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JOSHUA WOLF

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re GRAND JURY SUBPOENA dated February 1, 2006 and June 8, 2006 JOSHUA WOLF, Subpoenaed Party.	**No. CR 06-90064 MISC MMC** **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF SUBPOENAED PARTY'S ANSWER TO ORDER TO SHOW CAUSE RE CIVIL CONTEMPT** **Date: August 1, 2006** **Time: 9:00 a.m.** **Judge: William H. Alsup**

I. INTRODUCTION

Fifth Amendment Issue

The first preliminary question is whether the government will grant Joshua Wolf ("Wolf") immunity. On July 20, 2006, the Court made a finding that Wolf had made a showing of a legitimate fear of prosecution and the government needed to decide if it

would grant immunity[1]. (Question 1 to United States' Reply To Subpoenaed Party's Answer To Order To Show Cause Re Civil Contempt, hereinafter, "Gov't Resp.", at 1:28). The Court authorized further briefing on the issue of the impact of a grant of federal immunity on potential state prosecution. (Criminal Minutes, Judge William Alsup, July 20, 2006, hereinafter, "Crt. Min. Order", 2:3. Wolf agrees that a grant of use and derivative use immunity by the government may protect him from state prosecution under the 14th Amendment to the United States Constitution. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) Although not required by the Crt. Min.Order, Wolf agrees that the act of production doctrine is encompassed within a grant of immunity and an order of immunity. Because the government has not granted immunity to Wolf, as of the filing of this Reply, Wolf moves the Court to dismiss with prejudice the OSC Re Civil Contempt on the basis of the Fifth Amendment privilege against self incrimination. In the alternative, if the government moves for an order of use and derivative use immunity at or before the August 1, 2006 hearing, and the Court grants the immunity, Wolf requests to appear before the grand jury.

First Amendment Issue

The Court ordered further briefing on the First Amendment privilege. Wolf will endeavor to reply to the government's responses and will try to avoid making arguments likely to duplicate the contents of the Brief of Amicus Curiae ACLU in Support of Joshua

[1] The transcripts of July 20, 2006, have been ordered but will not be ready until 3 p.m. on July 31, 2006, in order to cite the exact language.

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Wolf's Answer To OSC Re: Contempt (here after, (ACLU Brief") filed on July 27, 2006.[2]

The question that is before the Court in this civil contempt hearing is whether the Court is going to balance the public interest in newsgathering and editorial process of Joshua Wolf, measured by the value of a journalist performing the vital role of covering anarchist and anti-war groups, the harm caused and to be caused on journalists who perform the vital role of covering anarchist and anti-war groups, the harm caused by circumventing the California Shield Law, and the lack of legitimate federal law enforcement interest, against the public interest in compelled disclosure by the Joint Terrorist Task Force, measured by the harm to the SFPD criminal investigation. In a nutshell, the question is whether the newsgathering and editorial process of Wolf has caused more harm than good.

The government's response to the question of balancing the dueling public interest centers on a rigid reliance of the preclusive effect of the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) and the 9th Circuit's decision in *In re Grand Proceedings (Scare v. United States)*, 5 F.3d 397 (9th Cir. 1993) while ignoring the fact that Fed.R.Evid. 501 was enacted three years after *Branzburg* and *Jaffe v. Redmond*, 518 U.S. 1 (1996) was decided three years after *Scare.* Gov't Resp. 6-7:20-7

Wolf submits that a proper legal analysis on whether the court should balance the interest starts with a proper reading of *Branzburg's* limited ruling that no absolute First Amendment reporter's privilege exist. Fed.R.Evid. 501 enacted three years after

[2] Attorney for Joshua Wolf would like to acknowledge that the legal analysis in this brief is part and parcel of the legal analysis in the pleadings filed on behalf of the Movants in *In re Grand Jury Subpoenas To Mark Fainaru-Wada and Lance Williams,* No. CR-06-90225 (continued...)

