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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Grand Jury Subpoenas to Lance Williams and Mark Fainaru-Wada	**Case No. CR-06-90225 MISC JSW** **NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF** **No Oral Argument Requested**

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that ABC, Inc; the American Society of Newspaper Editors; The Associated Press; The Bakersfield Californian; Belo Corp.; Cable News Network LP, LLLP; The California Newspaper Publishers Association; CBS Broadcasting, Inc.; Dow Jones & Company, Inc.; DR Partners d/b/a Stephens Media Group; The E.W. Scripps Company; Freedom

Communications, Inc., Gannett Co, Inc.; Los Angeles Times; New York Times Co; The Newspaper Association of America; Newsweek, Inc.; The Oregonian; The Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; Reuters America LLC; The San Diego Union-Tribune; the Society of Professional Journalists; Time, Inc.; and The Washington Post Company (collectively "*amici*") hereby move for leave to file a brief amicus curiae in support of the Motions of Lance Williams and Mark Fainaru-Wada to Quash Subpoenas, pursuant to Rule 47 of the Federal Rules of Criminal Procedure. This motion is based upon this Notice of Motion and Motion, upon the following Memorandum of Points and Authorities and accompanying Brief Amicus Curiae (attached hereto as Exhibit 1). Counsel for amici has conferred with Assistant United States' Attorney Brian Hershman concerning this Motion, who has authorized counsel to state that the United States takes no position on the merits of this Motion.

Respectfully submitted,

By s/ Sam N. Dawood

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amici include news organizations that publish newspapers and magazines or broadcast news located in every region of California and every state within the Ninth Circuit, many that distribute news nationwide, and a number of associations of journalists. *See* the Attached Appendix A hereto (Disclosure Statement and Description of Amici). All of the *amici* share a commitment to reporting news stories concerning public and private malfeasance, stories that sometimes depend on journalists' use of confidential sources and their ability to safeguard the identities of those sources.

The issues raised by the Motions to Quash the subpoenas served on the *San Francisco Chronicle* reporters are of profound importance to *amici*. They raise important questions of law fundamental to freedom of the press, and their outcome will therefore likely have a significant impact on the work of journalists and those who read or watch the news throughout the Ninth Circuit and beyond. *Amici* therefore respectfully seek leave to file a brief *amicus curiae*, attached as Exhibit 1. Both this Court and many other district courts regularly accept amicus briefs in cases raising important questions of public policy. *See, e.g., NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005) ("District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved"); *Planned Parenthood Federation of America v. Ashcroft,* 320 F.Supp.2d 957 (N.D.Cal. 2004); *Comcast of California II, L.L.C. v. City of San Jose, California*, 286 F.Supp.2d 1241 (N.D. Cal. 2003).

In this brief, *amici* hope to provide the Court with the perspective of working journalists on both the role that confidential sources have played in bringing vital issues to the attention of the public and the history of conflicts between government and the press concerning journalists' sources. Both topics speak directly to evaluating the lessons of "reason and experience" regarding the value of providing legal protection from compelled disclosure of confidential sources. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). *Amici* have endeavored to include in this brief background information unlikely to be addressed in the briefs of the Movants or the Government, and have

tried to avoid making arguments likely to duplicate the contents of the principal briefs. Amici are not requesting leave to argue at the hearing on the Motions of Lance Williams and Mark Fainaru-Wada to Quash Subpoenas set for August 4, 2006.

Dated: June 2, 2006

Respectfully submitted,

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APPENDIX A

CORPORATE DISCLOSURE STATEMENT AND DESCRIPTION OF AMICI

ABC, Inc.

ABC, Inc., alone or through its subsidiaries, owns ABC News, the ABC Radio Network, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public, including KGO-TV in San Francisco, KABC-TV in Los Angeles and KFSN-TV in Fresno. ABC News produces, among other programs, *World News Tonight*, *20/20* and *Nightline*.

ABC, Inc. is an indirect, wholly-owned subsidiary of The Walt Disney Company, a publicly-traded corporation.

American Society of Newspaper Editors

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

The Associated Press

The Associated Press is a not-for-profit membership corporation. It has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public, has no publicly held stock and no publicly held company owns 10% or more of its stock. The members of AP are more than 1,500 newspapers and more than 5,000 television and radio stations throughout the United States. AP also serves thousands of subscribing newspapers, news networks and other publishers and distributors of news worldwide. Founded in 1846, AP is now the largest newsgathering organization in the world.

The Bakersfield Californian

The Bakersfield Californian is a daily newspaper of general circulation published in Bakersfield, CA. It is a private, family-owned company.

Belo Corp.

Belo Corp., a publicly-traded company, began in 1842 and today owns and operates newspaper, television, cable news, and interactive media assets across the nation. Belo publishes *The Press-Enterprise*, a daily newspaper of general circulation serving Southern California's Inland Empire. Belo's other daily newspapers include The Dallas Morning News. Belo's nineteen television stations include six stations in the nation's fifteen largest broadcast markets.

Cable News Network LP, LLLP

Cable News Network LP, LLLP ("CNN"), a division of Turner Broadcasting System, Inc., which is a subsidiary of Time Warner Inc., a publicly traded company, is one of the world's most respected and trusted sources for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; four Web sites, including CNN.com, the first major news and information Web site; CNN Pipeline, an on-demand broadband video service; CNN Newsource, the world's most extensively syndicated news service; and partnerships for four television networks and one Web site.

The California Newspaper Publishers Association

The California Newspaper Publishers Association ("CNPA") is a nonprofit trade association representing approximately 650 daily, weekly and student newspapers in California. CNPA has defended the First Amendment rights of publishers to disseminate and the public to

receive news and information for well over a century.

CBS Broadcasting Inc.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS owns and operates broadcast television stations nationwide, including KPIX and KBHK in San Francisco, KCBS-TV and KCAL-TV in Los Angeles, KOVR and KMAX in Sacramento and KSTW in Seattle. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine programs such as *60 Minutes* and *48 Hours Investigates*.

CBS Broadcasting Inc. is a wholly-owned subsidiary of CBS Corporation, which is publicly traded.

Dow Jones & Company, Inc.

Dow Jones & Company, Inc. publishes *The Wall Street Journal*, a daily newspaper with a national circulation of over 2 million each business day, *WSJ.com*, a news website with more than 750,000 paid subscribers, Dow Jones Newswires, a collection of real-time electronic news services, *Barron's*, a weekly business and finance magazine, and, through its Ottaway Newspapers subsidiary, community newspapers throughout the United States, including in Stockton and Santa Cruz, California, and in Ashland and Medford, Oregon.

Dow Jones & Company, Inc. is a publicly traded company.

