ORAL ARGUMENT SCHEDULED FOR DECEMBER 8, 2004

In the

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

Nos. 04-3138, 04-3139, 04-3140

In Re Grand Jury Subpoenas, Judith Miller
Case No. 04-3138
District Court No. 04-MS-407

In Re Grand Jury Subpoenas, Matthew Cooper
Case No. 04-3139
District Court No. 04-MS-461

In Re Grand Jury Subpoena, Time Inc.
Case No. 04-3140
District Court No. 04-MS-460

On Appeal from the United States District Court
for the District of Columbia
Nos. 04-MS-407, 04-MS-461, 04-MS-460 (Chief Judge Thomas F. Hogan)

BRIEF OF THE UNITED STATES, APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND AUTHORITIES

_____Pursuant to D.C. Circuit Rule 28(a)(1), the United States, by Special Counsel Patrick J. Fitzgerald, submits this certificate:

(A) Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants Judith Miller, Matthew Cooper, and Time Inc.:

The American Society of Magazine Editors
Cable News Network LP, LLLP
Harper's Magazine Foundation
The New York Press Club
The Washington Post
The American Society of Newspaper Editors
The White House Correspondents Association

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants Judith Miller, Matthew Cooper, and Time Inc.

(C) Related Cases

The appeals of Judith Miller, Matthew Cooper, and Time Inc. are related and have been consolidated by this court's order dated October 19, 2004. Matthew Cooper and Time Inc. previously filed appeals from earlier orders of the district court (Nos. 04-3112 and 04-3113). Those appeals were voluntarily dismissed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

DOJ GUIDELINES

Authorities upon which we chiefly rely are marked with asterisks (*).

GLOSSARY

A-:	Appellants' Appendix
Br.:	Appellants' Brief
DOJ Guidelines:	28 U.S.C. §50.10
Ex.:	Exhibit
GA:	Government Appendix
SECA:	Government's Sealed Ex Parte Classified Appendix
SGA:	Government's Sealed Government Appendix

JURISDICTIONAL STATEMENT

The district court had jurisdiction over motions to quash subpoenas issued to appellants Judith Miller, Matthew Cooper, and Time Inc., and over the government's motion to hold Miller, Cooper, and Time Inc. in civil contempt, pursuant to Fed. R. Crim. P. 17(c), 28 U.S.C. § 1826, and 18 U.S.C. § 3231. The district court entered an order holding Miller in civil contempt on October 7, 2004 (A-461), and Miller timely filed a notice of appeal on October 12, 2004 (A-468). The district court entered an order holding Cooper and Time Inc. in civil contempt on October 13, 2004 (A-482), and Cooper and Time Inc. timely filed a joint notice of appeal on October 15, 2004 (A-484). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1826 and 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether *Branzburg v. Hayes* forecloses appellants' claim of a First Amendment reporter's privilege to resist giving evidence in a grand jury investigation being conducted in good faith.

2. Whether this Court should create a federal common law qualified reporter's privilege to resist compliance with a grand jury subpoena.

3. Whether the district court abused its discretion in finding that the government made the showing required to overcome any reporter's privilege.

4. Whether the district court abused its discretion in considering *ex parte* submissions from the government containing grand jury and classified information in ruling on challenges to subpoenas during an ongoing grand jury investigation.

5. Whether the Department of Justice internal guidelines on the issuance of media subpoenas provide a legal basis for a court to quash a subpoena, and, in the alternative, whether the district court correctly found full compliance with the guidelines.

STATEMENT OF THE CASE

On August 12 and 14, 2004, subpoenas were issued by a federal grand jury empaneled in Washington, D.C. seeking testimony and documents to New York Times reporter Judith Miller. A-176, A-178. Miller filed a motion to quash the subpoenas on August 19, 2004. A-461-62. The district court denied Miller's motion on September 9, 2004. A-503-508. After being advised that Miller refused to testify before the grand jury or produce documents despite the denial of her motion to quash, the government moved to hold Miller in civil contempt of court pursuant to 28 U.S.C. § 1826. A-457; A-461. On October 7, 2004, the district court held Miller in civil contempt of court based on Miller's refusal to comply with the subpoenas without just cause, and ordered that Miller be confined until such time as she was willing to comply with the grand jury subpoenas, or the grand jury expired, but in any event no longer than eighteen months. A-461-62. Miller was granted bail pending appeal of the order without objection from the government. *Id.* Miller's appeal followed. A-468-69.

On September 13, 2004, subpoenas were issued by the federal grand jury to reporter Matthew Cooper and his employer, Time Inc. ("Time"). A-314-15. Cooper and Time moved to quash the subpoenas, and the district court denied both motions on October 7, 2004 (A-

482). After being advised that Cooper and Time refused to testify and produce documents despite the denial of their motions to quash, the government moved to hold Cooper and Time in civil contempt of court pursuant to 28 U.S.C. § 1826. A-467; A-482. On October 13, 2004, the district court entered an order holding Cooper and Time in civil contempt of court based on their refusal to comply with the subpoenas without just cause. A-482. The court ordered that Cooper be confined, and that Time pay a fine of $1,000 per day until such time as they were willing to comply with the subpoenas. *Id.* However, the court granted Cooper bail and stayed Time's fine, pending their appeal of the court's order, without objection from the government. *Id.* Cooper's and Time's appeals followed. A-484.

STATEMENT OF FACTS

Introduction

The Special Counsel's investigation concerns alleged leaks of purportedly classified information by one or more government officials to reporters in apparent retaliation for a former government official's exercise of his First Amendment right to publicly criticize the government. During its investigation, the government has made narrow requests to a limited number of reporters for information crucial to the resolution of the investigation. These requests were made after exhausting all reasonable alternative means of gathering the critical information, after unsuccessfully attempting to negotiate with the reporters, and after obtaining waivers of confidentiality from a broad range of public officials encompassing the likely sources. As the district court found, the requests were focused, necessary, and

deferential to First Amendment interests. GA-47-GA-50. Nevertheless, to date, negotiations and litigation concerning the subpoenas to reporters has resulted in delaying the resolution of the grand jury's investigation by more than six months.

These consolidated appeals arise from civil contempt proceedings conducted during the ongoing federal grand jury investigation. Although the government took the position that it was not legally required to make any factual showing prior to demanding compliance with the subpoenas, in order to assure the district court that the subpoenas were appropriate, the government submitted, *ex parte* and under seal, detailed summaries of evidence gathered during the course of the investigation, with specific references to grand jury witness testimony, and materials identified as "classified." SGA-287-88. In order to maintain the confidentiality of these materials and the integrity of the ongoing grand jury proceedings, the government has presented to this Court *ex parte* and under seal all materials presented to the district court *ex parte* and under seal. Materials maintained under seal in the district court are contained in a sealed government appendix, while materials filed in the district court *ex parte* and under seal are contained in a sealed, *ex parte*, classified appendix. Thus, the government has filed with this Court three separate appendices: (1) a public appendix ("GA"); (2) a sealed appendix ("SGA"); and (3) a sealed, *ex parte*, classified appendix ("SECA"). The government will not quote from or discuss the substance of sealed materials in its brief.

The Leaks

During the spring and summer of 2003, a controversy arose concerning a statement made by President George W. Bush during the State of the Union address delivered on January 28, 2003. A-16, A-19. In that address, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." *Id.* The accuracy of this statement, later colloquially referred to as the "16 words," was called into question by a series of articles, including an Op-ed piece by Joseph C. Wilson IV, which was published in the New York Times on July 6, 2004. *See* A-233; A-237; A-26.

In the Op-ed piece, Wilson, a retired career State Department official, asserted that he had taken a trip to Niger at the request of the CIA in February 2002 to investigate allegations that yellowcake uranium had been sought or obtained by Iraq from Niger. A-232-33. According to Wilson, the CIA made this request after receiving inquiries from the Vice President about the allegation that uranium had been sought from Niger. *Id.* Wilson asserted that he reported to the CIA his conclusion that he doubted Iraq had actually obtained uranium from Niger, for a number of reasons. A-233-34. Wilson further opined that, based on his experiences, "some of the intelligence related to Iraq's nuclear weapons program was twisted to exaggerate the Iraqi threat." A-26; A-233.

On July 14, 2003, syndicated columnist Robert Novak published a column in the Chicago Sun-Times in which he asserted that "two senior administration officials" told him

that Wilson's wife, whom he described as a CIA "operative on weapons of mass destruction," suggested sending Wilson to Niger to investigate a report regarding attempted uranium purchases from Niger. A-26-27; A-237. Novak asserted that it was "doubtful" that Tenet ever saw Wilson's report, and "certain" that the President did not see it before the State of the Union address, and that the CIA did not regard the report as definitive. A-237.

After Novak's column was published, it was reported that other reporters had been told by government officials that Wilson's wife worked at the CIA monitoring weapons of mass destruction, and that she was involved in her husband's being sent to Africa. *See* A-26, A-147; SECA II Ex. D, E, G, I. Among the articles that related this report was an article contributed to by Matthew Cooper and published by Time.com on July 17, 2003. A-11. The article stated that: "some government officials have noted to Time in interviews that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction . . . [and] have suggested that she was involved in her husband's being dispatched to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore . . . ." *Id.* In addition, on September 28, 2003, the Washington Post reported that, in the July 2003 time frame, "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." A-27.

Grand Jury Investigation

In the fall of 2003, the government began an investigation into whether violations of federal law had occurred in connection with the unauthorized disclosure by government employees of information concerning the identity of a purported CIA employee. A-27. In late December 2003, Attorney General John Ashcroft recused himself from participation in the investigation, and delegated his full authority in connection with the investigation to Deputy Attorney General James B. Comey as Acting Attorney General. A-240. Deputy Attorney General Comey, in turn, appointed Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, as Special Counsel, and delegated full authority concerning the investigation to him. A-27; A-240-41. The grand jury investigation began in January 2004.

Grand Jury Subpoenas to Cooper and Time

During the period January through May 2004, the grand jury conducted an extensive investigation. SECA I; SECA II. On May 21, 2004, a grand jury subpoena was issued to Time Magazine reporter Matthew Cooper seeking testimony and documents related to two specific articles dated July 17, 2003 and July 21, 2003, to which Cooper contributed. A-21. The subpoena was issued in full compliance with the Department of Justice guidelines regarding the issuance of subpoenas to members of the news media, which require that subpoenas in criminal cases be issued only where there are reasonable grounds to believe that a crime has occurred and that the information sought is essential to a successful investigation,

particularly with reference to establishing guilt or innocence; that subpoenas be limited in subject matter and time frame; that subpoenas to members of the media be issued only after all reasonable efforts have been made to obtain the desired information from alternative sources, and after negotiations have been conducted in an attempt to obtain voluntary cooperation; and more generally, that determinations regarding the issuance of subpoenas be made with the goal of striking "the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." A-35. *See* 28 C.F.R. § 50.10.

