ORAL ARGUMENT NOT YET SCHEDULED

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

Case No. 10-5372

IN RE CONTEMPT FINDING IN UNITED STATES v. STEVENS

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

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OPENING BRIEF OF APPELLANTS BRENDA K. MORRIS AND WILLIAM M. WELCH II

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June 29, 2011

CERTIFICATION AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellants Brenda K. Morris and William M. Welch II hereby certify as follows:

1. **Parties.** The parties who appeared in the District Court proceeding and who are parties in this Court are Brenda K. Morris and William M. Welch II. Patty Merkamp Stemler appeared in the District Court proceeding, but she is not a party in this Court. This Court appointed Professor Steven Goldblatt amicus curiae. There are no intervenors.

2. **Rulings under review.** The rulings under review are the contempt finding entered against Ms. Morris and Mr. Welch by United States District Judge Emmet G. Sullivan on February 13, 2009 in *United States v. Stevens*, No. 08-cr-231, J.A. 114-15, and the memorandum opinion and order entered by Judge Sullivan in *In re Contempt Finding in United States v. Stevens* on October 12, 2010, No. 09-mc-273, 744 F. Supp. 2d 253 (D.D.C. 2010), J.A. 133-58, 159. After entering the contempt finding in *Stevens*, the District Court opened a new, miscellaneous matter on June 2, 2009 for further proceedings on the contempt finding. *See In re Contempt Finding in United States v. Stevens,* No. 09-mc-273. The District Court's memorandum opinion and order in *In re Contempt Finding in United States v. Stevens* were entered on the miscellaneous docket,

(Dkt. Nos. 7-8), and posted on the *Stevens* docket as well. *See* No. 08-cr-231 (Dkt. Nos. 421-22).

3. **Related cases.** The contempt finding from which this appeal arises was entered during post-trial proceedings in *United States v. Stevens*, No. 08-cr-231. The government previously filed a petition for a writ of mandamus and an emergency motion for a stay of an order entered by the District Court on January 14, 2009 in *Stevens*. The government's appeal was initially captioned *In re Michael Mukasey*, No. 09-3005, but, following the change in presidential administration, was later re-captioned *In re Mark Filip*, No. 09-3005. This Court granted an administrative stay to consider the merits of the government's filings on January 18, 2009. *In re Michael Mukasey*, No. 09-3005 (Doc. No. 1159938). The government subsequently moved to withdraw its filings as moot, *In re Mark Filip*, No. 09-3005 (Doc. No. 1160980), and this Court granted the government's motion. *Id*. (Doc. No. 1161000).

Undersigned counsel are aware of no other related case currently pending before this Court or any other court.

Respectfully submitted,

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On November 10, 2010, Ms. Morris and Mr. Welch filed a timely Notice of Appeal, J.A. 384, from the District Court's October 12, 2010 order dismissing the contempt proceedings. J.A. 159. At the direction of the Court, Ms. Morris and Mr. Welch further address this Court's jurisdiction in Point I of the Argument, *infra*.

INTRODUCTION

The District Court held Ms. Morris and Mr. Welch in criminal contempt of court for the inadvertent failure to produce thirty-four documents that the government had intended to produce. The Court did not give Ms. Morris or Mr. Welch notice of its intent to hold them in contempt, an opportunity to defend themselves, or a hearing. The Court summarily found their conduct "outrageous"; it stated that it was "adjudicating" them in contempt and that it intended to impose sanctions at the conclusion of the case; and it did not vacate the finding of contempt after the government produced the thirty-four documents within hours of the hearing. It is no solace to Ms. Morris and Mr. Welch that the Court did not follow through with its stated intent to impose further sanctions or that it later characterized the contempt as civil, for they remain adjudicated contemnors. Without review by this Court, the personal and professional records of Ms. Morris

and Mr. Welch will forever include a conviction of criminal contempt. This appeal seeks a reversal of that adjudication.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction over this appeal, where the District Court's initial contempt finding specifically contemplated further proceedings, and where the District Court's subsequent rulings did not fully relieve Ms. Morris and Mr. Welch of the burdens imposed on them by the contempt finding.

2. Whether the District Court's order of February 13, 2009 was a finding of criminal contempt, where the court (1) used language indicating that its contempt finding was punitive, (2) stated that it would address additional sanctions in later proceedings, and (3) continued to hold Appellants in contempt after they immediately complied with the Court's order.

3. Whether the District Court erred in entering its finding without any of the procedures required for findings of criminal contempt.