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Branzburg allows "the courts of the United States in the light of reason and experience" to recognize common law privileges. The rejection of 9th Circuit analytical approach in *Scare* by the Supreme Court in *Jaffe* resulted in there being no binding 9th Circuit decision on common law reporter's privilege under Rule 501. *See Miller v. Gammie*, 335 F.3d 899, 900 (9th Cir. 2003)(en banc)(where Supreme Court authority is clearly irreconcilable with prior circuit authority, "district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court [the 9th Circuit] as having been effectively overruled"). Therefore this Court is once again upon the uncharted seas and must decide in light of "reason and experience" which path to take.

The government's failure to admit, as it must, that the law has changed dramatically since *Branzburg* was decided in 1972 should cause this Court to pause and scrutinize the government's rigid distinctions between grand jury cases and other contexts raised in *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993), *Shoen v. Shoen*, 48 F. 3d 412 (9th Cir. 1995), and *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979). Gov't Resp. 7:8-26. The 9th Circuit and the 3rd Circuit cases discussing *Branzburg* are not as limited as the government claims.

This Court is encouraged to navigate as did Judge Tatel, J., from D.C. circuit, in his concurrence in *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1166 (D.C.Cir. 2006) acknowledging that he would recognize a qualified reporter's privilege pursuant to Rule 501, and *New York Times Co. v Gonzales*, 382 F.Supp.2d 457, 484, 492 (S.D.N.Y. 2005), appeal argued, No. 05-2639-CV (2d Cir. Feb. 13, 2006) concluded that a

(...continued)
MISC-JSW (N.D. Cal. 1996).

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reporter's privilege should be recognized under federal common law in order to avoid the constitution question.

II. STATEMENT OF FACTS

As part of his newsgathering and editorial process, Joshua Wolf, an independent journalist, sold video clips of a July 8, 2005, anarchist assembly. San Francisco Police Department (SFPD) and Joint Terrorism Task Force (JTTF) investigators have been investigating the July 8, 2005 assembly as part of their overreaching effort to silence First Amendment activities. The federal government is allegedly investigating the possible attempted arson of an SFPD police vehicle at the assembly on July 8, 2005. The SFPD is investigating a physical assault on a police officer at the assembly. The state court is prosecuting an individual stemming from the assembly. Three days after the assembly, the SFPD requested the assistance of the federal government's JTTF.

On or about the date of the request, several SFPD and FBI agents, acting in their roles as JTTF, came to Wolf's apartment in San Francisco seeking unpublished video footage of the demonstration. The JTTF questioned him about his connections to anarchist groups. Wolf refused to turn over any material, and now he is facing civil contempt.

The subpoena has interfered with Mr. Wolf's relationship with anarchist and anti-war groups that he covers as a freelance journalist. It has limited his access to protestors and his ability to cover demonstrations. *See* Declaration of Jeffrey Finigan In Support of United States' Request For Order To Show Cause Why Joshua Wolf Should Not Be Held In Civil Contempt, Exhibit A, here after, "Finigan Dec. 1."

The grand jury seeks raw footage of the assembly and the testimony concerning the footage from Wolf. The government possesses video clips of the footage broadcast to the public. Wolf has refused to comply with a grand jury subpoena based on his Fifth

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Amendment and First Amendment privileges. Wolf filed a motion to quash the subpoena, but no court has balanced the dueling public interests.

III. ARGUMENT

A. The Government's Briefing On The Fifth Amendment Privilege Is Beyond The Scope Of The Court's Order Issued Before The Filing Of The Government's Response

If the Court is inclined to consider the government's new argument that Wolf has not shown a legitimate fear of self incrimination based on the government's unauthorized briefing, the Court should, nevertheless, deny the government's request that is unburdened by any factual showing of need or any citation to supporting legal authority supporting its position that the video tape should be turned over. The government is asking this Court to enter territory that is "perilously close to doing what the Fifth Amendment forbids." *In re Brogna*, 589 F.2d 24, 28 (1st Cir. 1978)

The court should not require that private journalist materials be produced for an in-camera inspection because in camera review of a Fifth Amendment privilege claim should not force the witness to completely give up his privilege even if only for the judge and without the government present. In this case, there is sufficient evidence already to support the Court's finding on July 20, 2006, and a compelled production of the material in question for an in-camera review would "surrender the very protection which the privilege is designed to guarantee." *Hoffman v. U.S.*, 341 U.S. 479, 486-487 (1951)

The government cites *Brown* for the proposition that there must be "substantial hazards of self-incrimination that are real and appreciable, not merely imaginary and unsubstantial" for a Fifth Amendment privilege to be validly invoked. *United States v. Brown*, 918 F.2d 82, 84 (9th Cir. 1990). The government uses this proposition to argue that "the Court can only truly evaluate whether the unpublished video footage constitutes substantial hazards of self-incrimination that are real and appreciable if Wolf submits it to the Court." Gov't Resp. 2:23-25.

