No. _____

In The
Supreme Court of the United States

H. RAY LAHR,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN H. CLARKE
Counsel of Record
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 332-3030
johnhclarke@earthlink.net

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1.

Where the government does not dispute that it misrepresented eyewitness accounts to a tragedy, does a prohibition on disclosure of the identities of the witnesses on privacy grounds result in a blanket rule of non-disclosure not contemplated under the Freedom of Information Act?

2.

Is the district court's inquiry into the deliberative process privilege under the Freedom of Information Act limited to adjudication of whether the privilege is properly asserted, and does this limited review erroneously transform a qualified privilege into an absolute one?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is:

Petitioner: H. Ray Lahr.

Respondents: National Transportation Safety Board, Central Intelligence Agency, National Security Agency.

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PETITION FOR A WRIT OF CERTIORARI

H. Ray Lahr respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Ninth Circuit, dated June 22, 2009, is officially reported at 569 F.3d 964 (9th Cir. 2009), and is reproduced in Appendix A at 1-51.

The opinion and order of the U.S. District Court for the Central District of California, dated July 31, 2006, is officially reported at 453 F. Supp. 2d 153 (C.D. CA 2006) and is reproduced in Appendix B at 52-125.

The subsequent opinion and order of the U.S. District Court for the Central District of California, dated October 4, 2006, is officially reported at 2006 WL 2854314 (C.D. Cal. Oct 4, 2006), and is reproduced in Appendix C at 126-184.

The fees opinion and order of the U.S. District Court for the Central District of California, dated March 19, 2007, is not publicly reported, and is reproduced in Appendix D at 185-198.

The opinion of the U.S. Court of Appeals for the Ninth Circuit, denying *en banc* review, dated January

21, 2010, is not publicly reported, and is reproduced in Appendix E at 199-201.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on August 8, 2009. A timely petition for rehearing *en banc* was filed on July 20, 2009, and was denied on January 21, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552 provides, in relevant part:

> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (3)(A) * * * [E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (b) This section does not apply to matters that are –
>
> * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

* * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy

STATEMENT OF THE CASE

A. The Flight 800 Tragedy

On July 17, 1996, the military issued a warning that it was dangerous for civilian aircraft to fly below 10,000 feet in Military Operating Zone[1] Whisky 105 ("W-105"), whose western edge was about 15 miles off Long Island's coast. At 8:00 p.m., the military was

[1] Defined in *Airman's Information Manual* § 3:43: "[Warning zones] denote the existence of unusual, often invisible, hazards to aircraft, such as artillery firing, aerial gunnery, or guided missiles."

conducting classified military maneuvers.[2] The district court:

> The genesis of this suit lies in the tragic crash of Trans World Airline ("TWA") Flight 800 ("Flight 800"). On July 17, 1996, Flight 800 departed from John F. Kennedy International Airport in New York City, en route to Charles de Gaulle International Airport in Paris, France. The aircraft crashed into the Atlantic Ocean twelve minutes after departure. There were no survivors of the accident and the aircraft, a Boeing 747-131, was destroyed.

App. B at 55.

The tragedy unfolded at sunset, on a relatively cool, sunny day, ten miles off the coast of Long Island's south shore, a popular, affluent, summer resort. Without a word of warning from the cockpit, the plane exploded in view of as many as a thousand people up and down the coast – vacationers, surfers, fishermen, beach walkers, helicopter pilots, and other airline pilots. The multiple explosions were seen from "over 40 miles away."[3] The plane fell from the sky in flames, the cockpit broken off from the fuselage,

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[2] *See* graphic reprinted from March 10, 1997 Press Enterprise Newspaper article, *New Data Show Missile May Have Nailed TWA 800, Debris Pattern Provides Key to Mystery* App. F at 202.

[3] Quoting Nov. 17, 1997 CIA animation at 10:40, discussed *infra*.

tragically killing 230 people, thirty-eight of whom were under the age of 18. Almost seven hundred people would provide the FBI with formal witness statements as to what they had seen of the disaster.[4]

Seventeen months into the NTSB's four-year probe, on November 17, 1997, the three major networks broadcast excerpts of the CIA-produced video entitled, *What Did The Eyewitnesses See,*[5] and CNN broadcast the 14-minute video in its entirety.[6]

The video climaxed with an animation purporting to show what the eyewitnesses did see. As presented in the CIA video, the nose of the aircraft blew off from an internal explosion, and then the nose-less 747 "pitched up abruptly and climbed several thousand feet from its last recorded altitude of about 13,800 feet to a maximum altitude of about 17,000 feet." Trailing flames, this vertically zooming nose-less aircraft allegedly deceived the eyewitnesses into thinking they had seen a missile. Neither the government nor the media ever showed the animation again.

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[4] The record in the case includes 673 FBI 302 eyewitness interview reports.

[5] Video lodged in Cross-Appellant H. Ray Lahr's Excerpts of Record ("Lahr's Excerpts").

[6] *See* App. F at 203-06, four screen shots of CIA animation: (1) "What Did The Eyewitnesses See;" (2) "The Eyewitnesses Did Not See A Missile;" (3) "Not A Missile;" and (4) Quoting narrator, "Just after the aircraft exploded, it pitched up abruptly and climbed several thousand feet from its last recorded altitude of about 13,800 feet to a maximum altitude of about 17,000 feet."