DR Partners d/b/a Stephens Media Group

DR Partners d/b/a Stephens Media Group is a nationwide newspaper company, which publishes daily and weekly newspapers in eight states from North Carolina to Hawaii, including the *Las Vegas (NV) Review-Journal*, the largest daily newspaper in Nevada.

The E.W. Scripps Company

The E.W. Scripps Company is a publicly traded, diverse media concern with interests in newspaper publishing, broadcast television, national television networks, interactive media and television retailing. Nationwide, it operates 21 daily newspapers, 15 broadcast television stations, five cable and satellite television programming networks and a television retailing network. Scripps publishes two daily newspapers in California – the *Ventura County Star* and the *Record Searchlight (Redding)*.

Freedom Communications, Inc.

Freedom Communications, Inc., headquartered in Irvine, California, is a privately-owned diverse media company that primarily publishes metropolitan area and community newspapers and operates television broadcast stations. The company and its affiliates publish 28 daily and 48 weekly newspapers in 11 states, with a combined circulation of just over 1 million. Freedom's flagship newspaper is *The Orange County Register*, published in Santa Ana, California, with a daily circulation of approximately 300,000 and Sunday circulation of approximately 358,000. The television broadcast division includes eight stations in seven states, with five CBS and three ABC affiliates.

Freedom Communications, Inc. is a wholly-owned subsidiary of Freedom Communications Holdings, Inc, a privately held corporation.

Gannett Co., Inc.

Gannett Co., Inc. is an international news and information company that publishes 90 daily newspapers in the United States with a combined daily paid circulation of 7.3 million, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA Weekend, a weekly newspaper magazine with a

circulation of 22.7 million. Gannett's 21 television stations reach 19.8 million U.S. households. Gannett publishes four daily newspapers in California: *The Salinas Californian*, *The Desert Sun*, *Tulare Advance-Register* and *Visalia Times-Delta*. Gannett also owns KXTV-TV, an ABC television affiliate, in Sacramento.

Gannett Co., Inc. is a publicly traded company, has no affiliates or subsidiaries that are publicly owned and no publicly held company owns more than 10% of its stock.

Los Angeles Times

The *Los Angeles Times* is the largest metropolitan daily newspaper in the country, with a daily readership of nearly 2.2 million and about 3.3 million on Sunday. It is published by Los Angeles Times Communications LLC, a wholly owned subsidiary of Tribune Company, a publicly traded company. Its Times Community News division publishes the Daily Pilot, Glendale News-Press, Burbank Leader, Foothill Leader, the Huntington Beach Independent, Laguna Beach Coastline Pilot, La Cañada Valley Sun, and Crescenta Valley Sun. The Times also maintains a number of websites including www.latimes.com, a leading source of national and international news.

The New York Times Company

The New York Times Company publishes *The New York Times*, a national newspaper distributed throughout the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes eighteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations. In California, it publishes the *The (Santa Rosa) Press Democrat*, with a daily and Sunday circulation of about 90,000. The New York Times Company is publicly-traded.

The Newspaper Association of America

The Newspaper Association of America ("NAA") is a nonprofit organization representing the $55 billion newspaper industry. NAA members account for nearly 90 percent of the daily circulation in the United States and a wide range of nondaily U.S. newspapers.

Newsweek, Inc.

Newsweek, Inc. publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally. Newsweek, Inc. is a wholly owned subsidiary of The Washington Post Company. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.

The Oregonian

The Oregonian is a daily newspaper of general circulation based in Portland Oregon. *The Oregonian* is published by Oregonian Publishing Company LLC, which is an indirect subsidiary of Advance Publications, Inc., a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States.

The Radio-Television News Directors Association

The Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee provides representation, guidance, and research in First Amendment litigation. The Reporters Committee was founded in 1970 in response to a wave of government subpoenas directed at journalists.

Reuters America LLC

Reuters America LLC is an indirect wholly-owned subsidiary of Reuters Group PLC, which is traded on the London Stock Exchange and Nasdaq. It is a publicly traded company. Founded in 1851 in London, the Reuters Group serves the global financial markets and news media with a wide range of information products and transactional solutions. These include real-time and historical market data; research and analytics; trading platforms across a range of financial instruments; collective investment data and bench-marking analytics; plus news in text, video, graphics, and photographs. The Reuters Group delivers news and financial data to over 330,000 professional users. The Reuters Group is also the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 196 bureaus around the world, serving 129 countries. Reuters news is seen by over 1 billion people every day.

The San Diego Union-Tribune

The San Diego Union-Tribune is published by Copley Press, Inc., a privately held corporation which also owns nine other daily newspapers and operates Copley News Service, serving more than 1,000 clients worldwide.

The Society of Professional Journalists

The Society of Professional Journalists (SPJ) is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

Time Inc.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 150 magazines in the United States and abroad. Its major titles include Time, Fortune, Sports Illustrated, People, InStyle, Real Simple, Money, and Entertainment Weekly. Time Inc. is indirectly wholly-owned by Time Warner Inc., a publicly traded company.

The Washington Post Company

The Washington Post is a leading newspaper with a nationwide daily circulation of over 759,000 and a Sunday circulation of over 1.03 million. WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of The Washington Post Company. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.

EXHIBIT 1

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Grand Jury Subpoenas to Lance Williams and Mark Fainaru-Wada	**Case No. CR-06-90225 MISC JSW** Date: August 4, 2006 Time: 9:00 a.m. **No Oral Argument Requested**

BRIEF *AMICUS CURIAE* OF ABC, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, THE BAKERSFIELD CALIFORNIAN, BELO CORP., CABLE NEWS NETWORK LP, LLLP, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, CBS BROADCASTING INC., DOW JONES & COMPANY, INC., DR PARTNERS d/b/a STEPHENS MEDIA GROUP, THE E.W. SCRIPPS COMPANY, FREEDOM COMMUNICATIONS, INC., GANNETT CO., INC, LOS ANGELES TIMES, THE NEW YORK TIMES COMPANY, NEWSPAPER ASSOCIATION OF AMERICA, NEWSWEEK, INC., THE OREGONIAN, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REUTERS AMERICA LLC, THE SAN-DIEGO UNION-TRIBUNE, the SOCIETY OF PROFESSIONAL JOURNALISTS, TIME INC. AND THE WASHINGTON POST COMPANY

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INTRODUCTION

Confidential sources have often played a critical role in the flow of information to the public. Information provided by confidential sources has proved essential to unearthing criminal wrongdoing, exposing political corruption, and educating the public about the activities of its government. The subpoenas issued in this case to two reporters for the *San Francisco Chronicle* reflect an unusual and counterproductive effort to turn to journalists to find a confidential source. Enforcing these subpoenas can only do far more damage to the vigor of our free press than provide assistance to the criminal justice system.

