of the

underlying investigation into Chen. Id. In particular, she has deposed both FBI Agent Pappa—the creator of the PowerPoint Chen believes to be the source of the leaked material—and Stephen Rhoads—Herridge’s on-the-record source who was privy to Pappa’s work, who, in an email intended to prompt a Congressional investigation into Chen, boasted that “[n]obody on the planet [knew] more about this case than” he, and who proclaimed that he had “documents, emails, recordings and pictures that nobody else has.” Id., Ex. 25 (cleaned up). During her depositions of other government employees, moreover, Chen also asked if they had any idea who might have provided the private documents used in Herridge’s reporting. See, e.g., id., Ex. 17 at 164 [REDACTED]

[REDACTED]; id., Ex. 18 at 248 [REDACTED]
[REDACTED]
[REDACTED]; id., Exs. 20 & 21 [REDACTED]
[REDACTED]; id., Ex. 32 at 129 [REDACTED]
[REDACTED]

[REDACTED]. In a word, Chen’s pursuit of discovery has been probing, yet she has been unable to ascertain the alleged leaker’s identity. Indeed, her efforts have been far more extensive than those of the plaintiffs in Zerilli, who had made no attempt to depose any of the individuals who were most familiar with or who had access to documents from the investigation there. 656 F.2d at 714–15; see also Tripp, 284 F. Supp. 2d at 59 (upholding privilege where “the party seeking to compel disclosure has made no effort whatsoever, or insufficient efforts, to obtain the information sought from alternative sources, or has made conclusory claims that the information cannot be obtained from other sources”); In re Subpoena to Goldberg, 693 F. Supp. 2d at 88 (requiring litigant to seek out other sources that could “likely” provide requested information); Goldberg, 123 F. Supp. 3d at 20 (pointing out failure to seek “information from the obvious alternative sources”).

Despite Chen's efforts, Herridge and Fox identify several stones they believe she must turn to exhaust reasonable alternative sources. Particularly in light of the extensive discovery Chen has already undertaken, however, the Court does not believe further exploration of any of these additional sources offers more than a speculative prospect of identifying the source of the leak.

First, Herridge and Fox insist that Chen should have secured a comprehensive list of—and either deposed or sought declarations from—all FBI personnel who might have had access to Agent Pappa's PowerPoint [REDACTED]

[REDACTED]. That group, they say, would include [REDACTED]
[REDACTED]
[REDACTED]. Herridge Mot. at 18.

But Chen did try, unsuccessfully, to identify the relevant subset of those individuals who accessed the PowerPoint from that location. See Opp. to Herridge Mot., Ex. 30 at 29 (FBI 30(b)(6) deponent stating that [REDACTED]

[REDACTED]; id., Ex. 11 at 6 (FBI response to interrogatory stating that the [REDACTED]

[REDACTED]). In any event, requiring Chen to seek depositions or declarations from every person who nominally had access [REDACTED]—without any evidence that those individuals actually did access the PowerPoint (or, for that matter, were aware of its existence)—would be contrary to Lee's instruction that plaintiffs need not depose every individual “who could have had any kind of access to the information.” 413 F.3d at 61.

Similarly speculative is Herridge and Fox's argument that Chen should have further pursued information about individuals who [REDACTED]

[REDACTED]. Specifically, Herridge and Fox point to [REDACTED]
[REDACTED].

See Herridge Mot. at 19; Opp. to Herridge Mot., Ex. 30 at 100. They also point to [REDACTED] to his supervisors. Herridge Mot. at 18; id., Ex. P at 90–91, 178–79. [REDACTED], Herridge and Fox contend that Chen should have identified and deposed (or sought declarations from)

The foundation for such suppositions, however, is far too shaky. Although Pappa stated in his deposition that he believed [REDACTED]

[REDACTED], he also emphasized [REDACTED]

[REDACTED] Opp. to Herridge Mot., Ex. 5 at 214. At best, he could not recall

[REDACTED] Id. at 215; see also id. at 217 (Pappa stating he could not recall [REDACTED]

[REDACTED]); id. at 228–29 (Pappa stating that he could not recall [REDACTED]); id. at 298 (Pappa stating he did not recall [REDACTED]). One [REDACTED] [REDACTED] [REDACTED]

[REDACTED] recalled that [REDACTED] but also remembered that

[REDACTED] Opp. to Herridge Mot., Ex. 33 at 28. [REDACTED]

[REDACTED] Id., Ex. 14 at 88–91. As lukewarm as these leads are, Chen nevertheless attempted to

ascertain the identities of [REDACTED] through the FBI's 30(b)(6) deponent, who stated [REDACTED]. Id., Ex. 30 at 35–36, 38. In short, Chen did conduct follow-up discovery to ascertain [REDACTED], and in any case, Herridge and Fox have identified nothing in the record to suggest it is reasonably likely someone from [REDACTED] accessed, absconded with, or leaked the PowerPoint.

Finally, the Court is unpersuaded by the remaining specters Herridge and Fox cite as potential recipients of the PowerPoint. They point to the possibility that Agent Pappa might have given a copy of the PowerPoint to [REDACTED] employee named [REDACTED] to convey to [REDACTED] (whom Chen deposed). But [REDACTED]
[REDACTED]
[REDACTED]. Id., Ex. 13. And [REDACTED] testified that he could not [REDACTED]
[REDACTED]. Id., Ex. 15 at 86–87. Herridge and Fox cite another email in which a [REDACTED], requested that Pappa send [REDACTED] based on the PowerPoint to [REDACTED]. Herridge Mot. at 18–19. But neither [REDACTED] nor another recipient of that email, both of whom Chen deposed, could say [REDACTED], Opp. to Herridge Mot., Ex. 16 at 114; id., Ex. 32 at 65, nor is there any reason to believe [REDACTED]
[REDACTED], had any contact with or reason to leak to Herridge. Last, Herridge and Fox cite [REDACTED]
[REDACTED]
[REDACTED]. Herridge Mot., Ex. R. Once again, Chen asked [REDACTED] in his deposition. He replied that [REDACTED]

[REDACTED]
[REDACTED]. Opp. to Herridge Mot., Ex. 32 at 110–11.

To summarize, none of the potential leads on which Herridge and Fox rely amounts to anything more than speculation that some government officials might have seen or potentially had access to the alleged Privacy Act materials in this case. Moreover, far from amounting to “a reasonably well-defined number of possible alternative sources,” Goldberg, 123 F. Supp. 3d at 18, the number of potential sources Herridge and Fox would require Chen to exhaust would balloon to [REDACTED], all without any non-speculative evidence that they ever possessed, let alone leaked, the relevant materials. To require Chen to pursue these “ill-lighted” paths after the extensive discovery she has already conducted, and when evidence suggests that other individuals (such as Rhoads) both had access to the Chen investigation and an interest in publicizing it, see Opp. to Herridge Mot., Ex. 18 at 90–91, 184–86; id., Ex. 25, would read the word “reasonable” out of Zerilli’s exhaustion requirement. This factor, accordingly, tilts sharply in Chen’s favor.

4. *Reporter’s Status*

Next, as instructed by Zerilli, the Court considers the distinction between cases in which “the reporter is a party” and those “in which the reporter is not a party.” 656 F.2d at 714. As Zerilli explained, this factor can point strongly in favor of disclosure when the reporter is a party and “successful assertion of the privilege will effectively shield him from liability,” as in libel cases that require proof of actual malice. Id. Herridge and Fox are not parties to this case, so Zerilli’s concern about the “equities” does not decisively favor disclosure. At the same time, neither does that fact weigh against disclosure. Indeed, Lee acknowledged that the reporters there

were all non-parties and yet did not hesitate to affirm the district court's disclosure ruling based on the weight of the centrality and exhaustion factors there. 413 F.3d at 57 n.1.

5. *Other Factors and Considerations*

For the reasons discussed above, the Court does not read Zerilli or Lee to require either a full-bore analysis of Chen's likelihood of success on the merits of her Privacy Act claim or an assessment of the public and private interests at play beyond the factors discussed above. But, for the sake of completeness, the Court briefly explains here why Herridge and Fox's arguments along these lines likely would not change the outcome here in any event.

The Court will group Herridge and Fox's remaining arguments into two considerations. First, they maintain that their First Amendment interests outweigh Chen's interest in pursuing her Privacy Act claim because, in their view, she will be unable to obtain damages at the end of the day, either because Chen's alleged damages were caused by the Defense Department's independent decision to cut off tuition assistance to her university or because much (but not all) of Fox's reporting on her was derived from sources that do not implicate the Privacy Act. Herridge Mot. at 26–34. To these arguments, it is sufficient to repeat Zerilli's observation that Chen's "suit is not frivolous." 656 F.2d at 714. The Court need not, and does not, decide now whether Herridge and Fox are correct that Chen is barred from pursuing damages based on the Defense Department's revocation of tuition assistance, as those are not the only damages Chen alleges she suffered. She also seeks economic damages for consulting fees and reputation management services she claims to have incurred to remediate the harm caused by the Fox reporting. Opp. to Herridge Mot., Ex. 34 at 2; cf. Fleck v. Dep't of Veterans Affs. Off. of Inspector Gen., 596 F. Supp. 3d 24, 57 (D.D.C. 2022) ("Legal fees that a plaintiff incurs to protect against the effects of an agency's Privacy Act violations are cognizable damages under Section 552a(g)(4)."). She seeks further damages for lost profits, a sum that might include lost business opportunities without

regard to the loss of tuition assistance from the Defense Department. Opp. to Herridge Mot., Ex. 34 at 2; Compl. ¶ 56 (“The illegal leak of personal information has diminished Dr. Chen’s income, limited her professional opportunities, and decreased the value of the university that she wholly owns and into which she has invested the last two decades.”).

Even if Chen may ultimately have to distinguish between damages caused by the leak of information covered by the Privacy Act—such as the compromising photographs of herself and her husband—and not by other information in the Fox reporting that was either not so protected or was publicly available, the Court cannot say at this juncture that she will be unable to do so, particularly without expert opinions that could be crucial to that analysis. Indeed, even if Herridge and Fox are correct that only the photographs that appeared in the reporting could serve as the basis for Privacy Act damages—a question the Court does not decide—the Court does not doubt that the images of Chen holding or wearing a Chinese military uniform could have given the Fox reporting more traction than it otherwise would have had and caused Chen more damage than she otherwise would have suffered. A picture, after all, “is worth a thousand words.” Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258, 1295 (2023) (Kagan, J., dissenting). Were the photographs here irrelevant, moreover, the Court wonders why Herridge would have thought to include them in her reporting, notwithstanding the rather obvious legal implications of doing so. Although the Court does not intimate “any opinion as to whether” Chen “will ultimately prevail,” the current record does not support the conclusion “that no purpose would be served by disclosure of the identity of the sources.” Carey, 492 F.2d at 638.

Second, Herridge and Fox urge the Court to conclude that Chen’s “purely parochial, private interest” in her Privacy Act claim, absent evidence that the government “smeared an innocent person,” simply does not outweigh the First Amendment interest in promoting a robust free press, particularly in the area of reporting on national security. Herridge Mot. at 26, 34–39.

At the outset, the Court rejects the assertion that Chen’s Privacy Act claim implicates only her own personal interests. To make out a Privacy Act claim, a litigant must show that the government’s disclosure of covered material was “intentional or willful,” 5 U.S.C. § 552a(g)(4), and Congress has recognized the weightiness of such willful disclosures by creating a private right of action to deter them. Nor does the Court read Lee, Hatfill, or any of the other D.C. Circuit cases discussing the reporter’s privilege to turn on whether the Privacy Act plaintiff was wrongfully “smeared” by government leaks or, to paraphrase Herridge and Fox’s argument, “had it coming.” For good reason: The Privacy Act protects not just Chen but all private citizens, whether blameworthy or blameless, from the risk that government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals.

Of course, the Court does not question the vital role of a free press in “bar[ing] the secrets of government and inform[ing] the people.” N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring). But here, if Herridge and Fox are correct that only a few (in their view, insignificant) elements of their stories even implicated the Privacy Act, then that press function, including the reliance on confidential sources, need not have come into conflict with Chen’s statutory privacy rights at all. And, at the end of the day, the binding precedent of this Circuit does not permit this Court to cast aside all the “more precise guidelines” analyzed above based solely on the abstract “importance of a vigorous press.” Zerilli, 656 F.2d at 712–13.

* * *

The Court is mindful both “of the preferred position of the First Amendment,” Zerilli, 656 F.2d at 712, and of the fact that “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,” Lee, 413 F.3d at 60. As described above, the

two most important factors identified by Zerilli and Lee point decidedly in Chen's favor. The subpoenas, as modified, go to the heart of her Privacy Act claim, and she has exhausted all but the speculative alternative sources of information suggested by Herridge and Fox. That Herridge and Fox are not parties to the case does not outweigh those factors, nor do their concerns about the extent of Chen's damages or the importance of Herridge's work. Accordingly, balancing the foregoing factors, the Court concludes that Chen has overcome the qualified First Amendment privilege in this case.

B. Common Law Newsgathering Privilege

Although most of the parties' briefing is devoted to the qualified First Amendment privilege, Herridge and Fox also urge the Court to recognize a newsgathering privilege under federal common law. See Herridge Mot. at 39–45; Fox Mot. at 13–14. For the same reasons stated by Judge Collyer in Lee II and Judge Walton in Hatfill, the Court declines to recognize a federal common law newsgathering privilege here.

Herridge and Fox contend that the relationship between a journalist and her confidential source is “rooted in the imperative need for confidence and trust” and serves important public ends. Herridge Mot. at 40–41 (quoting Jaffee v. Redmond, 518 U.S. 1, 10 (1996)). But to “qualify as an exception from the general rule disfavoring testimonial privileges requires a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” Hatfill, 505 F. Supp. 2d at 44 (alterations and internal quotation marks omitted) (quoting Jaffee, 518 U.S. at 9). The “transcendent importance of a free press is that reporters can report the news and express opinions without fear of Government oppression or interference,” and the use of confidential sources is “not a *sine qua non* of journalism but only an important and useful tool.” Lee II, 401 F. Supp. 2d at 141; accord Hatfill, 505 F. Supp. 2d at 45.

Moreover, “[u]nlike the psychotherapist’s privilege recognized in Jaffee, ‘the likely evidentiary benefit that would result from the denial of the [reporter’s] privilege’” could be substantial. Hatfill, 505 F. Supp. 2d at 45 (second alteration in original) (quoting Jaffee, 518 U.S. at 11). Even if not absolute, a common law privilege that would preclude disclosure of a confidential source in a case such as this one, which the Court has found satisfies the Zerilli and Lee test, would “circumvent” this Circuit’s First Amendment privilege case law and would risk undermining “the fundamental purpose of the Privacy Act” of “discourag[ing] the kind of [alleged] leaks that are at issue in this action.” Lee II, 401 F. Supp. 2d at 139, 141–42. Moreover, as noted above, the balancing of interests contemplated by Herridge and Fox’s proposed common law privilege “would create a subjective and elastic standard whose outcome could not be predicted,” saddling district courts with the “daunting and well-nigh impossible task” of determining “whether the harm caused by leaked information outweighs the ‘value’ of that information to the citizenry.” Id. at 139. Given that this Circuit already has a well-established First Amendment privilege that both protects journalists’ interests and channels judicial discretion in balancing that interest against evidentiary need, Herridge and Fox fail to “demonstrate with a high degree of clarity and certainty that” their proposed privilege “will effectively advance a public good” relative to these potential drawbacks. Id. at 137 (quoting In re Sealed Case, 148 F.3d 1073, 1076 (D.C. Cir. 1998)).