In an effort to negotiate Cooper's compliance with the subpoena, the Special Counsel offered to limit the subpoena's scope to cover conversations between Cooper and a specific individual identified by the Special Counsel. A-283-84. Cooper refused to comply with the subpoena, even after the Special Counsel offered to narrow its scope and, instead, moved to quash the subpoena on June 3, 2004. A-317. On July 6, 2004, after briefing and a hearing, Cooper's motion was denied in open court. A-163. The district court's reasoning was set forth in a written order issued on July 20, 2004. A-26-36.

A subpoena was then issued to Time Inc. seeking the same documents requested in the subpoena to Cooper. A-59. Time moved to quash the subpoena (A-424-A-427), and its motion was denied on August 6, 2004. A-163.

Cooper and Time refused to comply with the subpoenas, despite the district court's denial of their motions to quash. A-284. After a hearing, the district court found that Cooper

and Time had refused to comply with the subpoenas without just cause, and therefore held them in civil contempt of court. A-163.

After being held in contempt, and after filing notices of appeal, Cooper and Time agreed to comply with the subpoenas as limited by the Special Counsel, on the understanding that the Special Counsel explicitly reserved the right to seek additional testimony and documents from Cooper and Time, if necessary. A-284; GA-50; SGA-279-80. Cooper indicated that his rationale for agreeing to provide testimony and documents pursuant to this agreement was the fact that the source had stated that he had no objection. GA-32. After Cooper and Time fulfilled their obligations under the agreement, the Special Counsel moved to vacate the district court's contempt order, and the motion was granted. A-272-73; A-285. The notices of appeal were then voluntarily dismissed.

On September 13, 2004, the grand jury issued subpoenas to Cooper and Time seeking: "testimony and documents relating to conversations between Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame a/k/a Valerie Wilson a/k/a Valerie Plame (the wife of former Ambassador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." A-314, A-315. Both subpoenas were issued in compliance with Department of Justice guidelines. GA-48-49.

Cooper and Time moved to quash these subpoenas and, on October 7, 2004, after briefing and a hearing, the district court denied the motions. GA-38. On October 13, 2004,

after a hearing, the district court held Cooper and Time in civil contempt of court based on their refusal to comply with the subpoenas without just cause. A-482-83.

Grand Jury Subpoenas to Miller

On August 12 and August 20, 2004, grand jury subpoenas were issued to reporter Judith Miller and her employer, the New York Times, seeking documents and testimony related to "conversations between Miller and a specified government official occurring between on or about July 6, 2003 and on or about July 13, 2003, concerning Valerie Plame Wilson (whether referred to by name or by description) or concerning Iraqi efforts to obtain uranium." A-176, A-178, A-230. These subpoenas were issued in compliance with the Department of Justice Guidelines. A-275. More specifically, the limited information sought by the subpoenas was expected to constitute direct evidence of innocence or guilt, and was necessary for the completion of the investigation, and all available alternative means of obtaining the information had been exhausted. *Id.*

In response to the subpoena, the New York Times indicated that it was in possession of no responsive documents. A-230. Miller refused to comply with the subpoenas and, instead, moved to quash them. SGA-3-4; A-279.

After briefing and a hearing, the district court denied Miller's motion to quash. A-274-78. Thereafter, the court found that Miller had refused to comply with the subpoenas without just cause and held her in civil contempt of court. A-461-62.[1]

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[1] Appellants make reference to two matters outside the record on appeal: a newspaper account describing a witness observed at the courthouse (Br. 20); and an unrelated proceeding (Br.

SUMMARY OF ARGUMENT

1. Appellants' claim of a First Amendment reporter's privilege to resist giving evidence in a grand jury investigation being conducted in good faith is foreclosed by binding precedent. Appellants Judith Miller, Matthew Cooper, and Time Inc. were served with grand jury subpoenas requiring them to give evidence in an ongoing investigation. In moving to quash the subpoenas, no allegation was made that the investigation was being conducted in bad faith or for purposes of harassment. Rather, the appellants claimed that as members of the media, they have a First Amendment privilege not to give evidence to the grand jury because doing so would impede their news gathering activities, especially if they would be required to reveal the identity of confidential sources. The district court properly denied the motions to quash based on *Branzburg v. Hayes*, in which the Supreme Court flatly rejected the claim that there is a First Amendment reporter's privilege that allows reporters to resist giving evidence in a grand jury investigation being conducted in good faith. In *Branzburg*, the Supreme Court engaged in a thorough analysis of the competing interests, including the public's right to "every man's evidence" as the grand jury fulfills its vital role in law enforcement and the alleged chilling effect that giving evidence would have on news gathering activities.

The Supreme Court, on a record similar to the one in this case, decided that the public interest in effective law enforcement outweighed the uncertain adverse effects from requiring

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54, n. 17). If the Court requests, the Special Counsel is prepared to make a supplemental submission to address either matter.

those few reporters who have evidence of crime to give evidence. *Branzburg* said that the courts should not be placed in the role of balancing law enforcement interests and the interests of reporters on a case-by-case basis, but that the courts could intervene in cases of bad faith investigations. Appellants' argument to this Court is that the majority opinion in *Branzburg* does not mean what it says because one of the Justices who joined the majority opinion wrote a brief concurring opinion that appellants claim had the effect of creating a First Amendment privilege requiring case-by-case balancing of interests by the courts in all cases, not just cases of bad faith investigations. The district court correctly rejected this interpretation of *Branzburg*, as has this Court. Absent a bad faith investigation, there is no First Amendment reporter's privilege to resist giving evidence to a grand jury.

2. Appellants argue that if there is no constitutional reporter's privilege under *Branzburg*, this Court should create a common law qualified reporter's privilege pursuant to its authority under Rule 501 of the Federal Rules of Evidence. This contention should be rejected because *Branzburg* clearly assessed the common law and found no common law reporter's privilege. The argument also ignores that *Branzburg* engaged in the same sort of balancing of interests that informs the creation of common law privileges and concluded that, in the grand jury context, the public's interests in law enforcement outweigh any adverse impact on news gathering. Creation of a common law reporter's privilege in the grand jury context would be at odds with the plain language of *Branzburg* and would be inconsistent with the balance of interests struck in that case.

3. In the proceedings in the district court, the government maintained that there was no valid claim of reporter's privilege. Nevertheless, the government submitted materials that allowed the district court to independently evaluate the ongoing investigation, including the need for the reporter's evidence and the exhaustion of alternative sources for the information. Based on these submissions, the district court properly found that even if it had recognized a qualified reporter's privilege as urged by appellants, that the record established that the government has made the showing required to overcome the asserted privilege. This finding provided an independent basis for the denial of the motions to quash and for this Court to affirm the orders of contempt.

4. The district court properly allowed the government to make much of its factual submission on an *ex parte* basis. First of all, the district court correctly found there was no valid reporter's privilege in the grand jury context, and if there is no available claim of privilege, providing any sort of discovery was inappropriate. Secondly, even assuming a colorable claim of privilege, the procedures used by the district court were clearly appropriate in light of concerns about grand jury secrecy and classification and impeding the progress of the grand jury. Appellants did not have a due process right as grand jury witnesses to comb through sealed grand jury materials and delay the grand jury process with a mini-trial. The district court's careful *ex parte* examination of the government's submissions was a completely proper procedure for the court to employ in reaching its conclusion that the government had made the showing necessary to overcome the asserted claim of privilege.

5. The Department of Justice internal guidelines for issuance of media subpoenas do not create a legal basis for a court to quash a grand jury subpoena. In this case, the government offered a detailed account of how it had complied faithfully with the Department guidelines. Although the district court found that the guidelines do not vest witnesses with rights, it went on to find that the Special Counsel had in good faith fully complied with the guidelines. That finding finds clear support in the record.

STANDARD OF REVIEW

A district court's finding of contempt under 28 U.S.C. § 1826 is reviewed for abuse of discretion. *In re Grand Jury Proceedings (Appeal of Freligh)*, 903 F.2d 1167, 1170 (7th Cir.1990); *In re Grand Jury Proceedings,* 40 F.3d 959, 961 (9th Cir. 1994); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1488 (10th Cir. 1990). *See also United States v. Nixon*, 418 U.S. 683, 702 (1974)("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c)").

The Court reviews *de novo* a district court's decision related to the recognition of a testimonial privilege. *In re Sealed Case*, 148 F.3d 1073, 1075 (D.C. Cir. 1998). Determinations regarding the applicability of the privilege or exceptions thereto, which

depend heavily on the factual context in which the privilege is asserted, are reviewed only for abuse of discretion. *In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1982).

ARGUMENT

I. *BRANZBURG V. HAYES* FORECLOSES APPELLANTS' CLAIM OF A FIRST AMENDMENT REPORTER'S PRIVILEGE TO RESIST GIVING EVIDENCE IN A GRAND JURY INVESTIGATION BEING CONDUCTED IN GOOD FAITH.

The district court correctly held that in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court "unequivocally rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith." A-26. The district court noted that *Branzburg* recognized that the First Amendment provides reporters with protection from providing testimony in cases where the grand jury investigation calls for the testimony in bad faith or for the purposes of harassment. A-30-31; *Branzburg*, 408 U.S. at 707-08.[2] The district court properly concluded: "In the absence of a grand jury acting in bad faith or with the sole purpose of harassment, *Branzburg* makes clear that neither the First Amendment nor the common law protect reporters from their obligations shared by all citizens to testify before the grand jury when called to do so." A-29.

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[2] The "headline" and "lead" of appellants' First Amendment argument do not accurately report the district court's written opinion. Br. at 22. The district court did not take the "absolutist" position that appellants attribute to the district court based on a portion of one sentence in the district court's July 20, 2004 memorandum opinion. *See* A-34. The sentence read in its entirety is clearly referring to the "core" of the *Branzburg* opinion and, read as a whole, the district court's opinion plainly acknowledges that *Branzburg* recognized First Amendment protection for reporters from grand jury investigations conducted in bad faith.

The district court's reading of the *Branzburg* decision is correct. The consolidated cases now before this Court present no accusation that the grand jury investigation is being conducted in bad faith or for the purposes of harassing the media; indeed, the record before the Court overwhelmingly establishes that the investigation is being conducted in good faith for legitimate law enforcement purposes. Therefore, appellants' claim of a broad constitutional privilege is foreclosed by *Branzburg* and there is no basis in the record to suggest this case presents the sort of bad faith investigation for which *Branzburg* reserved a measure of First Amendment protection.