Like tens of millions of other Americans, "[Ray] Lahr, a former Navy pilot and retired United Airlines Captain who has served as ALPA's Southern California safety representative for over fifteen years" (App. B at 67), saw the now notorious CIA animation, depicting the transformation of a nose-less jumbo jet into a soaring rocket. This animation instantly discredited all eyewitness testimony and ended any real investigation into the plane's destruction, and transformed the Flight 800 tragedy into the most controversial disaster in aviation history. It remains so today.

B. The District Court Opinion

The district court wrote that Flight 800 raises "much-debated questions" (App. B at 53) and that "the crash of Flight 800 and the government's investigation and findings are matters of great public interest." App. B at 102. The court elaborated in its fee order:

> Plaintiff provides ample evidence of the public's interest in the information obtained in this case. According to Plaintiff, TWA Flight 800 has already been the subject of nine books and over 2,000 newspaper articles. A Google search yields over 147,000 webpage hits. Plaintiff adds that well-qualified experts will analyze the disclosures and several will publish reports of their findings on the websites of Flight 800 Independent Researcher's Organization (at flight800.org)

> and the Association of Retired Airline Professionals (at www.twa800.com). At least two magazines have already published articles about this Court's ruling.

App. D at 189.

Lahr's Freedom of Information Act ("FOIA") request sought disclosure of "all records upon which all publicly released aircraft flight path climb conclusions are based, including, but not limited to, the underlying data and basis of all written reports and all video-animation-depictions." App. A at 8. "Lahr filed suit against the NTSB [and] [t]hereafter he added as defendants the CIA and National Security Agency ("NSA") . . . "[7] App. B at 67.

The Freedom of Information Act gives district courts exclusive jurisdiction to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). In two

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[7] Although the CIA is the principal defendant, it was not initially named because Lahr in good faith relied on that Agency's denial of its possession of responsive records. *See* Fee Order, App. D at 191:

> In its January 26, 2001 FOIA response letter, the CIA wrote, "[w]e have researched this matter, and have learned that the pertinent data, and resulting conclusions, were provided by the National Transportation Board (NTSB). CIA simply incorporated the NTSB conclusions into our videotape." . . . (Mot., 7:9-12) (citing June 16, 2004 Lahr Affidavit, Ex. 16). That was not correct.

"thorough opinions" (App. A at 9), issued in August and October of 2006, the district court granted in part and denied in part the three government partial summary motions, holding, *inter alia*:

- The FOIA's balancing test is inapplicable to Exemption 5, and thus, some of the information that had been withheld under the deliberative process privilege need not be disclosed
- Under the FOIA's balancing test, the privacy protections afforded by Exemption 7(C) do not shield the names of eyewitnesses from disclosure

Both holdings involve solely questions of statutory interpretation.

The district court resolved the first by holding, *inter alia*, that its analysis of the deliberative process privilege withholdings under Exemption 5 is limited to adjudication of whether the privilege is properly asserted. Once the court concluded that they did fall within the privilege, and thus fell under Exemption 5, the district court had no discretion to order disclosure. "[T]his Plaintiff-proposed balancing test is inapplicable to Exemption 5 . . . There, the only test the Court may apply is whether the record is both predecisional and deliberative." App. B n. 33 at 86.

As the government filed no transverse affidavits[8] on the issue of government impropriety, there was no question of material fact[9] to be decided on the court's resolution of the dispute over eyewitness names under Exemption 7(C)'s balancing test. "Defendants did not file any response to that statement [of genuine issues], so on this motion, at least, Plaintiff's assertions have not been repudiated." App. B at 60.

To determine whether a record is properly withheld, district courts must balance the privacy interest protected by the exemptions against the public interest in government openness that would be served by disclosure. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004); *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494-95 (1994).

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[8] Lahr filed affidavits from 29 expert and fact witnesses. The experts include former NTSB member, Dr. Vernon Gross, and retired Rear Adm. Mark Hill, as well as two aerodynamicists and six air-crash investigators, three of whom were parties inside the TWA Flight 800 probe. Seven of Lahr's affiants are eyewitnesses, four of whom saw the disaster from the air. All refute the government's zoom-climb hypothesis, including two eyewitnesses who are featured in the CIA's zoom-climb animation.

[9] "'When the moving party meets its burden, the adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.' Fed. R. Civ. P. 56(e)." App. B at 70.

"[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information." *Favish*, *id.* at 72. But where the government's basis for withholding the contested records is Exemption 7(C), "the usual rule that the citizen need not offer a reason for requesting the information is inapplicable." Instead, the requester must "establish a sufficient reason for the disclosure." *Id*.

The district court wrote that "[f]or the purpose of determining whether Exemption 7(C) (and other FOIA provisions) are applicable, and only for that purpose, the Court finds that, taken together, this evidence is sufficient to permit Plaintiff to proceed based on his claim that the government acted improperly in its investigation of Flight 800, or at least performed in a grossly negligent fashion. Accordingly, *the public interest in ferreting out the truth would be compelling indeed.*" App. B at 60-67 (emphasis added). The district court's analysis under the heading *Plaintiff's allegations of impropriety*:

> According to Plaintiff then, the government withheld evidence from the Flight 800 probe. The government altered evidence during the investigation. Evidence was removed from the reconstruction hangar. The government misrepresented radar data, which does not correspond to the "zoom-climb" conclusion. Radar data and flight recorder data are missing. It appears that underwater videotapes of the debris from the plane have been altered.

The government concealed the existence of missile debris field and debris recovery locations. At its first public hearing, the NTSB did not permit eyewitness testimony. Many eyewitnesses vehemently disagree with the conclusions the CIA expressed in the video animation. The CIA falsely reported that only twenty-one eyewitnesses saw anything prior to the beginning of the fuselage's descent into the water. The FBI took over much of the investigation from the NTSB, which should have been in charge, and the CIA never shared its data and calculations of the trajectory study with others for peer review, which would have been appropriate.