Just last year many Americans were fascinated by the revelation of the identity of "Deep Throat," modern history's most famous confidential source. While the motivations of former F.B.I. Deputy Director Mark Felt are still intensely debated, the consensus of history is that the country was well-served by promises of confidentiality made by *Washington Post* reporters to Felt and other government officials, promises that were respected by a federal court when challenged at the time. *See Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973). Indeed, the Ninth Circuit has pointed to *Post* reporter Bob Woodward as the paradigmatic example of an investigative journalist who is "protected by the [journalist's] privilege in his capacity as a newspaper reporter writing about Watergate." *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

While the subject-matter may be different, the investigation by the *San Francisco Chronicle*'s reporters into steroid use by professional athletes involved many of the same methods used by Woodward and Bernstein to investigate the Watergate break-in. Both investigations revolved around an on-going federal grand jury probe into comparatively minor crimes that implicated misconduct with far broader significance to the public.[1] Both depended extensively on

[1] *See, e.g.,* Bob Woodward & Carl Bernstein, *Gray Seen Destroying Hunt's Files*, WASH. POST, Apr. 27, 1973 at 1 (Acting FBI Director L. Patrick Gray III destroyed incriminating documents after being ordered to do so by John Ehrlichman and John W. Dean III, "FBI and other sources

confidential sources who provided grand jury and other related information from each federal investigation. Both spurred Congressional investigations and led to important institutional reforms. Both produced journalism of national interest and resulted in the publication of books reaching a geographic audience far broader than the readership of any single newspaper.

If subpoenas are enforced here to require the disclosure of reporters' sources, no reporter will likely be able to make a credible promise of confidentiality to a contemporary Deep Throat. The flow of information to the public and, on balance, the ultimate effectiveness of the criminal justice system will both suffer, since many criminal prosecutions would never even begin but for a confidential source disclosure in a news report. This reality would surely be inconsistent with the Ninth Circuit's understanding that reporters enjoy a privilege to report about stories like Watergate, a view supported by our Nation's history and the common-sense understanding of most Americans. Any privilege that evaporates in the face of a grand jury subpoena is effectively no privilege at all.

Through this brief, *amici* hope to provide the Court with the perspective of working journalists on both the role that confidential sources play in bringing vital issues to the attention of the public and the long history of government's accommodation of journalists' need to protect their sources. Both topics are particularly relevant to the questions of whether "reason and experience" support the formal recognition of a reporter's privilege under federal common law, *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996), the factors that should be considered under Fed. R.

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said."); Carl Bernstein & Bob Woodward, *2 Linked to Secret GOP Fund*, WASH. POST, Sept. 18, 1972, at A1 (two other former White House aides, Jeb Stuart Magruder and Hebert L. Porter, withdrew more than $50,000 from the secret accounts, "according to sources close to the Watergate investigation."); Bob Woodward & E.J. Bachinski, *White House Consultant Tied to Bugging Figure*, WASH. POST, June 20, 1972, at A1 (according to "federal sources close to the investigation," one of the Watergate burglars carried an address book with the telephone number of White House consultant E. Howard Hunt Jr.).

Crim. P. 17(c) when source disclosure is sought from a journalist, and the important constitutional values threatened by subpoenas seeking to unveil reporters' sources.

This brief will first demonstrate that the *Chronicle*'s reports about steroids in sports were investigated in the same manner as many other news reports of enormous public significance, stories which could not be reported if subpoenas like those at issue here are enforced against the press. *Amici* will then show that the principle protecting confidential newsgathering from state interference dates back to our nation's founding, has become well-established within state law, and historically has been respected by federal prosecutors and courts regardless of whether a privilege was formally recognized in any particular jurisdiction. As a result, the subpoenas approved and issued by the Justice Department in this case represent a striking departure from the historical norms that have long governed the relationship between government and the press. The clear import of both reason and experience strongly supports the recognition of a reporter's privilege in federal courts, or at a minimum heightened scrutiny under Rule 17(c), either of which should require these subpoenas to be quashed.

ARGUMENT

I. A REPORTER'S ABILITY TO SPEAK TO SOURCES IN CONFIDENCE IS VITAL TO THE FREE FLOW OF INFORMATION TO THE PUBLIC

The press "serves and was designed to serve [by the Founding Fathers] as a powerful antidote to any abuses of power by governmental officials." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Experience has demonstrated time and time again that at times the press cannot effectively perform this constitutionally recognized role without the ability to maintain the confidentiality of sources who will speak only on a promise of anonymity.

Journalists regularly depend on anonymous sources to report stories about matters of public concern. One recent examination of roughly 10,000 news media reports concluded that fully thirteen percent of front-page newspaper articles relied at least in part on anonymous

sources.[2] While there is healthy debate within the journalism profession about the appropriate uses of anonymous sources, all sides of that debate agree that confidential sources are at times essential to effective news reporting.[3]

The information anonymous sources make available to the public through the press has proved to be vitally important to the operation of our democracy and the oversight of powerful institutions, both public and private. This is especially true with regard to some of the most valuable investigative stories. Stories based on confidential source material regularly receive the nation's most coveted journalism awards, including Pulitzer Prizes[4] and George Polk Awards for Excellence in Journalism.[5] *See, e.g.*, John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57,

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[2] *See generally State of the News Media 2005*, www.stateofthemedia.org /2005/index.asp (last visited May 31, 2006).

[3] *See generally Reporters and Confidential News Sources Survey 2004*, www.firstamendmentcenter.org/ news.aspx?id=14922 (last visited May 31, 2006).

[4] For example, the Pulitzer Prize in Investigative Journalism for 2005 was awarded to Nigel Jaquiss, of *Willamette Week*, who relied on multiple anonymous and confidential sources in his "investigation exposing former governor [Neil Goldschmidt's] long concealed sexual misconduct with a 14-year-old girl." *See* www.pulitzer.org/year/2005/investigative-reporting (last visited May 31, 2006). Confidential source reporting has also regularly been recognized with the Pulitzer Prize for National Reporting. In 1996, for example, the Prize was awarded for the *Wall Street Journal's* reporting on the use of ammonia to heighten the potency of nicotine in cigarettes. *See* www.pulitzer.org/year/1996/national-reporting (last visited May 31, 2006). The use of such an enhancer had been denied by industry officials, but was revealed by internal reports of the Brown & Williamson Tobacco company. *See* Alix M. Freedman, *Impact Booster: Tobacco Firm Shows How Amonia Spurs Delivery of Nicotine*, WALL STREET JOURNAL, Dec. 28, 1995, at A1, col. 6. The 1999 Pulitzer Prize for National Reporting went to Jeff Gerth and the staff of *The New York Times* "for a series of articles that disclosed the corporate sale of American technology to China, with U.S. government approval despite national security risks, prompting investigations and significant changes in policy." *See* www.pulitzer.org/year/1999/national-reporting (last visited May 31, 2006). This series relied heavily on "highly classified intelligence reports," as well as interviews with confidential sources. *See* Jeff Gerth, *Reports Show Chinese Military Used American-Made Satellites*, THE NEW YORK TIMES, June 13, 1998, at A1.