To be sure, as Herridge and Fox point out, almost all of the states have adopted some form of reporter’s privilege, although the contours of those protections vary significantly from state to state. See In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1157–58 (D.C. Cir. 2006) (Sentelle, J., concurring). That factor weighs somewhat in favor of recognizing a similar federal common law privilege. But “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). For that reason, “new privileges should be created sparingly and with caution.” Lee II, 401 F. Supp. 2d at 136. And, although not dispositive, recognizing the common law privilege Herridge and Fox seek would stand in some tension with the Supreme Court’s pronouncement that “the common law recognized no such privilege,” at least in the criminal context. Branzburg v. Hayes, 408 U.S. 665, 698 (1972); see id. at 685 (“At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.”). Accordingly, the Court will not create a federal common law newsgathering privilege here.

C. Sequencing of Discovery

The Court must tackle one last question—Fox’s arguments that the subpoenas to it should be quashed as duplicative of the Herridge subpoenas, at least until discovery efforts are exhausted with respect to her. Fox contends that Zerilli’s exhaustion requirement demands that Chen seek discovery from Herridge first and that requiring Fox to submit to a deposition would be unnecessarily cumulative and duplicative under Federal Rule of Civil Procedure 26(b)(2)(C). Fox Mot. at 12–13, 14–16. Although Chen contends that Herridge and Fox may be able to provide different materials relevant to her claim, she does not oppose sequencing discovery to require Fox’s compliance with the subpoenas only if the discovery sought from Herridge is incomplete. Opp. to Fox Mot. at 18–19.

The Court agrees with this proposed approach. The “names of the sources who leaked information about Dr. [Chen] to the media are central to [her] Privacy Act claim[,]” and Chen’s subpoena to depose Herridge is “directly targeted at obtaining” that information. Hatfill, 505 F. Supp. 2d at 49. Until Chen has exhausted her efforts to obtain the alleged leaker’s identity from Herridge, she will not have exhausted reasonable alternative sources sufficient to require Fox to submit to a subpoena as well. Id. Of course, “depending upon the outcome of the reporter’s

deposition[], it may be necessary for the Court to revisit in the future whether corporate representatives of” Fox “should be compelled to provide deposition testimony.” *Id.* But, at least for now, the Court believes it prudent to proceed one step at a time.

Accordingly, the Court will grant Herridge’s motion insofar as it defers enforcement of Chen’s document subpoena and cabins her deposition subpoena, but it will otherwise deny her motion. Consistent with this opinion, Chen may depose Herridge regarding the identity and intent of the source or sources of the documents and images allegedly provided to her in violation of the Privacy Act, and any non-privileged other matters relevant to her Privacy Act claim. The Court will grant Fox’s motion, without prejudice to Chen renewing her subpoenas to Fox in the event Herridge cannot provide the information she seeks.

IV. Conclusion

For these reasons, it is hereby

ORDERED that [Dkt. Nos. 94 & 96] Catherine Herridge’s Motion to Quash is GRANTED in part and DENIED in part. It is further

ORDERED that [Dkt. Nos. 95 & 97] Fox News Network’s Motion to Quash is GRANTED.

SO ORDERED.



CHRISTOPHER R. COOPER
United States District Judge

Date: August 1, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION, *et al.*,

Defendants.

Case No. 18-cv-3074 (CRC)

MEMORANDUM OPINION AND ORDER

In August 2023, the Court partially denied journalist Catherine Herridge’s motion to quash a subpoena in this Privacy Act lawsuit, thereby permitting Plaintiff Yanping Chen to depose Herridge regarding the sources for her investigative reports on Chen’s affiliations with the Chinese military. At her deposition the following month, though, Ms. Herridge refused to answer any questions about the identity and intent of her sources. The question now is whether Herridge should be found in civil contempt for defying the Court’s clear and unambiguous order. After careful consideration, the Court concludes that a finding of civil contempt is warranted.

The Court does not reach this result lightly. It recognizes the paramount importance of a free press in our society and the critical role that confidential sources play in the work of investigative journalists like Herridge. Yet the Court also has its own role to play in upholding the law and safeguarding judicial authority. Applying binding precedent in this Circuit, the Court resolved that Chen’s need for the requested information to vindicate her rights under the Privacy Act overcame Herridge’s qualified First Amendment reporter’s privilege in this case. Herridge and many of her colleagues in the journalism community may disagree with that decision and prefer that a different balance be struck, but she is not permitted to flout a federal

court's order with impunity. Civil contempt is the proper and time-tested remedy to ensure that the Court's order, and the law underpinning it, are not rendered meaningless.

At the same time, Herridge does have a right to appeal this contempt order in the hopes of persuading the D.C. Circuit to recalibrate the existing qualified reporter's privilege in her favor or forge a new federal common law newsgathering privilege that sweeps more broadly than the Constitution. To provide ample room for her to exercise that right, the Court will stay the contempt sanction pending a timely appeal.

I. Background

Before delving into the present dispute, it is worth recounting the long journey to this point. Dr. Yanping Chen is a naturalized U.S. citizen who, in 1998, founded the University of Management and Technology ("UMT"), an educational institution that attracted a substantial number of military servicemembers who attended with tuition assistance from the Department of Defense. Compl. ¶¶ 13, 42. Beginning in 2010, Chen became the focus of an FBI investigation concerning statements she made on immigration forms about her work in China in the 1980s. *Id.* ¶ 15. As a part of that investigation, the FBI executed search warrants for Chen's home and the main office of UMT, seizing materials during both searches. *Id.* ¶¶ 18, 20.

Prosecutors eventually informed Chen that no charges would be filed against her, but about a year later, Fox News Network ("Fox") ran a series of television segments and news articles about her. The thrust of the stories, principally authored by then-Fox reporter Catherine Herridge, was that Chen had concealed her former membership in the Chinese military on her U.S. immigration forms and might have used UMT to funnel valuable information about the American military to the Chinese government. *Id.* ¶¶ 22, 25–31; see Catherine Herridge, Fox News Investigation: DoD-Funded School at Center of Federal Probes over Suspected Chinese

Military Ties, Fox News (Feb. 24, 2017, 1:58 PM), <https://www.foxnews.com/politics/fox-news-investigation-dod-funded-school-at-center-of-federal-probes-over-suspected-chinese-military-ties>. The reporting also included family photographs of Chen, excerpts from Chen's immigration forms, and a snippet from what appears to be an internal FBI memorandum summarizing an interview of Chen's daughter conducted for the investigation. Compl. ¶¶ 25–31.

Believing these materials could only have come from the FBI's search and that someone in the government leaked them to Herridge and Fox in violation of the Privacy Act—which generally prohibits federal agencies from disclosing internal records about a person without her consent—Chen filed suit in 2018 against the FBI, the Department of Defense, and two other agencies. *Id.* ¶ 23; *see* 5 U.S.C. § 552a. Over the next five years, Chen pounded the pavement to uncover the identity of the potential leaker. She served scores of document requests, interrogatories, and requests for admission; took 18 depositions of current and former government employees; issued over a dozen third-party subpoenas; and obtained declarations from 22 government personnel who had a connection to the FBI's investigation. Opp'n to Herridge Mot. to Quash at 2. Through that discovery, Chen developed a theory for how Herridge and Fox obtained the allegedly leaked records: that they came from an internal FBI PowerPoint presentation created by the lead agent on her case. *Id.* at 1. She also homed in on a few individuals who, she thinks, may have leaked the PowerPoint—namely, the lead case agent who created the PowerPoint, self-identified FBI-informant Stephen Rhoads (who was an on-the-record source for Herridge's reporting), and a few other government agents who might have possessed the PowerPoint. *Id.* at 10–11. Despite her best efforts, Chen has been unable to obtain direct evidence that any of them, or any other person, was responsible for the suspected leak.

After years of failed efforts and false starts, Chen sought to pursue the one seemingly surefire method to discover how Herridge and Fox obtained the materials in question: to ask them herself. Chen served Fox and Herridge with deposition subpoenas in May and June of 2022, respectively. See Notice of Filing Dep. Subpoena (Herridge deposition subpoena); Fox Mot. to Quash, Ex. H. (Fox deposition subpoena). She also served both with subpoenas for relevant documents and communications. See Herridge Mot. to Quash, Ex. L (Herridge document subpoena); Fox Mot. to Quash, Ex. G (Fox document subpoena). Herridge and Fox moved to quash the subpoenas, asserting the qualified First Amendment reporter's privilege and, alternatively, urging the Court to adopt a federal common law newsgathering privilege.

The Court partially denied Herridge's motion on August 1, 2023. See Chen v. Fed. Bureau of Investigation, No. 18-cv-3074 (CRC), 2023 WL 5289432 (D.D.C. Aug. 17, 2023) (redacted public version). Following binding case law, the Court explained that Chen's need for the requested evidence overcame Herridge's qualified First Amendment privilege and that it would be improper for the Court to circumvent that precedent by fashioning a wider common law privilege. Id. at *11.

Starting with the First Amendment, the Court faithfully applied the test that the D.C. Circuit established over forty years ago in Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). Zerilli began from the premise that the *qualified* reporter's privilege requires courts to weigh "the public interest in protecting the reporter's sources against the private interest in compelling disclosure." Id. at 712. Zerilli did not, however, end its analysis with that "general" guidance or contemplate that district courts would engage in a free-form, anything-goes balancing exercise. Id. It instead identified a "number of more precise guidelines" that "can be applied to determine how the balance should be struck in a particular case." Id. Chief among those considerations are

(1) whether the information sought is “central” to the claim and (2) whether the plaintiff has “exhausted every reasonable alternative source of information.” *Id.* at 713. Twenty-four years later, the Circuit doubled down on this test in *Lee v. Department of Justice*, reiterating that, in deciding when to “compel a non-party journalist to testify about a confidential source,” courts must focus on whether the information goes to “the heart of the matter” and whether the litigant has “exhausted ‘every reasonable alternative source of information.’” 413 F.3d 53, 59 (D.C. Cir. 2005) (quoting *Zerilli*, 656 F.2d at 713). Thus, while not forbidding consideration of other factors, the Circuit has made clear—not once, but twice—that district courts should anchor their analysis to *Zerilli*’s two guideposts: centrality and exhaustion.

Both factors weigh heavily in Chen’s favor, the Court concluded. On centrality, directly tracking the Circuit’s reasoning when confronted with the identical issue in *Lee*, “it is clear that the information [Chen] is seeking goes to the heart of [her] case.” *Id.* at 60. “[T]he relevant information is the identity of the individuals who may have leaked information in violation of the Privacy Act. If [Chen] cannot show the identities of the leakers, [her] ability to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised.” *Id.* As to exhaustion, Chen’s five-year odyssey to uncover the leaker’s identity assured the Court that her request to depose Herridge had come at “the end, and not the beginning, of the inquiry.” *Zerilli*, 656 F.2d at 713 (quoting *Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir. 1974)). The only reasonable option left was for Chen to ask Herridge herself. With the two central factors lopsided in Chen’s favor, the Court resolved that Herridge’s qualified First Amendment privilege must give way. *See Chen*, 2023 WL 5289432 at *3–11.

The Court could have stopped there. But for sake of completeness and in recognition of the important First Amendment rights at stake, it proceeded to explain why a full-bore analysis

of Chen’s likelihood of success on the merits of her claim or a free-form balancing of the public and private interests was unlikely to tilt the scales back in Herridge’s direction. Though it was premature to preview summary judgment, the Court recognized that Zerilli permits courts to sneak a peek at the merits to ensure the case is “not frivolous” such that no purpose would be served in forcing disclosure. 656 F.2d at 714. Peering around the corner, the Court found that Chen’s Privacy Act claim easily surpassed that low bar. The Court was also unmoved by Herridge’s contention that Chen’s “parochial” interest in her Privacy Act claim should yield to the public interest in a robust free press, especially when the reporting touches on national security and the subject is not an “innocent person.” See Herridge Mot. to Quash at 26, 34–39. Privacy Act claims vindicate more than the personal interests of the litigant, the Court explained; they serve a systemic function in deterring the “intentional or willful” dissemination of private records maintained by our government. Chen, 2023 WL 5289432 at *11 (quoting 5 U.S.C. § 552a(g)(4)). That is as true here as in any other case. On the other side of the ledger, the Court questioned just how much the public interest was actually advanced by Herridge including the purportedly leaked materials in the reporting when, on her own account, these records added little of substance to her stories. If they were just garnish, as Herridge claims, any conflict between the Privacy Act and the First Amendment could have been avoided without a serious loss to public understanding. Therefore, even if it were to venture beyond the Circuit’s “more precise guidelines” and consider the full panoply of possible interests, the Court found the outcome would likely remain the same. See id. at *10–11.

Moving beyond the First Amendment’s scope, the Court rejected Herridge and Fox’s invitation to open a back door to a broader balancing test by recognizing a federal common law newsgathering privilege. Id. at *11–12. In doing so, the Court followed the lead of other courts

in this district that have uniformly declined similar requests to “circumvent” the D.C. Circuit’s First Amendment case law by forging a more protective common law privilege. Lee v. Dep’t of Just. (“Lee II”), 401 F. Supp. 2d 123, 139 (D.D.C. 2005); accord Hatfill v. Gonzales, 505 F. Supp. 2d 33, 43–48 (D.D.C. 2007). As these courts recognized, a federal common law newsgathering privilege of the sort Herridge and Fox advocated “would create a subjective and elastic standard,” saddle courts with the “daunting and well-nigh impossible task” of determining “whether the harm caused by leaked information outweighs the ‘value’ of that information to the citizenry,” and undermine “the fundamental purpose of the Privacy Act” of “discourag[ing] the kind of [alleged] leaks that are at issue in this action.” Lee II, 401 F. Supp. 2d at 139, 141–42. Given that the Circuit recognizes a well-established First Amendment privilege that protects journalists’ interests and channels judicial discretion in balancing that interest against evidentiary need, the Court found that Herridge and Fox had not carried their burden of “demonstrat[ing] with a high degree of clarity and certainty that” their proposed privilege would “effectively advance a public good” relative to these potential drawbacks. Chen, 2023 WL 5289432 at *12 (quoting Lee II, 401 F. Supp. 2d at 137).

To minimize any intrusion into the press function, the Court concluded its opinion by sequencing discovery. Id. at *12–13. It first provisionally granted Fox’s motion to quash both subpoenas directed against the network as duplicative of the Herridge subpoenas. Id. at *12. By the same token, the Court granted Herridge’s motion to quash the document subpoena for the time being because this request would have proven unnecessary if Herridge provided the missing link in her deposition. Id. at *13. It further cabined Herridge’s deposition subpoena to ensure she did not have to answer any questions concerning sources who did not provide her information covered by the Privacy Act. Id. at *7, 13. Having whittled down the subpoenas to

their core, the Court concluded with a clear order: “Chen may depose Herridge regarding the identity and intent of the source or sources of the documents and images allegedly provided to her in violation of the Privacy Act, and any non-privileged other matters relevant to her Privacy Act claim.” Id. at *13.

Herridge then requested that this Court certify the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Exercising its discretion, the Court declined to certify because, in part, Herridge could refuse to comply with the Order and appeal from any subsequent finding of civil contempt. See Op. & Order, ECF No. 152 (“Certification Order”); Op. & Order, ECF No. 158 (“Motion for Reconsideration Order”). As the Court explained, that procedure is customary both in this jurisdiction and throughout the country. Herridge simultaneously sought an immediate appeal of this Court’s Order to the D.C. Circuit under 28 U.S.C. § 1292(b)’s collateral-order doctrine. The Circuit dismissed the appeal for lack of jurisdiction, reasoning along similar lines that Herridge could adequately vindicate her assertion of privilege by “seek[ing] appellate review of the district court’s order denying her motion to quash by defying that order and appealing from any contempt citation.” Order, Chen v. Fed. Bureau of Investigation, No. 23-5198 (D.C. Cir. Sept. 25, 2023). As a result, the Court’s Order remained in full effect.

