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July 28, 2006

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Client No.

The Honorable William Alsup
450 Golden Gate Avenue
Courtroom 9, 19th Floor
San Francisco, CA 94102

Re: *In re Grand Jury Subpoena, dated Feb. 1, 2006*
Joshua Wolf, Subpoenaed Party
U.S.D.C., Northern District of California
Case No. CR 06-90064 WHA

Dear Judge Alsup:

I understand that this Court, in connection with contempt proceedings relating to a Grand Jury subpoena seeking unpublished news material from Joshua Wolf, is addressing the issue of whether there exists a reporter's privilege under the First Amendment and federal common law. On behalf of the Reporters Committee for Freedom of the Press ("Reporters Committee"), as *amicus curiae*, I respectfully request leave to submit this letter brief to address the federal common law reporter's privilege.

The Reporters Committee is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The association has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. In particular, the Reporters Committee has briefed the issue of the reporter's privilege many times, including submitting an amicus brief in the CIA leak investigation case focusing on the federal common law analysis. *See In re Grand Jury Subpoena to Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied* __ U.S. __, 125 S.Ct. 2977 (2005); *id.* at 993-95 (Tatel, J., concurring) (agreeing that a federal common law privilege exists).

While the Reporters Committee strongly believes that the First Amendment requires recognition of a reporter's privilege, this letter focuses on the question whether there exists a

common law privilege under Fed. R. Evid. 501, as interpreted in *Jaffee v. Redmond*, 518 U.S. 1 (1996). As shown below, the answer is yes. The common law approach allows courts to adopt a rule that both protects First Amendment interests and vindicates the policy interests of the Federal Rules of Evidence.

This letter addresses two issues. First, the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the post-*Branzburg* mandate of Fed. R. Evid. 501 to develop common law privileges. Second, the Supreme Court's decision in *Jaffee* compels recognition of a reporter's privilege under Rule 501.

1. *Branzburg* does not address common law privileges under Rule 501

Branzburg, the sole Supreme Court decision to address the reporter's privilege, dealt exclusively with First Amendment issues. *Branzburg* of course analyzed the law as it existed in 1972, rather than the law as it exists today. In refusing to recognize a reporter's privilege that protected the reporters in that case from having to testify before a grand jury, the Court emphasized that at that time neither a majority of the states nor the federal government had found it necessary to enact a reporter's privilege. However, in language that presaged Rule 501, the *Branzburg* Court also observed that "[a]t the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Id.* at 706.

After the decision in *Branzburg*, Congress enacted Rule 501 of the Federal Rules of Evidence, explicitly for the purpose of directing federal courts to develop common law privileges in an "evolutionary" process in light of statutes, judicial decisions and policies. *Jaffee*, 518 U.S. at 9. Rather than enacting a series of specific federal privileges that could only be expanded or contracted by further legislation—the scheme that the Court seemed to anticipate in *Branzburg*—Congress provided that, where federal law applies, privileges are governed by "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.

As the Court observed in *Jaffee*: "'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.'" *Id.* at 8 (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)). Congress, in promulgating Rule 501, "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Id.* at 8-9 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

The landscape has changed dramatically since 1972—Congress enacted Rule 501 and an overwhelming majority of U.S. jurisdictions have now adopted a reporter's privilege through statute, judicial decision, or both. The existence of a common law privilege under Rule 501 must be considered in that light.

2. *Jaffee* requires recognition of a reporter's privilege under Rule 501

The Supreme Court's analysis in *Jaffee* mandates recognition of a common law reporter's privilege. The Court in *Jaffee* held that the development of a privilege under Rule 501 is justified if it "'promotes sufficiently important interests to outweigh the need for probative evidence.'" *Id.* at 9-10 (quoting *Trammel*, 445 U.S. at 51). In its 7-2 decision in *Jaffee*, the Supreme Court for the first time recognized as a matter of federal common law a psychotherapist-patient privilege under Rule 501. The Court articulated three factors to decide whether particular privileges should be recognized: (1) whether the proposed privilege serves significant public and private interests, (2) whether recognition of those interests outweighs the burden on truth-seeking that might be imposed by the privilege, and (3) whether such a privilege is widely recognized by the states.

