11-2511
12-1159

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 11-2511

IN RE: REQUEST FROM THE UNITED KINGDOM PURSUANT TO THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS IN THE MATTER OF DOLOURS PRICE

UNITED STATES,
Petitioner, Appellee,
v.
ED MOLONEY; ANTHONY McINTYRE,
Movants, Appellants.

No. 12-1159

ED MOLONEY; ANTHONY McINTYRE,
Plaintiffs, Appellants,
v.
ERIC H. HOLDER, JR., Attorney General;
JACK W. PIROZZOLO, Commissioner,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPELLANTS PETITION FOR PANEL REHEARING
OR REHEARING *EN BANC*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

I. INTRODUCTION

A rehearing or rehearing *en banc* should be granted in the consolidated appeals because the Panel's published decision *In Re Request From The United Kingdom Pursuant To The Treaty*, 11-2511 (1st Cir. 7-6-2012), 2012 WL 2628046, conflicts with the holding of the Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) in relation to the proper balance between freedom of the press and the public interest in the legal assistance of foreign law enforcement agencies. In this regard the decision also conflicts with the holding of this Court in *Cusumano v. Microsoft Corp.,* 162 F.3d 708, 714 (1st Cir. 1998). Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

This proceeding also involves a question of exceptional importance, namely, whether the public interest in the enforcement of discovery in support of a foreign criminal investigation precludes the assertion of a First Amendment right to the free flow of sensitive historical documents to the American public, as well as a claim to Fifth Amendment protection of oral historians and their confidantes against the deprivation of life, liberty or property, without due process of law.

The Panel recognized that this is a case of first impression with regard to the enforcement of the provisions of a Mutual Legal Assistance Treaty ("MLAT") in conjunction with 8 U.S.C. § 3512. Accordingly, a panel rehearing or rehearing *en banc* is warranted to establish a firm precedent.

It is respectfully submitted that the holding in *Branzburg* and its progeny does not accord with the Panel's proposition that "the fact that disclosure of the materials sought by a subpoena in criminal proceedings would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury." Furthermore, *Branzburg* at the very least engaged a "bad faith" provision, whereby journalists could invoke First Amendment

protection against subpoena powers to demonstrate bad faith on the part of the law enforcement authority. A consequence of the Panel's decision is that the Appellants have been deprived of any forum in which to challenge any bad faith acts on the part of the Attorney General and the requesting foreign law enforcement authority.

The Appellants submit that the Panel arrived at its decision from the starting point of the US-UK Mutual Legal Assistance Treaty ("US-UK MLAT"), which precludes a private right of action, but respectfully submit that this appeal should have been reviewed from the perspective of 8 U.S.C. § 3512, read in light of Federal Rules of Criminal Procedure Rule 17(c), which allows a district court to quash a subpoena which is "unreasonable or oppressive." If the Appellants have no means to demonstrate "unreasonableness," "oppression" or "bad faith" then domestic constitutional and statutory protections have been eviscerated by the language of a treaty, which by nature has never been subjected to full Congressional scrutiny. In this regard the decision conflicts directly with the holding of the Ninth Circuit in *In Re Search of the Premises Located*, 634 F.3d 557, 572 (9th Cir. 2011): "We therefore hold that, in the context of an MLAT request, a district court may not enforce a subpoena that would offend a constitutional guarantee."

II. ARGUMENT

A. *Branzburg* Did Not Exclude Review of a Legally Cognizable First Amendment Injury In These Circumstances.

Whereas the Panel determined that the Appellants had standing to assert their First Amendment objections to the government's subpoenas, it affirmed the denial of their right to be heard on those objections on the following grounds:

> "Our analysis is controlled by *Branzburg*, which held that the fact that disclosure of the materials sought by a subpoena in criminal proceedings would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury." *In re Request* *33.

However, *Branzburg* never has been interpreted to mean that members of the public - whether reporters, academics or "lonely pamphleteers" - have no right to be heard on whether or not the enforcement of a subpoena violates their First Amendment rights. To the contrary, as the *Branzburg* majority clearly stated:

> *Grand juries are subject to judicial control and subpoenas to motions to quash*. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth. *Branzburg v. Hayes*, 408 U.S. 665, 707-708 (1972). Emphasis added.

As explained by Powell J., whose concurrence was essential to the judgment:

> "Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id*. at 710 (Powell, J. concurring).