Plaintiff also submits evidence that the government's conclusion that there was a center-wing fuel tank explosion and the government's "zoom-climb" theory were physically impossible under the circumstances. For example, evidence suggested there was no spark in the center-wing fuel tank.

Once an explosion occurred, engine thrust would have been cut off with the loss of the nose of the plane. Furthermore, the aviation fuel used in Flight 800 is incapable of an internal fire or explosion. The zoom-climb theory is impossible because at least one wing separated early in the crash sequence. Additionally, a steeper climb would likely result in a reduction in ground speed, which contradicts radar evidence. In fact, Plaintiff's evidence suggests the "zoom-climb" theory is aerodynamically impossible.

> Finally, Plaintiff also claims that there were "military assets" conducting classified maneuvers in the area at the time of the crash, and several vessels in the area remain unaccounted for.

App. B at 60-67 (footnotes omitted).

C. The Court of Appeals Decision

The government appealed only the district court's holding that Exemption 7(C)'s equitable balancing test mandates disclosure of the eyewitnesses' names.

Lahr appealed the district court's holding that the FOIA's balancing test is inapplicable to resolutions of disputes under Exemption 5's deliberative process privilege.

Regarding the district court's order to provide complete copies of ten documents, from which the names of 233 eyewitnesses and one supervisory FBI agent had been redacted, the panel wrote that it was "compelled by precedent – especially by a recent case of this court, *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008) . . . to reverse this holding." App. A at 16. The panel wrote that, under FOIA Exemption 7(C)'s balancing test, the public could benefit from disclosure only if Lahr contacted the eyewitnesses "directly," and any contact would infringe on the privacy interests sought to be protected by Exemption 7(C).

The panel ruled against Lahr and affirmed the district court's Exemption 5 holding that "any discretion retained by the district court was limited to determining whether the withheld documents fell within the scope of the claimed privilege." App. A n. 15 at 32. The panel wrote:

> Relying on *General Services Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969), Lahr contends that traditional equity principles apply to determine whether withholding is warranted under Exemption 5. *See Benson*, 415 F.2d at 880 (holding that courts must weigh "the effects of disclosure and nondisclosure, according to traditional equity principles"). We have subsequently explained that the FOIA context is different, and that *Benson*
>
> > merely recognized that where documents normally privileged in the civil discovery context are involved, courts may employ in exemption 5 cases the same equitable principles that they may use to fix the scope of discovery in civil litigation against an agency. Except in this limited sense, however, courts do not possess 'equitable discretion' to deny FOIA requests.
>
> *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1088 n.4 (9th Cir. 1997).

Id.

REASONS FOR GRANTING THE PETITION

A. Where it is undisputed that the government misrepresented eyewitness accounts of a crime, prohibiting disclosure of the identities of these witnesses results in a blanket rule of non-disclosure not contemplated under the FOIA

In this case, the government did not dispute that it falsified its account of the disaster. In reality, it could not. Its zoom-climb hypothesis violates several immutable laws of physics,[10] in addition to being contradicted by all forensic evidence,[11] virtually all of which the government either deleted, altered, removed, hid, or misrepresented. Government misconduct was

[10] "[E]ngine thrust would have been cut off with the loss of the nose of the plane." App. B at 65. "[T]he aviation fuel used in Flight 800 is incapable of an internal fire or explosion." *Id*. The aircraft did not slow and thus could not have climbed. *Id*. at 64. n. 18. "Evidence suggests the 'zoom-climb' theory is aerodynamically impossible." *Id*. at 66 n. 25. "*See Hill Aff*., at ¶ 4 (Bates 51) (airplane at more than twenty degrees inclination will stall because it will no longer produce lift); *Pence Aff*., at ¶ 8 (Bates 259) (same); *Lahr Aff*., at ¶ 62 (Bates 275) (plane would have stalled about one and a half seconds after nose separation); *see generally Third Lahr Aff.* (under physical characteristics concluded by government, aircraft could never have reached impact point)." *Id*.

[11] The break-up sequence, the radar data, the photographic evidence, the underwater imagery, the explosive residue, the flight data recorder, the cockpit voice recorder, the climb analysis data.

so pervasive that non-governmental investigators[12] smuggled evidence out of the probe to give to the news media.[13]

The undisputed impossibility of the government's zoom-climb hypothesis begs the question posed by the CIA in its animation, *What Did The Eyewitnesses See*? Lahr wants to ask these witnesses. The CIA did not. Its analysts relied exclusively on FBI 302 interview reports, having interviewed *no* witnesses. The NTSB interviewed *one* eyewitness,[14]

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[12] NTSB investigations are conducted under the Party Process, under which non-governmental groups, or parties, possessing expertise in particular disciplines, are included in the process.

[13] Lahr's Excerpts, *Holtsclaw Aff.*: "[In] 1996, I provided to Captain Richard Russell the Radar tape . . . recorded at the New York Terminal Radar . . . authentic. . . . The tape shows a primary target at the speed of approximately 1200 knots converging with TWA-800 . . . It also shows a U.S. Navy P-3 pass over TWA-800 seconds after the missile has hit TWA-800." *See also Sanders Aff.*: Evidence smuggled out in 1996 by TWA Captain Terrell Stacey to investigative reporter James Sanders, including seat padding of reddish residue sample of missile exhaust (that *60 Minutes* freely surrendered to the FBI).