[5] The George Polk Awards have been awarded since 1949, and are one of the most coveted prizes in journalism. *See* www.brooklyn.liu.edu/polk/history.html (last visited May 31, 2006). In 2004, the Polk Awards for Magazine Reporting, Military Reporting, and Sports Reporting all went to articles based on confidential source material. *See* www.brooklyn.liu.edu/polk/polk04.html (listing awards) (last visited May 31, 2006).

74 (1985) ("Osborn") (reporting that confidential sources played "a significant role" in two-thirds of the stories nominated for Pulitzer Prizes).

Moreover, some of the most important investigative stories in our nation's history arose out of circumstances just like this case, where confidential sources may have violated a statute or common law duty by talking to the press in order to expose information of substantial public concern. Beyond Watergate, there are many compelling examples that could never have been reported if a reporter could not have credibly promised confidentiality to a source, such as:

Pentagon Papers – The Pentagon's secret history of America's involvement in Vietnam was, of course, leaked to *The New York Times* and *The Washington Post*. *See New York Times Co. v. United States*, 403 U.S. 713 (1971). In refusing to enjoin publication of the leaked information, Justices of the Supreme Court recognized that the newspapers' sources may well have broken the law, *id.* at 754 (Harlan, J., dissenting), and they were in fact prosecuted, albeit unsuccessfully, after later coming forward. *See* Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973, at A1. Nonetheless, "[i]n revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do," *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring), and there is now a broad consensus that no legitimate reason existed to conceal the Papers from the public in the first place.[6]

Neutron Bomb – Journalist Walter Pincus of *The Washington Post* relied on anonymous sources in reporting that President Carter planned to move forward with the

[6] Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, A25.

development of a so-called "neutron bomb," a weapon that could inflict massive casualties through radiation without extensive destruction of property.[7] While the information disclosed to Pincus was likely classified, the public outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.[8]

Fertility Fraud – Closer to home, in 1996 the *Orange County Register* received the Pulitzer Prize for its reporting on the unethical practices of the previously acclaimed UCI fertility clinic in Irvine, California. Using putatively confidential medical records obtained from an anonymous source, the paper documented how eggs retrieved from one patient were implanted in another, without the knowledge or consent of the donor.[9] The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic.[10] The disclosure of these records to the *Register* may have violated applicable law, yet the facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, "prompted the American Medical Association to rewrite its fertility-industry guidelines," and instigated legislative action.[11]

Enron – In a groundbreaking series of articles published in 2001, the *Wall Street Journal* relied on confidential sources and leaked corporate documents to reveal the illegal

[7] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[8] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

[9] Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A01.

[10] Susan Kelleher, Kim Christensen, David Parrish & Michael Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REGISTER, Nov. 4, 1995, at A16.

[11] Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996, at A26.

accounting practices of a company that had "routinely made published lists of the most-admired and innovative companies in America."[12] Among other things, confidential sources provided the *Journal* with "confidential" information about two partnerships operated by Enron Chief Financial Officer Andrew Fastow, which were used to hide corporate debt from the company's investors.[13]

Abu Ghraib – In April 2004, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq.[14] Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report by Major General Antonio M. Taguba that was "not meant for public release,"[15] CBS and Hersh documented the conditions of abuse in the Iraqi prison. After these incidents became public, other military sources who had witnessed abuse stepped forward, but only "on the condition that they not be identified because of concern that their military careers would be ruined."[16]

What is particularly striking about many of these examples is that even though (as is alleged in this case) a source may have violated a legal duty in providing information to a

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[12] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

[13] Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

[14] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories (last visited May 31, 2006); Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004.

[15] Hersh, *supra* note 14.

[16] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, BALT. SUN, May 9, 2004, at 1A (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

journalist, the information reported helped spur prosecution of much more serious crimes. *Amici* respectfully submit that a compilation of those serious crimes that have gone unresolved because a journalist was permitted to protect his source would be a very short list indeed, and would pale in comparison to the scores of criminal prosecutions undertaken as a result of news reports containing information gleaned from confidential sources. Thus, as the Supreme Court observed in discussing anonymous speech more broadly, although "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

The forced revelation of confidential sources would "significantly interfere with [the media's] news gathering ability" and result in the loss of many of these valuable news reports. *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). *See also In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1168 (D.C. Cir. 2006) ("*Miller*") (Tatel, J., concurring) (if investigators "could easily discover journalists' sources, the press's truth-seeking function would be severely impaired"). The Supreme Court has repeatedly recognized in a variety of contexts that forced disclosure of the identity of speakers addressing public matters will deter would-be speakers and result in the loss of a significant amount of important speech. For example, in *Talley v. California* the Court invalidated an ordinance requiring that leaflets identify an author on the grounds that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. 60, 65 (1960). In *McIntyre*, the Court recognized that election workers may well decide to remain anonymous out of "fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." 514 U.S. at 341-42. The same logic applies to those anonymous sources who turn to journalists as their conduit to the public. In fact, the absence of a legal privilege is far more likely to deter

communications to reporters than to psychotherapists, spouses, physicians, etc., because by their very nature communications to journalists involve public matters more likely to attract the attention of prosecutors and litigants.

II. THE LESSONS OF HISTORY STRONGLY SUPPORT RECOGNITION OF A REPORTER'S PRIVILEGE IN THE CIRCUMSTANCES OF THIS CASE

Journalists were able to report many of the important news stories discussed above only because historically they have faced little realistic threat of government subpoenas seeking disclosure of their sources. If, as the Government will no doubt argue, there is truly no legal impediment to enforcement of these subpoenas, then one would expect to find numerous historical examples of similar subpoenas being enforced every time an arguably illegal grand jury or other type of leak results in an important news story. Yet the reality is that stories such as Watergate, the neutron bomb, Abu Ghraib and numerous others involving less weighty matters did not result in grand jury subpoenas directed to reporters, even though the same legal arguments the Government will raise here would, in theory, have applied equally to any of those examples.