Accordingly, *Branzburg* simply rejected a constitutional privilege that would have provided a "virtually impenetrable constitutional shield, beyond legislative or judicial control," *id*. at 697, and which would have prevented reporters who were percipient witnesses to alleged crimes from appearing and answering "relevant and material questions asked during a good-faith grand jury investigation." *Id*. at 708. *Branzburg* did not hold, or even suggest, that all subpoenas are therefore immune from First Amendment review or that individuals have no right to be heard when they raise an objection to a subpoena on First Amendment grounds.1

1 Recent decisions more akin to *Branzburg* involved reporters who were witnesses to illegal conduct. *In Re Grand Jury Subpoena, Judith Miller,* 397 F.3d 964 (D.C. Cir. 2005), concerned a reporter for the New York Times who

The Panel's interpretation of *Branzburg* thus conflicts with a long line of Supreme Court cases which squarely hold that persons are entitled to assert First Amendment challenges to government efforts to compel the disclosure of information. Depending on the facts of the particular case, First Amendment protection from disclosure may be warranted. See, e.g., *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 243 (1957) (professor objected to answering legislative committee's questions on content of a lecture); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (subpoena of NAACP); *United States v. Rumley*, 345 U.S. 41 (1953) (seller of political books refused to disclose names of buyers); *DeGregory v. New Hamp. Atty. Gen.,* 383 U.S. 825 (1966) (individual subpoenaed as part of investigation of communists). See generally *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 468 n.5, 474 (2007) (First Amendment prohibits the government from employing a test requiring broad discovery of private citizens about their political activities); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (protecting anonymous leafletter);

None of foregoing cases – decided before and after *Branzburg* - involved any First Amendment "privilege" to refuse to testify. Yet in each case the Court heard from persons who claimed that compelled disclosure would infringe on protected First Amendment interests and, in each case, the Court validated the First Amendment claim. As the *Sweezy* Court stated when it reversed a contempt order based on a professor's refusal to testify about the content of a lecture he gave to 100 students (hardly a "confidential" communication):

> It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or

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was a witness to the crime of unlawful disclosure of a CIA agent's identity. James Taricani, the investigative reporter in *In Re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004) was provided with evidence by a defense lawyer, in violation of a protective order, who was being investigated for criminal contempt. The Appellants at bar did not bear witness to any criminal conduct at issue in the subpoenas.

> press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.

Id. at 245 (emphasis added). See also *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 545 (1963) ("The fact that the general scope of [an] inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information."). 2

In sum, the Panel opinion misread *Branzburg* as dictating the outcome in all cases in which a First Amendment objection is raised to a subpoena. *In re Request* *32, 33. *Branzburg* did not eliminate the right to be heard on a First Amendment objection to a government subpoena, nor did it relieve all courts of the obligation to consider and balance case-specific facts such as the true need for testimony, the resulting risk to people's lives, or the alternatives readily available to the government. The inquiry required is far more fact-sensitive, and requires that interested parties have the opportunity, denied here, to be heard. See generally *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 n.12 (1986) ("The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns.")

B. The Panel Foreclosed the "Bad Faith" Exception in *Branzburg*

The Panel noted that the *Branzburg* Court "left open . . . the prospect that in certain situations -- e.g., a showing of bad faith purpose to harass -- First Amendment protections might be invoked by the reporter." *In Re Request* *34 n22.

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2 *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), cited by the Panel, expressly reaffirmed the right of individuals to challenge subpoenas, and emphasized the obligations of courts to be sensitive to First Amendment interests when reviewing such claims. See 436 U.S. at 564-67; The Panel also relied on *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990), a case that considered whether a university enjoyed a special First Amendment privilege against disclosure of materials relevant to charges of racial or sexual discrimination in tenure decisions. As in *Branzburg* and *Zurcher*, the Court rejected a claim of special constitutional privilege and reaffirmed the right of persons to be heard in opposition to subpoenas that infringe on First Amendment interests; *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), cited by the Panel, upheld the right of a news source to assert state law claims for breach

Unfortunately, the Panel then closed the door on the *Branzburg* exception without due regard to its import.

With regard to the exception, the Panel simply found that "[t]his suit does not fall within that premise. There is no plausible claim here of a bad faith purpose to harass." Respectfully, whereas the Appellants do not make any claim that the purpose of the subpoenas was to "harass" the Appellants (although the information requested might certainly be utilized to harass their interviewees), the bad faith exception set forth in *Branzburg* is by no means limited to harassment, which the Supreme Court merely cites as an example.