STATEMENT OF THE CASE

Appellants Brenda Morris and William Welch are career prosecutors with the United States Department of Justice ("DOJ" or "Department"). Ms. Morris, then Principal Deputy Chief of the Department's Public Integrity Section ("PIN"), led the trial team in the prosecution of former Senator Theodore

Stevens. Ms. Morris was added to the trial team at the time Stevens was indicted. Mr. Welch was Chief of PIN and, with the Front Office of the Criminal Division, had oversight responsibility for management of the prosecution. During a post-trial hearing after the conviction of Senator Stevens, United States District Judge Emmet G. Sullivan summarily held Ms. Morris, Mr. Welch and two other Department attorneys in contempt of court. J.A. 114-15. The Court's stated basis was that the government had failed to produce to defense counsel thirty-four documents for which it had recently decided to waive work-product protection, but inadvertently did not actually produce by the time of the hearing. J.A. 114-15.

Upon holding Ms. Morris and Mr. Welch in contempt, the District Court announced its intent to hold further proceedings regarding sanctions at a later date. J.A. 114-15. The District Court memorialized its contempt finding in a written opinion in October 2010, which purported to resolve the open contempt issue. J.A. 133-58. Ms. Morris and Mr. Welch timely appealed the District Court's February 2009 contempt finding and its October 2010 ruling on November 10, 2010. J.A. 384.

STATEMENT OF FACTS

1. The Stevens Prosecution and the Joy Complaint

Approximately five weeks after the guilty verdicts in the *Stevens* prosecution, Chad Joy, an FBI Agent then assigned to the *Stevens* case, filed a

complaint with the FBI's Internal Inspection Division alleging misconduct by another FBI Agent and members of the *Stevens* prosecution team. The government notified the District Court and Stevens' defense counsel of Joy's complaint in a sealed memorandum on December 11, 2008. Dkt. No. 300.[1]

2. The January 21, 2009 Order and the Government's Response

On January 21, 2009, the District Court ordered the government to produce all communications to, from, or between anyone in PIN and any other office within DOJ regarding Joy's complaint. J.A. 207-08. The District Court further directed the government to file all responsive communications under seal, with a copy to defense counsel pursuant to the existing protective order in the case. J.A. 207-08.[2]

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[1] All references to the District Court docket are to the docket in No. 08-cr-231, unless otherwise indicated.

[2] This January 21 order followed a substantial amount of litigation over various issues relating to Joy's complaint, including (i) whether and in what form Joy's complaint should be disclosed to defense counsel and placed on the public docket; (ii) Joy's status as a whistleblower; and (iii) which DOJ officials should be required to respond to the Court's questions on the handling of Joy's complaint and how much time should be allowed for a response. It was the government's response to the January 21 order, however, that gave rise to the District Court's contempt finding.

The record reflects significant confusion regarding the distinct concepts of "whistleblower status" and "whistleblower protection." Although the distinction between these concepts has no bearing on the validity of the District Court's contempt finding, understanding it provides context for the order on which the contempt finding was based. The *Stevens* prosecution team initially believed that, in order to qualify for whistleblower "status," an employee was required to allege that he had suffered an unlawful reprisal as a result of having made a complaint. J.A. 232-34. After further consultation with DOJ experts on whistleblower matters, however, the prosecution team clarified that the term "whistleblower (continued…)

The government timely produced responsive communications and other materials *ex parte* and under seal. In a memorandum accompanying its submission, the government explained that it had interpreted the District Court's January 21 order and related statements preceding the order as requesting only communications about Joy's whistleblower status or his eligibility for whistleblower protection, as opposed to communications regarding Joy's complaint generally. J.A. 235-36.[3] The government further explained that, although the order directed it to produce all responsive communications to defense counsel, it was nonetheless making its submission *ex parte* because "compliance [with the order] would require the production of substantial amounts of privileged and work-product protected materials." J.A. 237. Citing these concerns, the government produced only a redacted copy of its memorandum to the defense. J.A. 237.

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status" — which does not appear in the FBI regulations or in the Whistleblower Protection Act — is simply a way of designating that an employee has made a protected disclosure. J.A. 226-28. After making a protected disclosure, the employee is entitled to "whistleblower protection," which includes both protection from unlawful reprisals and procedures for seeking relief in the event a reprisal occurs. J.A. 226-28. The confusion over these terms prompted the Court to inquire into DOJ's handling of Joy's complaint and his status as a whistleblower. J.A. 219-21.

[3] *See* J.A. 221 (explaining that "an accounting of communications with [PIN] regarding [ ] Joy's whistleblower status is necessary"); J.A. 179 ("I want to find out what — how the government handled this whole matter on whistleblower status.").)