A close look at the *Branzburg* decision confirms the district court's reading of that case. In *Branzburg*, several reporters served with grand jury subpoenas argued for recognition of a First Amendment reporter's privilege on the ground that identifying confidential sources and information to a grand jury would deter persons from providing information to the press "to the detriment of the free flow of information protected by the First Amendment." 408 U.S. at 679-80. The reporters asserted that they should not be required to testify before the grand jury until the government made a showing that the testimony was necessary, and that requiring the testimony was justified by a compelling public interest. *Id.* at 680.

The Supreme Court, noting that the creation of new testimonial privileges obstructs the search for truth, expressly declined to interpret the First Amendment "to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690. The Court stated:

> Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of all confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

Id. at 691. The Court concluded that the refusal to recognize a First Amendment reporter's privilege would not seriously undermine the ability of the press to collect and disseminate news, and that even if some news sources would be deterred, it could not "accept the argument that the public interest in possible future news about crime from undisclosed and unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." *Id.* at 695.

The Court concluded that the adverse effect on news gathering of requiring testimony from the limited group of reporters who witness crimes or receive evidence of a crime would not be significant enough to outweigh the public interest in law enforcement. *Id.* at 690-91. In reaching this conclusion, it is significant that the record before the Court in *Branzburg* contained affidavits and other materials advancing the claim that requiring testimony from the press would cause sources to dry up and significantly impede news gathering. *See Id.* at 665, n.5, 679-81, 693-94, 699, n.37.[3] The Court stated:

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[3] The affidavits and other materials submitted in *Branzburg* are similar to the affidavits submitted to the district court in these consolidated cases. *See, e.g.,* A-2, A-37, A-41, A-44, A-166, A-211.

> The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by the Court that, ordinarily, newsmen must testify pursuant to subpoenas, but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures are widely divergent and to a great extent speculative. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.

Id. at 693-94. The Court also responded to the claim that news sources would dry up by stating, "[T]his is not the lesson that history teaches us." *Id.* at 698. The Court noted, "From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished." *Id.* at 698-99.

The Court also addressed the question of whether it was wise to confer constitutional protection on those who commit crimes or have information concerning a crime. The Court stated:

> The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert–and no one does in these cases–that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news source to violate valid criminal laws.

Id. at 691. The Court added: "[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 695-96.

On these grounds, the Court rejected the suggestion that courts conduct a case-by-case balancing of interests each time a journalist is subpoenaed by a grand jury, in part because such case-by-case balancing would "present practical and conceptual difficulties of a high order." *Id.* at 701-06. In particular, the Court expressed its concern that such case-by-case balancing would cause the courts to "be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance." *Id.* at 705. The Court also stated its concern that "courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws." *Id.* at 705-06.

At the end of the majority opinion in *Branzburg*, the Court noted that "news gathering is not without its First Amendment protections." *Id.* at 707. The Court stated that in cases where grand jury investigations are conducted in bad faith, without legitimate law enforcement purposes, or to harass the press and disrupt relationships with news sources, a court would be authorized to grant a motion to quash on First Amendment grounds. *Id.* at 707-08. Justice Powell, who joined the majority opinion, wrote a brief concurring opinion underscoring the point made by the majority:

> As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury

> is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe his testimony implicates confidential source relationship without legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim of privilege should be judged on its facts by striking the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 709-10.

A fair reading of Justice Powell's concurring opinion makes clear that his purpose was to emphasize a point made in the majority opinion: In cases where grand jury investigations were being conducted in bad faith to harass the press, a court could consider a motion to quash. Justice Powell noted that, in evaluating a motion to quash in a case of alleged harassment of the press, a court would not apply the "heavy burdens of proof to be carried by the state" advocated by the dissent in *Branzburg* (*Id.* at 710 n.*), namely, requiring the government to make showings of relevance, necessity, and compelling and overriding interests as a precondition to enforcing the subpoena. *Id.* at 743 (Stewart, J., dissenting). Justice Powell explicitly stated that, even in a case of alleged harassment of the press, a court would not apply the rule proposed by the dissent, because in applying such a rule "the essential societal interest in the detection and prosecution of crime would be heavily subordinated." *Id.* at 710 n*. Justice Powell's short concurring opinion, fairly read, does not contain "disclaimers" regarding the majority opinion as suggested by the dissent. *See id.* at

745 n.36 (Stewart, J., dissenting). Instead, Justice Powell's concurring opinion emphasized a point made in the majority opinion in which he joined; the only disclaimers concerned points made in the dissenting opinion.

Appellants insist that Justice Powell's concurring opinion is inconsistent with the majority opinion that he joined and that the effect of the concurring opinion was to establish a First Amendment reporter's privilege and case-by-case balancing of interests *in all cases where a reporter is subpoenaed,* not just cases involving bad faith investigations.[4] Such an interpretation is squarely at odds with the plain language of the majority opinion in which Justice Powell joined. The position taken by appellants greatly exceeds the interpretation of Justice Powell's concurrence in Justice Stewart's *Branzburg* dissent: "While Mr. Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury." 408 U.S. at 725 (Stewart, J., dissenting).

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[4] Appellants protest that if Justice Powell's concurring opinion is read to endorse a case-by-case balancing of interests only in cases of alleged bad faith investigations, "then there is no First Amendment protection at all because protection from the harassment is available to all citizens and does not implicate any 'asserted claim of *privilege.*" Br. at 26 (quoting Justice Powell's concurring opinion in *Branzburg,* 408 U.S. at 710, emphasis added). This ignores the most obvious interpretation of Justice Powell's concurring opinion: He meant the "privilege" to be limited to cases where a bad faith investigation harasses a reporter. This interpretation would allow a reporters to move to quash if he has "reason to believe his testimony implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. Contrary to appellants' contention, this interpretation of Justice Powell's concurrence clearly extends First Amendment protection to reporters and allows a basis for a motion to quash that is not available to other citizens.

It must be noted that Justice Powell's concurring opinion is not a separate opinion concurring only in the judgment. Justice Powell was one of five Justices joining the entirety of Justice White's opinion for the court. Thus, Justice White's opinion is a majority opinion and not a plurality opinion. Appellants argue that a concurring opinion by a Justice also joining a majority opinion in its entirety can limit the scope of the majority opinion, and that Justice Powell's concurring opinion in *Branzburg* had that effect. Br. at 24-26. The primary answer to appellants' argument is that Justice Powell's concurring opinion was not inconsistent with the majority opinion he joined. If Justice Powell had fundamental disagreements with the scope of the majority opinion, he had the option of concurring without joining the majority opinion or expressly not joining the portions with which he did not agree. There is nothing in the majority opinion that reflects any disagreement among the five Justices joining the opinion and Justice Powell's concurring opinion is easily read to be fully consistent with the majority opinion.

Assuming for purposes of argument that Justice Powell's concurring opinion is to some degree more narrow than the majority opinion, in a case where a Justice joins in a majority opinion in its entirety, the better view is that "the meaning of the majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative." *McKoy v. North Carolina*, 494 U.S. 433, 448 n.3 (1990)(Blackmun, J., concurring). Appellants quote the view expressed in Justice Scalia's dissenting opinion in *McKoy* (Br. at 24-25) that a Justice may play the role of a "glossator"

whose concurring opinion takes a position more narrow than the majority opinion and expresses a "least common denominator" that limits the holding of the court. 494 U.S. at 462 n.3 (Scalia, J., dissenting). Appellants cast Justice Powell in the role of "glossator" in *Branzburg* despite the fact that their interpretation of his concurring opinion would nullify much clear language in the majority opinion in which he joined. No fair reading of the majority and concurring opinions in *Branzburg* could support the view that "four justices of the Court. . . fabricate[d] a majority by binding a fifth to their interpretation of what they [said]. . . ." *Id.*

Nothing in Justice Powell's later opinions reflects the emergence of "a more flexible view" than the *Branzburg* majority opinion, much less the wholesale transformation of the holding of *Branzburg* urged by appellants. Justice Powell's dissenting opinion in *Saxbe v. The Washington Post Co.*, 417 U.S. 843 (1974), is fully consistent with the view that his concurring opinion in *Branzburg* was not meant to disagree with the majority about the existence of a constitutional privilege, but only to emphasize that there would be First Amendment protection in cases of bad faith investigations. In *Saxbe*, Justice Powell wrote 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." 417 U.S. at 859. This statement simply takes note of what the majority opinion and Justice Powell's concurring opinion in *Branzburg* made clear: In grand jury investigations, First Amendment freedoms

are implicated, but in light of society's compelling interest in law enforcement, the reporter's claim of privilege must yield, unless the investigation is in bad faith for the purpose of harassment.

Also instructive of Justice Powell's meaning in his *Branzburg* concurrence is his later concurring opinion in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), a decision in which the Court rejected special Fourth Amendment protections for the news media. Justice Powell's opinion in *Zurcher* took issue with Justice Stewart's citation to Justice Powell's *Branzburg* concurrence for the proposition that the "Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment." *Id.* at 570 n.3. Justice Powell stated that his *Branzburg* concurring opinion "noted only that in considering a motion to quash a subpoena directed to newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime . . . Rather than advocating a special procedural exception for the press, [the concurrence] approved recognition of First Amendment concerns within the applicable procedure." *Id.* It is fair to read Justice Powell as referring to the bringing of a motion to quash based on the subpoena being unreasonable and oppressive on the ground that the grand jury investigation is being conducted in bad faith. That is the ground recognized by the majority opinion in *Branzburg* and amplified by Justice Powell's concurring opinion.

The Supreme Court's decision in *Branzburg* held that in the context of a good faith grand jury investigation there is no First Amendment reporter's privilege requiring a special

showing that the reporter's testimony is necessary. Although the Supreme Court has not directly addressed the issue since *Branzburg*, the Court has reiterated its holding. *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary."); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg* for the proposition that "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigations, even though the reporter might be required to reveal a confidential source."). The *Branzburg* decision's acknowledgment (emphasized by Justice Powell) that grand jury investigations conducted other than in good faith or for purposes of harassment "would pose wholly different issues for resolution under the First Amendment," 408 U.S. at 707, in no way detracts from the clear holding of the case, which rejects any reporter's privilege in the context of a good faith grand jury investigation.