The reason one does not find many historical examples of courts compelling journalists to disclose confidential sources to federal grand juries has nothing to do with the Government's success in policing leaks without turning to reporters, since it well-known that the success rate of such investigations are not very high. *See, e.g.*, *Miller*, 438 F.3d at 1175 (Tatel, J., concurring) ("the great majority of leaks will likely be unprovable without evidence from either leaker or leakee."). Rather, the reason that such subpoenas have been exceedingly rare is that through most of American history—dating back to the Founding era—either formal or informal restraints have been placed on the ability of prosecutors, litigants and even legislators to compel journalists to disclose their sources. This restraint reflects a basic social consensus that, on balance, compelling reporters to disclose confidential sources is a bad idea.

Indeed, the history of disputes between the government and the press over disclosure of confidential sources reveals a consistent pattern: whether or not a formal privilege was recognized, the judicial system for the most part has exercised self-restraint and respected journalists' practical need to protect their sources—a practice from which the Justice Department has clearly departed here. Where self-restraint ceased, prosecutors seeking to exercise a broad right to compel the disclosure of reporters' sources have been regularly repudiated, either by legislatures adopting statutory protections in the form of a Shield Law, or by courts imposing common law and constitutional limitations on the use of the subpoena power to compel the disclosure of reporters' sources, or by a return to self-restraint. *See Miller*, 438 F.3d at 1170 (Tatel, J., concurring) (the totality of state and federal constraints on compelling disclosure of sources makes "the case for a privilege here even stronger than in *Jaffee*."). Our nation's historic response to such subpoenas deserves careful consideration by the Court, because it powerfully supports the recognition of a formal legal privilege in this case, where the historic voluntary restraint of the Department of Justice has been abandoned.

A. The Fundamental Values Embodied In the Reporter's Privilege Date Back to Our Nation's Founding

The concept that journalists should be able to communicate with confidential sources free from state interference was not invented by modern journalism schools, but rather dates back to the origin of the Republic. Indeed, the controversy credited with first establishing uniquely American principles of freedom of the press—the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel in 1735—actually arose out of Zenger's refusal to identify to a grand jury the source(s) of material appearing in his newspaper that harshly criticized New York's royal government. Because he would not identify his sources in the very first criminal "leak" investigation on record, under the laws of the day Zenger was arrested and

charged with criminal responsibility himself as the publisher. Ultimately, he was acquitted by a jury. *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring) (discussing the Zenger case).

In his concurring opinion in *McIntyre*, addressing the history of constitutional protection for anonymous speech generally, Justice Thomas describes how Zenger's experience was repeated by others who comprised the eighteenth century "news media," which consisted largely of journals made up of contributions from individual authors. Those authors not infrequently requested anonymity and their identities were known only to the editor-publishers, who fought to honor the promises of confidentiality they had made against determined efforts by colonial authorities to learn the authors' identities. *Id.* at 360. For example, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor, Isaac Collins, to identify the author of a critical article. *Id.* at 362-63.

These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367. Several generations later, Congress in the nineteenth century would again try several times to compel journalists to identify their confidential sources, including sources who leaked information about pending legislation. Like their Revolutionary-era predecessors, the journalists who were targeted consistently refused and in a few cases were very briefly held in contempt.[17] By the twentieth century, Congress ceased any

[17] For example, in 1848 a reporter for the *New York Herald*, John Nugent, was held in contempt by the Senate for refusing to identify the source that leaked the Treaty of Guadalupe-Hidalgo, ending the Mexican War. Nugent was detained on the Capitol grounds, continued to submit reports under

effort to enforce legislative subpoenas for journalists' confidential sources, applying a kind of *de facto* privilege based on the recognition that such efforts are incompatible with a free press.[18]

While journalism has changed dramatically since the late eighteenth century, today's reporters, publishers and broadcasters perform essentially the same function as their Colonial-era predecessors: exercising their editorial judgment to enable some anonymous sources of information and opinion to reach a broad audience. Indeed, when Isaac Collins refused to comply with the New Jersey Legislature's demands on the grounds that to testify would "'betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press,'" he articulated exactly the same reasons why the *Chronicle* and its reporters are resisting the subpoenas served on them. *Id.* at 362 (citation omitted).

B. A Reporter's Privilege Under State Law Emerged in Direct Response to Attempts by State Prosecutors to Enforce Subpoenas Like Those Issued by the U.S. Attorney in This Case

Although Congressional efforts to compel reporters to disclose sources had been largely abandoned by the twentieth century, around the same time occasional efforts to compel reporters to identify their sources began to arise in judicial proceedings. As discussed in more detail in Part II. C below, very few of those disputes involved subpoenas by federal prosecutors, who for most of the twentieth century evinced little interest in seeking the testimony of journalists. Rather, most disputes over judicial subpoenas to the press arose in state courts, typically in state grand jury proceedings.

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the byline "Under Custody of the Sergeant-at-Arms", and was released after thirty days supposedly to "protect[] his health." In 1871, a similar scenario played out when the *New York Tribune* reported details of the Treaty of Washington. Two reporters, Zeb White and Hiram Ramsdell, were held in contempt and then released after nine days. *See* Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Va. L. R. 61, 77-79 (1950)

[18] For example, in 1945 the House Veterans Committee sought to compel a reporter to disclose the names of Veterans Administration officials used as sources in articles criticizing the V.A. After initially citing the reporter for contempt, the Committee reversed itself by a vote of 13 to 2 and permitted the reporter to continue testifying without disclosing his sources. 36 Va. L. R. at 81.

1. *Jaffee* Requires Consideration of State Reporter Shield Laws and Overrules the Ninth Circuit's Previous Test for Recognition of Common-Law Privileges

The state privilege laws that gradually emerged from these disputes are particularly important for this Court to consider, because the Supreme Court has made clear that the development of state law is a critical factor in considering whether to recognize any federal common-law privilege. *Jaffee*, 518 U.S. at 12-14. The application of *Jaffee*'s analysis to the question of a reporter's privilege presents a question of first impression in the Ninth Circuit, because *Jaffee* overruled what had been the Ninth Circuit's test for evaluating a common law privilege. Since *Jaffee*, no court within the Circuit has been called upon to apply its analysis to the reporter's privilege.

Prior to *Jaffee*, the Ninth Circuit held that whether any federal common law privilege exists pursuant to Rule 501 of the Federal Rules of Evidence must be determined solely by reference to the common-law decisions of state courts, rather than state statutes. The Circuit thus declined to recognize a psychotherapist's privilege on the grounds that the privilege had no "common law foundations", but rather "has developed by state statutory enactment." *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989) (per curiam). Similarly, a few years later, the Circuit declined to recognize a common law reporter's privilege (though the case did not actually involve a journalist) for the same reason, on the grounds that "the general common law rejects such a privilege," pointing to *Branzburg*'s observation that "'[a]t common law, *courts* consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.'" *In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993) *quoting Branzburg v. Hayes*, 408 U.S. 665, 685 (1972) (emphasis added).