Pursuant to that Order, Herridge sat for her deposition on September 26, 2023. See Contempt Mot., Ex. 3 (“Herridge Dep.”). In it, Herridge acknowledged that the Court’s Order required her to “identify the source or sources of any Privacy Act material related to Dr. Chen that [she] received in the course of [her] reporting on Dr. Chen and the University of Management & Technology.” Id. at 19:20–24; see id. at 19:25 (answering “yes”). Herridge also repeatedly admitted that she knew who the source was. See id. at 84:20–85:12, 86:11–87:5, 91:5–14, 94:18–95:10. Nonetheless, she steadfastly refused to disclose her source’s identity or

provide any information on when and in what form she received the allegedly leaked materials.

See, e.g., id. at 33:19–41:23, 44:20–49:11. When pressed, Herridge declared:

I have complete respect for the court and its authority and for the order. I have no desire to defy a court order, but my understanding is that the courts have ruled that in order to seek further judicial review, I must now disobey the order, and for that reason, among others, I am invoking my First Amendment rights and declining to answer the question.

Id. at 20:7–13; see also id. at 208:2–10 (repeating that statement).

Chen responded by filing an application for an order to show cause why Ms. Herridge should not be found in civil contempt for defying the Court’s Order. Herridge opposes the application, urging the Court to modify its Order based on “additional information.”

Alternatively, she requests that any civil-contempt sanction be nominal and stayed pending appeal.

II. Legal Standards

This Court has both an “inherent and a statutory power to enforce compliance with its orders through the remedy of civil contempt.” SEC v. Bilzerian, 112 F. Supp. 2d 12, 16 (D.D.C. 2000). The “power to punish for contempts is inherent in all courts; its existence is essential to . . . the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.” Broderick v. Donaldson, 437 F.3d 1226, 1234 (D.C. Cir. 2006) (quoting Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874)). Building on that innate power, Federal Rule of Civil Procedure 45(e) provides that an “issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena.”

A person is in contempt of court if she “violates a definite and specific court order requiring [her] to perform or refrain from performing a particular act or acts with knowledge of that order.” SEC v. Bankers All. Corp., 881 F. Supp. 673, 678 (D.D.C. 1995) (citation omitted).

The party seeking a finding of contempt must demonstrate, by clear and convincing evidence, that (1) there was a court order in place; (2) the order clearly and unambiguously required certain conduct; and (3) the alleged contemnor failed to comply with that order. Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC, 736 F. Supp. 2d 35, 38 (D.D.C. 2010). The alleged contemnor's intent in failing to comply is irrelevant, so a court need not find that an individual acted in bad faith to hold her in contempt. Bilzerian, 112 F. Supp. 2d at 16.

The purpose of civil contempt is not to punish but "to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1184 (D.C. Cir. 1981). Accordingly, civil-contempt sanctions "must be calibrated to coerce compliance or compensate a complainant for losses sustained." In re Fannie Mae Sec. Litig., 552 F.3d 814, 823 (D.C. Cir. 2009).

III. Analysis

A. Herridge Is in Contempt of Court

There is no genuine dispute that Herridge is in contempt of the Court's August 1, 2023 Order partially denying her motion to quash Chen's deposition subpoena. The Order clearly and unambiguously required Herridge to answer questions about "the identity and intent of the source or sources of the documents and images allegedly provided to her in violation of the Privacy Act, and any non-privileged other matters relevant to [Chen's] Privacy Act claim." Chen, 2023 WL 5289432, at *13. Herridge understood that straightforward directive. In her motion for certification, filed ten days later, she acknowledged the Court had directed her "to respond to the deposition subpoena to answer questions identifying confidential source(s) for the Fox reporting." Mot. to Certify Appeal at 4. At her deposition the following month, however,

Herridge willfully disobeyed the Order by refusing to answer questions about the identity of the sources who supplied the allegedly leaked materials. See Herridge Dep. at 20:11 (“I must now disobey the order.”). That obvious violation of “a definite and specific court order” warrants a finding of civil contempt. Bankers Alliance Corp., 881 F. Supp. at 678.

Herridge does not attempt to argue otherwise. She instead requests that, in lieu of finding her in contempt, the Court modify its Order based on “additional information that is relevant under Zerilli balancing”—including declarations from two esteemed journalists on the importance of confidential sources and from two former counterintelligence officials discussing the national-security interests purportedly at play here. See Opp’n at 17–28. But this “additional information” is just a new chapter in the same book of arguments Herridge raised, and the Court rejected, in her motion to quash the subpoenas. It does not undermine the Court’s prior decision or support the requested modification.

For starters, none of the additional information speaks to the two “precise guidelines” established in Zerilli and echoed in Lee: (1) whether the requested discovery is central to the plaintiff’s claim and (2) whether the plaintiff has exhausted other reasonable alternatives of accessing the information. See Zerilli, 656 F.2d at 712–13; Lee, 413 F.3d at 57–60. As the Court explained previously, in defining the contours of the reporter’s privilege, Zerilli and Lee did not embrace an open-ended weighing of all possible interests but rather struck the balance between private and public interests by reference to these two central factors. See Chen, 2023 WL 5289432, at *3–6. Applying this framework here, the Court found that both considerations favored Chen. Identifying the alleged leaker was central to Chen’s Privacy Act claim, and she had exhausted all reasonable alternative avenues of identifying Herridge’s source. See id. at *7–

9. With a one-sided score on the two most important factors, the Court concluded, the balance weighed in Chen’s favor and supported her request to depose Herridge.

Herridge’s current motion does not refute any of this analysis. She does not contend that the Court erred in finding Chen had satisfied her burden on both factors. Nor does she point to any new authority indicating that the Court misconstrued Zerilli and Lee when resolving that the balancing test should center on centrality and exhaustion—an understanding shared by numerous courts in this district.¹ Herridge simply renews her prior claim that “Zerilli calls for a broad-ranging balancing inquiry” to decide whether to pierce the reporter’s privilege. See Opp’n at 18–19. The Court rejected this contention once before and, upon second look, it is equally unpersuaded. It therefore reaffirms the core rationale behind its prior decision: Zerilli and Lee call on courts to focus primarily (even if not exclusively) on centrality and exhaustion, and those two factors are dispositive here.

Moreover, as was true the last go-around, the Court continues to believe that a free-wheeling balancing of interests would not change the outcome in any event. Herridge urges the Court to place three more considerations onto the scale: (1) the merits of Chen’s Privacy Act claim, including her prospects for recovering damages; (2) the national-security interests at stake; and (3) the broad chilling effect that Herridge fears will result from forcing her to disclose her sources. The Court mulled each of these considerations in its prior opinion, see Chen, 2023 WL 5289432, at *10–11, and nothing in the current motion alters the Court’s thinking.

¹ See, e.g., Hatfill, 505 F. Supp. 2d at 37–47; Lee II, 401 F. Supp. 2d at 139; In re Subpoena to Goldberg, 693 F. Supp. 2d 81, 85 (D.D.C. 2010); U.S. Commodity Futures Trading Comm’n v. McGraw-Hill Companies, Inc., 507 F. Supp. 2d 45, 50 (D.D.C. 2007); Tripp v. Dep’t of Def., 284 F. Supp. 2d 50, 55 (D.D.C. 2003); Hutira v. Islamic Republic of Iran, 211 F. Supp. 2d 115, 119, 121–22 & n.8 (D.D.C. 2002).

First, Herridge plows old ground in arguing that her First Amendment interests outweigh Chen’s interest in pursuing her Privacy Act claim because, in her view, Chen will be unable to recover any damages. Herridge asserts that any financial harm to UMT was caused by the Defense Department’s independent decision in January 2018 to cut off tuition assistance, not her reporting, and that any reputational harm is impossible to trace to the alleged Privacy Act violation because the lion’s share of her reporting came from lawful sources. See Opp’n at 1, 18–19. As the Court has explained, however, this effort to pick apart Chen’s claim far exceeds Zerilli’s cursory inspection to ensure the “suit is not frivolous.” See Chen, 2023 WL 5289432, at *10–11 (quoting Zerilli, 656 F.2d at 714). And regardless, even if it proves true that only a snippet of Herridge’s reporting—such as the compromising photographs of Chen and her husband—could support a Privacy Act claim, the Court still “does not doubt that the images of Chen holding or wearing a Chinese military uniform could have given the Fox reporting more traction than it otherwise would have had and caused Chen more damage than she otherwise would have suffered.” Id. at *10.

Downplaying the significance of the leaked materials is also a double-edged sword for Herridge. If the leaked materials truly did not affect the substance of her reporting on Chen but were instead mere ornamentation, as Herridge says, the press function need not have come into conflict with Chen’s statutory privacy rights at all. Herridge could have published the same set of stories minus the records—the incriminating photographs, excerpts from immigration forms, and snippets of FBI interviews—without compromising the informational value of her pieces. Had she done so, the Privacy Act would not be implicated, Chen would have no case, and the subpoenas would never have issued. Herridge (or her producers) instead decided to gild the lily

by including these evocative (and click-inducing) details—opening the door for a Privacy Act claim and discovery into the identity of the potential leaker.

Second, Herridge again urges the Court to consider the national-security implications of requiring her “to reveal the identity of her confidential source(s) to Plaintiff—a former colonel in the [People’s Liberation Army] whom [the Department of Defense] expressly determined to be a national security risk.” Opp’n at 21. She submits declarations from two counterintelligence experts who contend that, from their vantage, there is a “serious risk” Chen used UMT “to provide information on U.S. servicemembers” to Chinese officials and that Chen was not absolved of wrongdoing just because she was never prosecuted. *Id.* at 22–24. But whether or not these charges are true, any national-security concerns over requiring Herridge to reveal her source ring hollow. It is hard to fathom how disclosing Herridge’s source would place America in jeopardy. In fact, it is much more plausible that ferreting out the government agent who may have leaked the records would benefit, not harm, national security by exposing someone inclined to mishandle highly sensitive law-enforcement records. And on the off chance there were an actual security risk, the government is a party to this action and could easily intervene to protect these interests (as it has done on occasion in this case already).

Under the banner of “national security,” Herridge also maintains that it is appropriate to consider the “risk that Plaintiff was making U.S. servicemembers’ information available to a foreign power—and thus that her ‘private interest’ in this Privacy Act suit is, in effect, seeking taxpayer money to recover funding for that conduct.” *Id.* at 25–26. The Court strongly disagrees. The Court’s job is to apply the law evenhandedly, not to adjudicate who is worthy of the law’s protection. That the plaintiff “had it coming” is not a viable defense under the Privacy Act. The Act protects “all private citizens, whether blameworthy or blameless, from the risk that

government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals.” Chen, 2023 WL 5289432, at *11.

Whatever her past, Chen is no exception.

Third, Herridge asserts that forcing her to disclose her source would have a chilling effect and undermine the ability of the press to inform the public on important matters. On this score, Herridge submits declarations from the Dean of the Columbia Journalism School, Jelani Cobb, and Pulitzer Prize winning investigative journalist Steve Coll. See Opp’n at 19–21. Dean Cobb explains that confidential sources are “vital to the functioning of a free and independent press” and contends that the “act of disclosing a confidential source, even as the result of a court order, erodes the ability of journalists everywhere to credibly promise confidentiality to sources who demand it, and would have a chilling effect on the flow of important information to journalists reporting on government matters.” Id., Ex. B ¶¶ 5, 11. Mr. Coll adds that these concerns are only magnified in the areas of national security and international affairs, where it is often impossible to uncover what’s going on without confidential sources who are willing to turn over protected information. Id., Ex. C ¶¶ 6–8. The Reporters Committee for Freedom of the Press echoes these worries in its amicus brief. After touting that confidential sources have enabled journalists to tell some of the most important public-interest stories of the past half century—from Watergate to the Iran-Contra affair to warrantless surveillance post-9/11—the Reporters Committee warns that compelled disclosure here could stifle similar stories going forward, especially those involving sensitive issues of national security. Reps. Comm. Br. at 2–3, 11–13.

The Court appreciates these concerns and does not question the vital role of a free press in “bar[ing] the secrets of government and inform[ing] the people.” N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring). It also recognizes and respects that, in

many instances, confidential sources provide an essential ingredient for investigative reporting. That does not give the Court a free pass to ignore binding precedent, however. The Circuit in Zerilli was also “mindful of the preferred position of the First Amendment and the importance of a vigorous press.” 656 F.2d at 712. Yet, recognizing that the reporter’s privilege is not ironclad, the Circuit crafted a balancing test to determine when confidentiality must give way to competing interests—the central one being the interest of a litigant who needs the information to vindicate her rights and has exhausted every reasonable alternative source. Id. at 712–13; see also Carey, 492 F.2d at 639 (rejecting the contention that there is “an absolute First Amendment barrier to the compelled disclosure by a newsman of his confidential sources under any circumstances”). The Court is not free to disregard the balance the Circuit has struck by placing a thumb on the scale in favor of confidentiality.

Even if the Court enjoyed such discretion, it is important not to overstate the impact of requiring disclosure here. Judge Tatel expressed similar concerns about the detrimental effect compelling disclosure may have on journalists’ ability to gather information in his dissent from the denial of rehearing en banc in Lee back in 2005. See Lee v. Dep’t of Just., 428 F.3d 299, 301–02 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of reh’g en banc). Time has told a somewhat different story. Almost two decades have passed since Lee reaffirmed Zerilli and required the reporter there to divulge his source, yet there is limited evidence that the floodgates to journalists’ notepads have opened or the wellspring of confidential sources has dried up during that period. At most, there appears to have been an uptick in the number of subpoena requests for confidential sources in federal proceedings during the early 2000s. See RonNell Andersen Jones, Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media, 93 Minn. L. Rev. 585, 637–52 (2008); see also id. at 586 (acknowledging that the uptick

in subpoena requests did “not constitute an avalanche in scale”). But whether this was a blip or a sustained increase, a matter Herridge does not plumb, it has not resulted in widespread piercing of the privilege. Other courts in this district have long embraced and applied this Court’s reading of Zerilli and Lee. See supra pg. 12 n.1. And still, cases requiring reporters to divulge confidential sources have remained few and far between, as the Reporters Committee acknowledges. See Reps. Comm. Br. at 2 (“Privacy Act cases involving efforts to compel the identities of confidential journalistic sources are rare[.]”). That’s because, as Lee recognized, vigilant application of the centrality and exhaustion factors should ensure that compelled disclosure is the exception, not the rule. Lee, 413 F.3d at 60 (finding that an inquiry centered on these guidelines “does not leave journalists without protection”). Consistent with this expectation, courts applying the Circuit’s framework often have found that plaintiffs’ subpoena requests falter on one or both of these factors. See, e.g., In re Subpoena to Goldberg, 693 F. Supp. 2d at 88; Hatfill, 505 F. Supp. 2d at 49–50; Tripp, 284 F. Supp. 2d at 60–61; Hutira, 211 F. Supp. 2d at 121–22. That suggests Zerilli and Lee may have found the right balance after all.