[14] The only witness ever interviewed by the NTSB was Eastwind pilot Captain David MacLaine. He was staring directly at Flight 800 when it exploded, piloting an aircraft at about 17,000 feet. The transcript of his real-time Air Traffic Control: "Ah we just saw an explosion up ahead of us here about sixteen thousand feet or something like that. It just went down – in the water." (Lahr's Excerpts ATC Transcript *MacLaine*.) MacLaine's next day Report also reported that the aircraft fell downwards. When the NTSB interviewed MacLaine in March of 1999 – over two years after both the CIA and NTSB announced

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notwithstanding that its enabling statute mandates that it do so.[15]

The FBI provided the CIA 233 interview reports. The CIA used these reports to generate its report said to analyze what the witnesses saw, which, in turn, formed the basis of the CIA video, *What Did The Eyewitnesses See?* The CIA released its written analysis, but redacted the names appearing adjacent to the witnesses' accounts.

Here, evidence of the government's misrepresenting, then concealing eyewitness accounts from public view pervades the investigative history of the government's four-year probe, as the district court observed. "*See Hill Aff*., at ¶ 7, Exh. 1, p. 2 (Bates 46) (no

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their zoom-climb conclusions – he was repeatedly clear that all the debris fell downwards out of Flight 800, not upwards. (Interview Transcript *MacLaine Id*.) Had the aircraft climbed, it would have done so through MacLaine's airspace.

[15] *See, e.g*., Affidavit of former NTSB member Vernon Gross (Lahr's Excerpts): "[B]y a mandate of the Congress, there is one body, the National Transportation Safety Board, that is entirely charged with the investigation of any transportation accident . . . Any time you take away from the NTSB, which, by congressional charter, must be in charge, and have the FBI say that they [NTSB] will not investigate or interrogate any witnesses whatsoever, that immediately raises an issue in my mind about the politics of it." *See also* 49 U.S.C. § 1131(a)(2) (same); 49 C.F.R. Part 831, *Accident/Incident Investigation Procedures*; 831.5 *Priority of Board Investigations* (same, requiring agencies to timely exchange information); 49 U.S.C. § 1131(a)(2)(B) (amendment after TWA hearings providing mechanism to declare probe criminal before the FBI can divest the NTSB of primary jurisdiction).

witnesses allowed to speak at hearings); *Lahr Aff.*" (App. B at 63). The "FBI objected to [the] use of [the] CIA video and witness materials or testimony at [the] public hearing." *Id*. n. 15.[16] "Many eyewitnesses vehemently disagree with the conclusions the CIA expressed in the video animation" (*id*.), and Lahr is "not aware of any witness produced by FBI, CIA or NTSB that corroborated 'zoom-climb' theory." *Id.* n. 16.

Of the 183 known eyewitnesses to missile fire,[17] only a scattering of the accounts from these witnesses

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[16] *See also Id*. n. 7:

> *See Affidavit of Rear Admiral Hill*, at ¶ 17, Exh. C, pp. 2-3 (Bates 46-47) (adopting claims of William Donaldson, a deceased Naval Commander, that the NTSB assisted DOJ in hiding a witness and that the head of the FBI investigation placed the investigation in "pending inactive status" to avoid testing missile theory and to hide witness testimony); *Affidavit of James Speer*, at ¶¶ 14-15 (Bates 184) (ALPA's representative during the official probe claims that FBI covered up positive test for nitrates and hid airplane part); *Perry Aff*., ¶ at 50 (Bates 253) (FBI agent stated witness was too far away to see what she claimed); *Lahr Aff*., at ¶ 52-54 (Bates 273) (FBI would not allow Witness Group to conduct witness interviews, contrary to normal NTSB procedure); *Young Aff*., at ¶ 2(f) (Bates 394) (non-governmental parties to investigation had no access to FBI witness summaries for over [a] year).

[17] After the NTSB Witness Group reconvened (it had been disbanded), the FBI allowed Safety Board investigators to review 458 interview Reports, with names redacted, "provided no notes were taken and no copies were made," according to the resultant October 17, 1997, *Witness Group Factual Report,* NTSB Exhibit 4A (*see* Lahr's Excerpts). As the district court observed, the "Witness Group factual report states that, of 183 witnesses who

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appeared in print in lesser publications, and not a single account in the New York Times. The sad fact is that any eyewitness who desires to share his observations with the public is compelled to purchase advertising space. On the eve of the second public hearing, after four years of being ignored, six eyewitnesses placed a full-page advertisement in the Washington Times, entitled *We Saw TWA Flight 800 Shot Down By Missiles And We Won't Be Silenced Any Longer.* The August 2000 advertisement is subtitled "Here

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observed a streak of light, 96 said it originated from the surface." App. B at 64 n. 16. Conspicuously absent from the NTSB's public docket, containing "over 3,000 [case] documents" (App. A at 7), is this incriminating *Witness Group Factual Report*.

That Report also recounts that "[o]n July 21, 1996 . . . Assistant U.S. Attorney Valerie Caproni informed Norm Weimeyer, head of the Flight 800 probe's operations group, 'that no interviews were to be conducted by the NTSB.' " At the time, Caproni was Assistant U.S. Attorney in the Criminal Division of the United States Attorney's Office, Eastern District of New York. In August 2003, FBI Director Mueller named her General Counsel of the FBI. *See* Corporate Legal Times, *The Chosen One*, Oct. 2004, R. Vosper: "In addition, Caproni ruffled some feathers when she charged James Sanders, a freelance journalist, for removing a piece of the wreck in order to test it in a lab for explosive residue . . . 'Conspiracy theorists came out of the woodwork before the last piece of the plane hit the Atlantic,' she says."