Jaffee overruled the Ninth Circuit's interpretation of Rule 501, holding:

> It is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision. Although common-law rulings may once have

> been the primary source of new developments in federal privilege law, that is no longer the case.

518 U.S. at 13. *Jaffee*'s elimination of any distinction between state statutes and judicial decisions for purposes of Rule 501 necessarily requires reconsideration of the Circuit's holding regarding a common law reporter's privilege because, like the psychotherapist privilege, the reporter's privilege also evolved primarily as a creature of statute. Indeed, cases within the Ninth Circuit since *Jaffee* considering other potential common law privileges have consistently surveyed the development of relevant state statutes and recognized privileges that would not likely have passed muster under the Circuit's pre-*Jaffee* test. *See, e.g.*, *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1178-79 (C.D. Cal. 1998) (adopting a federal mediation privilege and noting that "[i]n assessing a proposed privilege, a federal court should look to a consistent body of state legislative and judicial decisions adopting such a privilege as an important indicator of both reason and experience"), aff'd, 216 F.3d 1082 (9th Cir. 2000); *In re Grand Jury Proceedings*, 949 F. Supp. 1487, 1493 (E.D. Wash. 1996) (recognizing a parent-child privilege and holding that "the Court is not bound to consider only judicially created 'common-law rulings' as the source of new privileges and may also look to policy determinations made by state legislatures as reflecting both reason and experience.") (citation omitted).

2. The Development of a Reporter's Privilege Among the States Strongly Supports Recognition of a Federal Privilege

The actual experience of the states follows a consistent pattern, quite similar to the historical experience of Congress when it briefly attempted, but ultimately rejected, the practice of subpoenaing journalists to identify sources of leaks from its chambers. State court efforts to compel journalists to disclose confidential sources have been infrequent, but when they did occur state legislatures usually responded by enacting statutes, often called "shield laws", that formally recognized a reporter's privilege. The vast majority of shield laws were enacted in two waves, as

an explicit repudiation of judicial decisions in high-profile cases to imprison journalists for refusing to obey orders compelling disclosure of their sources. Thus, a reporter's privilege under state law emerged not as an abstract affirmation of new legal principles, but rather as a confirmation of historical values intended to repudiate specific attempts to enforce the very kinds of subpoenas issued in these cases.

Specifically, the existence of a formal "reporter's privilege" dates back to the late nineteenth century, and has a much longer history than the psychotherapist privilege or others recently adopted pursuant to federal common law. The first formal privilege was enacted after *Baltimore Sun* reporter John Morris refused to reveal sources for stories about alleged bribery of elected officials when he was served with a grand jury subpoena. Morris spent just a few days in jail before being released, but the case prompted the Maryland legislature in 1896 to enact an absolute privilege against compelled disclosure of a journalist's sources, which remains the law in Maryland to this day.[19] The basic dynamic that led to the Maryland shield law – a journalist was subpoenaed and jailed for declining to identify sources, which prompted legislative action to prevent similar incidents in the future – would be repeated by many other states over the course of the next century.

The Maryland statute stood alone for more than thirty-five years until a number of high-profile incidents took place in the early 1930s, when eight reporters were imprisoned for periods ranging from five to forty days.[20] While the only state-court appellate opinion emanating from

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[19] *Knew the Grand Jury's Secrets: A Reporter of a Baltimore Paper Imprisoned for Contempt of Court*, CHICAGO DAILY TRIBUNE, Dec. 23, 1886; Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Va. L. R. 61, 66 (1950)

[20] For example, three *Washington Times* reporters and a *New York Tribune* journalist, Martin Mooney, served brief prison sentences for declining to comply with state grand jury subpoenas seeking sources for stories about vice crimes. In 1931 the editor of the *Hopewell News* in Virginia was jailed by a local judge after refusing to disclose the identity of the author of an anonymous letter to the editor harshly criticizing the municipal courts. He was released after just five days. The *Louisville Courier-Journal*'s editor was briefly jailed three years later after the state legislature sought to learn who wrote an anonymous letter to the editor attacking its procedure. 36

any of these incidents declined to recognize a formal privilege[21], between 1933 and 1937 seven states (including California) responded to them by enacting statutory privileges, while three more followed suit within a few years. Like Maryland's statute, all but one of these laws provided absolute protection from compelled disclosure of confidential sources.[22] The experience of the 1930s, which produced one state judicial decision rejecting a reporter's privilege but many more statutes enacting one, illustrates why the Ninth Circuit's prior practice of only considering the results of common-law adjudication would be plainly inconsistent with the requirements of *Jaffee*.

For roughly thirty-five years after the mid-1930s there are virtually no examples we have uncovered of meaningful efforts to compel non-party reporters to disclose their sources. For example, records by *amicus* the Reporter's Committee for Freedom of the Press suggest that only about a dozen newsgathering-related subpoenas were even served on the press from 1960-68, most of which presumably did not seek information about confidential sources. Osborn, 17 Colum. Hum. Rts. L. Rev. 57, 64 n. 24. In the early 1970s, however, federal prosecutors began to issue an unprecedented wave of federal grand jury subpoenas that culminated in the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). As a result, another ten states adopted shield laws within roughly a year of *Branzburg*, to prevent any potential efforts by state prosecutors to launch any similar campaigns.[23]

Va. L. Rev. at 71-74

[21] *People ex rel. Mooney v. Sheriff*, 199 N.E. 415 (N.Y. 1936).

[22] ALA. CODE tit. 7, § 370 (enacted in 1935); ARIZ. CODE ANN. § 23 (enacted in 1937); ARK. STAT. ANN. tit. 43, § 917 (enacted in 1936); CAL. CODE CIV. PROC. § 1881(6) (enacted in 1935); IND. ANN. STAT. § 2-1733 (enacted in 1941); KY. REV. STAT. § 421.100 (enacted in 1936); MD. ANN. CODE GEN. LAWS art. 35, § 2 (enacted in 1896); MICH. STAT. ANN. § 28.945(1) (enacted in 1949); MONT. REV. CODE §§ 93-601-1, 93-601-2 (enacted in 1943); N.J. STAT. ANN. § 2:97-11 (enacted in 1933); OHIO GEN. CODE § 6319-2a (enacted in 1941); PA. STAT. ANN. tit. 28, § 330 (enacted in 1937).