To be sure, beyond actual case results, stakeholders in this area should remain attuned to the ripple effects that court decisions have on confidential sources’ willingness to come forward in the first place. Identifying this impact can be tricky business, however. Much of the reporting on this score is anecdotal, and systematic studies lend only mild support for the notion that confidential sources may be slightly more hesitant to speak up nowadays. See Jones, supra, at 648–49 (finding 62.5% of newsroom leaders in 2007 reported that sources were as willing to speak on condition of confidentiality as five years before whereas 25.5% reported they were “somewhat less” willing to do so). But even then, it is uncertain whether sources are holding their tongues because, in their view, courts appear more solicitous of requests to compel

reporters to disclose sources. See Randall D. Eliason, The Problems with the Reporter's Privilege, 57 Am. U. L. Rev. 1341, 1359 (2008) (contending that “of all of the risks of exposure that a source faces, the danger that a reporter will be subpoenaed and compelled to testify is probably the most remote”). At a minimum, any marginal chilling effect has certainly not frozen the information pipeline. Instances of journalism built on confidential sources remain legion. See Reps. Comm. Br. at 12–13 (offering a “small sampling” of examples). The current dispute is a case in point. The Court’s interpretation of Zerilli and Lee was the prevailing law in this district at the time of the alleged leak. But Herridge’s source was still apparently undeterred by the prospect that, at some point in the future, a court might order Herridge to name her source. Projecting forward, then, it is far from clear that the Court’s decision will unnecessarily clog the free flow of information.

Finally, beyond these three considerations Herridge raised, the Reporters Committee also notes that the Department of Justice recently amended its internal policies to restrict its own use of compulsory processes to pierce the reporter’s privilege. See Reps. Comm. Br. at 8–10 (citing 28 C.F.R. § 50.10). That amendment may well be a salutary development deserving of applause, but it does not alter how the Court should resolve the current dispute based on this Circuit’s precedent. In fact, the Department of Justice’s forbearance showcases that federal court enforcement of the First Amendment is not the final word when it comes to protecting confidential sources. There is a robust body of local, state, and federal laws promoting the freedom of speech and press in ways that extend beyond the First Amendment’s safeguards. See Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299 (2021). One need look no further than the reporter’s privilege. Almost every State has enacted some form of “shield law” protecting reporters from having to disclose their sources.

See Chen, 2023 WL 5289432, at *12. Congress could do the same with a few strokes of a pen, but it has not done so. See Branzburg v. Hayes, 408 U.S. 665, 706 (1972) (“At the federal level, Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.”). Absent congressional intervention or a shift in Circuit precedent, the Court’s duty is to apply and enforce the law on the books.

* * *

In sum, after considering all the “additional information” Herridge has provided, the Court finds no compelling reason to modify its August 1, 2023 Order requiring her to answer questions concerning the identity and intent of the source or sources of the records allegedly given to her in violation of the Privacy Act, as well as any non-privileged other matters relevant to her Privacy Act claim. Herridge plainly violated that Order when she refused to divulge the identity of the suspected leaker during her deposition last September. That defiance warrants a finding of civil contempt, no matter how noble Herridge’s justification for refusing to reveal her source. See Bilzerian, 112 F. Supp. 2d at 16 (noting a contemnor’s intent is irrelevant). Herridge may disagree with the Court’s decision, as is her right, and she may believe that the Circuit’s reporter’s privilege doctrine strikes the wrong balance by undervaluing the importance of confidentiality for a free press. Still, the fact remains that “[l]itigants may not defy court orders because their commands are not to the litigants’ liking. If the rule of law is to be upheld, it is essential that the judiciary takes firm action to vindicate its authority and to compel compliance with lawfully issued directives.” Am. Rivers v. Army Corps of Eng’rs, 274 F. Supp.

2d 62, 70 (D.D.C. 2003). A finding of civil contempt is therefore appropriate and necessary to uphold those principles here.

Yet contempt must be confined to the clear and unambiguous scope of the Court's order, see Int'l Painters, 736 F. Supp. 2d at 38, so it cannot extend as far as Chen advocates. To repeat, the August 1, 2023 Order required Herridge to divulge her source and answer questions about any non-privileged other matters relevant to Chen's Privacy Act claim. Chen complains that, in addition to not naming the leaker, Herridge also declined to answer questions on various other matters such as "the preparation of the Fox News stories, the timing of their publication, and why certain materials and information were included or omitted." Contempt Mot. at 9. But those matters at least arguably fall within the First Amendment reporter's privilege, which "shields both confidential and nonconfidential information from compelled disclosure," Hutira, 211 F. Supp. 2d at 120, and generally guards against compelled disclosure of information that would have "a chilling effect upon the newsgathering and editorial processes," Maughan v. NL Indus., 524 F. Supp. 93, 95 (D.D.C. 1981). Disclosing these other items would intrude upon, and possibly chill, Herridge's newsgathering and editorial processes. The Court's Order therefore did not clearly require Herridge to answer these questions, so she cannot be found in contempt for refusing to do so.

B. Contempt Sanction

The remaining question is: What is the appropriate sanction for Herridge's contempt? Civil-contempt sanctions may "be employed for either or both of two purposes; to coerce the [contemnor] into compliance with the court's order, and to compensate the complainant for losses sustained." United States v. United Mine Workers of Am., 330 U.S. 258, 303–04 (1947). In considering these twin purposes, courts have "wide discretion" and "broad equitable powers to

craft remedial sanctions.” United States v. Two Gen. Elec. Aircraft Engines, 317 F. Supp. 3d 516, 522 (D.D.C. 2018) (quotation marks omitted). Exercising that discretion here, the Court will impose a fine of \$800 per day until Herridge complies with the Court’s Order but stay that fine for thirty days or until completion of proceedings on a timely appeal, whichever is later.

Herridge requests that the Court impose no more than a nominal sanction, such as \$1 per day. See Opp’n at 29. But such a trivial sanction would not serve the fundamental purpose of civil contempt: ensuring compliance with a court order. It would permit Herridge to pay pittance in perpetuity while continuously violating the Court’s directive and effectively vitiating Chen’s right to pursue her Privacy Act claim. That cannot be correct. Judicial orders are not tollbooths that can be bypassed with spare change. Recognizing this reality, other courts in this district have imposed far stiffer penalties in similar contexts to ensure journalists comply with disclosure orders. In Hatfill II, for example, the court imposed a graduated fine of \$500 for the first seven days following entry of the contempt order, which increased to \$1,000 per day the following week, escalating to \$5,000 per day thereafter. Hatfill v. Mukasey (“Hatfill II”), 539 F. Supp. 2d 96, 99 n.5 (D.D.C. 2008). Similarly, in Lee III, the court rejected the reporter’s request for a nominal sanction as “insufficient to [] coerce compliance” and imposed a fine of \$500 per day. Lee v. U.S. Dep’t of Just. (“Lee III”), 327 F. Supp. 2d 26, 33 (D.D.C. 2004). The Court will adopt the low-end of this range (roughly adjusted for inflation) and impose a fine of \$800 per day until Herridge complies with the August 1, 2023 Order.

The Court will stay that contempt sanction, however, to afford Herridge an opportunity to appeal this decision. Courts in this district and beyond have routinely stayed contempt sanctions to provide journalists ample room to litigate their assertions of privilege fully in the court of appeals before being coerced into compliance. See, e.g., Lee III, 327 F. Supp. 2d at 33; United

States v. Cutler, 6 F.3d 67, 70 (2d Cir. 1993); United States v. Cuthbertson, 630 F.2d 139, 143 (3d Cir. 1980). Indeed, when the district court denied a stay of contempt sanctions in Hatfill III, 539 F. Supp. 2d at 106, the D.C. Circuit stepped in and granted the stay request, see Hatfill v. Mukasey, No. 08-5049, Doc. No. 1104546 (D.C. Cir. March 11, 2008) (per curiam). Following suit, the Court will stay the contempt sanction against Herridge pending a timely appeal.

Apart from being the standard practice in this context, a stay pending appeal is justified here under the four-factor test for determining whether such a stay is warranted: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” Cuomo v. U.S. Nuclear Regul. Comm’n, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). First, given that prior reporter’s privilege cases have divided the Circuit and attracted en banc activity, and that almost two decades have passed since the Circuit decided Lee, it is possible that the Circuit may take the opportunity to refine the applicable First Amendment test in Herridge’s favor or recognize a new federal common law newsgathering privilege broader than the constitutional analog. See Citizens for Resp. & Ethics in Washington v. Off. of Admin., 565 F. Supp. 2d 23, 28 (D.D.C. 2008) (noting a “court is not required to find that ultimate success by the movant is a mathematical probability” (quotation marks omitted)). Second, absent a stay, Herridge would have to choose between disclosing her source’s identity—a decision that “is, by its very nature, irreparable,” Robert Half Int’l Inc. v. Billingham, 315 F. Supp. 3d 419, 433–34 (D.D.C. 2018)—or face possible financial hardship by racking up potentially hundreds of thousands of dollars in fines in the interim. Third, though the Court appreciates that an appeal will further delay resolution of Chen’s Privacy Act claim, the time it will take to pursue an

appeal is somewhat marginal in comparison to the five years Chen has already spent to suss out the leaker's identity. Fourth, the Court recognizes there are competing public interests at stake—namely, the First Amendment interest in protecting confidential sources versus a substantial interest in ensuring compliance with court orders and enforcement of the Privacy Act. But given that the question now is only whether to defer contempt sanctions in the interim to ensure that Herridge can litigate her First Amendment claim to the hilt before revealing her source, the Court finds that the public interest also favors the stay request. See Certification Order at 3 (“[I]t is better to be safe than sorry when it comes to First Amendment rights.”).

The Court concludes that these two elements—a \$800 per day fine combined with a stay pending appeal—will adequately ensure compliance with the Court's Order while preserving Herridge's right to appeal that decision. See Lee III, 327 F. Supp. 2d at 33 (“[T]he journalists' argument that the fine should be nominal where constitutional issues will be presented on appeal can be addressed simply by staying the fine pending appeal.”). At the present juncture, the Court does not deem it necessary to award Chen any compensatory sanctions for costs and fees related to Herridge's deposition or the ensuing contempt proceeding. Chen argued all along (and the Court and the Circuit agreed) that refusing to comply with the Court's Order and being found in contempt was the ordinary and proper route for obtaining appellate review here. That Herridge ultimately chose to pursue this avenue to appellate review does not necessarily warrant compensation for Chen. The Court also opts, for now, not to follow the approach adopted in Hatfill II and forbid Herridge from accepting funding from any other persons or entity to pay her contempt sanction. See 539 F. Supp. 2d at 107. The Court may reconsider these matters down the line depending on how things play out after any appellate proceedings.

IV. Conclusion

For these reasons, it is hereby

ORDERED that Herridge is in civil contempt of the August 1, 2023 Order of this Court; it is further

ORDERED that Herridge is fined in the sum of \$800.00 per day, payable to the United States, until she complies therewith; it is further

ORDERED that the aforementioned fine will be stayed for a period of thirty days, or until completion of proceedings on a timely appeal, whichever is later; it is further

ORDERED that Chen's application for a compensatory award of sanctions is denied without prejudice.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: February 29, 2024

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 18, 2024 Decided September 30, 2025

No. 24-5050

YANPING CHEN,
APPELLEE

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
APPELLEES

CATHERINE HERRIDGE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-03074)

Patrick F. Philbin argued the cause for appellant. With him on the briefs were *Kyle T. West* and *Chase Harrington*.

Judd E. Stone II was on the brief for *amicus curiae* Senator Ted Cruz in support of appellant.

Bruce D. Brown, *Katie Townsend*, *Gabe Rottman*, and *Grayson Clary* were on the brief for *amici curiae* Reporters Committee for Freedom of the Press, et al. in support of appellant.

Andrew C. Phillips argued the cause and filed the brief for appellee Yanping Chen.

Jane Shim was on the brief for *amici curiae* Asian American Legal Defense and Education Fund, et al. in support of appellee.

Before: KATSAS and CHILDS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KATSAS.

KATSAS, *Circuit Judge*: Yanping Chen alleges that federal officials violated the Privacy Act by disclosing records about her compiled as part of an FBI investigation. The records were published by Fox News. In discovery, Chen sought to compel Catherine Herridge—one of the journalists involved in publishing the records—to identify who had leaked them. Herridge invoked a First Amendment reporter’s privilege to avoid being compelled to testify. The district court held that Chen had overcome that qualified privilege and ordered Herridge to answer Chen’s questions. When Herridge refused to do so, the court held her in contempt. On appeal, Herridge reasserts the privilege. We affirm the district court.

I

The First Amendment to the Constitution provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” U.S. Const. Amend. I. In *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), this Court recognized a “qualified reporter’s privilege” based on the First Amendment. *Id.* at 712–14. Where it applies, the privilege allows reporters to resist civil discovery into the identity of their confidential

sources. *See id.* We identified two considerations as being “of central importance” in determining whether the privilege applies—the litigant’s “need for the information” and her efforts “to obtain the information from alternative sources.” *Id.* at 713. We further noted that the “equities weigh somewhat more heavily in favor of disclosure” if, as in libel cases, the journalist is a party and successful assertion of the privilege “will effectively shield him from liability.” *Id.* at 714.

The reporter’s privilege often arises in litigation under the Privacy Act, which prohibits government agencies from publicly disclosing certain records about individuals without prior consent from the individual to whom the record pertains. 5 U.S.C. § 552a(a)(4), (b). An individual harmed by a Privacy Act violation may bring a civil action against the offending agency. *Id.* § 552a(g)(1), (5). If the agency acted “in a manner which was intentional or willful,” then the affected individual may recover “actual damages,” subject to a statutory floor of \$1,000. *Id.* § 552a(g)(4)(A).

II

A

We recite the facts as alleged in the complaint. Yanping Chen was born in China. In 1987, she moved to the United States to study at George Washington University, from which she eventually obtained graduate degrees. Chen became a lawful permanent resident in 1993 and a citizen in 2001.

In 1998, Chen founded the University of Management and Technology (UMT), an educational institution headquartered in Arlington, Virginia. Until January 2018, UMT participated in the Department of Defense’s “Tuition Assistance Program,” which pays a portion of tuition expenses for military students.

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In 2010, the Federal Bureau of Investigation began investigating Chen for statements made on her immigration forms. The FBI interviewed Chen's family and colleagues, seized her computer, used an informant to gather information about her, monitored her travel, and recorded her private conversations. In 2012, the FBI executed search warrants at Chen's home and UMT's main office. The FBI seized materials including tax records, business documents, family photographs, and electronic storage devices. In 2016, the U.S. Attorney's Office for the Eastern District of Virginia decided not to file charges against Chen.

In 2017, Fox News aired a report alleging that Chen had concealed her prior work for the Chinese military. The network later published an FBI form memorializing an interview with Chen's daughter, personal photographs seized from Chen's home during the FBI search, and information from Chen's immigration and naturalization papers. The reports stated that the FBI searches had occurred as part of a counter-intelligence operation. They also cited anonymous sources describing a conflict between the FBI and the U.S. Attorney's Office over whether to file charges against Chen, as well as comments from an anonymous FBI agent who was upset that UMT continued to receive payments from DoD. The print versions of these reports were authored by Catherine Herridge.

In 2018, DoD terminated UMT's participation in the Tuition Assistance Program. That decision, along with a broader hit to UMT's reputation, caused its enrollment and revenue to fall sharply. These losses impacted Chen's income and the value of her personal investment in UMT.

B

In December 2018, Chen filed this Privacy Act lawsuit against the FBI and various other federal agencies. She sought

damages and an injunction prohibiting further disclosures of information about her.

In discovery, Chen served various document requests, interrogatories, and requests for admission, took eighteen depositions of current and former government employees, issued over a dozen third-party subpoenas, and obtained declarations from 22 government personnel who were connected to the FBI investigation. Despite all of this, Chen was unable to determine who was responsible for leaking the materials aired in the Fox reports. Ultimately, in mid-2022, Chen served Herridge and Fox with deposition and document subpoenas. Both Herridge and Fox moved to quash the subpoenas on the ground that they sought information protected by reporter's privileges grounded in the First Amendment and federal common law.