The plain import of the *Branzburg* decision has been embraced by this Court. *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 570-71 (D.C. Cir. 1977).[5] Confronted with a claim by the appellant that *Branzburg* protects newsmen from grand jury

[5]In an earlier decision, the D. C. Circuit noted that *Branzburg* was decided in the context of a grand jury investigation, and stated: "In a grand jury context, the First Amendment considerations cannot prevail, *e.g.*, to preclude a witness from giving information as to a crime he has witnessed." *United States v. Liddy*, 478 F.2d 586, 587 (D.C. Cir. 1972). The court stated that *Branzburg* might have different implications in the context of a trial. *Id.*

questioning unless the government makes preliminary showings of relevance and necessity, the Court stated that appellant's claim "though wholly unsupported by the holding in *Branzburg* is not without adherents." *Id.* at 570. Noting that the dissenting opinion in *Branzburg* had proposed a similar approach, the court stated:

> The *Branzburg* majority, however, rejected that formulation in clear and unmistakable terms. In their view, its adoption would frustrate the historic role of the grand jury in determining possible violations of law. Further, its recognition would needlessly "embroil() (courts) in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance . . . ." These considerations "disposed of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that . . . (reporters) possess relevant information not available from other sources . . . ."
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> The *Branzburg* opinion did not leave newsmen completely without protection from indiscriminate probing for news sources. In particular, the Court observed that official harassment of the press undertaken solely to disrupt a reporter's relationship with news sources would clearly be subject to judicial control. In a separate opinion, Mr. Justice Powell, who also concurred in the opinion of the Court, emphasized and elaborated upon this aspect of the majority opinion[.]

Id. at 570-71 (footnotes omitted). After quoting from Justice Powell's concurring opinion, the court stated:

> We conclude that *Branzburg* squarely rejected the very privilege appellant asserts that it established. A newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury questions are put in bad faith for the purpose of harassment, he can call on the courts for protection.

Id. at 571.[6]

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[6]The fact that the appellant in *In re Possible Violations of 18 U.S.C.* was a religious worker arguing for a First Amendment privilege based on freedom of religion rather than freedom of the press does not alter the court's authoritative reading of *Branzburg*, which was the basis for the court's holding that no preliminary showing needed to be made by the government. This reading

In a later decision, this Court reaffirmed this reading of *Branzburg*. *Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Co.*, 593 F.2d 1030, 1061-62, n.107 (D.C. Cir. 1978). In *Reporters Committee*, the court noted that *Branzburg* held that "journalists have no special First Amendment right to maintain the secrecy of their sources in the face of good faith felony investigations." *Id.* at 1050. The court interpreted *Branzburg* as explicitly rejecting case-by-case judicial balancing of interests in good faith grand jury investigations. *Id.* at 1061. The Court stated that Justice Powell's concurring opinion was "fully consistent" with the *Branzburg* majority's rejection of a case-by-case balancing approach in good faith grand jury investigations. *Id.* at 1061 n. 107. The Court stated:

> Although Justice Powell refers to case-by-case "balancing," it is clear that he is actually referring to the availability of judicial case-by-case screening out of bad faith

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of *In re Possible Violations of 18 U.S.C.* is fully consistent with the court's analysis of that case in *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 10-11 (D.D.C. 1996). The court stated that in the absence of bad faith or harassment, the *Branzburg* decision means that the government is not required to make a preliminary showing before requiring a reporter to testify before a grand jury. 59 F. Supp. 2d at 10-14. The court rejected the argument that Justice Powell's concurring opinion in *Branzburg* authorizes the district court to balance interests, finding that Justice Powell's concurring opinion was consistent with the *Branzburg* majority, which determined that "if ever, the balance of interests may apply only when the grand jury's inquiry is not conducted in good faith." *Id.* at 14. The court noted that engaging in a balancing of interests on a case-by-case basis would result in the sort of "procedural delays, detours, and disruptions in grand jury investigations" that the Supreme Court has warned against. *Id*. In its opinion in *In re Grand Jury 95-1*, the court stated that there was no issue of the revealing of confidential sources by the reporters before the court and that if the grand jury attempted to learn the journalist's sources, that the journalists "may seek protection from the Court." 59 F. Supp. 2d at 14. The court did not reach the reporters' argument that *Branzburg* calls for case-by-case judicial screening when a grand jury, operating in good faith, seeks the identity of a confidential source. The government submits that the rejection of special protection of confidential sources in the grand jury is at the core of the *Branzburg* decision.

"improper and prejudicial" interrogation. Indeed, this court has already so interpreted Justice Powell's opinion in [*In re Possible Violations of 18 U.S.C. 371, 641, 1503]. Id.*[7]

This Circuit's application of *Branzburg* in the context of a good faith grand jury investigation finds support in the decisions of several other circuits. *See In re Grand Jury Proceedings*, 5 F.3d 397, 399-404 (9th Cir. 1993); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992); *In re Grand Jury Proceedings*, 810 F.2d 580, 587-88 (6th Cir. 1987); *United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998); *In re Grand Jury Subpoena American Broadcasting Co.*, 947 F. Supp. 1314, 1317-20 (E.D. Ark. 1996).

Among federal appellate courts, only the Third Circuit has a case suggesting broad recognition of a qualified reporters' privilege in the grand jury context. *See In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d. Cir. 1992). The opinion of the district court in *Williams* is inconsistent with the holding of *Branzburg* and cannot be squared with the cases in this Circuit interpreting *Branzburg*. In the opinion of the district court in *Williams*, the court interpreted the Third Circuit's broad recognition of a journalist's qualified federal common law privilege to require a demonstration by the government of necessity to prevent a grand jury subpoena from being

[7]In *Reporters Committee*, Judge Wilkey wrote the opinion for the court. Judge Robinson concurred in all but one section of Judge Wilkey's opinion. Judge Robinson concurred in the portions of the opinion interpreting *Branzburg*. *Id.* at 1047 n.50, 1071 n.4. Appellants' dismissal of the interpretation of *Branzburg* in *Reporters Committee* on the ground that the panel was "highly fractured" (Br. at 31) ignores that a majority of the panel joined that portion of the opinion.

quashed. 766 F. Supp. at 367-69, citing *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

In *Williams,* the district court's basis for extending the Third Circuit's expansive reporter's privilege to the grand jury context despite *Branzburg* was flawed. The district court relied on an incorrect reading of Justice Powell's concurring opinion, essentially concluding that Justice Powell's concurrence authorized case-by-case judicial balancing of interests in all cases where grand juries subpoena the press. 766 F. Supp. at 368. Of course, the *Branzburg* majority, including Justice Powell, meant that case-by-case balancing would occur only in cases of bad faith harassment. The position espoused by the district court in *Williams* tracked the position of the *Branzburg* dissenters rather than the majority.[8] In sum, the district court's decision in *Williams* is at odds with *Branzburg* and the interpretation of *Branzburg* in this Circuit. *See In re Grand Jury Proceedings*, 5 F.3d 397, 403 (9th Cir. 1993)(declining to follow *Williams* on the ground that it directly conflicts with the Supreme Court's holding in *Branzburg*).

In the face of the clear authorities in this Circuit concerning the reporter's privilege in the grand jury context, appellants assert that the law is to the contrary. Appellants principally rely on civil cases from this Circuit. In *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), the Court of Appeals recognized a First Amendment reporter's privilege in civil cases,

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[8] The district court's decision in *Williams* also concluded that Fed. R. Evid. 501, adopted after *Branzburg,* provided a mandate for courts to expand on common law privileges. 766 F. Supp. at 367-68. This aspect of the *Williams* decision is discussed *infra.*

distinguishing *Branzburg* on the ground that the Supreme Court "justified the decision by pointing to the traditional importance of grand juries and the strong public interest in effective criminal investigation." *Id.* at 711. The court found that "in civil cases, where the public interest in effective law enforcement is absent, [*Branzburg*] is not controlling." 656 F.2d at 711, citing *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir.1974). *See also*, *Clyburn v. New World Communications, Inc.*, 903 F.2d 29, 35 (D.C. Cir. 1990). Under the approach of the *Zerilli* line of cases, when a civil litigant seeks to subpoena a member of the press, the district court is supposed to balance the litigant's need for the information, considering the efforts to obtain the information from alternative sources, against the public's interest in protecting a reporter's confidential sources. *Zerilli*, 656 F.2d at 711-14. Whatever the merits of the cases adopting the *Zerilli* approach to the reporter's privilege in civil cases, by their very terms those decisions do not limit *Branzburg* in the context of the grand jury, nor do those cases undermine this Circuit's interpretation of *Branzburg* in *In re Possible Violations of 18 U.S.C.* or *Reporters Committee.*

Appellants point to language in the *Zerilli* opinion stating that *Branzburg* "indicated that a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify." 656 F.2d at 711; Br. at 22. After this passage, the *Zerilli* opinion cites to the portion of the majority opinion in *Branzburg* providing First Amendment protection for the media in cases of bad faith investigations. 656 F. 2d at 711 (citing to *Branzburg,* 408 U.S. at 707). *Zerilli* did not address the issue of reporter's

privilege in the grand jury context, noting that *Branzburg* "may limit the scope of the reporter's First Amendment privilege in criminal proceedings. . . ." *Id.* *Zerilli* and other civil cases do not support appellants' position.[9]

Appellants acknowledge that this Court has not yet resolved the question of whether the reporter's privilege applies at a criminal trial, Br. at 29, but argue that *United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000) points to application of a reporter's privilege in criminal proceedings. In *Ahn*, a criminal defendant sought to withdraw his guilty plea on the ground that the government "breached its duty of good faith and an implied promise of secrecy by leaking information to the news media about his arrest." *Id.* at 29. The defendant subpoenaed the two television reporters who allegedly received the leak and the reporters filed a motion to quash "arguing that reporters possess a qualified privilege not to disclose confidential sources." *Id.* at 37. The district court found that there was no implied promise of secrecy and that the defendant had not carried his burden of establishing that the government caused the leak. *Id.* The district court granted the reporters' motion to quash, finding that "the reporters' testimony was not 'essential and crucial' to Ahn's case and was

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[9]The government acknowledges that this Circuit has held a qualified reporter's privilege applicable in civil actions and that the district court has applied that holding in a number of cases. *See, e.g., Lee v. United States Department of Justice*, 287 F. Supp. 2d 15, 19-20 (D.D.C. 2003); *Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 334-36 (D.D.C. 1994). Several other circuits have found a qualified reporter's privilege in civil cases. *See, e.g., In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *Shoen v. Shoen*, 3 F.3d 1292-93 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). As discussed in a recent opinion of the Seventh Circuit Court of Appeals, the number of cases finding such a privilege in civil proceedings and criminal trials is "rather surprising in light of *Branzburg*." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003)("The approaches that these decisions take to the issue of privilege can certainly be questioned.").