3. The February 3, 2009 Order and the Government's Response

The *Stevens* defense team objected to the government's submission, contending that the government had failed to make a complete production and had violated the January 21 order by submitting responsive materials *ex parte*. J.A. 240-41. The defense accordingly moved to dismiss the indictment or for a new trial, or, in the alternative, to hold the government in contempt. J.A. 241.

On February 3, 2009, the District Court ordered the government to respond to the defense's motion to dismiss within a week. J.A. 256. The Court further directed the government to file a detailed privilege log for each communication it wished to withhold, as well as certain additional communications between Patty Merkamp Stemler, Chief of DOJ's Criminal Appellate Section, and officials in DOJ's Civil Division. J.A. 256. The District Court did not address whether the government's interpretation of the January 21 order — that the production was limited to communications regarding Joy's whistleblower status or eligibility for whistleblower protection — was correct. J.A. 259.

The government filed a memorandum and privilege log on February 9, 2009. In the memorandum, the government argued that the work-product doctrine shielded certain categories of responsive communications from disclosure. J.A. 260-61. The government identified approximately 200 such communications in individual entries on its privilege log. J.A. 278-300. For

thirty-four of the 200 documents, the entries on the privilege log were blank. J.A. 278-300. These entries reflected thirty-three emails and one letter. For the most part, these documents related to nonsubstantive topics such as times for meetings or telephone conferences. J.A. 301-38. The government stated in its responsive memorandum that "the government hereby waives any assertion of work-product protection that might otherwise apply to those documents for which no specific basis for privilege is provided." J.A. 301-38. Although the government expressly waived work-product protection for the thirty-four documents, it neglected to produce the documents to the defense.

4. The February 13, 2009 Status Hearing

On the afternoon of February 13, 2009, Ms. Morris, Mr. Welch, and PIN Attorney Kevin Driscoll appeared for the government at a status hearing. Ms. Stemler attended the hearing as well, sitting in the gallery. The Court recognized Mr. Driscoll as "a new member of the team," and Mr. Welch introduced Mr. Driscoll as the government's "work product expert." J.A. 108. Addressing Mr. Driscoll, the District Court clarified that — as the government had asserted in its filings — the January 21 order was directed to communications regarding Joy's whistleblower status or his eligibility for whistleblower protection. J.A. 111 ("Absolutely. Whistleblower status only. That's it.").

The District Court next asked if it correctly understood that there were "approximately 33 documents" as to which the government was not asserting work-product protection and had not yet been produced. J.A. 113. Mr. Driscoll acknowledged that these documents had not been produced and explained that the government had "relinquish[ed] the assertion of privilege with respect to them, and since we have done so, we will provide them to the defendant." J.A. 113. The Court then asked Mr. Driscoll whether there was any reason "why those documents have not been produced to date." J.A. 113-14. Mr. Driscoll responded that the government was waiting for clarification as to whether its interpretation of the January 21 order was correct. J.A. 114. The District Court responded that it "understood all that" and again asked Mr. Driscoll why the documents had not been produced. J.A. 114. Mr. Driscoll responded that there was "no reason" and that the documents would be produced "forthwith." J.A. 114.

The District Court thereupon held Mr. Driscoll, Ms. Morris, and Mr. Welch in contempt:

> [The January 21, 2009 order] was a court order. That wasn't a request. I didn't say do this out of the goodness of your heart. I said turn them over or invoke the privilege, and you're telling me there's no reason why they weren't turned over, so I'm holding the team of attorneys responsible for that in contempt of court and I'll deal with whatever sanctions are appropriate at the conclusion of this case. I want those documents turned over today before the close of business, and my interpretation of close of business is five o'clock.

J.A. 114-15.

Following this exchange, the District Court asked Mr. Driscoll whether there was anyone else it needed to include in its contempt finding. J.A. 115. Ms. Stemler, who was seated in the courtroom, identified herself as having signed the government's February 9 memorandum. J.A. 115. After a brief colloquy with Ms. Stemler and Mr. Driscoll, the District Court held Ms. Stemler in contempt as well. The Court then reiterated that:

> I'll deal with the sanctions associated with the [contempt] at a later date, but that's outrageous for the Department of Justice, the largest law firm on the planet, to come before a federal judge and say, yeah, Judge, you know, we recognized your order, we realized it and we just haven't gotten around to complying with it, and we really don't have a good faith reason or any reason for not having complied with it. That is not acceptable in this court and that's the reason why I'm adjudicating those attorneys in contempt.

J.A. 115-16.

The government produced the thirty-four documents by 4:48 p.m. that day, and the District Court acknowledged the government's compliance that evening. (Email from Hon. Emmet G. Sullivan to Marc A. Levin, Feb. 13, 2009.)[4]

[4] This email is not part of the record of the *Stevens* proceedings. Appellants have provided the email to amicus counsel and will make a copy available to the Court upon request.