See App. F at 202: Graphic reprinted from March 10, 1997 Press Enterprise Newspaper article, *New Data Show Missile May Have Nailed TWA 800, Debris Pattern Provides Key to Mystery*, reporting that "author and investigative reporter" James Sanders had gathered and reviewed evidence from which he had concluded that the crash was the result of a collision with a missile.

Are A Few Of The Hundreds Of Our Statements The FBI Concealed," followed by six eyewitness accounts. It ends, "America Must Know The Truth." It is reprinted here, App. F at 207-12, and states in part:

> We are some of the hundreds of eyewitnesses to the crash of TWA Flight 800 that killed 230 people off the coast of Long Island on July 17, 1996.
>
> We are OUTRAGED that the FBI would not let a single one of us testify at the NTSB's public hearing . . . The FBI feared that our testimony would undermine the video produced by the CIA that was shown on national television to persuade viewers that we all mistook the plane's burning fuel for a missile . . .
>
> * * *
>
> We are INCENSED that for nearly four years the FBI refused to release its hundreds of reports of interviews with eyewitnesses who told them what we saw – the plane being hit by missiles . . .
>
> * * *
>
> And we are SHOCKED at the lengths to which the FBI, the CIA and the NTSB have all gone to discredit and ignore our testimony in order to hide the truth.
>
> * * *
>
> Hundreds of us SAW what happened. The FBI, the CIA and the NTSB must not be

> allowed to get away with this cover-up by defamation of the eyewitnesses . . .
>
> * * *
>
> Admiral Thomas H. Moorer, former Chairman of the Joint Chiefs of Staff, has said, "All the evidence would point to a missile."
>
> * * *

App. F at 207-212.

The advertisement generated no media attention.

The district court reasoned that disclosure might "assist Plaintiff in investigating and uncovering government malfeasance by, for instance, leading to individuals who might repudiate what the government attributed to them or might even declare that the government misused or misrepresented the information they provided." App. C at 105. The court reasoned that privacy implications from disclosure, on the other hand, would be minimal.

> Defendants proffer no assertions by any of the eyewitnesses, *even in camera*, that they wish to avoid being asked for information. Even assuming these individuals ultimately were contacted, if they were not interested in responding to inquiries, they could easily decline to be interviewed. Therefore, the consequences arising from disclosure appear slight.

App. B at 104-05.

The panel relied on *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008) in reversing the district court's holding. That case adjudicated the disclosure of the names of 23 employees that the Forest Service had redacted from its Report on a controversial fire that killed two of its own employees, and which led to OSHA citations and criminal charges. The panel concluded that *Lahr* "is for all relevant purposes identical to that in *Forest Service Employees*." App. A at 25. The panel wrote that, under FOIA Exemption 7(C)'s balancing test, the public could benefit from disclosure only if Lahr contacted the eyewitnesses "directly," and any contact would infringe on the privacy interests sought to be protected by Exemption 7(C). Disclosure of "identities . . . alone will shed no new light on the [Agency's] . . . performance of its duties beyond that which is already publicly known." *Id*. at 24, quoting *Forest Service*.

The panel's conclusion that eyewitnesses who are not among Lahr's affiants are "heretofore silent witnesses" who "have by their silence indicated that contact is unwelcome" (App. A at 19-20[18]) works a near

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[18] The panel reasoned:

> In *Forest Service Employees*, '[t]he fact that the record does not indicate that any of the employees ha[d] spoken out in the five years since the incident occurred le[d] us to conclude that such contacts [were] unwanted.' *Id.* Similarly here: Although some of the eyewitnesses have spoken out, and indeed, have joined Lahr in insisting that the NTSB and CIA reconstructions do

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blanket rule of nondisclosure of eyewitness names, even where all indications that witnesses to the event – whose accounts were first, misrepresented, and, second, ignored – *want* to be heard. Under the panel's analysis, the more likely it is that disclosure would "open up the inner workings of government to public scrutiny" (*Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976)), because "inquiries by media representatives [are] substantially more likely" (App. A at 20), the less likely the court is to order disclosure.

Once it is determined that a FOIA plaintiff seeks disclosure of names of eyewitnesses in an effort to contact them to corroborate or refute what the government attributed to them, the inquiry is at an end, because the witnesses, or at least those who are not among the plaintiff's affiants, have not "come forward publicly." *Id*. at 19. Under the Ninth Circuit's reasoning, the greater the possibility that disclosure of the records will reveal government corruption or negligence, thereby fulfilling the purpose of the FOIA, the greater the reason to keep the documents from the public.

> not accord with their perceptions, others have not come forward publicly despite the widespread publicity given the reconstruction of the incident. It is presumably these heretofore silent witnesses whom Lahr wishes to contact. *Forest Service Employees* indicates that these witnesses have by their silence indicated that contact is unwelcome.

App. A at 19-20.

The privacy issue before the lower courts was whether disclosure of the names corresponding to accounts that these witnesses allegedly provided to investigators was a warranted disclosure under Exemption 7(C), which allows withholding records only if disclosure could be "an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Warranted invasions of the personal privacy are not exempt. Under the panel's analysis, avoidance of direct contact is analyzed the same in cases involving government corruption as it is where the FOIA plaintiff seeks disclosure to facilitate learning whether statutes are being diligently enforced.[19]

The panel's decision is an untenable expansion of this Court's holding in *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487

[19] The panel cited *Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484-85 (9th Cir. 1994), where a labor organization sought the release of payroll records submitted to the Air Force by a government contractor working on an Air Force base in an effort to learn whether the Air Force was diligently enforcing a federal wage statute. *Id.* at 1481. Direct contact with the employees was necessary to accomplish the organization's goal, and it was held that Exemption 6 authorized the Air Force to withhold the payroll records because the only "additional public benefit" the release of the employees' personal information would provide was "inextricably intertwined" with the invasion of the employees' privacy. *Id.* at 1485. Avoidance of harassment is a cognizable privacy interest under the FOIA, protecting against "unwanted commercial solicitations." *Id.* at 1479.