[23] 59 Del. Laws ch. 163, § 1 (enacted in 1974); 1973 Minn. Laws ch. 735, §§ 1-5 (enacted in 1973); 1973 Neb. Laws 380, §§ 1-4 (enacted in 1973); NEV. REV. STAT. §§ 49.275 (enacted in 1971); 1970 N.Y. Laws ch. 615, § 1 (enacted in 1970); 1973 N.D. Laws ch. 258, § 1 (enacted in 1973); OKLA. STAT. tit. 12, § 2506 (enacted in 1974); 1973 Or. Laws ch. 22, §§ 2-6 (enacted in 1973); 1971 R.I. Pub. Laws ch. 86, § 1 (enacted in 1971); 1973 Tenn. Pub. Acts ch. 27, §§ 1-3

California's experience was a typical example of this dynamic. California's shield law was originally enacted in 1935, but was amended in response to the Ninth Circuit's decision in *Farr v. Pitchess,* 522 F.2d 464 (9th Cir. 1975), one of the last of the *Branzburg*-era cases. *Farr* affirmed the denial of a *habeas corpus* petition filed by former *Los Angeles Herald-Examiner* reporter William Farr, who had been incarcerated several years earlier by a state court for declining to identify a source who leaked information in violation of a protective order entered in the criminal trial of Charles Manson.

Farr was originally held in contempt after a state trial judge found that he could not invoke the California shield law, because by the time contempt proceedings took place Farr had left the paper's employ to work as a press aide for a local public official. *Farr v. Superior Ct*, 99 Cal. Rptr. 342 (2d Dist. 1971). In response, the Legislature amended the law in 1971 to expressly apply it to former journalists. Cal. Evid. Code § 1070. In Farr's state court appeal, the Second District affirmed the contempt order on different grounds, holding that the application of the shield law to Farr's case would violate the separation of powers. *Farr*, 99 Cal. Rptr. at 348. By the end of the 1970s, Californians effectively overrode that rationale as well by adding the shield law to the California Constitution. *See In re Willon*, 55 Cal. Rptr. 2d 245, 255 (6th Dist. 1996).

Over the course of the next several decades, seven more states and the District of Columbia adopted privilege statutes, again often in direct reaction to local or even national incidents in which reporters were briefly jailed.[24] At present, 32 states and the District of Columbia have

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(enacted in 1973).

[24] For example, the two most recent laws were enacted as a direct response to jailings of journalists. North Carolina enacted a law after a local television journalist was jailed for two hours in a case that did not even involve any confidential source. *See In re Owens*, 517 S.E.2d 605 (N.C. 1999); N.C. Gen Stat. § 8-53.11. Just last month, Connecticut passed a shield law in response to recent federal judicial decisions enforcing grand jury subpoenas to reporters issued by special prosecutors. Public Act No. 06-140, available at http://www.cga.ct.gov/2006/ACT/Pa/pdf/2006PA-00140-R00HB-05212-PA.pdf (last viewed May 31, 2006).

statutory shield laws. *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 502-04 & nn. 34-40 (S.D.N.Y. 2005) (citing statutes). As discussed above, almost all of these statutes were enacted to expressly repudiate judicial efforts to enforce grand jury subpoenas like those at issue in this case, and as a result all of the state shield laws apply to grand jury subpoenas. Moreover, most of the remaining 18 states that have not enacted shield laws have recognized a privilege pursuant to common law, state constitutions, or in some cases the First Amendment. *Id.* (citing cases).

Importantly, the scope of the privileges recognized within the states would in most instances support quashing the subpoenas issued here. Seventeen states recognize an absolute privilege applicable in all judicial proceedings[25], and roughly the same number recognize a qualified privilege that cannot be overcome merely by a showing that the information is highly relevant and the state has exhausted all alternative means of identifying the source.[26] Rather, those states require some additional showing of a compelling public interest in enforcing the subpoenas that resembles the balancing exercise applied by Judge David Tatel in the recent *Miller* case, a balance that when applied to the facts of this case easily favors quashing the subpoenas. *Miller,* 438 F.3d at 1175 (Tatel, J., concurring) (courts "must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value").

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[25] Ala. Code § 12-21-142; Ariz. Rev. Stat. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evid. Code § 1070; Del. Code Ann. tit. 10, §§ 4320-26; D.C. Code Ann. §§ 16-4701 to 4704; Ind. Code §§ 34-46-4-1 & 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; Md. Code Ann., Cts. & Jud. Proc. § 9-112; Mont. Code Ann. §§ 26-1-901 to 903; Neb. Rev. Stat. §§ 20-144 to 147; Nev. Rev. Stat. § 49.275; N.J. Stat. Ann. §§ 2A:84A-21 to 2A:84A-21.8; N.Y. Civ. Rights Law § 79-h; Ohio Rev. Code Ann. §§ 2739.04 & 2739.12; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. § 5942.

[26] *See, e.g.*, Alaska Stat. §§ 09.25.310-320; Colo. Rev. Stat. § 13-90-119; Fla. Stat. Ann. § 90.5015; La. Rev. Stat. Ann. § 45:1453; Minn. Stat. Ann. § 595.024; N.M. R. Evid. 11-514; N.D. Cent. Code § 31-01-06.2; Tenn. Code Ann. § 24-1-208. The actual number of states that would apply a balancing test similar to Judge Tatel's is probably larger, because many states have not had occasion to define the precise contours of the privilege they have recognize through judicial decisions.

Finally, there is no evidence that the existence of strong state shield laws has inhibited state law enforcement efforts. On the contrary, a large, bipartisan majority of state attorneys general recently expressly urged the federal courts to adopt a similar privilege, so as not to undermine state policy on this question.[27] In short, the history of state-law recognition of a reporter's privilege is an archetypical example of "'the evolutionary development of testimonial privileges'" envisioned by *Jaffee* and strongly supports the application of a federal common law privilege to quash the subpoenas served in these cases. *Jaffee,* 518 U.S. at 8 (*quoting Trammel v. United States*, 445 U.S. 40, 47 (1980)).

C. These Subpoenas Represent a Sharp Break with Past Federal Practice Declining to Seek Disclosure of Journalists' Sources

The history of subpoenas in federal courts is equally instructive in understanding why "reason and experience" support the formal recognition of a common law reporter's privilege under federal law. Even more than their state counterparts, the available historical evidence suggests that, with the exception of the few years surrounding *Branzburg*, Justice Department prosecutors have very rarely sought to compel reporters to identify confidential sources. In effect, federal prosecutors for the most part have informally recognized a kind of *de facto* privilege that largely obviated the need for recognition of a more formal one in many federal jurisdictions. In this respect, the subpoenas issued in this case represent a sharp break with past practice, a break that the collective experience of both state and federal courts indicates will exact a price from press freedom far beyond any service paid to the ends of criminal justice.