The following day, the District Court *sua sponte* entered a minute order vacating its contempt finding as to Mr. Driscoll. J.A. 339. The District Court explained that Mr. Driscoll "did not sign the relevant pleadings, has not entered an appearance in this case, and appears to have been brought in by his supervisors for the limited purpose of addressing a discrete issue." J.A. 339. Although it vacated the contempt finding as to Mr. Driscoll, the District Court left the finding in place as to Ms. Morris, Mr. Welch and Ms. Stemler, notwithstanding the fact that the government had produced the thirty-four documents the previous afternoon. J.A. 339.

5. Subsequent Proceedings

Soon after the contempt findings, the government notified the District Court that it was producing all of the remaining documents on its privilege log, as well as certain additional materials, to the defense. J.A. 340-43. The government also informed the Court that a new team of DOJ attorneys would handle the case going forward. J.A. 339.

In April 2009, the government moved to dismiss the *Stevens* indictment after concluding that certain exculpatory evidence had not been disclosed to the defense. (Dkt. No. 324.) The District Court granted the motion. (Dkt. No. 372.) The Court also appointed Henry F. Schuelke III, a private Washington lawyer, to investigate "such criminal contempt proceedings as may be

appropriate" against six government attorneys, including Ms. Morris and Mr. Welch. J.A. 344.[5]

Notwithstanding its previous statement that it would "deal with whatever sanctions are appropriate at the conclusion of this case," the District Court did not revisit its February 13 contempt finding after dismissing the *Stevens* indictment. Thus, in June 2009, Ms. Stemler filed a motion to vacate the contempt finding as to her. J.A. 345-83.[6] The District Court opened a new, miscellaneous docket — *In re Contempt Finding in United States v. Stevens*, No. 09-mc-273 — for proceedings on Ms. Stemler's motion. On October 12, 2010, the District Court denied Ms. Stemler's motion to vacate the contempt order as to her. J.A. 159.

In denying Ms. Stemler's motion to vacate, the District Court made three pronouncements that affected not only the contempt finding against Ms. Stemler, but also the finding against Ms. Morris and Mr. Welch. First, the District Court declared that its contempt finding was civil in nature, and that the purpose of the finding was to compel the government to comply with the January 21, 2009 order. J.A. 137. Second, the District Court concluded that the government had purged the contempt when it produced the thirty-four documents

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[5] As of this filing, Mr. Schuelke's investigation is ongoing.

[6] Ms. Stemler had not been named by the District Court as a subject of the Schuelke investigation. J.A. 344.

immediately following the February 13, 2009 hearing. J.A. 135-36. Finally, the District Court explained that, in light of the government's compliance with its order, it did not believe that contempt sanctions were necessary or appropriate. J.A. 135-36. The District Court thus concluded that there was nothing left for it to do with respect to the contempt finding, and it therefore dismissed the miscellaneous case. J.A. 136.

STANDARD OF REVIEW

The three questions presented by this appeal are all subject to de novo review. First, this Court has "an independent obligation to determine jurisdiction de novo." *Waters v. Rumsfeld*, 320 F.3d 265, 271 (D.C. Cir. 2003) (citation omitted).

Second, whether the District Court's contempt finding is criminal or civil is a question of law that is subject to de novo review. *See, e.g.*, *Cobell v. Norton*, 334 F.3d 1128, 1145 (D.C. Cir. 2003) ("A contempt proceeding is either civil or criminal by virtue of its character and purpose, not by reason of the trial judge so denominating the proceeding."); *In re E.I. Dupont DeNemours & Company-Benlate Litig.*, 99 F.3d 363, 367 (11th Cir. 1996) (reviewing de novo a district court's characterization of its contempt finding); *United States v. Winter*, 70 F.3d 655, 660 (1st Cir. 1995) (same).

Third, whether the District Court erred in adjudicating Ms. Morris and Mr. Welch in contempt, without any of the procedures required for criminal contempt, is also subject to de novo review. *See United States v. Young*, 107 F.3d 903, 910 (D.C. Cir. 1997) ("We review de novo to determine whether procedures comported with the Due Process Clause and with Rule 42(b) [now subsection (a)] of the Federal Rules of Criminal Procedure.").

SUMMARY OF ARGUMENT

1. The Court has jurisdiction over this appeal. Although the District Court made its contempt finding on February 13, 2009, the finding did not become final and appealable until October 12, 2010. Appellants' notice of appeal was timely filed on November 10, 2010. And because the contempt finding is a criminal citation with potential collateral consequences for Ms. Morris and Mr. Welch, the District Court's October 12, 2010 opinion and order did not render it moot.