not relevant to determining Ahn's guilt or innocence." *Id.* This Court, in a brief discussion of the issue, concluded: "Because we agree that Ahn failed to carry his burden, we hold that the district court did not make an error of law or abuse its discretion in granting the reporters' motion." *Id.*

For two reasons, *Ahn* does not advance appellants' cause. First, *Ahn* did not concern a grand jury proceeding. The only allusion to grand jury proceedings was a "*Cf.*" citation to *Branzburg*. Second, a close examination of the proceedings in *Ahn* shows that the decision does not have much significance even in the context of criminal trials. As the transcript of the district court proceedings reflects, no party to the case objected to the application of the reporter's privilege under *Zerilli*. SGA-190. In addition, the district court stated that it was treating defendant's motion to withdraw his plea of guilty based on the government's alleged violation of the plea agreement as a "breach of contract issue" and that the subpoenaed testimony did not go to guilt or innocence and was not crucial to a trial of the case. SGA-192-93. In sum, *Ahn* adds little to appellants' argument.[10]

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[10] Soon after *Branzburg* was decided, the district court applied *Branzburg*'s holding in a criminal trial. *United States v. Liddy*, 354 F. Supp. 208, 213-17 (D.D.C. 1972). Decisions in some other Circuits point to that result. *See, e.g., United States v. Smith*, 135 F.3d 963, 968-72 (5th Cir. 1998); *In re Shain*, 978 F.2d 850, 852-54 (4th Cir. 1992). *But see United States v. Hubbard*, 493 F. Supp. 202 (D.D.C. 1979)(the district court interpreted *Branzburg* as requiring case-by-case balancing of interests and applied that approach in a criminal case). Several other Circuits have found that such balancing is appropriate in criminal trials. *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1503-04 (11th Cir. 1986); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 147-48 (3d Cir. 1980). In any event, the question of the application of *Branzburg* outside the context of a grand jury proceeding is not presented by the litigation now before the Court.

For the reasons stated, the *Branzburg* decision forecloses appellants' claim of a broad constitutional reporter's privilege to resist giving evidence in a grand jury investigation.

II. THIS COURT SHOULD NOT CREATE A FEDERAL COMMON LAW QUALIFIED REPORTER'S PRIVILEGE TO RESIST COMPLIANCE WITH A GRAND JURY SUBPOENA.

Appellants argue that even if *Branzburg* forecloses their claim of a constitutional reporter's privilege in the grand jury context, this Court should create a federal common law qualified privilege for a reporter to resist compliance with a grand jury subpoena. Appellants ask this Court, pursuant to Fed. R. Evid. 501, to engage in an analysis similar to that in *Jaffee v. Redmond,* 518 U.S. 1 (1996), the case in which the Supreme Court recognized a testimonial privilege for psychotherapists. In performing such an analysis, this Court is asked to consider the social good achieved by protecting confidential communications between reporters and their sources, the societal costs to the truth-seeking process, the recognition of some form of reporter's privilege by the states, and several other factors. Br. at 33-42. Appellants contend that an analysis consistent with *Jaffee* will compel the conclusion that this Court should recognize a qualified federal common law reporter's privilege in the grand jury context. Appellants urge the Court to create a reporter's privilege in the grand jury context modeled on the qualified privilege applied in this Circuit in civil cases. Br. at 42 (citing *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981)). The unstated – and false – premise of appellants' approach is that this Court is writing on a clean slate with regard to whether there is a qualified common law reporter's privilege in the grand jury

context. As the district court correctly concluded, the Supreme Court decided in *Branzburg* that there is no constitutional or common law reporter's privilege to resist compliance with a grand jury subpoena. A-276-78.

In *Branzburg,* the Supreme Court analyzed the common law and expressly declined to create a reporter's privilege in the grand jury context, emphasizing the burdens such a privilege would impose on the functions of the grand jury. 408 U.S. at 685-91. The Court noted that "the great weight of authority" was against recognition of the privilege in the grand jury context, and 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," and that this view of the law was "very much rooted in the ancient role of the grand jury." *Id.* at 685-86. After considering the argument that "some newsmen rely a great deal on confidential sources" and that some sources might not come forward if newsmen might have to testify, the Court stated: "[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen." *Id.* at 693. Application by this Court of the analysis in *Jaffe* is inappropriate where the Supreme Court has previously expressed its view of the balancing of societal interests in the grand jury context and concluded there is no constitutional or common law privilege.

The adoption of Federal Rule of Evidence 501 several years after *Branzburg* does not change the fact that *Branzburg* resolved the common law argument. Rule 501 was intended to "[leave] the law of privileges in its present state" and provided that the common law of privileges would continue to be developed by the federal courts. *Advisory Committee Note, Fed. R. Evid. 501.* While Rule 501 was not intended to freeze the law of privileges, the rule retained the common law development of privileges, so *Branzburg*'s previous rejection of the reporter's privilege still represents the Supreme Court's resolution of the issue. Indeed, this Court acknowledged in *Zerilli* that *Branzburg* governed the scope of the reporter's privilege in the grand jury context. 656 F.2d at 711. As the Ninth Circuit has stated, "We discern nothing in the text of Rule 501, however, that sanctions the creation of privileges by federal courts in contradiction of the Supreme Court's mandate." *In re Grand Jury Proceedings*, 5 F.3d at 403 n.3. *See also*, *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir, 2004) ("In *Branzburg*, the Supreme Court flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege."); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1178 n.4 (1st Cir. 1988)(rejecting reliance upon a federal common law privilege wholly apart from the First Amendment). Ultimately, the creation of a common law reporter's privilege in the grand jury context is "tantamount to . . . substituting, as the holding of *Branzburg*, the dissent written by Justice Stewart (joined by Justices Brennan and

Marshall) for the majority opinion." *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987).[11]

The Supreme Court's balancing of societal interests and rejection of a reporter's privilege in the grand jury context was sound at the time *Branzburg* was decided, and it is sound today. In analyzing the desirability of adopting a testimonial privilege at common law and under Rule 501, the starting point is the time-honored principle that the public has a right to "every man's evidence," and therefore the general rule disfavors testimonial privileges. *Jaffee*, 518 U.S. at 9. *Branzburg* recognized this principle, noting that it "is particularly applicable to grand jury proceedings." 408 U.S. at 688. The *Branzburg* decision emphasized the historic role of the grand jury, an institution with constitutional status. *Id.* at 686-87. The Court stated: "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in the process." *Id.* at 690. In short, the public's right to every man's evidence is most important in the grand jury context, such as where a reporter may be witness to an illegal leak of information or may have direct evidence necessary to the successful completion of criminal investigation by a grand jury into possible violations of laws protecting national security interests.

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[11] The only federal decision invoking Rule 501 as authority to apply a common law privilege in the grand jury context despite *Branzburg* is *In re Williams,* 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992). *See In re Grand Jury Proceedings*, 5 F.3d 397, 403 (9th Cir. 1993)(declining to follow *Williams* on the ground that it directly conflicts with the Supreme Court's opinion in *Branzburg*).

The right of the public to every man's evidence can give way when "reason and experience" show that proposed privilege "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee*, 518 U.S. at 9-10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).[12] Of course, the Supreme Court in *Branzburg* addressed this issue and stated, "On the records before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." 408 U.S. at 690-91. As discussed at length above, the Supreme Court engaged in an extensive analysis of the claim that requiring testimony from reporters would have a chilling effect on news gathering that would outweigh the societal interest in obtaining probative evidence in a criminal case. The Court considered submissions similar to those before this Court and found that sources for the press would not "dry up," stating that "the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the

[12] The *Jaffe* decision noted that the failure of a privilege to be among the nine originally proposed for inclusion in the Rules of Evidence is a factor that disfavors recognition of the privilege. 518 U.S. at 14-15 (citing *United States v. Gillock,* 445 U.S. 360, 367-68 (1980)). A reporter's privilege was not among the nine proposed. *See* 56 F.R.D. 183, 230-61 (Proposed Rules 501-513). The isolated legislative statements cited by appellants do not show any Congressional consensus for a federal reporter's privilege. Br. at 33-34. A clearer indicator may be the 32 years that have passed without the passage of a federal "shield law" despite the Supreme Court's statement that Congress was free to pass such a statute if it perceived an evil that needed to be addressed. *Branzburg*, 408 U.S. at 706.

threat of subpoena. . . ." *Id.* at 694. The Court concluded that "[n]othing before us indicates that a large number or percentage of *all* confidential news sources" are themselves implicated in crime or possess evidence relevant to a grand jury investigation "and would in any way be deterred by our holding. . . ." *Id.* at 691.

In conducting the balancing of interests, the Supreme Court also noted the difficulties of administering the qualified privilege in the grand jury context, a factor that still weighs against recognition of such a privilege. As discussed above, a qualified privilege would "embroil the courts in preliminary factual and legal determinations" and "distinguishing between the value of enforcing different criminal laws." *Id.* at 705-06.[13]

One other factor mentioned by the Supreme Court in *Branzburg* was that self-regulation by the Department of Justice provided an alternative means of addressing the concerns raised by the reporters in that case. The Supreme Court in *Branzburg* noted the existence of an earlier version of the Department of Justice guidelines. 408 U.S. at 706-07, n.41. The Supreme Court found the guidelines as a reason *not* to recognize a privilege: "[A]t the federal level the Attorney General has already fashioned a set of rules for federal officials

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[13] If this Court were, pursuant to Rule 501, to create the qualified testimonial privilege urged by appellants, significant issues as to the contours of the privilege would arise. For example, since an evidentiary testimonial privilege would be to provide common law protection for the confidential relationships between sources and reporters, the courts would need to resolve the issue of who holds the privilege and, therefore, the right to waive it. *See Jaffe*, 518 U.S. 1, 15 n. 14 ("Like other testimonial privileges, the patient may of course waive the protection.") Although there is authority for the proposition that the reporter's privilege belongs to the reporter (Br. at 43 n. 14), that result is inconsistent with the law of waiver of most other privileges recognized under the common law and Rule 501.

in connection with subpoenaing members of the press to testify before grand juries or at criminal trials. These rules are a major step in the direction the reporters herein desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials." *Id.* at 706-07 (footnote omitted). The Department of Justice internal guidelines on media subpoenas have been revised over the years and are followed by the Department. *See* 28 C.F.R. § 50.10. While these guidelines, by their terms, do not "create or recognize any legally enforceable right in any person," 28 C.F.R. § 50.10(n), the Department of Justice's self-regulation of its issuance of media subpoenas provides an alternative means of advancing the societal interests promoted by the creation of a privilege. The existence of the Department of Justice guidelines and the Department's adherence to the guidelines presents a significant factor distinguishing the situation considered by the Supreme Court in *Jaffe*: Here there is a well-established alternative means of protecting the interests that a testimonial privilege would protect.