The Appellants had raised credible claims of other bad faith acts and omissions of the Attorney General, and the foreign law enforcement agency for whom he sought to enforce discovery under the US-UK MLAT, which readily fit the *Branzburg* exception. The Panel partly acknowledged these objections. *In Re Request**17 n11. Not least in support of the exception was the Appellants argument that the purpose of the subpoenas was not the pursuit of a *bona fide* criminal investigation, and that in any event the foreign law enforcement authorities could obtain the information sought from less sensitive sources. See also Amicus Curiae Brief Of American Civil Liberties Union Of Massachusetts In Support Of Appellants ("ACLUM Brief") pp 13-18.

A broader reading of the bad faith exception also accords with the Appellee's position in *In Re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 971-972 (D.C. Cir. 2005):

> "Therefore, the United States contends, Justice Powell, who expressed no disagreement with the majority about the existence of a constitutional privilege, only emphasized that there would be First Amendment protection *in cases of bad faith investigations*." Emphasis added.

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of a pledge of confidentiality and therefore supports the right of the Appellants to be heard in this case.

The Appellants had raised allegations concerning the bad faith nature of the investigation under discussion of the *Intel* factors. See Case Number: 12-1159, Appellants' Brief, Document: 00116349671 at 42; ACLUM Brief, Document: 00116341265 at 20, 21. However, the Panel dismissed without analysis the Appellants' contention that the foreign investigation was not *bona fide*, and also Panel failed to address the Appellants' overarching argument that the information sought could readily be obtained from a less sensitive source. Accordingly, the Panel failed to determine if the Appellants' arguments fall within the *Branzburg* exception, which was the question framed by the lower court. See *U.S. v. Trustees of Boston College* (D.Mass. 12-16-2011) 831 F. Supp.2d 435, 453:

> "In sum, the First Circuit's balancing approach prevents compulsory disclosure of a reporter's confidential sources unless it is 'directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and . . . where the same information is readily available from a less sensitive source.'"

As the Appellants are precluded from review of the asserted bad faith acts or omissions of the Executive, and precluded from proffering any evidence of the availability of the same information from less sensitive sources, then the *Branzburg* exception is rendered meaningless in this context, and the Appellants are left without any forum in this country through which to challenge properly pleaded procedural abuse which intrudes on their First Amendment rights, and Fifth Amendment due process rights.

Justice Powell's concurring opinion in *Branzburg, supra,* further emphasized the limited nature of the Supreme Court's holding and expressly acknowledged the First Amendment interests at stake: "As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy." The Court stated that the "balance of these vital

constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."408 U.S. at 709-710.

In stark contrast, the Appellants here are left without any remedy, and the asserted bad faith acts of the Attorney General will not have been adjudicated on the facts, such that the balance between the free flow of information and the obligation to assist foreign law enforcement will not have been engaged.

In his concurring opinion, Torruella J. found that the majority had failed to recognize that "the First Amendment affords the Appellants 'a measure of protection . . . in order not to undermine their ability to gather and disseminate information.'" Torruella J reiterated this Circuit's holding in *Cusumano v. Microsoft Corp.,* 162 F.3d 708, 714 (1st Cir. 1998) with regard to the protection of academic research:

> "Confidentiality or anonymity, where prudent, naturally protects those who seek to collect or provide information. Accordingly, it is similarly well-settled that the First Amendment's protections will at times shield 'information gatherers and disseminators,' from others' attempts to reveal their identities, unveil their sources, or disclose the fruits of their work."

In examining the degree of protection to which the Appellants are entitled as academic researchers who "come within the scope of these protections, as recognized by this Circuit's settled law," Torruella J. determined that "balancing the interests on either side of such a request is both proper and essential." *Id.* at 43-44. Torruella J. nevertheless determined that "any such interest has been weighed and measured by the Supreme Court and found insufficient to overcome the government's paramount concerns in the present context." *In Re Request* *46.

With respect, such an interest cannot properly be measured by the preclusion of the *Branzburg* bad faith exception, and the Panel's ruling precludes interested parties from being heard and presenting evidence on those exceptional claims which the Supreme Court in *Branzburg* expressly held they had a right to assert. The

Appellants had made sufficient allegations for the pleading stage of the litigation, but were denied the opportunity to present supporting evidence.

C. Denying the Appellants the Right to Intervene Excluded Evidence Directly Relevant to the Enforceability of the Subpoenas.