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Brown said nothing of the sort and the leading case on the matter says quite the opposite. The U.S. Supreme Court, in a case that established the premise quoted in the *Brown* case, wrote:

> If the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'

Hoffman v. U.S., 341 U.S. 479, 486-487 (1951).

The 9th Circuit repeated the *Hoffman* principle when it declared, "If a witness were required actually to prove the validity of his claim of privilege, he would necessarily relinquish it." *Hashagen v. U.S.* 283 F.2d 345, 348-349 (9th Cir. 1960). The 1st Circuit also explained when "the court refuses to acknowledge the privilege and insists on in-camera verification from the lips of the witness, even though reasonable grounds for claiming the privilege appear in the surrounding circumstances, the court comes perilously close to doing what the Fifth Amendment forbids." *In re Brogna*, 589 F.2d 24, 28 (1st Cir. 1978). In other words courts should avoid forcing a witness to give up his Fifth Amendment privilege through an in-camera review if it can be avoided.

In this case the Court has already made a finding based on the record that Wolf has a legitimate fear of prosecution, or at the very least, that the video could "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman* at 486, citing *Blau v. United States*, 1950, 340 U.S. 159.

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If the court still entertains the government argument that reasonable grounds do not exist in the surrounding circumstances, the court should be reminded that Wolf's Fifth Amendment privilege must "be accorded liberal construction in favor of the right it was intended to secure." *Hoffman* at 486, see also *Hashagen* ("The 'guarantee against testimonial compulsion' embodied in the Fifth Amendment to the United States Constitution must be liberally construed and broadly applied in order to sustain fully the basic right it was designed to protect.") and *In re Brogna* at 28 (concluding that an in-camera hearing was not required at all "if the external circumstances support the privilege claim").

1. Wolf Seeks Use and Derivative Use Immunity Which Arguably Might Eliminate Fear Of State Prosecution

The Supreme Court has held that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964). Therefore, Wolf requests use and derivative use immunity before he is ordered to return to the grand jury for questioning.

2. The Government Has Failed To Present Admissible Evidence To Establish Any Admission By Wolf Pursuant To The Act Of Production Doctrine

A Court order compelling Wolf to turn over personal journalist material would violate the act of production doctrine and is equivalent to ordering him to "produce the firearm allegedly used in an offense." *See Goldsmith v. Superior Court*, 152 Cal.App.3d

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76, 199 Cal.Rptr. 366 *(1984) (*holding that defendant is not required to produce the firearm allegedly used in offense*); Fisher v. U.S.* 391, 410 n.11 (1976)(holding that an act of producing a self-authored document is the same as that of producing chattel or a document authored by another); *In re Grand Jury Subpoenas Served February 27, 1984*, 599 F. Supp. 1006 (E.D. Wash. 1984)(holding that petitioner could claim privilege as to contents of only those nonbusiness documents authored by him which contained thoughts so personal that disclosure would infringe on right to privacy). The 9th Circuit has applied the act of production doctrine to quash a grand jury subpoena under the Fifth Amendment. *See Grand Jury Proc. On February 4, 1982*, 759 F.2d 1418 (9th Cir. 1985) (holding that the subpoena must nonetheless be quashed as production of the defendant's documents would "relieve the government of proving the existence, possession, or authenticity of the records, and, thus could be incriminating.") *Id.* at 1421.

Unlike *Fisher*, the existence and possession or control of the subpoenaed documents is at issue in this case and the government has the burden of proving these facts. 425 U.S. at 412. The government thereby attempts to compel Wolf to provide materials which would be testimonial in nature, and he hereby asserts his Fifth Amendment privilege regarding any production, as the production of any such documents would require a testimonial act in violation of the privilege. Based on the 9th Circuit analysis in such situations, the privilege must prevail.