In the face of the *Branzburg* decision, appellant's primary basis for urging this Court to create a common law qualified reporter's privilege under Rule 501 is that additional jurisdictions have recognized various versions of a reporter's privilege since *Branzburg* was decided. Br. at 38-40. Appellants claim "an overwhelming and almost total consensus in this country that a reporter's privilege exists and must be protected." Br. at 33. While the number of states with some form of statutory privilege has increased by fourteen (from 17 to 31) in the 32 years since *Branzburg*, the claim that 49 states "have recognized a reporter's

privilege in one context or another" creates a false impression. Many of the state court decisions cited by appellants are lower court decisions that do not represent definitive statements of state common law. Br. at 39, n. 12. Furthermore, appellants fall short of demonstrating an "overwhelming consensus" on the extension of the qualified privilege to the context at issue here: a grand jury, acting in good faith, seeking information from a reporter relevant to the investigation of a crime. In the federal system, no "shield law" has been adopted and very few courts have applied a reporter's privilege in the grand jury context. While it is acknowledged that there are now more jurisdictions in which some form of reporter's privilege has been recognized, and that this is a relevant factor for this court to consider under *Jaffe*, this factor is not as compelling as the situation in *Jaffe* and, in any event, cannot trump *Branzburg*'s balancing of interests and clearly expressed view of the inappropriateness of a common law privilege.

Appellants place special emphasis on the District of Columbia "shield law." Br. at 40-41. *See* D.C. Code, §§ 16-4701-4704. Appellants do not contend that the D.C. "shield law" governs this case, nor could they. *See Lee v. United States Department of Justice*, 287 F. Supp. 2d 15, 17 (D.D.C. 2003). Rather, appellants suggest that the existence of the D.C. "shield law," which provides absolute protection for confidential sources, provides support for their contention that this Court should create a qualified reporter's privilege pursuant to

Rule 501.[14] In light of *Branzburg*'s clear refusal to recognize a common law qualified reporter's privilege, the D.C. "shield law" does not change the result in this case.

In sum, the balance struck by the Supreme Court in *Branzburg* is the proper balance of societal interests, and as the Court noted, reporters will have First Amendment protection in cases of harassment and bad faith investigations, as well as protection through the executive branch's self-regulation through the Department of Justice guidelines.

III. THE DISTRICT COURT PROPERLY FOUND THAT THE GOVERNMENT SATISFIED ALL REQUIREMENTS FOR OVERCOMING ANY QUALIFIED REPORTER'S PRIVILEGE.

The appellants suggest that compliance with the subpoenas should not be compelled because the information sought by the subpoenas may be cumulative, and may be obtainable through other sources. Br. 44, 49. However, as the district court correctly found, the showing made by the government was sufficient to satisfy even the most stringent of balancing tests. *See* GA-38, 48-49; A-275; A-35.

This Court has held in the context of civil cases that, in balancing "the public interest in protecting the reporter's sources against the private interest in compelling disclosure" in the context of civil litigation, the district court should consider (a) whether the information

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[14] In the Brief of Amici Curiae of 23 Major News Organizations and Reporters' Groups In Support of Appellants Urging Reversal, it is urged that this Court create a common law privilege modeled on the D.C. "shield law," and provide absolute protection for sources and qualified protection for other information. Br. of Amici Curiae at 27-28. Appellants, in contrast, argue for a qualified privilege. Whatever the strength of the consensus for a qualified privilege in the grand jury context, it is clear that no strong consensus exists for an absolute privilege in any context. *See* Br. of Amici Curiae at 28.

sought "is of central importance" to the litigant's claim or defense; (b) whether the litigant has exhausted reasonable alternative sources of the information; and (c) whether the journalist is a party to the action. *Zerilli v. Smith*, 656 F.2d 705, 712-14 (D.C. Cir. 1981). *See also Alexander v. FBI*, 186 F.R.D. 21, 49 (D.D.C. 1998). The third factor, whether the journalist is a party, is generally only relevant where the journalist is the defendant, in which case compliance is generally required. *See Anderson v. Nixon*, 444 F. Supp. 1195, 1199 (D.D.C. 1978).

The subpoenas to Cooper, Time, and Miller, in sum, seek testimony and documents relating to communications related former Ambassador Wilson, Valerie Plame, and Iraqi efforts to obtain uranium, during a strictly limited time frame A-314-15; A-176; A-178. As the district court correctly found, the information sought by the subpoenas is not only relevant, but is likely to constitute direct evidence relating to guilt or innocence, and therefore is of central importance to the investigation. A-36; GA-48-49; A-275. *See In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004)(finding that there was no doubt that testimony of reporter who received video tape leaked in violation of protective order was highly relevant to a good faith criminal investigation); *Lee v. United States Department of Justice*, 287 F. Supp. 2d 15, 19 (D. D.C. 2003)(identity of sources who leaked to reporters information identifying plaintiff as criminal suspect was crucial to plaintiff's case in defamation action against purported leakers).

Moreover, as the district court correctly found, prior to the issuance of the challenged subpoenas, all reasonable alternative sources of the information sought by the subpoenas had been explored. A-36; GA-48; A-275. *See N.L.R.B. v. Mortensen*, 701 F. Supp. 244, 249 (D.D.C. 1988)(compliance required where reporters were the only other participants in conversations with source and, thus, were the "direct and most logical" source of information regarding statements made during conversations).

Appellants argue that, if the Special Counsel cannot establish that the grand jury has already developed strong evidence of guilt on the part of the target of its investigation, then the information sought cannot be deemed necessary, or central to the investigation. Br. at 44-45. Appellants' argument incorrectly presupposes that the grand jury's investigatory function may be artificially circumscribed. However, "[n]o grand jury witness is 'entitled to set limits on the investigation that the grand jury may conduct.'" *United States v. Dionisio*, 410 U.S. 1, 15 (1973)(quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)).

As the Supreme Court has made clear, the grand jury's duty is to "inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *See United States v. R. Enterprises*, 498 U.S. 292, 297 (1991). *See also Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)("A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'")(quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)). Thus, "[t]he investigative power

of the grand jury is necessarily broad if its public responsibility is to be adequately discharged." *Branzburg*, 408 U.S. at 700 (quoting *Costello v. United States*, 350 U.S. 359, at 364 (1956)). Therefore, given the broad investigatory power and responsibility possessed by the grand jury, the grand jury may not be precluded from seeking evidence until it has assembled a provable, or nearly provable case, against a particular target. To the contrary, evidence that supports a finding of *innocence*, as well as of guilt, is of central importance to the successful completion of a grand jury investigation. To hold otherwise would result in impeding the grand jury's investigation and "frustrating the public's interest in the fair and expeditious administration of the criminal laws." *R. Enterprises*, 498 U.S. at 297-99 (quoting *United States v. Dionisio*, 410 U.S. at 17).

In analyzing whether the government met the requirements necessary to overcome the qualified privilege urged by appellants, the district court properly weighed the public's interest in law enforcement with any burden on news gathering that would result from requiring the appellants to comply with the subpoenas. A-278. As the appellants must acknowledge, the public has an essential interest in the "detection and prosecution of crime." *See In re Possible Violations of 18 U.S.C.*, 564 F.2d 567, 571 (D.C. Cir. 1977). *See also Branzburg v. Hayes*, 408 U.S. 665, 690, 710 (1972). If anything, the public's interest is heightened in this case, because the crimes being investigated have national security implications, and the subjects of the investigation are government officials with access to sensitive government information.

The public's First Amendment interest in the free flow of the information at issue here is less substantial than the public's interest in law enforcement. In the case of Miller, the confidentiality of media sources is not at issue because, as discussed above, the government has identified a specific individual about whom Miller is being asked to provide information and, thus, Miller is not being asked to identify a source unknown to the government. While Cooper and Time are being asked to identify a confidential source, given the nature of the relevant communications – namely, the alleged disclosure of sensitive government information for the purpose of political advantage or retaliation against a critic of the administration – any interest in non-disclosure on the part of the source, rather than the public, is not worthy of protection, and should not weigh in the balance. *See also Branzburg*, 408 U.S. at 691-92 ("Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not."). As recognized in *Lee v. United States Department of Justice*, 287 F. Supp. 2d 15, 23 (D.D.C. 2003), citing *Branzburg* at 691-92, it is doubtful whether any "truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that [legally] they may not reveal." To the contrary, the public has a strong interest in the reporting, and prosecution, of criminal conduct. *See Branzburg*, 408 U.S. at 697.

An additional factor the Court should consider in balancing the public's interest in law enforcement with any associated burden on news gathering is the existence of any waiver of confidentiality by the reporter's sources. GA-32. Where sources have waived any claim of confidentiality with respect to the subject conversations, that waiver insulates the reporter from accusations of a breach of confidentiality, and limits the potential impact on their credibility and trustworthiness in the eyes of other "sources." The source's waiver essentially operates as an agreement for the reporter to treat the substance of the subject conversations as "on-the-record" or "for attribution." Such agreements made by confidential sources are honored by members of the news media every day.[15] In such cases, there is "no conceivable interest in confidentiality." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). Indeed, as noted by the Seventh Circuit in *McKevitt*, in a case such as this one (where the source wants the information disclosed and the reporter, "paradoxically," wants it secreted), the parties are "reversed from the perspective of freedom of the press, which seeks to encourage publication rather than secrecy." *McKevitt*, 339 F.3d at 533 (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 533-34 (1989)).

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[15] Miller argued below that only she could waive the "privilege" with respect to her conversations with the source. That argument, whatever its merits, misses the point, which is that a source's waiver reduces or eliminates any interest in non-disclosure, and substantially shifts the balance toward requiring compliance with the subpoena. *See Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 120 (D.D.C. 2002)(the absence of confidentiality may be considered "as a factor that diminishes the journalist's, and the public's, interest in non-disclosure")(quoting *In re Schoen*, 5 F.3d 1289, 1295 (9th Cir. 1993)). Moreover, as discussed above, it is far from certain that an evidentiary testimonial privilege would or should belong to the reporter, rather than the source.