The district court denied Herridge's motion to quash in relevant part. It concluded that Chen had met her burden to overcome the qualified First Amendment privilege recognized in this Court's precedents. The court then refused to recognize a distinct newsgathering privilege under federal common law. The court sequenced discovery so that Chen could depose Herridge regarding her sources for the records allegedly disclosed in violation of the Privacy Act before seeking potentially the same information from Fox News. The court thus largely denied Herridge's motion and granted Fox's while allowing Chen to renew her subpoenas at a later time if necessary.

Following unsuccessful attempts to appeal the discovery order, Herridge sat for a deposition on September 26, 2023. When questioned, she refused to disclose the identity of her source, and she refused to provide information on when and how she received the leaked items. Herridge stated that she

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was disobeying the discovery order so that she could seek appellate review of it.

The district court held Herridge in civil contempt. It imposed a fine of \$800 per day until Herridge complied with the discovery order, but stayed the fine pending resolution of this appeal.

III

A non-party may appeal an adjudication of civil contempt even before the entry of final judgment in the underlying case. *See, e.g., U.S. Cath. Conf. v. Abortion Rts. Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *In re Clinton*, 973 F.3d 106, 112 (D.C. Cir. 2020). And our review of the contempt order “logically includes” a review of the discovery order underlying the contempt. *Lee v. DOJ*, 413 F.3d 53, 59 (D.C. Cir. 2005). Whether a discovery order correctly articulates our test for the reporter’s privilege is a legal question that we review *de novo*. *Id.* We review a district court’s application of that test for abuse of discretion. *Id.*

We begin with a survey of the caselaw recognizing a reporter’s privilege under the First Amendment. Next, we discuss the district court’s application of governing precedent to this case. Finally, we consider Herridge’s invitation to announce a new reporter’s privilege rooted in federal common law rather than the Constitution.

IV

A

Under *Zerilli*, reporters have a qualified First Amendment privilege to protect the identity of their sources from civil discovery. 656 F.2d at 710–12. After recognizing the

privilege, we set forth “more precise guidelines” for determining when it can be overcome. *Id.* at 713. We identified two considerations “of central importance” for doing so—whether the information is “crucial” to the case and whether the litigant seeking the information “has exhausted every reasonable alternative source of information.” *Id.* In addition, we stated that a litigant may be more likely to overcome the privilege in cases where the reporter is a party (as in libel cases) than in cases where she is not (as in Privacy Act cases like this one). *Id.* at 714.

In *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005), this Court held that a litigant may overcome the privilege by showing centrality and exhaustion—even in a case where the reporter is not a party. Like this case, *Lee* involved an appeal by non-party journalists held in contempt for refusing to identify their confidential sources in Privacy Act litigation. *Id.* at 55. Applying *Zerilli*’s “two guidelines [for] determining when a court can compel a non-party journalist to testify about a confidential source,” we held that the district court had not abused its discretion in requiring the reporters to testify. *Id.* at 59–60. First, the plaintiff had shown that the information he sought went to the “heart” of the case, given the difficulty in proving intent or willfulness without knowing the identity of the leakers. *Id.* at 60. Second, by deposing numerous witnesses before seeking to compel the reporters’ testimony, the plaintiff had met his burden to exhaust reasonable alternative sources of information. *Id.*

For the *Lee* Court, that was the end of the matter. We expressly declined to engage with *Zerilli*’s distinction between journalists who are parties to a lawsuit and those who are not, since all the journalists in the case before the court were non-parties. *Lee*, 413 F.3d at 57 n.1. And in response to an objection that we were leaving journalists without enough

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protection, we explained that a litigant's power to subpoena a journalist remains constrained by the requirements of centrality and exhaustion, which are not perfunctory, and by "the usual requirements of relevance, need, and limited burdens on the subpoenaed person" embodied in federal procedural and evidentiary rules. *Id.* at 60.

B

On appeal, Herridge does not contest the district court's determination that *Lee*'s centrality and exhaustion requirements for overcoming the privilege were satisfied. Herridge nonetheless asks us to rule in her favor because (1) Chen's Privacy Act claim is frivolous or meritless and (2) *Lee* conflicts with prior circuit precedent and therefore does not bind us. We reject both contentions.

1

Herridge argues that we should uphold the privilege because Chen's Privacy Act claim is frivolous. We agree that our governing framework is flexible enough to accommodate such an inquiry. In *Zerilli*, we noted that the claim at issue was "not frivolous" as part of our inquiry into whether the information sought was "crucial" to the plaintiff's case. 656 F.2d at 714. And although *Lee* did not separately discuss frivolousness, we did reiterate the importance of considering whether the information sought "goes to the heart of his case." 413 F.3d at 60. Such an inquiry can readily accommodate assessing whether the underlying claims are frivolous. For if a claim would fail regardless of what the requested discovery might reveal, there is no good reason for deeming the discovery to be centrally important, much less for abrogating the privilege on that basis. *See, e.g., Carey v. Hume*, 492 F.2d 631, 637–38 (D.C. Cir. 1974).

We reject Herridge’s contention that the Privacy Act claim here is frivolous. Herridge presses two main points: “most” of Chen’s alleged damages were caused by DoD’s independent decision to cut off funds to UMT, Appellant’s Br. at 34, and “almost all” of Herridge’s reporting came from sources other than Privacy Act information, *id.* at 42. But “most” is not all, and Chen does seek damages not flowing from a loss of business after DoD severed its ties with UMT. Likewise, even if Herridge collected “almost all” of her information from material that was already in the public domain, Chen plausibly alleges that some of it had to have come from Privacy Act violations—such as the disclosure of photographs seized from Chen’s home during the FBI search. And so long as Chen establishes that *some* Privacy Act violation harmed her, she may recover actual or statutory damages if it was willful. 5 U.S.C. § 552a(g)(4)(A); *Doe v. Chao*, 540 U.S. 614, 627 (2004). In sum, Herridge’s arguments at most suggest that Chen is likely to recover only a small amount of damages, but that does not render her claim frivolous.

Beyond this discrete point about frivolousness, Herridge more broadly urges that Chen’s claim is simply *not that important*. In Herridge’s view, regardless of centrality and exhaustion, the reporter’s privilege should prevail if a court determines that the social importance of the news story outweighs the plaintiff’s personal interest in vindicating her claim. Here, for example, Herridge argues that “the public’s interest in protecting journalists’ ability to report without reservation on sensitive issues of national security” should outweigh Chen’s merely private interest in recovering perhaps as little as \$1,000 in statutory damages. Appellant’s Br. at 3 (quoting *Lee v. DOJ*, 428 F.3d 299, 302 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc)).

Herridge’s proposed balancing test echoes the view advanced by the judges dissenting from denial of rehearing *en banc* in *Lee*. See 428 F.3d at 300–03. As they were in dissent, we are left simply to apply the *Lee* panel opinion. And although Herridge describes that opinion as silent on the questions whether and how to weigh factors *beyond* centrality and exhaustion, even silence is fatal to her position here. Again, Herridge contends that the district court erred in ordering her to disclose the identity of her confidential source, despite its findings as to centrality and exhaustion. Given this posture, it makes no difference whether *Lee* affirmatively forbade the broader interest-balancing favored by Herridge or simply failed to apply it. Either way, *Lee* held that a district court permissibly found a reporter’s privilege overcome based on findings of centrality and exhaustion in a Privacy Act case, without any broader balancing of private and public interests. 413 F.3d at 60. And that suffices to foreclose Herridge’s privilege claim here.

Perhaps recognizing as much, Herridge falls back to an argument that *Zerilli* affirmatively requires case-by-case balancing regardless of *Lee*. She therefore asks us to disregard *Lee* as inconsistent with prior circuit precedent. But there is no inconsistency. *Zerilli* upheld an assertion of the reporter’s privilege in a case where the plaintiff had failed to exhaust, see 656 F.2d at 714, and it expressly reserved the question “whether compelled disclosure would have been appropriate if [plaintiffs] had fulfilled their obligation to exhaust alternative sources,” *id.* at 714 n.52. Then, *Lee* answered that question in the affirmative, in a Privacy Act case where the plaintiff had established both centrality and exhaustion. See 413 F.3d at 57–61. Herridge points us to *Zerilli*’s more general statement that “courts should look to the facts of each case, weighing the public interest in protecting the reporter’s sources against the private interest in compelling disclosure.” 656 F.2d at 712.

But *Zerilli* made that statement in the course of deciding whether to recognize a reporter's privilege at all. *See id.* at 710–12. Having done so, the Court then established “more precise guidelines ... to determine how the balance should be struck in a particular case.” *Id.* at 713. And as explained above, it crystallized those guidelines into two inquiries “of central importance”—whether the information is “crucial” to the case and whether the litigant could obtain it from a “reasonable alternative source.” *Id.*

V

Finally, Herridge urges us to recognize, as a matter of federal common law, a reporter's privilege broad enough to permit the case-by-case interest balancing urged by the *Lee* dissents. We decline this invitation to end-run our precedent.

Rule 501 of the Federal Rules of Evidence authorizes federal courts to recognize new privileges “in the light of reason and experience.” Fed. R. Evid. 501; *see Jaffee v. Redmond*, 518 U.S. 1, 8 (1996). But Herridge has provided little cause to think that “reason and experience” support the privilege that she propounds. As to reason, the First Amendment analysis in cases like *Zerilli* and *Lee* thoroughly lays out the competing considerations of encouraging newsgathering while also respecting the elemental principle that “the public has a right to every man's evidence.” *Trump v. Vance*, 591 U.S. 786, 791 (2020). As to experience, Herridge contends that virtually every state has recognized some form of a reporter's privilege. She attached to her opening brief a chart summarizing the relevant law in every state. But as this chart demonstrates, the privilege varies widely in its scope from state to state, both in the abstract and on the question whether case-by-case interest balancing is appropriate. In short, if the First Amendment itself does not entitle Herridge to disobey

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discovery obligations imposed on every other citizen in the circumstances of this case, we see little reason to create that entitlement as a matter of judge-made common law.

For these reasons, we decline to recognize a federal common law newsgathering privilege.

Affirmed.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5050**September Term, 2025**

FILED ON: SEPTEMBER 30, 2025

YANPING CHEN,

APPELLEE

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
APPELLEES

CATHERINE HERRIDGE,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-03074)

Before: KATSAS and CHILDS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*

J U D G M E N T

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: September 30, 2025

Opinion for the court filed by Circuit Judge Katsas.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5050**September Term, 2025****1:18-cv-03074-CRC****Filed On:** June 4, 2026

Yanping Chen,

Appellee

v.

Federal Bureau of Investigation, et al.,

Appellees

Catherine Herridge,

Appellant

BEFORE: Katsas and Childs, Circuit Judges; and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellee Yanping Chen's and appellant Catherine Herridge's joint motion to extend deadlines for a response to, and reply in support of, appellant's motion to stay issuance of the mandate, it is

ORDERED that the motion be granted. Appellee's response is now due June 12, 2026, and any reply is due June 23, 2026.

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5050**September Term, 2025****1:18-cv-03074-CRC****Filed On:** June 23, 2026

Yanping Chen,

Appellee

v.

Federal Bureau of Investigation, et al.,

Appellees

Catherine Herridge,

Appellant

BEFORE: Katsas and Childs, Circuit Judges; and Edwards, Senior Circuit
Judge

ORDER

Upon consideration of appellant's motion to stay issuance of the mandate pending the filing and consideration of a petition for writ of certiorari in the Supreme Court, and the opposition thereto, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Withheld Pursuant to Protective Order

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Fox News investigation: DoD-funded school at center of federal probes over suspected Chinese military ties

By Catherine Herridge, Pamela Browne, Cyd Upson, ,

Published February 24, 2017

Fox News



Undated photo: UMT academic dean J. Davidson Frame, right, salutes his wife, left, UMT president Yanping Chen Frame.

EXCLUSIVE: Based just four miles from the Pentagon in northern Virginia is an innocuous-sounding online school for "management and technology" — which a Fox News investigation reveals has been at the center of multiple federal probes about its leadership's alleged ties to the Chinese military and whether thousands of records from U.S. service members were compromised.

The University of Management and Technology in Rosslyn, Va., which opened in 1998, touts a campus in Beijing and "partnerships" with universities around the world. The U.S. taxpayer-funded school claims to have had 5,000 graduates in the last five years and to be "especially proud of our students stationed in US military bases around the globe."

However, there is another side to the school's leadership that drew the attention of the FBI, the Justice Department, the Pentagon, Immigration and Customs Enforcement, and the Naval Criminal Investigative Service (NCIS) since at least 2012 -- and perhaps as early as 2009.

In December 2012, the FBI made two very public raids of UMT and the northern Virginia home of university president Yanping Chen Frame and its academic dean, her husband J. Davidson Frame. Documents reviewed by Fox News show it was a counter-intelligence case, known as a "200d," one of the most highly sensitive categories for a federal probe.

Photos, exclusively obtained by Fox News, appear to show Chen as a young officer in the People's Liberation Army, the military wing of China's communist party. Another photo shows Frame saluting his wife, Chen, who is holding a uniform. Three independent experts said it was a Chinese military colonel's uniform.



This undated photo appears to show Yanping Chen Frame before she came to a U.S. graduate school.

Yet since those FBI raids, UMT has continued to collect more than \$6 million from Defense Department tuition assistance programs as well as the Department of Veterans Affairs through the post-9/11 GI bill.

"It's a bad deal for the soldiers, and it's a bad deal for the taxpayer," Stephen Rhoads, a military veteran turned whistleblower who says he worked with the FBI on the case, told Fox News in an exclusive interview. "Nobody's getting what they paid for."

Rhoads said he worked at UMT recruiting vets when the FBI approached him in 2012 regarding the federal investigation. Emails and other documents reviewed by Fox News corroborate key elements of Rhoads' story.

"One of the first sentences she [Chen] ever threw out -- after she found out I was an Army officer, was, 'Well ... I was a colonel in the army,'" Rhoads explained. "During our first face-to-face encounter, absolutely ... she did not deny it."

Rhoads said he thought Chen meant the U.S. Army, and asked whether she trained in Texas. "She laughed and said, 'Oh, no, I was in the Chinese army, you know.'"

Chen, 64, came to the United States in 1987 from Beijing on a non-immigrant visa with her daughter Lele Wang. The Chinese government funded Chen's research at George Washington University where she received a Ph.D. in Public Policy in 1999, the year after UMT was created.

While Rhoads says Chen was upfront about her Chinese military experience, he claimed she hid those ties on immigration applications. Fox News reviewed Chen's immigration records where she consistently denied ties to the Chinese or any foreign military. When asked, "Have you ever been a member of, or in any way affiliated with, the communist party or any other totalitarian regime?" Chen checked "no." She would later become a naturalized U.S. citizen.

While there are no U.S. laws preventing a naturalized citizen from running a school like UMT, the Fox News investigation found that Chen's ties to the Chinese military appear to run deep.

Three outside experts consulted by Fox News confirmed the authenticity of the Chinese uniforms in the photos of Chen and Frame.

"If somebody was wearing that uniform, I would say that there's a very great likelihood that they were in the People's Liberation Army," Dennis Blasko, a leading Chinese military expert said, referring to the photo of what appears to be Chen in uniform.

Asked about the photo of Frame saluting his wife, Blasko observed, "This is a P.L.A. officer's uniform -- active duty -- from between 1987 and 2007 ... And from the epaulettes, we can see this -- three stars and two red stripes would be a full colonel."

Blasko emphasized that P.L.A. insignia can only be purchased with the permission of the Chinese military, and "you would have to have a certificate from your unit to buy [it]."

Blasko, a West Point graduate who worked as a military attache in China, wrote "The Chinese Army Today: Tradition and Transformation for the 21st Century," one of the definitive books about the Chinese military.