2. The District Court's February 13, 2009 order was a finding of criminal contempt for three reasons. First, the District Court stated that it intended to impose sanctions at a later date. Second, the alleged contempt was not purged by the government's compliance with the Court's January 21, 2009 order. The government produced the thirty-four documents on the very same day the contempt finding was issued, but the District Court did not lift the finding as to Ms. Morris

or Mr. Welch. Instead the Court continued to hold open the prospect of further sanctions. Third, the District Court penalized Ms. Morris and Mr. Welch by reprimanding them for what it characterized as "outrageous" behavior by the government.

3. Before it could hold Ms. Morris and Mr. Welch in criminal contempt, the District Court was required to provide Ms. Morris and Mr. Welch with the procedural protections guaranteed by Rule 42(a) of the Federal Rules of Criminal Procedure and the Constitution: notice; appointment of a prosecutor; an opportunity to prepare a defense; and a trial at which guilt must be proven beyond a reasonable doubt. It failed to provide any of those protections before holding Ms. Morris and Mr. Welch in criminal contempt. It is far too late to unwind the proceedings and remand for those protections now. The District Court's contempt finding therefore should be vacated.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

This Court's order of March 30, 2011 directed Appellants and the appointed amicus curiae to address whether the Court has jurisdiction over this appeal, including (i) whether Ms. Morris and Mr. Welch filed a timely notice of appeal from a final, appealable judgment, and (ii) whether the matter is moot in light of the District Court's memorandum opinion of October 12, 2010. The

answer to the first question is yes; the appeal was timely, because it was only in October 2010 that the Court issued a final, appealable order purporting to resolve the pending contempt finding and dismissing the case. The answer to the second question is no; the October 2010 opinion did nothing to "moot" the consequences of Ms. Morris and Mr. Welch having been adjudicated to be in criminal contempt.

A. The Appeal Was Timely.

The contempt finding from which this appeal arises was entered on February 13, 2009. It did not become final and appealable, however, until October 12, 2010.

In response to Ms. Stemler's motion to vacate the contempt finding, the District Court opened a new, miscellaneous matter for further proceedings in June 2009. *See In re Contempt Finding in United States v. Stevens*. J.A. 100-03. Sixteen months later, in October 2010, it declared that its earlier contempt finding was civil, that the government had purged the contempt on the same afternoon it was issued, and that additional sanctions were therefore unnecessary. J.A. 135-37. The District Court thus determined that there was "nothing more for [it] to do with respect to the contempt finding" and dismissed the case. J.A. 136. It was at this point — after it had finally ruled on the issue of sanctions and dismissed the case — that the District Court entered a final judgment that brings up the initial

contempt finding for review. Ms. Morris and Mr. Welch timely filed their notice of appeal on November 10, 2010. J.A. 384.

The February 2009 finding of contempt was not immediately appealable for two reasons. First, when it made the initial contempt finding, the District Court stated that there would be "further proceedings at the appropriate time" and that it would "deal with whatever sanctions are appropriate at the conclusion of this case." J.A. 114-15. An order that leaves sanction issues open for further proceedings is not a final, appealable order. *See Combs v. Ryan's Coal Co.*, 785 F.2d 970, 975-78 (11th Cir. 1986), *rehearing denied*, 791 F.2d 169 (11th Cir. 1986); 15B Charles Alan Wright, Arthur Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3917, at 377-79 (2d ed. 1991 & Supp. 2008) ("Finality, in short, requires determination of both liability and sanction . . . ") (citing cases).

Second, the District Court did not employ the requisite procedures before holding Ms. Morris and Mr. Welch in criminal contempt. When the requisite procedures are followed, "[c]riminal contempt judgments are immediately appealable pursuant to 28 U.S.C. § 1291 because they result from a separate and independent proceeding . . . and are not part of the original cause." *Cobell*, 334 F.3d at 1140 (quoting *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985)). This criminal contempt finding, however, was not the result of a separate and independent proceeding; indeed, there were no separate processes

attending it at all. The District Court failed to provide any of the requisite protections of the Constitution or Rule 42(a) of the Federal Rules of Criminal Procedure, which, as we explain below, is the core deficiency of its contempt finding. Because the separate processes guaranteed to criminal contemnors were not followed, the District Court's contempt finding was not immediately appealable when it issued. *See* 15B Wright, Miller & Cooper, *Federal Practice & Procedure* § 3917, at 392 (where district court summarily imposes a criminal contempt finding without following the requisite procedures, the failure by a party to appeal the contempt finding immediately "cannot defeat the right to review on appeal from a subsequent final judgment.") (citations omitted); *see also Southern Ry. Co. v. Lanham*, 403 F.2d 119, 125 (5th Cir. 1968); *Duell v. Duell*, 178 F.2d 683, 687-89 (D.C. Cir. 1949).