As discussed above, appellants' claims that the subpoenas will impinge on their ability to gather and report the news, and that compliance would have adverse effects on their news gathering efforts in the future are, like the claims made in *Branzburg*, generalized and speculative, and based on predictions by journalists which the Supreme Court noted in *Branzburg* are properly viewed in the "light of professional self-interest." 408 U.S. at 693-95. In fact, it is far from clear that compelled disclosure of the information required by the subpoenas reasonably could be expected to have a significant adverse impact on the appellants' future news gathering efforts, much less on the efforts of other journalists. As the Supreme Court noted in *Branzburg*, even assuming that appellant and other journalists rely heavily on confidential sources and that some sources may be deterred from furnishing information based on the risk that reporters may be called before a grand jury, this does not prove that such a risk will have a significant impact on the free flow of information protected by the First Amendment. *Branzburg*, 408 U.S. at 693.

Indeed, as well illustrated by the communications at issue here, confidential sources in general and public officials in particular rely heavily on journalists to get their views before the public. Given this reliance, it is highly doubtful that the powerful interests that underlie the "symbiotic" relationships between journalists and public officials would be threatened by requiring that journalists with information relevant to crime disclose such information to the grand jury. *See Branzburg*, 408 U.S. at 694-95. Contrary to appellants' contentions, the only sources who likely would be deterred from speaking to the press by the

prospect of a reporter being required to testify in the grand jury are those involved in criminal conduct, which sources are "[n]either above the law or beyond its reach." *Id.* at 699. In any event, as the majority reasoned in *Branzburg*, whatever speculative risk is created by requiring journalists to provide grand jury testimony is worth taking because the alternative – allowing crime to go undetected or unpunished – is unacceptable.

Moreover, appellants' specific claim that requiring the disclosure of sources would impinge on reporters' ability to uncover government misconduct rings hollow, given that the investigation in this case involves information that may have been released by a government official for political or retaliatory reasons, rather than the release of information in the nature of "whistleblowing." *See* SECA II Ex. I. No public policy protects the "free flow" of information regarding a purported CIA employee, the disclosure of which may not only be illegal, but may threaten at the very least the security of the employee. Accordingly, public policy weighs heavily in favor of, rather than against, "chilling" such retaliatory disclosures by public officials. Moreover, even if compelling compliance with the subpoenas may create an incidental burden on news gathering, on as noted in *Branzburg*, it cannot seriously be maintained that it is better to write about government misconduct than to prosecute it. *See Branzburg*, 408 U.S. at 692. In the absence of essential evidence, unlawful conduct by government officials cannot be prosecuted.

The First Amendment guarantees a free press primarily because of the important role it can play as "a vital source of public information." *Zerilli v. Smith*, 656 F.2d 705, 710-11

(D.C. Cir. 1981)(quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)). In this case, given the limited potential impact of disclosure on the free flow of information to the public, and the compelling interests of the public in disclosure, the district court correctly held that a balancing of interests favors requiring compliance with the instant subpoenas.

IV. THE DISTRICT COURT PROPERLY CONSIDERED *EX PARTE* SUBMISSIONS OF GRAND JURY AND CLASSIFIED INFORMATION IN RULING ON CHALLENGES TO SUBPOENAS ISSUED DURING AN ONGOING GRAND JURY INVESTIGATION.

Appellants claim that their right to due process was violated by the district court's rejection of their demand for access to the *ex parte* submissions of the Special Counsel, which contained extensive references to sensitive and classified grand jury information, including the identities of witnesses, the substance of grand jury testimony, and the strategy or direction of the investigation, which was then and is now continuing. This claim lacks merit.

If the district court correctly held that there is no reporter's privilege in the grand jury context, then it would be inappropriate to consider providing the appellants with discovery of matters occurring before the grand jury. Even assuming that appellants presented a colorable claim of privilege, the district court's decision to permit information protected by grand jury secrecy to be addressed by the Special Counsel in *ex parte* affidavits was well-grounded in the precedent of the Supreme Court and this Court, and in no way violated appellants' rights.

It is well settled that the grand jury context "presents an unusual setting where privacy and secrecy are the norm." *In re Sealed Case*, 199 F.3d 2000 (D.C. Cir. 2000). *See also Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, at 218 n. 9 (1979). Indeed, the Supreme Court consistently has recognized that "the proper functioning of our grand jury system *depends* upon the secrecy of the grand jury proceedings." *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958)(emphasis added). For this reason, "[u]nlike typical judicial proceedings, grand jury proceedings and related matters operate under a strong presumption of secrecy." *See In re Sealed Case,* 151 F.3d 1085, 1069-71 (D.C. Cir. 1998).

Grand jury secrecy safeguards a number of distinct interests. *Douglas Oil*, 441 U.S. at 218-19. Among these are the encouragement of voluntary participation by witnesses and the protection of witnesses from retribution and inducements. *Id.* If grand jury proceedings were made public, many prospective witnesses would be deterred from presenting testimony due to fears of retribution based on the knowledge that those against whom they testify would be aware of their testimony. *Procter & Gamble*, 356 U.S. at 681. Similarly, witnesses who did appear before the grand jury would be less likely to testify fully and frankly, as they would be subject to retribution as well as inducements. *Id.* Of course, disclosure of grand jury matters can also taint prospective witnesses, and influence their testimony based on testimony provided by other witnesses, or indications of the grand jury's investigative strategy. Preserving the secrecy of the proceedings also assures that "persons who are

accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co.*, 441 at 219 (footnote omitted).

In order to further these interests, the Federal Rules of Criminal Procedure prohibit grand jurors, attorneys for the government, and others serving in official capacities from disclosing matters occurring before the grand jury. Fed. R. Crim. P. 6(e)(2)(B). In addition, Local Criminal Rule 6.1 of the district court for the District of Columbia provides that documents related to the grand jury may only be made public based upon "a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." L. CR. R. 6.1.

Due process does not require that members of the news media be given detailed information regarding grand jury investigations in order to challenge subpoenas. To the contrary, in the rare instances in which judicial proceedings ancillary to the grand jury are permissible (such as proceedings on motions to quash subpoenas), the use of *ex parte* filings and sealed proceedings to preserve and protect the confidentiality of grand jury proceedings is commonplace. *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (to protect grand jury secrecy, independent counsel entitled to submit evidence to rebut claim of Fed. R. Crim. P. 6(e) violation *ex parte* for *in camera* review by district court); *In re Grand Jury Proceedings*, 33 F.3d 342, 353 (4th Cir. 1994)(in light of overriding need to preserve grand jury secrecy, government's *in camera* proffer as to the existence of the crime-fraud exception to the attorney-client privilege did not violate due process though it deprived other party of full

opportunity to be heard). *See also R. Enterprises, Inc.*, 498 U.S. 292, 302(1991)(suggesting that courts require *in camera* disclosure of the subject of investigation in order to discourage routine use of motions to quash as a form of discovery). The need to preserve the confidentiality of grand jury proceedings is of course the most acute where the grand jury's investigation is ongoing. See *Butterworth v. Smith*, 494 U.S. 624, 632 (1990)(noting that some interests served by grand jury are less significant after grand jury has been discharged). Liberal discovery in the context of a grand jury proceeding is also because it would "engage the district court and the prosecutor in lengthy collateral proceedings and in so doing divert the grand jury from its investigation." *In re Sealed Case*, 151 F.3d 1059, 1071 (D.C. Cir. 1998).

The cases relied upon by appellants to support their due process argument do not advance their cause. First, the Ninth Circuit's decision in *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1972), relied upon by appellants, was superseded by 410 U.S. 1 (1973), and is no longer good law. *See In re Braughton*, 520 F.2d 765 (9th Cir. 1975)("To the extent that our decision in *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1972), may be considered to support the witness in his refusal to cooperate, it has been superseded . . . . Nothing in the law of this circuit now requires a court to interrupt the grand jury while a recalcitrant witness produces a series of minitrials challenging the reasonableness of the government's efforts to obtain fingerprint, voice, or handwriting exemplars or the relevance of such exemplars to the government's case.").

Because *In re Kitchen*, 706 F.2d 1266, 1272 (2d Cir. 1983) and *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973) involved circumstances so dissimilar from those presented in this case, they do not support appellants' argument that they were entitled to see the Special Counsel's *ex parte* submissions. In *In re Kitchen*, a prosecutor relied upon the detailed testimony of one witness in an attempt to prove that a second witness's testimony that he could not remember certain details was false. In those circumstances, the court held the second witness was entitled to confront the testimony of the first witness to defend himself in the contempt proceeding. Similarly, in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), the court held that an evidentiary hearing was required where the contempt proceeding turned primarily on whether the witness and his counsel were subjected to illegal electronic surveillance and whether the use immunity provided to the witness afforded him sufficient protection. Thus, whereas in *Kitchen* and *Alter* a finding of contempt turned on the determination of a discrete factual issue and the disclosure of limited evidence related to that issue was appropriate, here appellants are demanding access to the full scope and breadth of the grand jury investigation so that they can make the same arguments they made without such evidence – that their testimony is not essential, and there are other avenues that the grand jury has not pursued.

In fact, the appellants had full and fair hearings on their motions to quash, which included extensive briefing by the parties, and the district court's *in camera* review of detailed affidavits of the Special Counsel. While appellants claim the right to present a more

factually detailed argument, no such argument was necessary to enable the district court to fairly and fully analyze the necessity of the information sought by the subpoenas and the grand jury's efforts to obtain the information from alternative sources. As the court's findings indicated, these were not close questions. *See* GA-38, 48-49; A-275; A-35. Thus, as the district court found, there was no purpose to be served in allowing appellants access to sensitive grand jury information.

Moreover, contrary to appellants' suggestion, the use of *ex parte* submissions actually enhanced the district court's decision-making process by allowing the Special Counsel to prepare, and the court to view, a full and complete recitation of pertinent facts, rather than a cursory summary, which would have been necessary had disclosure been required.

The appellants' argument that "it is difficult to understand" how disclosure of grand jury information to appellants' attorney (but not to appellants) would inhibit potential witnesses from providing full and frank testimony could be made in any case. As the Supreme Court and this Court have recognized, increasing the number of persons to whom grand jury is information is available increases the risk of inadvertent or illegal release to others and thus "'renders considerably more concrete the threat to the willingness of witnesses to come forward and testify fully and candidly." *In re Sealed Case No. 98-3077*, 151 F.3d at1071 (quoting *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 432 (1983). The importance of maintaining the confidentiality of grand jury proceedings is not minimized by the fact that some of the prospective witnesses are members of the press. In addition,

disclosing grand jury information to appellant's counsel while prohibiting disclosure to appellants would put counsel in the awkward position of having to make decisions regarding litigation strategy without being able to share his reasons with his clients, or his consult with his clients in making those decisions.

Finally, appellants make the argument that, because the Special Counsel "disclosed certain sensitive information to appellants' counsel in order to . . . persuade appellants that if they were to testify . . . the inquiries would be narrow," there is no reason to preserve the secrecy of other information relating to the grand jury proceedings. Not only is this argument illogical, but it is difficult to imagine a more powerful disincentive to making disclosures during good faith negotiations with the media than to hold that such disclosures provide a basis for opening the floodgates of disclosure of all aspects of the grand jury investigation.