(1994), where Exemption 6[20] authorized the Defense Department to withhold the home addresses of its employees from its response to a FOIA request filed by the unions representing the employees. *Id*. at 502. Noting that the unions sought this information precisely because nonunion employees had decided not to share it with them, the Court found it "clear" that such employees had "*some* nontrivial privacy interest in nondisclosure, and in avoiding the influx of union related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure." *Id.* at 501 (emphasis in original).

In *United States Dep't of State v. Ray,* 502 U.S. 164, 178-79 (1991), this Court applied Exemption 6 to withhold the identities of Haitian refugees interviewed in State Department reports where there was no indication that an additional round of interviews by the FOIA requester "would produce any relevant information that is not set forth in the documents that have already been produced." The Court explained

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[20] Because of their similar language, Exemption 7(C) is often closely associated with Exemption 6. Exemption 6 protects "personnel . . . and similar files the disclosure of which would constitute *a clearly unwarranted* invasion of personal privacy," whereas Exemption (b)(7) protects law enforcement records which "could reasonably be expected to constitute *an unwarranted* invasion of personal privacy" (emphasis added). However, Exemptions 7(C) and 6 "differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions," the former being more protective of privacy than the latter. *United States Dep't of Defense v. Fed. Labor Relations Auth*., 510 U.S. 487 (1994), 496 n. 6.

that an "asserted interest in ascertaining the veracity of the [government's] interview reports" would not outweigh privacy interests, where "[t]here is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports." *Id*. at 179. The same cannot be said here.

As one court explained, "[f]or example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner." *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984). According to this Court, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978). "[A] basic purpose of the FOIA is to . . . [provide] a needed check against corruption." *Id*.

"In this case," wrote the Ninth Circuit, "because only the names of witnesses and agents are missing from the released documents, under the applicable precedents the 'marginal additional usefulness' of the names in exposing government misconduct must outweigh the privacy interests at stake." App. A at 23 (citation omitted). The panel dismissed the district court's observation that, "[o]n the other hand, disclosure of these persons' identities ultimately could

contribute significantly to the 'public understanding of the operations or activities of the government.'" App. B at 105 quoting *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. at 494 (1994)

On the issue of disclosure of witness identities, the Ninth Circuit treats all law enforcement records equally; such a blanket proscription is in derogation of this Court's observation in *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976), that "disclosure, not secrecy, is the dominant objective" of the FOIA. The Ninth Circuit's precedent works a near-irrefutable presumption that the names of witnesses in a criminal probe cannot be disclosed.

Because "Plaintiff's assertions have not been repudiated" (App. B at 61), the panel's holding was a pure question of law. Whether to order disclosure of investigative records of the TWA Flight 800 tragedy is a question of exceptional importance. The question of whether the CIA zoom-climb animation is "the boldest and most flagrant lie ever visited on the American people in peacetime"[21] is an extremely important one. As an event cannot be both impossible and possible at the same time, eyewitnesses did not see the aircraft in "various stages of crippled flight," as the CIA video claims, but rather, they saw something else.

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[21] *First Strike*, J. Cashill & J. Sanders, WND Books 2003, Chap. 9, *The Big Lie*, at 155.

If unchallenged allegations of the government's concealment[22] of the facts of the most controversial disaster in aviation history[23] do not tip the balance in favor of disclosure of the eyewitness' names,[24] nothing would. The Ninth Circuit's precedent results in a near blanket rule of non-disclosure not contemplated under the FOIA.

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[22] *See* Lahr's Excerpts, Affidavit of Air Line Pilot's Association representative James Speer: "[I]t's been successfully covered up, the truth is not known, and there are many people fortunately still working on it trying to discover the truth . . . [I]t was never declared a crime scene . . . So here we are in limbo, a dedicated group of people with a mission to seek the truth, obstructed by the government."

[23] *See* Lahr's Excerpts, Affidavit of Blackhawk pilot Major Fred Meyer: "This was not an accident. . . . If you're conducting a missile shoot under the main traffic control routes into New York City, you have exhibited in my mind, depraved indifference to human life. That's not an accident – under any statute – any codes anywhere. That's murder. Now, if it was a foreign force – that's murder . . . "

[24] Nor did the panel affirm disclosure of names redacted from the CIA's reports on eyewitnesses who have *not* been silent, including Lahr's affiants. *See* district court opinion (App. 63 n. 16): "*See Brumley Aff.*, at ¶¶ 1-2 (Bates 210) (representation in video isn't close to what he saw); *Wire Aff.*, at ¶¶ 2-5 (Bates 214) (what was in video did not represent what he had told agent); *Fuschetti Aff.*, at ¶¶ 1-2 (Bates 191) (pilot of other plane never saw vertical movement); *Meyer Aff.*, at ¶ 5(b) (Bates 193) (aircraft never climbed); *Angelides Aff.*, at ¶ 5 (Bates 215) (animation bore no resemblance to what he saw)." *And see id*. at 62 n. 7: "*Perry Aff.*, ¶ at 50 (Bates 253) (FBI agent stated witness was too far away to see what she claimed).