B. The Appeal Is Not Moot.

The District Court's October 2010 ruling does not moot this appeal. Ms. Morris and Mr. Welch have a justiciable interest in seeking to vacate the contempt finding, which will impose adverse collateral consequences on them as long as it remains outstanding.

It is both settled law and common sense that a criminal contempt finding may have collateral consequences, including, *inter alia*, potential "adverse career consequences" and "damage [to an attorney's] reputation in the legal

community." *United States v. Scrimsher*, 493 F.2d 842, 844 (5th Cir. 1974) (contempt finding not moot where "[o]pportunities for appointment to the bench or to other high office might be foreclosed"); *see also Richmond Black Police Officers Ass'n v. City of Richmond, Virginia*, 548 F.2d 123, 129 (4th Cir. 1977) (contempt finding not moot where "each of the appellants may possibly be subjected to collateral legal consequences"). A court "need not make a detailed inquiry into the actual existence of specific collateral consequences that may be presumed" to follow from a criminal contempt finding — the mere possibility is sufficient. *Wolfe v. Coleman*, 681 F.2d 1302, 1305 (11th Cir. 1982) (citation omitted); *cf. Sibron v. New York*, 392 U.S. 40, 57 (1968) (explaining that "a criminal case is moot only if it is shown *that there is no possibility* that any collateral consequences will be imposed") (emphasis added).

If not vacated by this Court, the District Court's improper contempt finding may adversely affect Ms. Morris and Mr. Welch's career advancement, their reputations as public servants, their disciplinary records in the jurisdictions in which they are admitted to practice, and their ability to be admitted either *pro hac vice* or permanently in other jurisdictions where they are not currently admitted. For example, applicants to the bar of the United States District Court for the District of Columbia must state whether they have "ever been held in contempt of court, and, if so, the nature of the contempt and the final disposition thereof."

United States District Court for the District of Columbia, L.Cv.R. 83.8(b)(4). In addition, membership to the bar of the District Court must be renewed every three years, L.Cv.R. 83.9, and the renewal form asks whether the applicant has been held in contempt since the last renewal. *See* http://www.dcd.uscourts.gov/dcd/sites/dcd/files/atty-renew.pdf. The Local Rules also require a member of the bar to notify the Clerk of Court when he or she is held in contempt. L.Cv.R. 83.15(b)(3). Upon receipt of such information, the Clerk is required to notify the Committee on Grievances, "which shall proceed in accordance with these rules." L.Cv.R. 83.15(d). Such rules are common in other jurisdictions.[7]

Thus, at a minimum, an adjudicated contemnor is subject to the potential of repeated investigation and possible denial of the ability to practice in various courts. Because an adjudication of criminal contempt plainly can have potential adverse consequences for an attorney, this appeal presents a live case or controversy in which Ms. Morris and Mr. Welch have a concrete and justiciable interest.

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[7] *See*, *e.g.*, United States District Court for the Eastern District of Michigan, L.Cv.R. 83.20(c)(2); United States District Court for the Eastern District of New York, L.Cv.R. 1.3(a); United States District Court for the Southern District of New York, L.Cv.R. 1.3(a); United States District Court for the Middle District of Pennsylvania, Petition for Special Admission, *available at* www.pamd.uscourts.gov/docs/admission.pdf; ABA Model Rule on *Pro Hac Vice* Admission.

II. THE DISTRICT COURT'S CONTEMPT FINDING WAS CRIMINAL, PROCEDURALLY IMPROPER, AND SHOULD BE VACATED.

A. The District Court Held Ms. Morris and Mr. Welch In Criminal Contempt.

The question whether a contempt finding is civil or criminal depends on the "character and purpose of the sanction involved." *Int'l Union, United Mineworkers v. Bagwell*, 512 U.S. 821, 827 (1994) (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)). A civil contempt finding is "imposed to compel compliance with an order the Court." *Cobell*, 334 F.3d at 1145 (citation omitted). Thus, a civil contemnor "is able to purge the contempt . . . by committing an affirmative act." *Bagwell*, 512 U.S. at 828. Criminal contempt, by contrast, is "used to punish, that is, to vindicate the authority of a court following a transgression rather than to compel future compliance." *Cobell*, 334 F.3d at 1145 (citation omitted). Accordingly, a criminal contemnor "cannot avoid or abbreviate the penalty through later compliance." *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 438 (D.C. Cir. 2010) (internal citations omitted). The District Court's actions and statements in February 2009 show that the Court's contempt finding was criminal, not civil, in nature and effect.