In her George Washington University dissertation, Chen thanks her father, a P.L.A. general, who directed arms and technology development. "My father, General Chen Bin, gave me the inspiration to pursue this area of study," Chen wrote. "As former Chairman of COSTIND (1982-87), he was an important player in supporting and directing the (Chinese) space program."

In her 2012 FBI interview, Chen denied she ever was a colonel in the P.L.A., emphasizing she had worked as a doctor in the Chinese space program. Chen said it was a "civilian agency." The interview summary suggests federal agents challenged Chen's characterization. Outside experts told Fox News the Chinese civilian and military space programs are intertwined.

While Chen's immigration application is more than a decade old, and past the five-year statute of limitations, there may be a "continuation" of fraud, according to Ray Fournier who worked with the State Department's office of diplomatic security for more than 20 years. Fournier, an expert on visa and passport fraud, worked for the Joint Terrorism Task Force in San Diego, where his investigative work led to an arrest warrant for the American-born cleric Anwar Awlaki, who was later killed by the CIA.

Fournier said, "If she has marked 'no' on the petition, but if in fact, the answer is yes ... then we have a false statement. And where that comes into play, most assuredly, is in the arena of passport fraud. It is this application." With each renewal of Chen's U.S. passport, Fournier said, investigators should determine whether the falsehood was repeated. "These are issues of inadmissibility," he said.

While going through the immigration process, Chen was also launching what would become a multi-million-dollar online academy. But that academy's work would eventually attract the attention of federal investigators, who questioned whether students' records were remotely accessed from China.

Before the 2012 raid, Chen's daughter Lele Wang who also works at UMT, told the FBI that "Contractors' in the UMT Beijing Office have [administrator] privileges" to access the student database.

Rhoads said UMT recruited service members who provided their military history when they enrolled. "It got uploaded into an O-drive, they called it ... their personal military bio, you know, where they were trained, how they were trained, how long, that could be remotely accessed."

Rhoads said Chen had a particular interest in Ohio's Wright-Patterson Air Force Base, which is a research and technology hub.

And there was more. "She wanted me to go out to these remote reserve and National Guard centers, you know ... in small-town America and start gettin' U.S. soldiers from those centers. Get their information, basically. Who's out there in the woods? How many units we got?"

Rhoads recalled to Fox News that he was instructed by the FBI to tell Chen that he was going to testify before a Virginia grand jury. "They wanted to, I guess see how ... she would react."

At the time, Rhoads said Chen had no idea he was working with the bureau.

He said, "Well, at this point, she didn't know I was working for them at all. And she's like, 'Oh, you don't tell them anything. We don't know each other. You don't ... know what you don't know,' was her buzz phrase. 'You don't -- you don't know I was a colonel in the P.L.A. They'll never have proof to say that.'"

Emails obtained by Fox News show Rhoads and at least one FBI agent alerted the Defense Department, but another Memorandum of Understanding (MOU) was signed in 2014 through 2019 allowing UMT to collect millions in federal taxpayer aid.

An FBI agent in one email exchange wrote, "I let my management and the AUSAs [assistant U.S. attorneys] know about her renewal with DoD. Incredible."

Asked about the renewal, as well as whether DoD personnel were warned and additional steps were taken to vet UMT, the DoD chief for Voluntary Education Assistance, Dawn Bilodeau, referred questions to Pentagon spokesperson Laura Ochoa. In an email, Ochoa said, "In light of reports regarding University of Management and Technology (UMT), the Department is reviewing the DoD MOU signed between the institution and the DoD for compliance."

No one has been charged with any crime in connection with the investigation. Sources told Fox News that Assistant U.S. Attorney for the Eastern District of Virginia James P. Gillis got the case, but there was a disagreement with the FBI over how to proceed, based on the case law and the extent to which sources and methods would be revealed.

Neither the FBI nor a spokesman for Gillis would comment to Fox News but separately, a spokesman for NCIS said they cannot comment on an "ongoing investigation." A FOIA request filed by Fox News Senior Executive Producer Pamela Browne confirmed an NCIS investigative file for UMT.

Fox News made repeated requests by phone and via email for interviews with Yanping Chen and J. Davidson Frame. After Chen's daughter said they were too busy to prepare and traveling out of town, Fox News went to their offices in Rosslyn, Va.

A school representative, who would not identify himself, confirmed Chen and Frame were in the office that day, but after learning Fox News was at the front desk, the couple refused to come out. Fox News' questions covered how UMT was run, Chen's suspected military ties, whether service members' records are secure, and how millions in taxpayer dollars are spent.

Fox News also sent a series of questions to the Chinese embassy in Washington, D.C., but there was no immediate response.

According to UMT, nearly 20,000 students have studied there, while 10,710 have earned degrees.

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Congress investigating taxpayer-backed school over alleged ties to Chinese military after Fox News report

By Catherine Herridge, Pamela Browne, Cyd Upson, ,

Published May 01, 2017

Fox News

EXCLUSIVE: Four congressional committees are demanding answers from the FBI and departments of Justice and Defense about a taxpayer-funded school that markets to the military, after a Fox News investigation exposed alleged ties between the university's leadership and the Chinese military.

The ongoing Fox News investigation has focused on the Virginia-based University of Management and Technology, its president Yanping Chen Frame and the school's academic dean, J. Davidson Frame, Chen's husband. UMT was raided by the FBI in 2012 as part of a counterintelligence investigation, but multiple sources told Fox News the case ran into roadblocks once it reached the U.S. attorney's office.

"There's not only a lot of smoke coming out of this one, there's some fires out there that need to be extinguished and some people that really have to answer the questions," House Oversight Committee Chairman Jason Chaffetz, R-Utah, said.

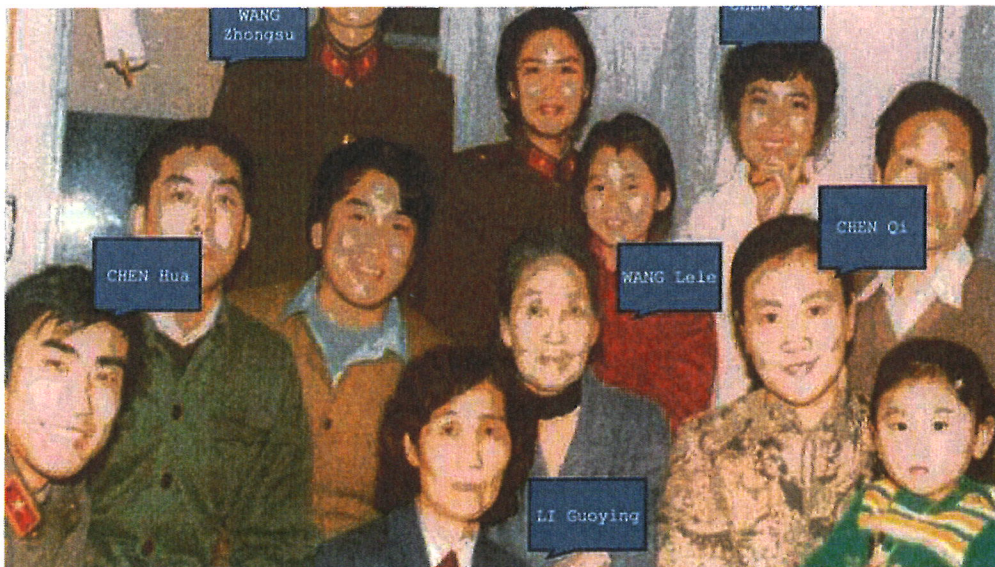
In a letter to Defense Secretary James Mattis on April 12, Chaffetz said military service members and their personnel records remain at risk. He questioned why the Defense Department continues to fund the school with taxpayer dollars through the GI Bill and the tuition assistance program.

"There was no obligation to give this money. They didn't have to give this money. Somebody made a proactive decision to authorize this, to move forward, and then why not cut it off?" Chaffetz said.

Since the 2012 FBI raid, UMT received more than \$6 million. Some \$250,000 has been received by the school since Fox News aired its first report in February.

"It's a bad deal for the soldiers ... it's a bad deal for the taxpayer," said former UMT employee Stephen Rhoads, a U.S.-veteran-turned-whistleblower who says he worked as an FBI informant on the case. "It absolutely disgusts me and needs to stop."

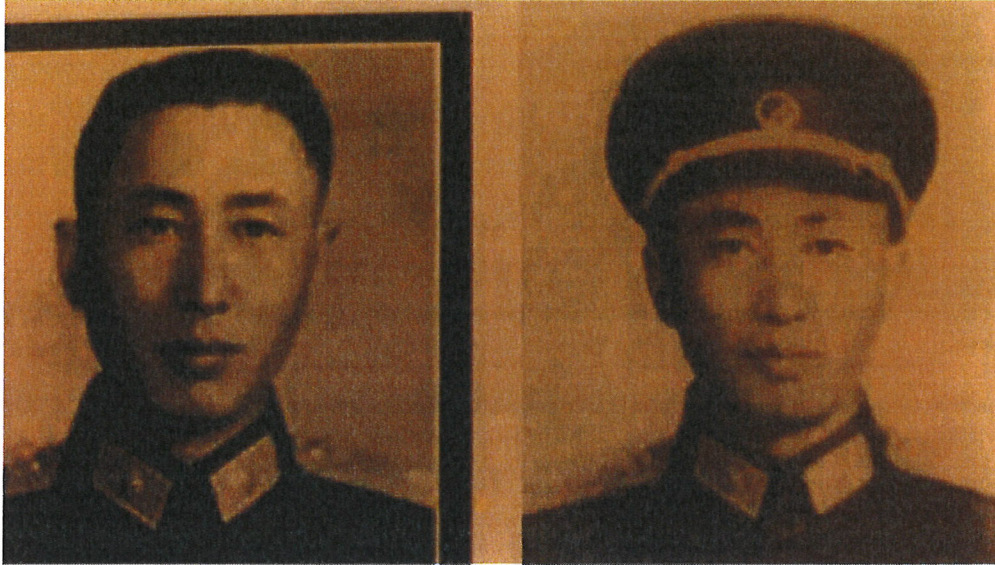
After the Fox News investigation, the Defense Department put the school under review but continues to fund it. When he worked there, Rhoads said the school got more than 250,000-\$300,000 per month in taxpayer dollars.



Undated photo of Yanping Chen and family wearing PLA uniforms. (Exclusively obtained by Fox News)

Photos obtained by Fox News apparently show Chen wearing the uniform of a young officer in the Chinese military of the People's Liberation Army, known as the PLA, along with her family. In another undated photo, Chen appears to salute the grave of her father, Chen Bin, who was a senior general in the PLA in charge of technology and arms acquisition.

"Her father joined the Communist Party in the 1930s. He supposedly participated in the Long March and that ... gives her credentials not unlike being an officer in the continental army," said Peter Mattis, a fellow with the Jamestown Foundation and leading expert on China. "The Long March," between 1934-1935, has long been referred to as a bloody pillar of the Chinese Communist Revolution which ultimately led to the creation of the People's Republic of China.



Undated photos of Yanping Chen's father, Gen. Chen Bin. (Exclusively obtained by Fox News)

Mattis said a school like UMT would be attractive to the Chinese military.

"You get what you'd call a curated database. You're not just getting a database of a lot of Americans. You're getting a database of people who are interesting to you, people who work in the U.S. military, who have access to a sensitive technology," Mattis said. "This is valuable to China for two reasons. The first is, militaries everywhere want to know what a potential adversary might look like -- what are their capabilities, how will they act? The second is this might also serve as a vehicle for recruiting individuals."

Mattis added, "If intelligence is a numbers game and maybe one out of 100 or one out of 500 people are willing to commit treason, then the faster you can go through those numbers, the better off you are. They're looking for former officials, classmates, spouses, friends and they have no problem recruiting someone with only secondhand access to information."

Fox News has confirmed that the Naval Criminal Investigative Services (NCIS) is also investigating the UMT. Separately, multiple sources told Fox News that the U.S. attorney for the Eastern District of Virginia, James P. Gillis, declined to prosecute in 2014, but that may be about to change.

The FBI, the U.S. attorney for the Eastern District of Virginia and the Defense Department declined to comment, citing the ongoing probe.



Undated photo of Yanping Chen and her husband J. Davidson Frame, who run the University of Management and Technology in Virginia. (Exclusively obtained by Fox News)

Chaffetz stressed his dismay with the reaction of the Department of Justice. "Just turning the other cheek on something that appears at least on the surface to be so blatant -- that begs the question, what are the 100,000-plus people at [the Department of Justice] doing?"

Fox News has an open invitation for an interview with Yanping Chen and J. Davidson Frame. They told Fox News in February they were too busy.

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FBI 'reopening' probe of DoD-funded school with suspected Chinese military ties, rep says

By Catherine Herridge, Pamela Browne, Cyd Upson, ,

Published June 28, 2017

Fox News

The FBI is "reopening" its probe of a taxpayer-funded online school for military servicemembers after a six-month Fox News investigation exposed its alleged Chinese military ties, according to a senior Republican lawmaker.

"They've told us they're looking more seriously at it, that they're quote, unquote, reopening that investigation, and I hope to get some answers," retling Rep. Jason Chaffetz, R-Utah, told Fox News.

Reached by phone, an attorney claiming to represent the university told Fox News he's unaware of any current criminal justice probe implicating his client. Separately, the Naval Criminal Investigative Service (NCIS) confirmed in a statement to Fox News that the investigation into the University of Management and Technology (UMT) "is still an active multi-agency investigation so there's nothing we can say at this point."

In 2012, the FBI raided the Rosslyn, Va.-based UMT and the home of its president, Yanping Chen Frame, a Chinese-born naturalized U.S. citizen, and her husband J. Davidson Frame, the school's academic dean.

CONGRESS PROBING TAXPAYER-BACKED SCHOOL OVER ALLEGED CHINESE MILITARY TIES

Documents reviewed by Fox News, as well as recently unsealed court records, show the FBI focused on whether UMT's military personnel records could be remotely accessed from China, potentially compromising military histories of U.S. servicemembers, as well as Chen's alleged false statements on immigration documents that eventually allowed her to gain U.S. citizenship.

Chaffetz stressed that Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, is going to "take the reins" on the case from the congressional side. "I know he'll be tenacious in trying to get to the truth, but we want to know about [Yanping Chen] specifically, about what has this school been doing -- remember it's taxpayers' funds that are going ... to perpetuate this, and yet there are a lot of question marks on whether or not that data, that information, is going directly to the Chinese government."

With heavy marketing to members of the U.S. military, government records show the school has collected upwards of \$250,000 per month from U.S. taxpayers via the Department of Defense (DoD) through the GI Bill and tuition-assistance programs.

Fox News' investigation found the school's president has long-standing ties to the Chinese military or PLA (People's Liberation Army). While attending George Washington University, where her education was funded by the Chinese government, Chen wrote about her family's PLA connections, thanking her father, Chen Ben, who was a senior general in the Chinese military in charge of technology and arms acquisition. She received a Ph.D. in Public Policy from the school in 1999.

DOD-FUNDED SCHOOL AT CENTER OF FEDERAL PROBES

Photos obtained exclusively by Fox News, and reviewed by a leading national security expert on Chinese military uniforms, appear to show Yanping Chen as a young PLA officer and wearing a PLA uniform alongside family members.

"Her father joined the Communist Party in the 1930s. He supposedly participated in the Long March and that gives her credentials not unlike being an officer in the continental army," said Peter Mattis, a fellow with the Jamestown Foundation and a leading expert on China. The Long March, from 1934-1935, has long been referred to as a bloody pillar of the Chinese Communist Revolution which ultimately led to the creation of the People's Republic of China.