B. The district court's inquiry into the deliberative process privilege under the FOIA should not be limited to adjudication of whether the privilege is properly asserted, as such an analysis erroneously transforms the qualified privilege into an absolute one

Exemption 5 provides that FOIA disclosure requirements do not apply to information that qualifies as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency." *United States v. Weber Aircraft Corp*., 465 U.S. 792, 801 (1984). Exemption 5 incorporates all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.

The discovery privilege at issue here is the deliberative process privilege, which is commonly understood to "cover[ ] documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. . . ." *NLRB v. Sears,* 421 U.S. 132, 150 (1975).

The deliberative process privilege is a qualified privilege.

Here, the lower courts followed the rule memorialized by this Court in *NLRB* (*supra*), that, in the FOIA context, the standard to be employed is whether the documents would "routinely be disclosed" in civil litigation.[25] Under this analysis, documents for which a party would have to make a showing of need are not routinely disclosed and thus do not fall into this category. As a result, the qualified deliberative process privilege is treated as if it were an absolute one, and courts in FOIA cases do not take into account a party's need for the documents in ruling on a privilege's applicability. Once a government agency makes a *prima facie* showing of privilege, the analysis under FOIA Exemption 5 ceases, and the court does not proceed to balance the interests.

By contrast, in civil litigation, to decide whether to uphold a claim of deliberative process privilege, the

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[25] *NLRB v. Sears*, 95 S. Ct. 1504, 1516, n. 15 (1975):

> The ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's need in the context of the facts of his particular case, or on the nature of the case. However it is not sensible to construe the Act to require disclosure of any document which would be disclosed in a hypothetical litigation in which the private party's claim is the most compelling. Indeed the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would "routinely be disclosed" in private litigation and we accept this as the law. H.R. Rep. No. 1497, p. 10.

court must balance the government's claimed need for secrecy against the court's own need for evidence to resolve a dispute before it. In civil discovery disputes, courts weigh the relative need of the parties and the kind of litigation involved – a balancing test.

In apparent justification of this disparate treatment of qualified privileges under FOIA, courts observe that the identity of the litigants and the need for the evidence is always the same under the FOIA. The plaintiff's identity is irrelevant, and the sole factor weighing in favor of disclosure under the FOIA, the extent to which disclosure would open up the inner workings of government to public scrutiny,[26] is not considered.

The government's interpretation is unsupported by the legislative history, violates the well-settled principle that FOIA exemptions are to be construed narrowly, and, indeed, is contrary to the purpose of the statute.

Congress did not intend a blanket rule of non-disclosure for deliberative materials. "It is relatively clear from the legislative history that Congress, like

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[26] *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. at 495: The "only relevant 'public interest in disclosure' . . . is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contributing significantly *to public understanding of the operations or activities of the government*.'" *Id*. (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. at 775 (1989)) (emphasis in original).

most people in 1966, had never heard of the 'deliberative process privilege.' The only privileges specifically mentioned in the legislative history are the attorney-client and work product privileges." McCormick Evid. § 108 (6th Ed.) "Forty years ago a writer found very little authority for any privilege for communications between government officials. At the time the Federal Rules of Evidence were adopted, there were only a handful of cases that recognized the deliberative process privilege. It is only in the last two decades that federal courts have developed the privilege." Wright and Graham, Fed. Prac. & Pro. Chap. 6 *Privileges* § 5680 Official Information – Deliberative Process Privilege.

Moreover, "[t]he prediction that Exemption 5 was potentially the 'most far-reaching' of the F.O.I.A. exemptions has proved to be true in practice."[27] This far-reaching application was likely the impetus for President Obama's January 21, 2009, *Memorandum*

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[27] Wright and Graham Fed. Prac. & Pro. Chap. 6 *Privileges* § 5680 Official Information – Deliberative Process Privilege:

> According to a study by the Congressional Research Service of the Library of Congress, the (b)(5) exemption was the second most frequent ground for refusing to disclose under the Freedom of Information Act during its first four years, having been invoked in 375 of 1800 refusals while the trade secret and commercial information exemption was invoked 403 times. *See* Freedom of Information Act Amendments Sourcebook, House Government Operations Committee and Senate Judiciary Committee, 94th Cong., 1st Sess., 1975, p. 104-105.

for the Heads of Executive Departments and Agencies, where he wrote that "Government should not keep information confidential merely because public officials might be embarrassed by disclosure, [or] because errors and failures might be revealed . . . " In Attorney General Holder's March 19, 2009, *Freedom of Information Act Memorandum* of the same name, he wrote the "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."

An agency's withholding of documents must fall into one of nine exemptions. 5 U.S.C. § 552(b)(1)-(9), 552(d). In accordance with the broad disclosure provisions of FOIA, the enumerated exemptions are narrowly construed. *See, e.g., John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989), *reh'g denied*, 493 U.S. 1064 (1990); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Categorical exemption upon making a *prima facie* showing of the qualified deliberative process privilege is a narrow construction. So too with the attorney work product privilege, more accurately referred to as the work product doctrine.[28]

In deference to the "philosophy of full agency disclosure" that animates FOIA, "[t]he Supreme Court

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[28] The work product doctrine, recognized by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), (i) protects materials created by non-lawyers as well as lawyers, and (ii) can be overcome if the adversary establishes a substantial need for the material.

has interpreted the disclosure provisions of FOIA broadly. . . ." *Lion Raisins Inc. v. United States Dep't of Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004). The purpose of FOIA is to protect "the citizens' right to be informed about what their government is up to." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). "Disclosure, not secrecy, is the dominant objective of FOIA." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). According to this Court, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978).