1. The Contempt Finding Was Not Coercive.

At no point during the February 13 hearing, or at any other time prior to its October 2010 opinion, did the District Court state or suggest that compliance

by the government would be adequate to purge the contempt. In fact, the District Court stated otherwise: before directing the government to produce the thirty-four documents by the end of the same day, the District Court stated that there would be "further proceedings at the appropriate time" and that it would "deal with whatever sanctions are appropriate at the end of this case," regardless of whether the government complied with its order by the specified deadline. J.A. 114. The Court's stated intention to impose sanctions at a later date should be dispositive of the criminal nature of the contempt.

Later events further confirm that the contempt finding was criminal in nature. The government complied with the District Court's order within hours of its issuance, and the District Court acknowledged the government's compliance that same evening. (Email from Hon. Emmet G. Sullivan to Marc A. Levin, Feb. 13, 2009.) The following day, the District Court lifted its contempt finding as to Mr. Driscoll for reasons unrelated to the government's compliance. J.A. 339. But despite having acknowledged the night before that the government had complied with the January 21 order, the District Court left Ms. Morris, Mr. Welch, and Ms. Stemler in contempt — after the allegedly contumacious conduct had been fully purged. J.A. 339. This removed any doubt that the contempt finding was punitive — and therefore criminal — in nature.

In its later opinion denying Ms. Stemler's motion to vacate, the District Court declared that its contempt finding was civil in nature. J.A. 137.[8] It stated that the purpose of the finding was "to compel the government to comply with its January 21, 2009 order[,]" and that, during the February 13, 2009 hearing, the Court "set forth the means by which the [government] attorneys could purge themselves of contempt" by directing the government to produce the thirty-four nonsubstantive documents to defense counsel by close of business on the date of the hearing. J.A. 149. But if the contempt finding were really civil — as the District Court now characterizes it, long after the fact — the District Court would have lifted the finding not only as to Mr. Driscoll, but also as to Ms. Morris, Mr. Welch, and Ms. Stemler, when the government produced the thirty-four documents on the afternoon of February 13. Yet the District Court did not do so. Its *post hoc* assertion in October 2010 that the February 2009 contempt finding was

[8] The District Court assumed, incorrectly, that Ms. Stemler agreed with its position. J.A. 136-37. In her motion to vacate, however, Ms. Stemler argued forcefully that the purpose of the contempt finding was to admonish or reprimand the government for "its perceived disregard of the court's authority." J.A. 362-67. Thus, Ms. Stemler, like Ms. Morris and Mr. Welch here, asserted that the contempt finding was criminal, not civil, and that the district court had entered the finding without employing any of the procedures required by Federal Rule of Criminal Procedure 42(a). J.A. 365-66.

civil in nature does not transform that February 2009 finding into something it was not at the time.[9]

2. The District Court's Reprimand of Appellants Constituted Criminal Contempt.

In discerning whether a contempt finding is intended to serve as punishment for past acts, the language the trial court uses in finding a party in contempt is highly relevant. Here, the District Court's reprimand of the government indicates criminal contempt.

This Court has recognized that a district court may "impose a reprimand as the sole sanction for an adjudication of contempt, particularly where the contemnor is a public official acting in his or her official capacity." *Cobell*, 334 F.3d at 1146. In *Cobell*, for example, the District Court held the Secretary and Assistant Secretary of the Interior in civil contempt for what the Court

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[9] Furthermore, to the extent the contempt finding can be characterized as civil — which it cannot — it was not the type of "purely coercive" citation that may later be rendered moot through compliance with an underlying order. *See In re Grand Jury Subpoena Duces Tecum*, 955 F.2d 670, 672 (11th Cir. 1992) ("In the context of purely coercive civil contempt, a contemnor's compliance with the underlying order moots the contemnor's ability to challenge his contempt adjudication."). The District Court left the contempt finding in place, and expressly held open the possibility of sanctions, for nearly 20 months *after* the government complied with its January 21, 2009 order. Thus, even assuming that the contempt finding had civil characteristics, it was in no way "purely coercive." At most, it was a partially punitive contempt order, and therefore a criminal contempt order. *See, e.g., Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983) (where a contempt order contains a mixture of criminal and civil elements, "the criminal aspect of the order fixes its character for purposes of procedure on review.") (citing *Penfield Co. of California v. S.E.C.*, 330 U.S. 585, 591 (1947)).

characterized as "litigation misconduct" and four instances of "fraud on the court." *Id*. at 1146. At the time it entered the contempt finding, the District Court called the Interior Department "an embarrassment to the federal government," noted that it was "saddened and disgusted by the [D]epartment's intransigence," and stated that the Secretary and Assistant Secretary could "now rightfully take their place . . . in the pantheon of unfit trustee-delegates." *Id*. at 1136.