Mattis said a school like UMT could be valuable to China for two reasons: "The first is, militaries everywhere want to know what a potential adversary might look like -- what are their capabilities; how will they act? The second is, this might also serve as a vehicle for recruiting individuals."

The high-profile 2012 FBI raid did not result in any charges against UMT or Yanping Chen. After the initial report on the school aired in February, Fox News was told there was a logjam between the FBI and U.S. Attorney's Office for the Eastern District of Virginia over how to proceed and whether evidence could potentially compromise intelligence collection methods. Since the raid five years ago, UMT has received in excess of \$6 million in government funding.

Four congressional committees are now demanding answers as to why the school still receives taxpayer dollars.

"The rub here is that it's all being funded by taxpayers' money, and so here we are, the American taxpayers, feeding this beast that may potentially be giving information directly to the Chinese government, and that better not be the case," Chaffetz said.

Regarding the UMT investigation, Chaffetz added, "There has been a lot of smoke coming here, and you got whistleblowers who are close to the situation saying something's wrong here, something's not right. ... So I hope the Department of Justice, specifically the FBI, is taking it much more seriously than they have in the past."

Stephen Rhoads -- a whistleblower, former UMT employee and veteran who came forward to Fox News -- called it "very encouraging" that the House Oversight and Senate Judiciary committees are getting involved and "law enforcement is no longer turning a blind eye to Yanping Chen and UMT."

"I want to thank Fox News for following up on a story that deeply impacts our servicemembers, tax dollars, and national security," he said. "As a servicemember, it is important that allocated funds are not misappropriated."

Yet money keeps flowing to UMT. The Defense Department admitted via email that they put the school under review but continue to fund it. "The Department's Memorandum of Understanding with UMT has not changed. Funding under the MOU flows directly from the Services to Institutions," a spokesperson said via email.

Grassley sent a three-page letter on June 14 to Homeland Security Secretary John Kelly citing Fox News' reporting. With a deadline of June 28, Grassley sought information on any Yanping Chen immigration records that may have been "falsified...to conceal her affiliation with the Chinese military."

In the first phone call returned to Fox News, attorney John C. Kiyonaga said he represents Yanping Chen and the University of Management and Technology. Kiyonaga said his client has been charged "with absolutely nothing" and characterized the U.S. government's handling of the case as "full of bluster and innuendo."

The FBI had no comment. Legal experts said it would be unusual for the bureau to notify an individual or entity in the event a case is re-opened.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION, UNITED STATES
DEPARTMENT OF JUSTICE, UNITED
STATES DEPARTMENT OF DEFENSE,
and UNITED STATES DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

Case No.: 1:18-cv-3074-CRC

DECLARATION OF CATHERINE V. HERRIDGE

I, CATHERINE V. HERRIDGE, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a Senior Investigative Correspondent at CBS News. I have held the position of Senior Investigative Correspondent since I joined CBS News in 2019.

2. I was the Chief Intelligence Correspondent at Fox News Channel from 2011 until I joined CBS News in 2019. Prior to that, from 1990-1996 I was a London-based radio reporter and TV correspondent for ABC News. In 1996, I joined Fox as a London-based correspondent covering the United Kingdom, Europe, and the Middle East. From 1998-2000, I was a New York City-based investigative correspondent for the Fox Broadcast network newsmagazine "Fox Files." After 9/11, I was named Homeland Security Correspondent covering the Homeland Security, FBI, and Justice Departments, and my reporting focused on anti-terrorism, surveillance, and espionage issues. In all, I have been reporting on national security and intelligence matters for 32 years.

3. Over the course of my career, I have covered matters involving all 18 elements of the U.S. Intelligence Community, including but not limited to, the FBI, the CIA, the Defense Intelligence Agency (DIA), the National Security Agency (NSA), the National Geospatial-Intelligence Agency (NGA), as well as the Director of National Intelligence (DNI). My investigative reporting in this area relies on confidential sources or information.

4. Over the course of my 32 years as a national security and intelligence reporter, I have carefully developed a reputation for protecting the confidentiality of my sources. I have never revealed a confidential source.

5. In 2017, in my role as a Chief Intelligence Correspondent at Fox, I was the lead reporter on three articles, and related broadcast reports, (collectively, "Reporting"), concerning a then-ongoing, multi-agency investigation into The University of Management and Technology ("UMT") and Yanping Chen. The three print articles were published on February 24, 2017, April 28, 2017, and June 28, 2017.

6. I never disclosed my confidential source(s) on those stories to any other person at Fox.

7. Over the course of my career, I have pursued reporting that results in concrete changes. For example, I worked on an investigative report that uncovered the true extent of the injuries U.S. servicemembers suffered from an Iranian ballistic missile attack on a U.S. base in Iraq in January 2020. The U.S. government had downplayed the injuries, even to the point of denying servicemembers the Purple Hearts they rightly deserved. As a result of the reporting, 50 soldiers received Purple Hearts. *See* <https://www.cbsnews.com/news/purple-heart-iran-missile-attack-50-soldiers/>. I recently received the Kevin Carmody Award for Outstanding Investigative Reporting for an investigation that exposed serious health hazards from toxic waste at a U.S.

military base in Uzbekistan where thousands of U.S. servicemembers have been stationed. *See* <https://www.sej.org/winners-sej-20th-annual-awards-reporting-environment>. That reporting drove legislation and culminated in President Trump signing an Executive Order in January 2021 requiring a comprehensive health study for those who had been stationed at the base. *See* <https://www.cbsnews.com/news/uzbekistan-k2-karshi-khanabad-base-us-troops-radiation/>; <https://www.cbsnews.com/news/trump-executive-order-veterans-k2-karshi-khanabad/>. None of this reporting would have been possible without confidential sources.

8. Based on my 32 years of experience reporting on national security and intelligence matters, I believe confidential sources, and the information they provide, are essential for informing the public on matters relating to national security, including information relating to the military, espionage, government surveillance, and homeland security.

9. Based on my experience, I believe that, without a reliable assurance of confidentiality, no source with access to important national security information with significant value to the public would be willing to bring that information to members of the press.

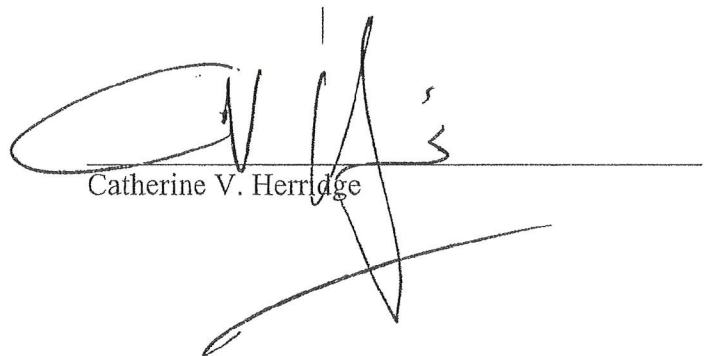
10. Compelling the disclosure of journalists' confidential sources in the national security and intelligence arena will have an enormous chilling effect on the flow of crucial national security information to the public—information that is central for ensuring that there is an informed electorate, which is a bedrock principle of our democracy. Fear of exposure will make sources less likely to serve as whistleblowers or otherwise act as confidential sources for such matters. Given the secrecy that naturally prevails in the national security and intelligence space, the absence of sources would make it impossible for the press to shine a light on the actions of the government and would blunt accountability. As a result, the role journalists play in informing the public would be diminished, and efforts to produce journalism that provides meaningful oversight

of sensitive national security as well as intelligence matters and ensures the accountability of government officials to the people would be crippled.

11. If I were compelled to disclose a confidential source or sources in this litigation, I believe it would have a ripple effect, discouraging potential sources from confiding in other national security journalists. As a result, it would reduce the ability of my fellow reporters to inform the public and ensure accountability of the government to the voters. In addition, if I were compelled to disclose a confidential source or sources, my own professional reputation as a reporter who protects the confidentiality of sources—a reputation I have built over the course of 32 years—would be irretrievably damaged. Sources would be unlikely to confide in me, and I would no longer be able to produce the kind of journalism that has driven positive change benefitting the public and military servicemembers.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 27, 2022



Catherine V. Herridge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION,
U.S. DEPARTMENT OF JUSTICE,
U.S. DEPARTMENT OF DEFENSE, U.S.
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

Case No. 1:18-cv-03074-CRC

Hon. Christopher R. Cooper
United States District Judge

I, Stephen W. Coll, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am currently a professor at the Columbia Journalism School and from July 2013 to July 2022 served as Dean of the Journalism School.
2. From 2007 to 2013, I served as the President and CEO of New America, a think tank focusing on a number of issues, including national security studies, technology, asset building, education, and the economy.
3. I have been a staff writer for the New Yorker since 2005, writing on national security, intelligence controversies, and the media. From 2004 through 2005, I was an associate editor at the Washington Post. Prior to that I served as a managing editor at the Post from 1998 until 2004. I was a reporter, editor, and foreign correspondent at the Post from 1985 to 1998.
4. I am the author of a number of nonfiction books involving investigative reporting on issues of foreign affairs and national security, including *Directorate S: The C.I.A. and America's Secret Wars in Afghanistan and Pakistan* (2018); *The Bin Ladens: An Arabian Family*

in the American Century (2008); and *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001* (2004).

5. I have received a number of awards for my reporting, including two Pulitzer Prizes, the National Book Critics Circle Award, the PEN/John Kenneth Galbraith Award, the Arthur Ross Book Award, the Cornelius Ryan Award, the Lionel Gelber Price Award, the Ed Cunningham Award, the Robert F. Kennedy Journalism Award, and the Livingston Award for International Reporting. In addition, from 2012 to 2013, I was a voting member of the Pulitzer Prize Board and as Dean of the Columbia Journalism School served as a non-voting *ex officio* member of the Pulitzer Prize Board from 2013 to 2022.

6. Based on my years of experience as an investigative journalist focusing on national security and international affairs, it is my opinion that the press could not effectively report on such matters without the use of confidential sources. Confidential sources are absolutely essential for the press to fulfill its function of keeping the people informed about their government.

7. Throughout my career I have found it essential to rely on confidential sources to keep the public informed about government activities. Confidential sources are vital for uncovering the truth and reporting on matters of public importance, especially to inform the public about government actions in the national security realm that might otherwise be shielded from view.

8. In the national security field, it simply is not possible to contradict official government positions (or to evaluate leaks directed by high-level government officials) without the use of confidential sources. In this field, most information of significance is often officially protected from disclosure in some way. Given restrictions on providing such information to the

press openly, those with information about important government activities would not serve as sources unless they could be provided with credible promises of confidentiality.

9. Assurances of confidentiality must be credible if they are going to convince a potential source to provide national security information. Developing a confidential source is one of the most difficult parts of national security reporting and requires that the source have a high degree of trust that the reporter will maintain confidentiality as a matter of course.

10. A reporter who discloses a confidential source—even if it is done only under compulsion of a court order—would seriously damage his or her ability to successfully report on government activities in the national security field in the future. In my opinion, sources would likely no longer trust such a reporter to work with him or her.

11. More importantly, a contempt order that successfully forces a reporter to disclose a national security source would have a broad chilling effect on the flow of critical information to the press and thus to the people. It would have a ripple effect discouraging government personnel with critical knowledge—including whistleblowers with knowledge of wrongdoing or government incompetence—from serving as sources because it would undermine their confidence that any reporter could promise them confidentiality. As a result, it would undermine the ability of the press to hold powerful decisionmakers accountable before the public. That would impair the ability of the press to fulfill its function of keeping the people informed about the actions of their government.

Date: December 13, 2023



Stephen W. Call

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANPING CHEN,

Plaintiff,

V.

FEDERAL BUREAU OF
INVESTIGATION,
U.S. DEPARTMENT OF JUSTICE,
U.S. DEPARTMENT OF DEFENSE, U.S.
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

Case No. 1:18-cv-03074-CRC

Hon. Christopher R. Cooper
United States District Judge

I, William Jelani Cobb, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am the Dean of the Columbia Journalism School, a position I have held since 2022. Prior to becoming Dean, I served for six years as the Ira A. Lipman Professor of Journalism at the Columbia Journalism School.

2. In addition, I have been a staff writer at The New Yorker since 2015. My articles and essays have also appeared The Washington Post, Essence, Vibe, Emerge, The Progressive, The Washington City Paper, One Magazine, Ebony and TheRoot.com. I have also been a featured commentator on National Public Radio, CNN, Al-Jazeera, CBS News, and other national broadcast outlets.

3. In 2020, I received a Peabody Award for my PBS Frontline film *Whose Vote Counts?* In 2018, I was a finalist for the Pulitzer Prize in commentary. I am currently a member

of the Board of Directors of the American Journalism Project. I am also an *ex-officio* member of the Pulitzer Prize Board.

4. I received my B.A. in English from Howard University in 1994, and an MA and PhD in American History from Rutgers in 2003.

5. Based on my years of experience as a journalist and journalism professor, it is my opinion that confidential sources are vital to the functioning of a free and independent press.

6. One of the most important roles of the press—likely its most important—is to ensure accountability of government officials to the people by keeping the people informed about their government. The press cannot serve this function without confidential sources.

7. The public often associates the term “confidential source” with government sources who provide a reporter with previously unknown information that forms the basis for new reporting. “Deep Throat,” who leaked the Watergate story, is an example of such a source. Reporters, however, use confidential sources in much more varied ways. For example, before unquestioningly reporting the official government line on a policy or event—itsself often the result of a leak from a higher level of government—journalists are taught to reach out to confidential sources they have developed to see whether the government’s position or narrative provides the whole truth. Without such confidential sources, the press would be unable to contradict official government narratives on sensitive matters of policy.

8. Confidential sources are also useful for confirming information developed through other means. Without such information, stories reporting on sensitive government actions often could not run due to lack of verification.

9. Based on my experience, it is often critical to guarantee sources anonymity in order to effectively report on government. Given various restrictions on providing government information outside official channels, it is often impossible to report on matters of key national importance without using sources whose cooperation risks serious sanctions.

10. However, promises of confidentiality alone are insufficient to secure the trust of a confidential source: those promises must also be credible. In my opinion and based on my experience, absent effective assurances of confidentiality, no one with access to important information bearing on sensitive governmental matters would be willing to serve as a confidential source. Without reliable assurances of confidentiality, an increased fear of exposure would make government sources unwilling to provide information to journalists even when it is key to informing the electorate of important issues.

11. The act of disclosing a confidential source, even as the result of a court order, erodes the ability of journalists everywhere to credibly promise confidentiality to sources who demand it, and would have a chilling effect on the flow of important information to journalists reporting on government matters.

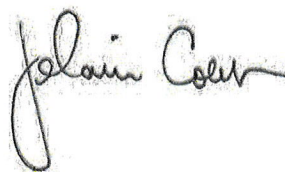
12. Forcing Ms. Herridge to disclose her source(s) would have a broad chilling effect on investigative journalism. By indicating to sources that promises of confidentiality may not be reliable, it would discourage sources from coming forward and would thereby broadly damage the ability of all reporters covering government to do their jobs effectively.

13. Because disclosure of confidential sources can have such broad effects on the profession generally, journalists are trained on the importance of strictly adhering to promises of confidentiality. At Columbia, we teach students that such obligations are a sacred aspect of the

profession that, if broken, would undermine the ability of the press to fulfill its core function of informing the populace about the government's actions. Most journalists therefore operate on an understanding that they will not reveal confidential sources even when under threat of contempt for violating a court order.

14. A reporter who discloses a confidential source would also irreparably damage her own ability to report effectively on government matters in the future. Other sources who require confidentiality but become aware of the disclosure will be less willing to work with that reporter. This is yet another reason why we teach aspiring journalists that it is vitally important for them to strictly maintain their promises of confidentiality.