The Court emphasized that a confidential psychotherapist-patient relationship serves important private and public interests. It serves important private interests insofar as it protects the interests of particular patients who might not seek treatment absent an assurance of confidentiality or who might be embarrassed or disgraced in the event confidential communications were disclosed. *Id.* at 10-11. And it serves a significant public interest insofar as it might maintain "[t]he mental health of our citizenry." *Id.* at 11. The Court held that these interests outweighed the need for probative evidence that might be produced absent the privilege. The Court found that "the likely evidentiary benefit that would result from the denial of the privilege is modest" because in the absence of a privilege there likely would be fewer confidential communications and thus less of the very evidence at issue. *Id.* at 11-12.

Finally, the Court emphasized the consensus among the states regarding recognition of a psychotherapist-patient privilege in one form or another. "[T]he policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing [privilege]," because "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Id.* at 13. Furthermore, where there is such a consensus, the Court concluded, the federal courts' failure to recognize a privilege would "frustrate the purposes of the state legislation that was enacted" to meet the goals of the privilege. *Id.*

All three *Jaffee* factors weigh strongly in favor of a federal common law reporter's privilege. First, the reporter's privilege is overwhelmingly recognized by the states, as forty-nine states, as well as the District of Columbia, have now recognized a reporter's privilege. Thirty-two of these states and the District of Columbia have done so by enacting statutes, commonly

referred to as "shield laws." *See, e.g.*, Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070 (2006).[1] The remainder have done so by judicial decision. *See In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 993-94 (Tatel, J., concurring). "[T]he existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee*, 518 U.S. at 13. *Jaffee* further recognized that because "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court," the "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." 518 U.S. at 13 (footnote omitted). So too here: any state's creation of a reporter's privilege has little value if the federal courts do not also honor the privilege.

This factor applies to directly to Mr. Wolf's case. Had Mr. Wolf been subpoenaed in state court, California's shield law would unquestionably protect him from divulging his unpublished material. *See* Cal. Const. art. I, § 2(b).[2]

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[1] *See also* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300 *et seq.*; Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101 *et seq.*; Del. Code. Ann. tit. 10, §§ 4320, *et seq.*; D.C. Code Ann. §§ 16-4701 *et seq.*; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. 5/8-901 *et seq.*; Ind. Code § 34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-55; Md. Code Ann. Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws § 767.5a; Minn. Stat. §§ 595.021 *et seq.*; Mont. Code Ann. §§ 26-1-901 *et seq.*; Neb. Rev. Stat. §§ 20-144 *et seq.*; Nev. Rev. Stat. Ann. § 49.275; N.J. Stat. Ann. §§ 2A:84A-21 *et seq.*; N.M. Stat. Ann. § 38-6-7; N.M. R. Evid. 11-514; N.Y. Civ. Rights Law § 79-h; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code. Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510 *et seq*; 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws §§ 9-19.1-1 *et seq.*; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208. Connecticut also passed a shield law in June of this year. *See* H.B. 5212, "An Act Concerning Freedom of the Press," Gen. Assem., Reg. Sess. (Conn. 2006), *available at* http://cga.ct.gov/2006/ACT/PA/2006PA-00140-R00HB-05212-PA.htm.

[2] "(b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any *unpublished information* obtained or prepared in gathering, receiving or processing of information for communication to the public." See also Cal. Evid. Code § 1070(b).

Second, freedom of the press furthers "a public good of transcendent importance." *Jaffee*, 518 U.S. at 11. It was established "not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). As the Supreme Court has recognized, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). Throughout the nation's history, confidential communications to journalists have resulted in news stories of the greatest public importance, with Watergate perhaps the most famous example. While the D.C. Circuit did not resolve the issue in *In re Grand Jury Subpoena to Judith Miller*, Judge Tatel correctly observed the consequences that denial of the privilege would bring:

> If litigants and investigators could easily discover journalists' sources, the press's truth-seeking function would be severely impaired. Reporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner first-hand information about the criminal underworld. Such valuable endeavors would be all but impossible, for just as mental patients who fear "embarrassment or disgrace," will "surely be chilled" in seeking therapy, so will sources who fear identification avoid revealing information that could get them in trouble.

397 F.3d at 991 (Tatel, J., concurring) (citations omitted).

The protection of unpublished information obtained or created by journalists during the course of newsgathering, or information relating to the editorial process, also serves the public interest. A chief facet of the press's constitutional role is to gather information; and compelling reporters to release unpublished material risks making them an arm of the prosecution and chilling their newsgathering function. "To compel the production of a reporter's resource materials . . . can no doubt constitute a significant intrusion into and, certainly, a chilling effect upon the newsgathering and editorial processes." *Maughan v. NL Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981). The Third Circuit has put it this way:

> The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege.