This Court vacated the contempt finding on appeal, concluding that despite the District Court's characterization, its contempt finding was criminal, not civil. This Court explained that the trial court used "exceedingly strong words" in finding the defendants in contempt, suggesting that it intended the finding as a reprimand. *Id*. at 1146. Thus, this Court concluded that, because "the District Court clearly intended to punish the defendants," and because its opinion lacked "any suggestion that the defendants could yet comply [with the order] and thereby purge themselves of the contempt," the contempt finding was "criminal rather than civil[.]" *Id* at 1147.[10]

[10] As noted above, *supra*, at 17-19, the imposition of a reprimand did not render the February 2009 contempt finding immediately appealable because the district court (1) left open the issue of additional sanctions, and (2) made the finding of criminal contempt without following the requisite procedures.

Here, as in *Cobell*, the District Court clearly reprimanded Ms. Morris and Mr. Welch for failing to comply with the January 21, 2009 order, and did so in comparably strong language:

> I'll deal with the sanctions associated with the [contempt] at a later date, but that's outrageous for the Department of Justice, the largest law firm on this planet, to come before a federal judge and say, yeah, Judge, we recognized your order, we realized it and we haven't gotten around to complying with it, and we really don't have a good faith reason for not having complied with it. *That is not acceptable in this court and that's the reason why I'm adjudicating those attorneys in contempt.*

J.A. 116 (emphasis added).

The District Court "adjudicat[ed]" Ms. Morris and Mr. Welch in contempt because it believed that their purported failure to comply with the January 21, 2009 order was "outrageous" and "not acceptable." Those comments are the hallmarks of a punitive contempt order. As this Court has explained, "[i]n the civil contempt setting, the [district] court has no independent interest in vindicating its authority should its orders be violated." *Washington Metro. Area Transit Auth. v. Amalgamated Transit Union*, 531 F.2d 617, 622 (D.C. Cir. 1976). Vindicating a perceived affront to its authority, however, was precisely the District Court's purpose in holding Ms. Morris and Mr. Welch in contempt. Thus, as in

Cobell, the contempt finding here was unmistakably punitive — and therefore criminal — in nature.[11]

B. The District Court Held Ms. Morris And Mr. Welch In Criminal Contempt Without Affording Them The Requisite Procedures.

A person alleged to have committed criminal contempt is entitled to the processes attending any other criminal proceeding: notice; the appointment of a prosecutor; and a trial. *See* Fed. R. Crim. P. 42(a).[12] Further, because "[c]riminal contempt is a crime in the ordinary sense, . . . criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Bagwell*, 512 U.S. at 826 (citations and internal quotation omitted).

The District Court failed to employ those procedures, however, before finding Ms. Morris and Mr. Welch in contempt. It did not provide notice; it did

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[11] To the extent the contempt finding was civil, as the District Court asserted in its October 12, 2010 opinion and order, the District Court abused its discretion by entering the finding on the record before it. As noted above, Ms. Morris and Mr. Welch were held in contempt for failing to ensure the timely production of thirty-four nonsubstantive documents to the defense. Considered in light of the government's broader efforts to comply with the January 21, 2009 order, its failure to produce the thirty-four documents was a regrettable oversight, but insufficient to warrant a finding of contempt.

[12] Federal Rule of Criminal Procedure 42(b) provides that a district court may "summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies." Fed. R. Crim. P. 42(b). That provision does not apply here, where the allegedly contumacious conduct was failure to comply with a discovery order that occurred outside the District Court's presence. *See Bagwell*, 512 U.S. at 833 ("failure to comply with document discovery … occur[s] outside the court's presence.").

not appoint a prosecutor; and it did not conduct a trial. Instead, the District Court summarily concluded, after learning that the government had failed to produce the thirty-four documents, that Ms. Morris, Mr. Welch, and their colleagues were in contempt. The District Court's contempt finding was procedurally improper and therefore should be vacated.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the District Court's adjudication that Ms. Morris and Mr. Welch were in contempt of Court on February 13, 2009.

Respectfully submitted,

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June 29, 2011

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,361 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2011, I electronically filed the foregoing Opening Brief of Appellants Brenda K. Morris and William M. Welch II with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the registered CM/ECF users listed below:

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I further certify that, pursuant to D.C. Circuit Rules 25 and 31, eight (8) paper copies of the Opening Brief of Appellants were hand-delivered to the Clerk of the Court.

Dated: June 29, 2011

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