Date: December 12, 2023

A handwritten signature in black ink, reading "Jelani Cobb". The signature is fluid and cursive, with the first name "Jelani" written in a larger, more prominent script than the last name "Cobb".

William Jelani Cobb
Dean, Columbia Journalism School

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION,
U.S. DEPARTMENT OF JUSTICE,
U.S. DEPARTMENT OF DEFENSE, U.S.
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

Case No. 1:18-cv-03074-CRC

Hon. Christopher R. Cooper
United States District Judge

I, William R. Evanina, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am the CEO of The Evanina Group, LLC, a company I founded to advise other CEOs and Boards of Directors on strategic corporate risks, particularly those backed by foreign state actors.
2. Prior to founding The Evanina Group, I spent 32 years working in the United States government, 24 of which were with the FBI, CIA, and National Counterintelligence and Security Center ("NCSC").
3. From 2009 through 2010, I served as a Special Agent in Charge in the FBI's National Security Office. From 2010 to 2012, I served as the Assistant Special Agent in Charge of the FBI's Washington Field Office, where I oversaw counterintelligence operations involving Russia and counterterrorism matters.

4. From 2013 through 2014, I ran the FBI and CIA's joint Counterintelligence Division/Counterespionage Group, where I coordinated personnel from multiple intelligence agencies in countering foreign espionage.

5. In 2014, I was appointed to serve as the Director of the National Counterintelligence and Security Center ("NCSC") within the Office of the Director of National Intelligence. Congress subsequently made the position subject to the Appointments Clause and, in February 2018, President Donald Trump formally nominated me to the position. On May 6, 2020, the United States Senate confirmed my nomination by a 84-7 vote.

6. While serving as the Director of the NCSC, I was responsible for leading and supporting U.S. government and U.S. private sector entities at risk from intelligence collection or attack by foreign adversaries.

7. As a result of my years of experience working on counterintelligence matters, I am deeply familiar with the methods commonly employed by the Communist Party of China ("CCP") and its security services to engage in intelligence gathering in the United States.

8. I cannot provide, and in this declaration I do not purport to provide, any testimony as to facts about Plaintiff. I am presenting only my opinions assessing likely risks based on the information in the record that I have reviewed.

9. In order to form my opinions about this case, I have reviewed the following:

- a. Catherine V. Herridge's Memorandum in Support of Her Motion to Quash, Dkt. 96-1;
- b. the FBI's Search Warrant Affidavit for the Search of the University of Management and Technology ("UMT") and the home of Plaintiff, Yanping Chen, Dkt. 96-11 ("FBI Affidavit");

- c. the three articles ("Articles") Ms. Herridge wrote concerning Plaintiff and UMT, Dkts. 96-3, 96-5, 96-6;
- d. a Military Times article describing DOD's decision to terminate Plaintiff's university from DOD's Tuition Assistance Program;
- e. Plaintiff's Opposition to the Motion to Quash, Dkt. 122;
- f. and the Deposition Transcript of Catherine Herridge ("Herridge Tr.").

10. These materials present substantial evidence that Plaintiff was a colonel in the People's Liberation Army ("PLA"). In fact, the FBI Affidavit indicates that the FBI had her on tape admitting to an informant that she was a "full colonel" in the Chinese military. The Affidavit also presents substantial evidence that she lied about her service in the PLA on immigration forms and to federal investigators. The university that she founded, UMT, catered particularly to U.S. servicemembers and collected information about their military training and current duty stations. As the FBI Affidavit explains, the FBI had concerns that this information was remotely accessible from China.

11. Based on my familiarity with the CCP's intelligence gathering methods, it is my opinion that this pattern of activities is consistent with common CCP intelligence methods and there is a serious risk that Plaintiff was involved in making U.S. servicemember information available to China.

12. The CCP has a history of sending PLA members to the United States on academic visas with instructions to lie about their PLA affiliation on their immigration paperwork and, once embedded, to engage in intelligence gathering. For example, in 2020, DOJ charged four researchers with doing just that. *United States v. Wang*, 3:20-mj-70720-MAG (N.D. Cal. June 8, 2020); *United States v. Tang*, 2:20-mj-00096-DB (E.D. Cal. June 26, 2020); *United States v. Song*,

21-CR0011-WHA (N.D. Cal. Feb. 18, 2021) (superseding indictment); *United States v. Zhao*, 1:20-cr-187-JRS (S.D. Ind. Aug. 4, 2020).

13. As I have explained in prior testimony before Congress, the PRC routinely utilizes non-traditional collectors to conduct a plurality of its information collection efforts here in the U.S. due to their successful ability to hide in plain sight. Non-traditional collectors are in positions involving legitimate work and research, and they use those positions to collect information.

14. The information these non-traditional collectors gather is often biographical in nature. Once that information is gathered and analyzed, the CCP uses it to aggressively target government employees and servicemembers who may have access to sensitive, non-public, or classified information or valuable skill sets.

15. In another recent case, a CCP asset admitted to participating in scheme in which he created a fake company that he then used to solicit resumes from U.S. servicemembers. *United States v. Yeo*, 20-cr-87 (July 24, 2020 D.D.C.). Chinese intelligence services then used those resumes to identify servicemembers for potential recruitment.

16. Finally, in another recent case, DOJ charged four Chinese nationals with using an academic institution, seemingly created for the purposes of intelligence gathering, to target and recruit U.S. persons to serve as sources for the CCP. *United States v. Lin*, 3:22-cr-00710-MAS (D.N.J. Oct. 20, 2022).

17. In my opinion, the type of information UMT gathered from its students in this case would be of great interest to the CCP. Chinese intelligence operations regularly seek to collect large databases of information on U.S. government personnel. For example, the CCP was responsible for a data breach at the Office of Personnel Management in which the security clearance forms (SF-86s) for millions of government employees were stolen. Data on military

members would be particularly valuable for the CCP. At a minimum, UMT would have access to information similar to the servicemember resumes the CCP was specifically targeting for collection in the *Yeo* case, if not more detailed service information.

18. As the Chief of Staff of the Air Force recently warned, the CCP hopes to recruit U.S.-trained military personnel to help “fill gaps” in their military capabilities and training regimes. Air Force News Service, *CSAF Issues Warning of PLA Recruitment of U.S. Air Force Members, Veterans*, <https://www.af.mil/News/Article-Display/Article/3520635/csaf-issues-warning-of-pla-recruitment-of-us-air-force-members-veterans/>. The information that allegedly was at issue here is exactly the kind of information needed to identify and target servicemembers for that intelligence gathering effort.

19. DOD’s decision to terminate UMT’s participation in its Tuition Assistance Program and to announce publicly that the termination was made on national security grounds indicates that DOD decided that there was a national security risk here. This further indicates to me that there is a serious risk that Plaintiff was making U.S. servicemember information available to CCP intelligence services.

20. Based on my familiarity with counterintelligence investigations and prosecutions, the fact that Plaintiff was not prosecuted for these activities does not provide a sound basis for drawing the conclusion that Plaintiff was not, in fact, making information about U.S. servicemembers available to the CCP.

21. In my experience, counterintelligence cases are often not prosecuted, even when the government has sufficient evidence to establish a case. Bringing a prosecution risks identifying confidential sources and methods that were used to obtain the relevant evidence, and in many cases the U.S. government may determine that it is preferable to put a stop to the collection activity

without prosecution. DOD effectively ended any further intelligence collection here by terminating UMT's participation in the Tuition Assistance Program and publicly announcing that the termination was on "national security grounds."

22. Under the premise of Plaintiff's case, the confidential source or sources for Ms. Herridge's stories were government employees who had access to the details of a counterintelligence investigation. In my opinion, disclosing the identity of such employee(s) to a person whom DOD has found to be a national security risk (for the reasons above) would itself create an additional layer of risk. If I were making a decision on national security grounds, I would take all steps possible to avoid the additional risk of disclosing information about government counterintelligence personnel to a person who was a colonel in the PLA and whom DOD had found to be a national security risk.

Date: December 13, 2023


William R. Evanina

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

YANPING CHEN,	)	
	)	
Plaintiff,	)	Case No. 1:18-cv-03074-CRC
	)	
v.	)	Hon. Christopher R. Cooper
	)	United States District Judge
FEDERAL BUREAU OF	)	
INVESTIGATION,	)	
U.S. DEPARTMENT OF JUSTICE,	)	
U.S. DEPARTMENT OF DEFENSE, U.S.	)	
DEPARTMENT OF HOMELAND	)	
SECURITY,	)	
	)	
Defendants.	)	

I, Holden Triplett, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a co-founder of Trenchcoat Advisors, a company I founded to advise other companies on human-driven security risks, especially those backed by nation states. I am also currently an adjunct professor at Georgetown University's Walsh School of Foreign Service, where I teach a course on Chinese Intelligence, Security, and Influence.

2. Prior to forming Trenchcoat Advisors, I spent just under 15 years serving in various roles with the Federal Bureau of Investigation ("FBI"). In my last government position, I served as the FBI Faculty Chair at the National Intelligence University, where I taught courses on Counterintelligence and Chinese Intelligence and Information Warfare.

3. From 2017 to 2018, I served as the Director of Counterintelligence on the National Security Council. In that capacity, I led the development of counterintelligence policy for the United States, drafting presidential directives and legislation to protect the U.S. Government and the private sector from exploitation by foreign governments.

4. From 2014 through 2017, I served as the FBI's senior official in the People's Republic of China. Before that, I spent two years serving as an FBI senior official in Russia.

5. As a result of my years of experience working on counterintelligence matters in general and in China in particular, I have a strong familiarity with the objectives, capabilities, and methods of the Chinese intelligence services.

6. I have been retained to provide my expert opinions in this matter.

7. I cannot attest to, and in this declaration I do not purport to provide, any facts about Plaintiff. I am providing solely my opinions assessing likely risks based on the materials I have reviewed.

8. I have signed the declaration to be bound by the Protective Order in this matter, Dkt. 27. In order to form my opinions about this case, I have reviewed the following:

- a. [REDACTED]
[REDACTED] ("DoD Decision");
- b. Catherine V. Herridge's Memorandum in Support of Her Motion to Quash, Dkt. 96-1;
- c. the FBI's Search Warrant Affidavit for the Search of the University of Management and Technology ("UMT") and the home of Plaintiff, Yanping Chen, Dkt. 96-11 ("FBI Affidavit");
- d. the three articles ("Articles") Ms. Herridge wrote concerning Plaintiff and UMT, Dkts. 96-3, 96-5, 96-6;
- e. a Military Times article describing DoD's decision to terminate Plaintiff's university from DoD's Tuition Assistance Program;
- f. Plaintiff's Opposition to the Motion to Quash, Dkt. 122; and

g. the Deposition Transcript of Catherine Herridge (“Herridge Tr.”).

9. These documents contain substantial evidence indicating that the Plaintiff, Yanping Chen, was a colonel in the People’s Liberation Army (“PLA”). Among the public documents, Ms. Herridge’s articles have an on-the-record statement from one of Plaintiffs’ employees describing how Plaintiff revealed to him that she was once a colonel in the PLA. More important, the FBI Affidavit indicates that the FBI has a recording in which the Plaintiff admits that she was a “full colonel” in the Chinese military. The FBI Affidavit also presents substantial evidence indicating that she repeatedly lied about her service in the PLA when filling out her immigration forms. As further noted in the materials, the university the Plaintiff founded, UMT, enrolled a large number of U.S. servicemembers and collected information about their military training and duty stations. The Affidavit reports that the FBI had concerns that this information could be remotely accessed from China.

10. Based on my familiarity with the CCP’s intelligence services, it is my opinion that these actions are consistent with the CCP’s interests and intelligence-gathering methods.

11. The CCP regularly sends PLA members or former PLA members to study in the United States with instruction to engage in intelligence gathering once they arrive. DOJ recently charged four Chinese nationals for engaging in that exact conduct. *United States v. Wang*, 3:20-mj-70720-MAG (N.D. Cal. June 8, 2020); *United States v. Tang*, 2:20-mj-00096-DB (E.D. Cal. June 26, 2020); *United States v. Song*, 21-CR0011-WHA (N.D. Cal. Feb. 18, 2021) (superseding indictment); *United States v. Zhao*, 1:20-cr-187-JRS (S.D. Ind. Aug. 4, 2020).

12. The use of a business platform such as UMT to collect intelligence is consistent with the PRC intelligence practices, including the use of traditional and “non-traditional” collectors to conduct information collection efforts here in the U.S. Non-traditional collectors—

individuals serving as businesspeople, academics, and students—take on positions involving legitimate work and research, which they then use to collect valuable information.

13. One of the goals of the CCP intelligence services is to collect biographical information of U.S. government persons in order to “spot” individuals who may be susceptible to recruitment efforts. The CCP then uses that information to target for recruitment government employees and military servicemembers with access to sensitive or classified information or with other valuable skill sets.

14. Recently, the Chief of Staff of the Air Force issued a warning noting that the CCP, through the use of foreign front companies, hopes to recruit U.S.-trained military personnel to help “fill gaps” in their military capabilities and training regimes. Air Force News Service, *CSAF Issues Warning of PLA Recruitment of U.S. Air Force Members, Veterans*, <https://www.af.mil/News/Article-Display/Article/3520635/csaf-issues-warning-of-pla-recruitment-of-us-air-force-members-veterans/>. This is consistent with my knowledge of the goals of CCP intelligence in general, and CCP military intelligence in particular. It is not enough for Chinese intelligence to steal a blueprint or technical manual. Often, they need someone with experience building or repairing the stolen technology, to make the intelligence they gather worthwhile. As a result, one of the chief tasks of CCP intelligence is identifying and recruiting individuals with desirable knowledge to work for the Chinese government and help “train the trainers.”

15. As noted in the DoD decision, [REDACTED]
[REDACTED] The information UMT collected and possessed is exactly the type of information CCP intelligence would need to identify to recruit former servicemembers with particular training and skill sets in the intelligence

effort the Chief of Staff of the Air Force warned about. The fact that UMT's information matched the information needed in a known CCP intelligence effort supports my assessment that there is a serious risk that Plaintiff was involved in making information about U.S. servicemembers available to China.

16. Factual findings in DOD's decision further support my assessment that there is a serious risk that Plaintiff was involved in making U.S. servicemember information available to China. Support comes from the findings that: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17. DOD determined that Plaintiff was a national security risk and terminated UMT's participation in the Tuition Assistance Program on that ground. In my opinion, these findings support the conclusion that there was a serious risk that Plaintiff was involved in intelligence gathering for China.

18. Based on my familiarity with counterintelligence investigations, the fact that Plaintiff was not prosecuted does not undermine my assessment that there is a serious risk that Plaintiff was making U.S. servicemember information available to China. In my experience, many counterintelligence cases do not result in prosecution, even when the government has enough

evidence to prove its case. Prosecuting an espionage case often risks identifying the confidential sources and methods that were used to obtain the government's evidence. As a result, it is often necessary to use other methods to stop the intelligence gathering activity without actually bringing a prosecution. Here, DOD effectively stopped further information gathering by terminating UMT from the Tuition Assistance Program and by publicly announcing that its decision was based on "national security grounds."

19. The premise of Plaintiff's case is that Ms. Herridge relied on source(s) in the government with detailed access to a counterintelligence investigation. In my opinion, an order requiring Ms. Herridge to identify counterintelligence personnel to a former colonel in the PLA creates further national security risk. Every piece of information that is disclosed about counterintelligence operations and personnel can allow an adversary to build a more complete picture of counterintelligence operations and capabilities. In my assessment, providing the names of counterintelligence personnel to a person whom DOD has found to be a national security risk creates an additional risk that should be avoided.

Date: December 14, 2023


Holden Triplett