The 9th Circuit examined the propriety of a subpoena *duces tecum* in the grand jury context in *In Re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905 (9th Cir. 2004) ("*Doe*"). The Court focused on the inherent testimonial nature of such a potential

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production:

> Doe's claim of privilege is directed, however, not to the documents themselves but to the act of producing the documents. [Footnote omitted.] A witness' production of documents in response to a subpoena may have incriminating testimonial aspects. *See United States v. Hubbell*, 530 U.S. 27, 36, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) (*Hubbell II*); Fisher [*v. United States*], 425 U.S. 391, 410, 96 S.Ct. 1569 [(1976)]. By producing documents in compliance with a subpoena, the witness admits that the documents exist, are in his possession or control, and are authentic. *See Hubbell II*, 530 U.S. at 36, 120 S.Ct. 2037. These types of admissions implicitly communicate statements of fact that may lead to incriminating evidence. *See id.* at 36, 38, 120 S.Ct. 2037. Whether the act of production has a testimonial aspect sufficient to attract Fifth Amendment protection is a fact-intensive inquiry. *See Fisher*, 425 U.S. at 410, 96 S.Ct. 1569 (stating the resolution of whether documents are testimonial "depend[s] on the facts and circumstances of particular cases or classes thereof").

Id. at 909-10.

As required by *Doe,* once the privilege against self-incrimination is asserted or a claim is made that the production of documents requires a testimonial act in violation of the privilege, the government bears the burdens of production and proof on the questions of possession and the existence of documents that are the subject of the subpoena. *Id.* at 910, citing *In re Grand Jury Proceedings, Subpoenas for Documents*, 41 F.3d 377, 380 (8th Cir. 1994). Further, only when the "'existence and location' of the documents under subpoena are a 'foregone conclusion' and the witness 'adds little or nothing to the sum total of the Government's information by conceding that he in fact has the [documents]' [will] no Fifth Amendment right [be] touched because the 'question is not of testimony but of surrender.'" *Ibid*., citing *Fisher v. United States,* 425 U.S. 391, 411, 96 S.Ct. 1569 (internal quotations in original, quoting *In re Harris*, 221 U.S. 274, 279, 31 S.Ct. 557, 55 L.Ed. 732 (1911). Meeting these burdens is no easy task:

> The government [is] not required to have actual knowledge of the existence

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> and location of each and every responsive document; the government [is] required, however, to establish the existence of the documents sought and [the subpoenaed party's] possession of them with "reasonable particularity" before the existence and possession of the documents could be considered a foregone conclusion and production therefore would not be testimonial. *See Hubbell II*, 530 U.S. at 44, 120 S.Ct. 2037; [*United States v. Hubbell*] (*Hubbell I*), 167 F.3d [552], 579 [(C.A.D.C. (1999)]; *In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2d Cir.1993).

Id. at 910.

Since the existence, location, and authenticity of documents under subpoena *duces tecum* in *Doe* were not a foregone conclusion, the government failed to show that production of documents by the witness would not be testimonial, and the Fifth Amendment privilege therefore was applicable. *Id.* at 911 ("A subpoena such as this, which seeks all documents within a category but fails to describe those documents with any specificity indicates that the government needs the act of production to build its case against Doe"); *see also United States v. Doe*, 465 U.S. 605, 614, n. 12, 104 S.Ct. 1237 ("The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist ... is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself."); *United States v. Cohen*, 388 F.2d 464, 468 (9th Cir. 1967) (where a witness has been ordered to produce documents which would incriminate the witness but are not owned by him or her, the Fifth Amendment protects the witness from having to produce them; possession is "the necessary and sufficient condition of the [Fifth Amendment] privilege, for the compelled production, identification, and authentication of incriminating materials by the possessor will incriminate him [or her], whether or not the documents are his"); *Couch v. United States*, 409 U.S. 322, 329 (1973)

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(holding that taxpayer had no Fifth Amendment right to prevent disclosure of business records in the possession of her accountant, but noting in dictum that the accountant made no claim that he may tend to be incriminated by the production, implying that the accountant might have such a claim).