United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (citations omitted). Likewise, as the Ninth Circuit expressly noted in discussing the basis for the First Amendment-based reporters' privilege, "the compelled disclosure of non-confidential information harms the press' ability to gather information 'by converting the press in the public's mind into an investigative arm of prosecutors and the courts . . . . If perceived as an adjunct of the police or the courts, journalists might well be shunned by persons who might otherwise give them information without a promise of confidentiality.'" *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (quoting Duane D. Morse & John W. Zucker, *The Journalist's Privilege* in *Testimonial Privileges* 474-75 (Scott N. Stone & Ronald S. Liebman eds., 1983)) (emphasis added). In short, reason and experience demonstrate that the public and private interests at stake here are even more powerful than those in *Jaffee*.

Third, these interests outweigh any likely evidentiary benefits that would result from denial of the privilege, as the Supreme Court has found with regard to other privileges. *See Jaffee*, 518 U.S. at 11-12 (psychotherapist privilege); *Swidler & Berlin v. United States*, 524 U.S. 399, 407-08 (1998) (attorney-client privilege). Given the amount of "evidence" that is "unlikely to come into being" absent a reporter's privilege, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Jaffee*, 518 U.S. at 11, 24. The federal district court in *New York Times Co. v. Gonzales* concluded precisely that in applying a qualified privilege under *both* the First Amendment and federal common law to preclude government agents from seizing telephone records of Judith Miller and another New York Times reporter:

> The balance of the private and public interests that would be served by the asserted privilege, when weighed against the modest evidentiary benefit that rejection of the privilege would likely achieve, demonstrates that the recognition of a reporter's privilege under Rule 501 is appropriate here.

382 F. Supp. 2d 457, 501 (S.D.N.Y. 2005) (appeal pending). The court adopted the rationale of *Jaffee*, noting that potential confidential sources faced with the threat of compelled disclosure will likely choose to remain silent. *Id.* In reaching its conclusion, the court noted the extensive state and federal authority for recognizing a federal common law privilege. *Id.* at 494, 502. "The case for recognizing a particular federal privilege is stronger . . . where the information sought is protected by a state privilege." *Id.* at 494-495 (quoting *Pearson v. Miller*, 211 F.3d 57, 67 (3d Cir. 2000)).

For all these reasons, a federal common law reporter's privilege exists that at the very least requires a showing that, before journalists may be compelled to disclose unpublished materials, there must be a showing that the information is crucial to the inquiry and unavailable from other sources, and that the need for disclosure outweighs the public interest in the free flow

of information through the dissemination of news. *See In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 999-1000 (Tatel, J., concurring).[3]

The government's only response to the weight of authority supporting a federal common law privilege is to cite the Ninth Circuit case of *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir. 1993). *Scarce*, however, dealt not with the reporter's privilege, but with the existence of a common law "scholar's privilege" under Rule 501. The case also predated *Jaffee* and therefore did not consider the factors that *Jaffee* put forth for establishing common law privileges under Rule 501. As noted above, in the modern context of overwhelming state support for the privilege, those factors support conclusively the establishment of the federal common law privilege.

Accordingly, the Reporters Committee strongly urges this Court to recognize the federal common law reporter's privilege and consider its application to the subpoena of Mr. Wolf's unpublished news materials.

Respectfully submitted,

Theodore J. Boutrous, Jr.

TJB/jaa

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[3] The privilege should apply to Internet journalists, engaged in "the gathering and dissemination of news," *O'Grady v. Superior Court* (Apple Computer, Inc., Real Party in Interest), 139 Cal. App. 4th 1423, 1458-59, 1466 (2006) (holding that Internet publisher could not be compelled to produce unpublished material under subpoena).

CERTIFICATE OF SERVICE

I, Suzanne Maruschak, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is One Montgomery Street, 31st Floor, San Francisco, California 94104, in said County and State; I am employed by Gibson, Dunn & Crutcher and am currently working with Amanda M. Rose, a member of the bar of this Court, and at her direction, on **July 28, 2006**, I served the within:

LETTER BRIEF OF AMICUS CURIAE

by placing a true copy thereof in an envelope addressed to the person named below at the address shown:

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☑ **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Certificate of Service was executed by me on **July 28, 2006**, at San Francisco, California.

Suzanne Maruschak

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