The Panel rejected the appellant's personal safety concerns in a single sentence, reasoning that if safety concerns were insufficient to establish a privilege in *Branzburg*, they must also be insufficient here. *In Re Request* *38. Somewhat confusingly, the Panel found that the Appellants pleading "alleged…that enforcement of the subpoenas would violate Moloney and McIntyre's First and Fifth Amendment rights" (*id.* *12) dismissed the Fifth Amendment claim as not having been pled or briefed. *Id.* at *fn18.

The Appellants' Fifth Amendment claim has therefore been jettisoned in contravention of *Branzburg* admonition that "[w]e do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." 408 U.S. at 707-708.

The result is a decision-making process that excluded the only individuals before the court who (1) had direct contact with and personal knowledge of the sources at issue; and (2) access to witnesses and evidence capable of challenging the assertions of the government. The Appellants were denied the right to be heard on issues such as whether it was "reasonable to believe that a prosecution would take place in the underlying case," and whether "the crimes under investigation by the United Kingdom were 'of a political character." *In Re Request* * 17 n.11. Conclusory findings about the purpose of the subpoenas, or whether the subpoenas are based on the legitimate law enforcement needs, are not entitled to deference on appeal when the primary sources of contrary evidence were not allowed to be heard.

D. The Statute at 18 USC § 3512 Requires the Court to Implement the Reasonableness Standards at Fed. R. Crim. P. Rule 17(c)

The Appellants alleged that, in issuing the subpoenas, the Attorney General

could not simply invoke the provisions of the US-UK MLAT alone but had to rely upon the district court's discretionary authority under 18 U.S.C. §3512. The Appellants argued that this gives them the right, as interested parties whose interests are affected by the subpoena requests, to challenge the "reasonableness" of a subpoena request under Fed.R.Crim.P. Rule 17(c).

The Ninth Circuit in *In Re Search of the Premises Located*, 634 F.3d 557, 572 (9th Cir. 2011) clearly established that Federal Courts must consider constitutional challenges to the enforcement of an MLAT subpoena ("The enforcement of a subpoena is an exercise of judicial power… federal courts [must] be able to consider constitutional challenges to the action they are requested to compel, and to refrain from participating in action that would violate the constitution.")

In contrast, the Panel found that "the law enforcement interest here – a criminal investigation by a foreign sovereign advanced through treaty obligations -- is arguably even stronger than the government's interest in *Branzburg* itself. Two branches of the federal government, the Executive and the Senate, have expressly decided to assume these treaty obligations."

However, the Executive and Senate cannot oust constitutional protections. It must be left to the judiciary to provide the necessary oversight of the compliance of the United States with its treaty obligations when treaty functions touch upon constitutional safeguards. See *In Re Search, supra(* "The Constitution's separation of powers does not permit either the legislative or executive branch to convert the judicial branch into a mere functionary.")

Invoking Fed.R. Crim.P. Rule 17 (c), the Supreme Court in *United States v. R. Enterprises, Inc*., 498 U.S. 292, 299 (1991) found that even subpoenas issued in furtherance of grand jury proceedings are not without procedural safeguards:

> "The investigatory powers of the grand jury are nevertheless not unlimited…Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass."

In recognition of the difficulty for subpoena recipients in challenging the "reasonableness" of complying with a subpoena, the Supreme Court in that case found that the Government would carry at least a minimal evidentiary burden:

> "Consequently, a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion." *Id.* at 301.

In contrast, the Panel here has not addressed the scope of the District Court's discretion regarding the "reasonableness" of a subpoena, and instead determined that, with regard to an MLAT, the Government simply carries no burden whatsoever. Accordingly, the strictures of Fed. R. Crim. P. Rule 17(c) have been rendered redundant whenever a subpoena is issued pursuant to an MLAT request for legal assistance from a foreign government. This gives foreign law enforcement authorities greater powers than domestic agencies, a position which specifically flies in the face of the stipulation in the Agreement on Mutual Legal Assistance Between the United States of America and the European Union, U.S.-E.U., June 25, 2003, S. Treaty Doc. No. 109-13 ("US-EU MLAT") that "[t]he provisions of this Agreement shall not…*expand or limit rights otherwise available under domestic law*." US-EU MLAT, art. 3 ¶5 (emphasis added).

The Panel rejected the Appellants' "broader contention that the US-EU MLAT provides a basis for applying U.S. domestic law" as misplaced. *In Re Request* at 41 n.14. The Panel found that "[b]y its terms the provision applies only to the US-EU MLAT and not to any of the related bilateral agreements, such as the US-UK MLAT at issue in this case." This is erroneous as a matter of international law.