The government assertion of waiver based on Wolf's declaration submitted to the court is merritless. Wolf has objected and moved to strike Jeffrey Finigan's declaration in Support of United States' Request For Order To Show Cause Why Joshua Wolf Should Not Be Held In Civil Contempt paragraph 2, lines 8-11, and Exhibit A to said declaration. The evidence cited by Mr. Finigan and Exhibit A is inadmissible against Wolf under the Fifth Amendment to the United States Constitution. *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968) (when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection); *See* also *Pettyjohn v. United States*, 419 F.2d 651, 653 n. 5 (1969) (extending the holding in Simmons to motions alleging Fifth Amendment grounds for suppression). The court in U.S. v. Moran-Garcia, 783 F.Supp. 1266, 1271 (S.D. Cal. 1991) summed up the law clearly:

> In selecting a policy designed to effectively preserve scarce judicial resources, the Court does not sacrifice defendants' Fifth Amendment right against compelled self-incrimination. It is true that often the only individual who both (a) has personal knowledge of material facts and (b) is available to the defense is the defendant himself. Moreover it also is true that when a defendant desiring an evidentiary hearing is the only suitable declarant, it becomes incumbent upon the defendant to file a testimonial statement-even one which may include incriminating evidence. The filing of such a statement, however, will not interfere with the defendant's Fifth Amendment right.

The government's new declaration trying to establish an admission through the search of the internet is unavailing because there is no purported admission. *See* Rule 36

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of the Federal Rules of Civil Procedure.

B. The Court Is Not Precluded From Balancing The Dueling Public Interests

There is no dispute that Wolf is a journalist. Declaration of Jeffrey Finigan in Support of United States' Reply To subpoenaed Paty's Answer to Order To Show Cause Re Civil Contempt, here after "Finigan Dec. 2", paragraph 2. There is no dispute that Wolf's unpublished information is protected against "compelled production for a reporters' source materials can constitute a significant intrusion into the newsgathering and editorial processes." *U.S. v. Cuthbertson*, 630 F.3d 139, 147 (3rd Cir. 1980) The "public policy favoring the free flow of information to the public that is the foundation for the privilege" would be "substantially undercut." *Id.* The 9th Circuit relied on *Cuthbertson* in *Shoen I* when it stated "the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality." 5 F.3d 1289, 1295 (9th Cir. 1993)

The overriding dispute between the parties is whether the Court can perform a balancing of the dueling public interest at issue. The government requests an overreaching interpretation of *Branzburg* which has been rejected by the 9th Circuit. Gov't Resp. 6-7:20-7. In support of its erroneous reading of *Branzburg* the government waives as a trophy the Judith Miller proceedings. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C.Cir. 2006), cert. denied, 125 S.Ct. 2977 (2005). However, the *Miller* panel could not agree on whether a reporter's privilege should be recognized under federal common law. One member concluded that it should in light of *Jaffe, id.* at 1166 (Tatel, J., concurring); one member declined to recognize such a privilege, *id.* At 1153 (Sentelle, J., concurring); and the third member considered it unnecessary to decide the issue but observed that the court was not foreclosed from doing so by *Branzburg, id*, at 1160 (Henderson, J., concurring). Lastly, the driving force behind *Miller* was the unusual national security implications which are not present in this case. It is worth pointing out that the government fails to cite *New York Times Co. v. Gonzalez,* 382 F.Supp.2d 457 (S.D.N.Y. 2005)(on appeal) where the government's grand jury subpoena was quashed by

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the recognition of a common law reporter's privilege.

The weight of authority is for a narrow reading of *Branzburg* requiring a balancing of interest. 408 U.S. at 709-10 (Powell, J., concurring); *see Zurcher v. Stanford Daily*, 436 U.S. 547, 570 n.3 (1978)(Powell, J, stated "in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime."); *see also Saxbe v. Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting)("I emphasized the limited nature of the *Branzburg* holding in my concurring opinion," and that "a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated"). The 9th Circuit in *Scarce* recognized that Justice Powell's decisive opinion must be "read together with the majority opinion" and given effect. 5 F.3d at 401.