Thus, the appellants did not need, and were not entitled to, disclosure of detailed information regarding the grand jury proceedings in order to obtain a full and fair hearing of their motions to quash, or to defend themselves from a contempt order.

V. THE DEPARTMENT OF JUSTICE GUIDELINES DO NOT CREATE RIGHTS ENFORCEABLE BY APPELLANTS THROUGH MOTIONS TO QUASH AND, EVEN IF THEY DID, COMPLIANCE WITH THE SUBPOENAS WOULD BE REQUIRED BECAUSE THEY MEET AND EXCEED THE GUIDELINES.

Appellants argue that any failure on the part of the Special Counsel to establish compliance with the Department of Justice ("DOJ") guidelines for issuing subpoenas to news media provides an independent basis for reversal. The district court correctly observed that it was doubtful that the DOJ guidelines were enforceable, and found that, even if they were, the guidelines were fully satisfied. A-35; A-275.

The Department of Justice guidelines for issuing subpoenas to news media as set forth in 28 C.F.R. § 50.10 and the United States Attorney's Manual § 9-2.161 provide that subpoenas for testimony of members of the news media must be approved by the Attorney General,[16] and should meet the following standards:

(a) "In criminal cases, there should be reasonable grounds to believe, based on nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation–particularly with reference to establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information." § 50.10(f)(1);

(b) Before issuing a subpoena to a member of the news media, all reasonable efforts should be made to obtain the desired information from alternative sources. § 50.10(b); § 50.10(f)(3);

(c) Wherever possible, subpoenas should be directed at information regarding a limited subject matter and a reasonably limited period of time. Subpoenas

[16] Appellants do not contest the Special Counsel's authority to approve subpoenas to members of the media in connection with the instant investigation.

should avoid requiring production of a large volume of unpublished materials and provide reasonable notice of the demand for documents. § 50.10(f)(6);

(d) "The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." § 50.10(f)(4); and

(e) When issuance of a subpoena to a member of the media is contemplated, the government shall pursue negotiations with the relevant media organization. The negotiations should seek accommodation of the interests of the grand jury and the media. "Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media." § 50.10(c).

More generally, the guidelines provide that determinations regarding the issuance of subpoenas to members of the news media should be made with a goal of striking "the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice," (§ 50.10(a)), and "avoiding claims of harassment," (§ 50.10(f)(5)).

As the district court observed, the DOJ guidelines expressly state that they do "not create or recognize any legally enforceable right in any person." A-35; A-275; 28 C.F.R. § 50.10(n). *See In re Special Proceedings*, 373 F.3d 37, 44 n.3 (1st Cir. 2004)(noting that DOJ guidelines state that they do not create legally enforceable rights); *In re Grand Jury Subpoena American Broadcasting Companies, Inc.,* 947 F. Supp. 1314, 1322 (D. Ark. 1996)(declining to quash subpoena based on failure to comply with DOJ regulations, on ground that regulations, by their own terms, confer no rights on media witnesses). *See also In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 880 (4th Cir. 1994)(holding that special

prosecutor's failure to comply with guidelines regarding issuance of subpoenas to attorney, even if applicable, were not enforceable by witness through motion to quash).

Moreover, the guidelines' very nature indicates that they do not confer a substantive right on any party, and are not judicially enforceable. The guidelines are not required by the Constitution or statute. *In re Special Proceedings*, 373 F.3d 37, 44 n. 3 (1st Cir. 2004). They include a purely internal enforcement mechanism. Their purpose is to guide the Department's exercise of discretion in determining whether, and when, to seek the issuance of subpoenas to reporters, rather than to confer substantive or procedural benefits upon individual reporters. Thus, the guidelines are of the kind to be enforced internally by the agency, and do not provide a basis for judicial enforcement through motions to quash. *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992)(holding reporters have no right to seek enforcement of DOJ guidelines before being compelled to testify)(citing *United States v. Caceres*, 440 U.S. 741 (1979)(exclusionary rule not applicable to evidence obtained in violation of internal IRS regulations governing electronic surveillance)); *In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 880 (4th Cir. 1994)(following *In re Shain*, 978 F.2d at 854). *See generally Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 583 (D.C. Cir. 1994)(Department of Education "origination" policy did not create legally enforceable rights in students, noting that "enunciating a policy is simply not the same as creating a binding substantive right.").

The DOJ guidelines are thus distinguishable from regulations like the ones involved in *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), relied upon by appellants. In that case, despite regulations requiring the publication of directives that "'inform the public of privileges and benefits available' and of 'eligibility requirements,'" the Bureau of Indian Affairs attempted to limit general assistance benefits to otherwise eligible beneficiaries based on an unpublished eligibility requirement. Finding that the publication requirement was intended to benefit potential beneficiaries by ensuring their access to eligibility information and preventing arbitrary eligibility decisions, the Court held that the agency could not enforce its unpublished eligibility requirements. *See also Lopez v. Federal Aviation Administration*, 318 F.3d 242 (D.C. Cir. 2003)(reviewing decision not to renew individual's employment as a "designated engineering representative" ("DER") based on the FAA's failure to comply with procedural safeguards intended to protect DERs); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)(holding habeas corpus relief proper where INS failed to follow regulations governing the procedure to be followed in processing alien's application for suspension of deportation); *Vitarelli v. Seaton*, 359 U.S. 535 (1959)(dismissal of employee prohibited where agency failed to comply with procedures designed to protect employees from arbitrary employment decisions).

This interpretation of the guidelines is consistent with the well-established law holding that, given the special nature of prosecutorial discretion, *see United States v. Armstrong*, 517 U.S. 456, 464-65 (1996)(hesitance required in reviewing executive's

exercise of core function), internal prosecutorial protocols do not vest individuals with personal rights. For example, courts consistently have held that the DOJ's "Petite policy," which restricts federal prosecution of individuals for acts of which they already have been prosecuted by state or local authorities, does not create substantive or procedural rights enforceable by individuals. *E.g., United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003)(holding that failure to comply with DOJ "Petite policy" did not reflect vindictiveness, and noting that fact that "Department of Justice has developed an internal protocol for exercising discretion and channeling prosecutorial resources does not provide license for courts to police compliance with that protocol . . . ."); *United States v. Patterson*, 809 F.2d 244, 248 (5th Cir.1987)*; United States v. Hutul*, 416 F.2d 607, 626 (7th Cir. 1969); *United States v. Lara*, 294 F.3d 1004, 1007 (8th Cir. 2002); *United States v. Thompson*, 579 F.2d 1184, 1189 (10th Cir. 1978); *United States v. Alston*, 609 F.2d 531, 537 (D.C. Cir. 1979). Similarly, courts have refused to allow defendants to challenge alleged failures to comply with death penalty protocols. *United States v. Lee*, 274 F.3d 485, 493 (8th Cir. 2001)(holding death penalty protocol created no substantive or procedural rights, and commenting that no case had ever held that the *Accardi* doctrine applies to the internal regulations of the DOJ), *cert. denied*, 537 U.S. 1000 (2002); *United States v. Frye*, 372 F.3d 729 (5th Cir. 2004)(holding death penalty protocol creates no enforceable rights).

It is therefore clear that, by their express terms and their nature, the guidelines did not entitle the appellants to litigate the question of the Special Counsel's compliance before being compelled to testify, and do not provide an independent ground for reversal.

In any event, as the district court correctly held, the subpoenas fully comply with the DOJ guidelines. Prior to the issuance of the subpoenas, the Special Counsel determined, and the district court agreed, that the subpoenas struck "the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice" in compliance with 28 C.F.R. § 50.10(a), and that, in this case, the public's interest in fair and effective law enforcement exceeded any claimed adverse impact on the free flow of information protected by the First Amendment. *See Lee v. United States Department of Justice*, 287 F. Supp. 2d 15, 19 (D. D.C. 2003); *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 10-11 (D.D.C. 1996); *N.L.R.B. v. Mortensen*, 701 F. Supp. at 249.

Specifically, as set forth in detail in the *ex parte* submissions, there are reasonable grounds to believe, based on substantial evidence obtained from non-media sources, that one or more federal criminal statutes were violated in connection with disclosures to the news media of information relating to the purported CIA employment of Ambassador Joseph Wilson's wife (Valerie Plame). *See* 28 C.F.R. § 50.10(f)(1).

There is also reason to believe that the information sought by the subpoenas is essential to a successful investigation, particularly with respect to guilt or innocence. *See id.*

As discussed above, the subpoenas to Cooper, Time, and Miller seek testimony and documents relating to communications with government officials (a single, specified official in Miller's case) regarding former Ambassador Wilson, Valerie Plame, and Iraqi attempts to purchase uranium. This information bears a direct relationship to the grand jury's investigation and is expected to constitute direct evidence of guilt or innocence. By definition, evidence needed to establish guilt or innocence is "essential" to a criminal case, and is not merely "peripheral" or "speculative" as those terms are used in 28 C.F.R. § 50.10(f)(1).

Moreover, prior to the issuance of the challenged subpoenas, the grand jury conducted an extensive investigation, and all reasonable efforts were made to obtain relevant information from alternative sources. Therefore, the subpoenas meet the requirements of both §§ 50.10(b) and (f) of the DOJ guidelines.

The information sought by the subpoenas is appropriately limited to specific topics and time periods as required by 28 C.F.R. §§ 50.10(f)(4) and 50.10(f)(6). Specifically, the information sought is focused on testimony and documents related to communications occurring during a limited time period, which specifically concern former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Plame Wilson; or Iraqi efforts to obtain uranium. Given the limited scope of the information sought by the subpoenas and the general nature of the investigation, it is obvious that there is a real

possibility that the information sought will be relevant and of substantial importance to the investigation, as required by § 50.10(f).

Appellants do not contest the fact that the Special Counsel attempted to negotiate with them and their counsel in order to obtain their voluntary cooperation before the subpoenas were issued in compliance with DOJ guideline § 50.10(c), or that the subpoenas were issued only after they refused to cooperate.

Thus, in light of the facts set forth in the Special Counsel's *ex parte* affidavits, it is clear that the district court did not abuse its discretion in determining that, even if the DOJ Guidelines were enforceable by appellants through motions to quash, compliance with the subpoenas would be required because the subpoenas met and exceeded those guidelines.

CONCLUSION

For all of the foregoing reasons, the government respectfully requests that this Court affirm the orders of the district court.

Respectfully submitted,

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