First, the Appellants point was that the US-UK MLAT cannot work an ouster of domestic law, and the US-EU MLAT is simply articulating the obvious. See also Treaty with the United Kingdom on Mutual Legal Assistance in Criminal Matters, S. Exec. Rep. No. 104-23, at p. 12: "The Committee believes that MLATs should not, however, be a source of information that is contrary to U.S. legal principles." Indeed, as the Panel recognized, the Government is compelled to pursue a subpoena request under domestic law at 18 USC § 3512.

Whereas the District Court did not consider itself to be bound by the Federal Rules of Criminal Procedure, it nevertheless held that "the Rules still inform the Court's standard for reasonableness." *U.S. v. Trustees of Boston College* (D.Mass. 12162011), 831 F. Supp.2d 435, 450.

Unfortunately, the Panel declined to consider whether the "reasonableness" standard at 17(c) was applicable to a request under 18 USC 3512. If that is the case, then for the reasonableness standard to have any meaning, the Appellants must have the opportunity to provide evidence of bad faith and abuse of process on the part of the Attorney General and foreign law enforcement agency.

The Supreme Court set forth the applicability of this standard in *United States v. Nixon*, 418 U.S. 683, 699-700 (1974):

> "A subpoena for documents may be quashed if their production would be 'unreasonable or oppressive,' but not otherwise... The leading case in this Court interpreting this standard is *Bowman Dairy Co. v. United States,* 341 U.S. 214 (1951). This case recognized certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases, id., at 220; (2) its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials,[fn11] *ibid*. As both parties agree, cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States v. Iozia*, 13 F.R.D. 335, 338 (SDNY 1952), as to the required showing. Under this test, in order to require production prior to trial, the moving

> party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'"

As discussed above, the Appellants allege that the subpoenas at issue fail on a number of these grounds, most notably because the documents are not relevant, are otherwise procurable from other sources, and that the application is not made in good faith.

In *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) Judge Posner, referring to the protections found at Fed.R.Crim.P. 17(c), proffered his own formula:

> "It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena *duces tecum* directed to the media, like any other subpoena *duces tecum*, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas."

In the case at bar, the Executive has successfully avoided the same scrutiny under which, as the Supreme Court cautioned in *Branzburg*, grand juries are expected to "operate within the limits of the First Amendment."

The Supreme Court in *United States v. R. Enterprises, Inc*., also stated that: "The Court of Appeals determined that the subpoenas did not satisfy Rule 17(c), and thus did not pass on the First Amendment issue. We express no view on this issue, and leave it to be resolved by the Court of Appeals." *Id.* at 303. Accordingly, there is clearly an expectation that this Circuit would also address the Appellants' First Amendment claims in light of 17(c). See also *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 709 (1986):

> "In every case, therefore, where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation.' *Schneider v. State*, 308 U.S. 147, 161 (1939)."

Respectfully, the reasonableness standard implied into the statute at 18 USC 3512 must be tested by a judicial review of the Attorney General's actions, regardless of the limiting language of the US-UK MLAT.

E. If The MLAT Standards Replace The Intel Standards, Then There Must Be A Means To Judicially Review Those Standards

The Panel found that the Appellants' reliance on *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), also failed. *In Re Request* fn.17. The Appellants had argued that the district court should have evaluated the subpoenas by applying the discretionary factors set forth in *Intel*, where the Supreme Court set out factors that bear consideration in ruling on a § 1782(a) request for the production of evidence for use in a foreign tribunal. 542 U.S. 241 at 264.

The Panel found that the Supreme Court "developed the *Intel* factors to apply to a situation where 28 U.S.C. § 1782(a) provided the only substantive standards for evaluating a request, but here such substantive standards are provided by the US-UK MLAT." Indeed, the Appellants had submitted that there was considerable overlap between the *Intel* standards and the MLAT standards.

However, the Panel's decision means that, unlike the *Intel* standards, the substantive standards provided by the US-UK MLAT are judicially meaningless, as they are not subject to challenge in any forum. What we are left with is the Attorney General's unfettered and unbridled discretion that has always been prohibited as a violation of due process.

III. CONCLUSION

For the foregoing reasons, the issues raised herein involve questions of exceptional importance based on points of law and fact which the Panel has overlooked and the Appellants respectfully request that the Honorable Court grant a panel rehearing or rehearing *en banc* to consider the issues raised by this petition.

Dated: August 20, 2012
Long Island City, New York

Respectfully submitted,

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/s/ Eamonn Dornan