The government's ridged distinction of *Riley v. Chester*, 612 F.2d 708 (3rd Cir. 1979), *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), and *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993) misses the point- the 3rd and 9th Circuits have not interpreted *Branzburg* broadly but instead have taken a narrow reading. The 9th Circuit in *Scarce* also took a narrow reading of *Branzburg* stating that *Branzburg* limited a balancing only in grand jury investigations involving "serious criminal conduct." *Scarce*, 5 F.3d at 402 (quoting *Farr*, 522 F.2d at 467-68).

Wolf understands that the state is investigating a serious but certainly not a federal crime- a physical attack on a police officer. *See* Gov't Resp. 8:26-28. Wolf further understands that the state might be concern about an alleged attempted arson of a police vehicle also not a federal crime. *Id.* However, as compelling as these purposes are for a state crime, the harm being caused to Wolf newsgathering activities and his relationship with his confidential sources outweighs any tenuous connection with any alleged legitimate federal investigative purpose. *See In re Grand Jury Proceedings*, 5 F.3d 397, 401.

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If the Court is incline to give a sweeping read of *Branzburg,* as requested by the government, and concludes it does not have the authority to balance the dueling public interest through a narrow reading of *Branzburg*, the Court can still perform a balancing under Rule 501 or Rule 17(c), under the First Amendment.

1. Rule 501 Common Law Privilege

The government cites *In re Grand Jury Proceedings (Scarce),* 5 F.3d 397 (9th Cir. 1993) as an instructive and relevant case for this Court to consider. However, *Scare* did not involve a journalist nor is the 9th Circuit dicta regarding a federal common law privilege pursuant to Fed.Evid.Rule 501 binding precedent on this Court. Commentary made "during the course of delivering a judicial opinion," but which are "unnecessary to the decision in the case" are "therefore not precedential." *Best Life Assur.Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002).

The government failure to address the Supreme Court's decision in *Jaffee* cited in Wolf's Answer is because the 9th Circuit's analytical framework in interpreting common law privileges under Rule 501 is in conflict with the Supreme Court's decision in *Jaffee. Id*., 518 U.S. at 7 (citing *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989). The 9th Circuit was on the losing side having rejected a privilege under Rule 501 seven years before *Jaffe*. *In re Grand Jury Proceedings*, 867 F.2d 562. *Jaffee* is the only Rule 501 case binding on this Court. *See Miller v. Gammie*, 335 F.3d 899, 900 (9th Cir. 2003)(en banc)(where Supreme Court authority is clearly irreconcilable with prior circuit authority, "district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court [the 9th Circuit] as having been effectively overruled").

In *Scare* the 9th Circuit was looking for federal common law rooted in historical common-law which *Branzburg* had determined did not exist. *See In re Grand Jury Proceedings,* 867 F.2d 562. However, three years after *Branzburg*, Rule 501 was enacted, and *Jaffe* stated that Congress "manifested an affirmative intention not to freeze the law of

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privilege," but rather to "leave the door open to change," *Trammel v. United States*, 445 U.S. 40, 47 (1980), and to "continue the evolutionary development of testimonial privileges."" *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 47). Therefore, whether this Court should recognize a reporter's privilege under Rule 501 is an issue of first impression due to the development of the law.

This Court is encouraged to navigate as did, Judge Tatel, J., from D.C. circuit, in his concurrence in *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1166 (D.C.Cir. 2006) acknowledging that he would recognize a qualified reporter's privilege pursuant to Rule 501, and *New York Times Co. v Gonzales*, 382 F.Sup.2d 457, 484, 492 (S.D.N.Y. 2005), appeal argued, No. 05-2639-CV (2d Cir. Feb. 13, 2006) concluded that a reporter's privilege should be recognized under federal common law in order to avoid the constitution question.

2. Rule 17 (c)

Neither Judge Chesney nor Judge Maria Elena-James balanced the dueling interest pursuant to Rule 17 (c) as required by the 9th Circuit and the Supreme Court. *See In re Grand Jury Subpoena to Nancy Bergeson*, 425 F.3d 1221, 1225-26 (9th Cir. 2005); *United States v. R. Enterprise, Inc.*, 498 U.S. 292, 299 (1991). "The factors the district court must consider under Rule 17(c) (2) - unreasonable and oppressiveness- cannot sensibly be converted into a mechanical rule enabling an escape from case-by-case judgment." *Bergeson*, 425 F.3d at 1225.