Prior to the late 1960s we are aware of only one reported federal court decision addressing a subpoena issued to a non-party journalist in a criminal proceeding, and in that case the reporter was excused from testifying on grounds unrelated to the reporter's privilege. *See Burdick v.*

[27] *See* Brief of the States in Support of the Petitions for Writs of Certiorari, *Miller v. United States*, Nos. 04-1507, 04-1508 (May 18, 2005).

United States, 236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege). Indeed, the *Branzburg* era in the early 1970s appears to be the only time in American history when federal prosecutors made a practice of issuing subpoenas to the press for confidential sources. However, just as state legislatures did in response to subpoenas issued by state prosecutors, many lower federal courts and ultimately even the Justice Department itself reacted so negatively to the practice that the historical *status quo* was effectively restored shortly after the Supreme Court's decision in *Branzburg*. Many lower federal courts increasingly recognized some form of privilege and, perhaps more importantly, in 1973 the Justice Department adopted internal guidelines that virtually eliminated efforts to serve and enforce subpoenas such as the ones issued in this case. 28 C.F.R. § 50.10.

As a result, almost thirty years passed between the Ninth Circuit's decision in *Farr* in 1975 and the next federal court decision to affirm the enforcement of a subpoena for a journalist's confidential source. *See In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004). During that period *amici* are aware of only two federal judicial decisions arising from subpoenas issued by federal grand juries or prosecutors seeking confidential sources from journalists. Both involved alleged grand jury leaks to the media, and both subpoenas were quashed. *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982).[28]

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[28] By its own account the Justice Department has issued "little more than a handful" of subpoenas for confidential sources during that roughly 33-year period. Statement of Chuck Rosenberg, United States Attorney for the Southern District of Texas, Senate Judiciary Committee (Oct. 19, 2005), *available at* http://judiciary.senate.gov/testimony.cfm?id=1637&wit_id=4704 (last visited on May 31, 2006). However, the case law suggests that many or perhaps even all of those subpoenas did not ultimately result in any disclosure of sources. There are also a few examples of the reporter's privilege being asserted by persons who were not obviously journalists, and whose standing to even raise the privilege was disputed. It is perhaps no coincidence that courts faced with those facts proved less receptive to the privilege arguments asserted. *See, e.g.*, *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993) ("scholar's privilege" asserted by graduate student seeking to shield the identity of his houseguest).

Thus, the lessons of both "reason and experience" overwhelmingly point to recognition of a federal privilege applicable to these subpoenas. The protection of confidential newsgathering has deep roots in American history; the states have reached a virtual consensus recognizing a broad reporter's privilege without any evidence of injury to local law enforcement; and for virtually all of American history the federal criminal justice system has flourished without needing to even issue such subpoenas. On the other side of the ledger, history has proved time and time again that the ability of journalists to gather news free from any significant threat of compelled disclosure has served the public interest, including the interests of criminal justice, since many prosecutions originate from news reports based on confidential sources.

Recently, however, two special federal prosecutors conducting leak investigations, unencumbered by the Justice Department's internal guidelines, have attempted to break with historical practice and have turned to journalists after their investigations failed to uncover the source of a leak to the press. *See Miller, supra; In re Special Proceedings, supra.* To date the results of those cases and are somewhat mixed. Both decisions either actually or potentially recognized some form of reporter's privilege applicable in federal grand jury proceedings, but did not quash the subpoenas issued. However, this case has none of the unusual national security implications that drove the result in *Miller*. Moreover, the one grand jury subpoena that was authorized by the Justice Department, seeking to identify a reporter's source of an alleged grand jury leak indirectly, through her telephone records, was quashed. *See New York Times Co. v. Gonzalez,* 382 F.Supp.2d 457 (S.D.N.Y. 2005).[29]

This case appears to be the Justice Department's first attempt to follow the lead of the special prosecutors and subpoena journalists directly, breaking with its historic respect for the confidentiality of journalists' sources. The subpoenas were served the very week that the Attorney

[29] The government's appeal in *Gonzalez* is currently pending in the Second Circuit.

General of the United States made a series of public statements indicating that the current Justice Department believes subpoenas are justified to solve leak investigations, and would contemplate going even further to prosecute journalists for reports involving classified information.[30] If the instant subpoenas to the *Chronicle* are enforced, it is reasonable to expect that more will follow and the norms that have historically governed the relationship between government and the press will be seriously altered. The overwhelming weight of our collective national experience demonstrates, *amici* respectfully submit, that such a shift would not be in the interest of the public or ultimately of the criminal justice system itself.

CONCLUSION

Given the groundbreaking nature of the Department's demand in this case, the Court should carefully consider the lessons of "reason and experience", and should quash the subpoenas either by recognizing a privilege under federal common law or the First Amendment, or by recognizing that a grand jury subpoena does impose an "undue burden" and is "oppressive" pursuant to Rule 17(c) when it is issued to compel disclosure of a reporter's confidential source.

Dated: June 2, 2006

Respectfully submitted,

By s/ Sam N. Dawood

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[30] Adam Liptak, *Gonzales Says Prosecutions of Journalists Are Possible*, THE NEW YORK TIMES, May 22, 2006 at A14; ABC News, *This Week*, May 21, 2006; Zachary Coile, *Gonzales Defends Move Against BALCO Reporters*, SAN FRANCISCO CHRONICLE, May 20, 2006 at A3.

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Proof of Service

I, Pamela J. Maiwandi, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is One Embarcadero Center, Suite 600, San Francisco, California 94111-3611.

I caused to be served the following document:

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

I caused the above document to be served on each person on the attached list by the following means:

☑ I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on June 2, 2006, following the ordinary business practice.
(Indicated on the attached address list by an [M] *next to the address.)*

☐ I enclosed a true and correct copy of said document in an envelope, and placed it for collection and mailing via Federal Express on , for guaranteed delivery on , following the ordinary business practice.
(Indicated on the attached address list by an [FD] *next to the address.)*

☐ I consigned a true and correct copy of said document for facsimile transmission on _____.
(Indicated on the attached address list by an [F] *next to the address.)*

☐ I enclosed a true and correct copy of said document in an envelope, and consigned it for hand delivery by messenger on April 7, 2004.
(Indicated on the attached address list by an [H] *next to the address.)*

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

Executed on June 2, 2006 at San Francisco, California.

Pamela J. Maiwandi

Service List

Key:	[M] Delivery by Mail	[FD] Delivery by Federal Express	[H] Delivery by Hand
	[F] Delivery by Facsimile	[FM] Delivery by Facsimile and Mail	

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