"[W]e examine first the language of the governing statute, guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Ins. Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 523 (1993) (internal quotations, brackets, and citations omitted).)

After *in camera* reviews, the lower courts allowed the government to withhold one record entirely, and two in part, on the grounds that they were protected under the deliberative process privilege.

- Record 27, an 18-page CIA Report, entitled, *Dynamic Flight Simulation*, dated March 3, 1998, described by the district court "analysis and preliminary conclusions," from which the court

ordered disclosure of its title, date and bolded titles, holding the balance to be deliberative. App B. at 172. The panel affirmed. App. A at 34.

- Record 28, a March 1998, 17-page CIA "[d]raft report concerning preliminary analysis and conclusions regarding radar tracking" (App. B at 174), held partially exempt from disclosure, save its title, date, bolded titles, and Appendix. App. A at 34.
- Record 43, a five-page CIA "draft with handwritten annotations reflecting candid discussion and opinion * * * regarding CIA analysis of eyewitness reports about the crash . . . entitled, "An Overview of the C.I.A.'s Analysis of Witness Statements in the TWA Flight 800 Investigation" (App. C at 174), undated, held to be exempt from disclosure in its entirety. App. A at 33.

The sole factor weighing in favor of disclosure under the FOIA, the extent to which disclosure would "open up the inner workings of government to public scrutiny" (*Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976), was not considered.

A record is protected by the privilege if its authors were acting within their statutory authority. Here, they were not. First, the author would have to be oblivious to the fact that the zoom-climb theory violates the laws of physics, as well as the fact that all forensic and testimonial evidence is consistent

only with a missile strike. Second, the record itself must be consistent with good faith deliberation leading to a good faith conclusion of the existence of a zoom-climb.

Record 27 is an "eighteen-page CIA document dated March 1998, described by the agency as a '[d]raft report containing analysis and preliminary conclusions regarding further assessment of TWA Flight 800,' on the subject of "Dynamic Flight Simulation" (App. A at 33), written after release of CIA's animation. From its released headings that record undoubtedly purports to explain Flight 800's aerodynamics. But that impossibility is among numerous allegations that defendants did not dispute. "On this motion . . . Plaintiff's assertions have not been repudiated." App. B at 61. *See also id.* at 66: "In fact, Plaintiff's evidence suggests the 'zoom climb' theory is aerodynamically impossible." App. B at 66. Disclosure of the basis upon which the government allegedly relied would reveal false assumptions.

Similarly with the CIA's Record 28, *Analysis of Radar Tracking*. Not one of the dozen sets of Radar data is consistent with any scenario that included a zoom-climb. If this record reflects that Radar corroborates the zoom-climb hypothesis, it is false, and if it contradicts any zoom-climb, it is further evidence that defendant's zoom-climb was knowingly false. Thus, this "radar tracking" record would open up the inner workings of government to public scrutiny.

Record 43, the "Overview of the C.I.A.'s Analysis of Witness Statements," is said to "discuss[ ] the CIA's assessment of individual eyewitness reports," with "[h]andwritten comments and edits appear[ing] on each page." App. A. at 35. Given that the CIA never interviewed a single eyewitness, as well as the government's dissemination of scores of fabrications regarding eyewitness accounts, this record cannot reflect good faith deliberations regarding eyewitnesses' accounts, but, rather, reflects efforts to cover them up.

Like most of the CIA records at issue in the case, these three were generated after the animation's broadcast,[29] but still held to be "predecisional."[30]

Lahr also argued "government misconduct, crime, and fraud bars the application of Exemption

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[29] *See, e.g.,* Lahr's Excerpts, *Clarke Decl*., listing 23 contested CIA records, only 11 of which predate the broadcast of the CIA animation; *see also id*. at 558 ¶ 13, *Schulze Decl*.: "[N]o supporting aerodynamic calculations were begun until almost a year later [after broadcast of CIA animation]."

[30] The district court reasoned that "[t]he CIA video animation surely has the status of a final agency decision, but . . . the August 23, 2000 NTSB Aircraft Accident Report also is a final agency decision, and to the extent that it does not expressly incorporate the earlier CIA findings, further work on the matter after the November 17, 1997 broadcast would be predecisional." App. B at 111. Lahr argued that a document is predecisional when it is "received by the decisionmaker [sic] on the subject of the decision prior to the time the decision is made," *Sears,* 421 U.S. at 151.

5."[31] But, ruled the panel, "Lahr did not so argue in the district court, and so waived the issue." App. A at 27-28. "Lahr argues that we may nonetheless reach the question because it is purely one of law," but, "[h]ere, considering the issue for the first time on appeal would unfairly prejudice the government . . . Lahr did, of course, make general allegations of government misconduct in the district court, as his entire request is an attempt to prove a massive government conspiracy. But disproving the general, substantive allegations of misconduct is not the government's obligation in FOIA litigation." *Id*. Under this analysis, whether the government falsified its version of the disaster is irrelevant.

As these records purport to explain the impossible, Lahr has made a clear "allegation of a connection between these particular documents and government misconduct," contrary to the panel's reasoning. *Id*. at 29 n. 14.

The government did not deliberate the aircraft's post-initiating event flight trajectory. It deliberated how to cover it up.

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[31] App. A at 27-28: "*See In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government."

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN H. CLARKE
Counsel of Record
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 332-3030

Counsel for Petitioner