The government is silent on Rule 17(c), other than to argue that 28 C.F.R. § 50.10 should not be consider by the Court as an independent ground for quashing the subpoena. Gov't Resp. 5:3-14. However, the government misses the point of Wolf's argument. In *Bergeson* the court took into consideration whether the government had followed the DOJ guidelines in issuing the subpoena to an attorney as well as the impact on the relationship between the attorney and client regardless of whether the communications where privileged or confidential. 425 F.3d at 1225. The Court of Appeal affirmed the district court's quashing of the subpoena pursuant to Rule 17 (c). *Id*. at 1227.

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The government has been hiding the ball on the issue of whether they complied with 28 C.F.R. 50.10 by seeking the approval of the attorney general until the Court asked them to state whether they had complied. Neither in candor to this Court, or Wolf, has the government stated whether it exhausted all other sources after it obtained the video clip of Wolf as required by 28 C.F.R. 50.10(b), (c), and (f)(1). The DOJ is published in the Code of Federal Regulations and must stand for something other then lip service. The DOJ regulations should be adhered to especially when the government is asking the Court to place someone in custody for refusing to adhere to a subpoena.

The subpoena issued to Wolf is oppressive and unreasonable because of the destructive impact it is having on his confidential source relationship. The subpoena has interfered with Mr. Wolf's relationship with the anarchist and anti-war groups he covers as a freelance journalist. It has limited his access to protestors and his ability to cover demonstrations. Exhibit A, Finigan Dec. 1. Wolf's ability to inform the public on matters of public concern have been directly interfered by the subpoena.

Bergeson is instructive when a subpoena might have a deep impact on a confidential relationship. 425 F.3d at 1225-27. The court in Bergeson required the government to establish a "compelling purpose" for issuing the subpoena to an attorney that might impact the attorney-client relationship. *Id.* Wolf understands that the state is investigating a serious but certainly not a federal crime- a physical attack on a police officer. *See* Gov't Resp. 8:26-28. Wolf further understands that the state might be concern about an alleged arson of a police vehicle, also not a federal crime. *Id.* However, as compelling as these purposes are for a state crime, the harm being caused to Wolf is oppressive and unreasonable when weighted against the tenuous connection with any legitimate federal investigative purpose. *See In re Grand Jury Proceedings*, 5 F.3d 397, 401.

C. The Balancing Of Interest Favors The Public Interest In Newsgathering and Editorial Process

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In *Bursey v. United States*, 466 F.2d 1059 (1972), *overruled on other grounds, In re Grand Jury Proceedings*, 863 F.3d 667, 669-70 (9th Cir. 1988) the 9th Circuit addressed the *Branzburg* decision in a grand jury context for the first time. The ruling was issued the day after *Branzburg*, and the court held that the grand jury questions posed to reporters for the Black Panther Party newspaper abridged constitutional protections for the press. The court balanced the respective interests and stated that "[w]hen First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Id.* at 1088. The court went on to say:

> We reject the Government's second contention that the First Amendment is nugatory in a grand jury proceeding. No governmental door can be closed against the Amendment. No governmental activity is immune from its force. That the setting for the competition between rights secured by the First Amendment and antagonistic governmental interests is a grand jury proceeding is simply one of the factors that must be taken into account in striking the appropriate constitutional balance.

Id. at 1082.

On petition for rehearing the 9th Circuit rejected that broad reading of *Branzburg*: "We have reexamined our analysis of the factors involved in balancing the First Amendment rights against the governmental interests asserted to justify compelling answers to the questions here involved, and we have concluded that the balance we struck is not impaired by *Branzburg*." *Id.* at 1091.

One of the factor recognized in *Bursey* that this Court must balance is the critical public function of reporters in keeping the public informed:

> The First Amendment interests in this case are not confined to the personal rights of [the journalist]. Although their rights do not rest lightly in the balance far weightier than they are the public interests in First Amendment freedoms that stand or fall with the rights that these witnesses advance for themselves. Freedom of the press was not guaranteed solely to shield persons engaged in newspaper work from unwarranted governmental harassment. The larger purpose was to protect public access to information… In the context of litigation, vindication of these public rights secured by the First Amendment is primarily committed to persons who are also asserting their individual constitutional rights. *Bursey*, 466 F.2d at 1083-84; *see also Shoen v. Shoen*, 5 F.3d 1289, 1292

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A second factor for this Court to consider is the public policy of the State of California and the people of California in protecting reporters from forced disclosures. *See Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (the court "may also look to state privilege law-here, California's- if it is enlightening"); *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975) ("In determining the federal law of privilege in a federal question case, absent a controlling statute, a federal court may consider state privilege law.")

The Court is asked to take judicial notice of the affidavit submitted to Judge White of this district in *In re Grand Jury Subpoenas To Mark Fainaru-Wada and Lance Williams*, No. CR-06-90225 MISC-JSW (N.D. Cal. 1996) by Attorney General Bill Lockyer who states:

> When California voted to include a strong shield law in their state Constitution, they made a deliberate policy choice on where to strike the balance between the public's interest in forcing reporters to disclose confidential sources and its interest in a robust free press. *** California voters understood that an intimidated press cannot effectively inform the public, and when the public is not informed, our democracy cannot properly function. When the government can compel journalists to reveal their sources, and jail them for refusing, it endangers not just the freedom of the press, but the people's liberty.

Request for Judicial Notice, Exhibit A, Lockyer Aff't, par. 5. Wolf does not suggest that the California Constitution governs in a federal case but is arguing that the Court should consider the people of California's policy choice in protecting a journalist in this case where the alleged federal government's investigation involves California property and not federal property.

A third factor for the Court to consider is the alleged wrongdoing. So far the government is not claiming that Wolf has committed any crime.[3] The alleged underlying crime the government alleges it is investigating to make the tenuous connection with a federal crime does not involve national security concerns as in *Miller*, 438 F.3d 1141, nor

[3] However, the government reluctance to grant Wolf immunity, cause Wolf to fear that he is a targeted of the criminal investigation.

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does it involve terrorism, or violence against a federal person or property. The federal interest in this case is not of national security, acts of terrorism, or violent federal crime that would go unpunished. All there is in this case is a reporter's newsgathering and editorial process that has been harm and continues to be harm by these oppressive and harassing proceedings. The only articulated interest by the government is one that misleads this Court into believing there is some tenuous federal crime.

The fourth factor the Court should consider is whether the government has exhausted all other avenues in accordance with the DOJ. *See Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995); *In re Grand Jury Subpoena to Nancy Bergeson*, 425 F.3d 1221, 1225-26.

The fifth factor the Court should consider is the harm already caused to Wolf and that will be cause to reporter's in general who cover anti-war protest and anarchist because Wolf "appear[s] to be an investigative arm of the judicial system or the research tool of government . . . ." *Shoen*, 5 F.3d at 1294-95. In *Shoen* the court stated:

> It is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or places where a policeman or politician wouldn't be welcome. 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, barred from meetings which they should otherwise be free to attend and to describe, or even physically harassed if, for example, *observed taking notes or photographs at a public rally*.

Id. at 1295 (quoting Morse and Zucker, supra, at 474-75) (emphasis added).

The subpoena issued to Wolf and these proceedings have had a destructive impact on his confidential source relationship. The subpoena has interfered with Mr. Wolf's relationship with anarchist and anti-war groups that he covers as a freelance journalist. It has limited his access to protestors and his ability to cover demonstrations. Exhibit A, Finigan Dec. 1. Wolf's ability to inform the public on matters of public concern have been directly interfered with by the subpoena. Jailing Wolf will send a clear message to all reporters, activists, anti-war groups, anarchist or groups viewed as unpopular by the federal government that public discourse and the reporting of public events will no longer

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be allowed in the United States without government interference to obtain newsgathering and editorial materials.

III. CONCLUSION

Wolf has shown that under any standard of balancing, whether public benefit versus public harm, reasonableness and oppressiveness, or need for exhaustion the facts in this case, are heavy on the side of dismissing the civil contempt proceedings under the First Amendment.

July 28, 2006

Respectfully Submitted
Siegel & Yee

By: _____/s/_____
JOSE LUIS FUENTES, Attorney for Joshua Wolf

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