Nos. 06-16995 and 06-16996 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Grand Jury Subpoenas
to Mark Fainaru-Wada, Lance Williams,
and The San Francisco Chronicle

On Appeal From the United States District Court
for the Northern District of California

BRIEF OF ERWIN CHEMERINSKY, VINCENT BLASI, SUSAN ESTRICH, KENNETH KARST, LAURIE LEVENSON AND RODNEY SMOLLA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are scholars of constitutional law with special expertise in the law of the First Amendment, a field in which each *Amicus* teaches and writes. While *Amici* have varying perspectives on many issues, *Amici* agree that basic constitutional principles counsel reversal of the judgment below.

Amici respectfully submit this brief in order to argue, specifically, that the district court decision below should be reversed to the extent that it rejected independent judicial balancing under the First Amendment. Specifically, *Amici* contend that it was error to decline to balance the interest of the press in freedom to gather news of public importance against the Government's alleged need to coerce information from the press rather than pursue its leak investigation by less intrusive means. *Amici* also contend that under our constitutional system of separation of powers, the protection of First Amendment interests in such a balance is quintessentially a matter for the neutral magistracy of the courts, not merely the Executive's capacity for self-restraint. *Amici* urge this Court to reverse the decision below in order to reaffirm the essential role of the federal judiciary, particularly in the First Amendment context where seemingly abstract values can so easily fall prey to law enforcement zeal.

Amici submit this brief in their individual capacities, and their affiliations are listed as follows for identification purposes only:

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II. STATEMENT OF THE CASE

A. The "Leaks" and the Contempt Orders.

This case involves the supposed leak of grand jury transcripts, not in the secret investigative stage but after the indictment had been issued in the criminal case and the government had provided the transcripts to the defense in preparation for a public trial. (Thus the government knew when it produced them that the

transcripts could soon become public.) Whether made by government agents or others, the transcript leaks were apparently in violation of the district court's pretrial protective order. ER 210-220, 283. The district court referred the violation, which could constitute contempt, to federal prosecutors to investigate. ER 283.[1]

Rather than work with the referring judge to investigate the leak, the prosecutors investigating the violation of the protective order convened a criminal grand jury. When some preliminary investigative steps did not yield the identity of the leaker(s), the prosecutors secured the issuance of grand jury subpoenas to two reporters who had written stories quoting the grand jury transcripts, and to the newspaper that published them (the *San Francisco Chronicle*). *See* ER 392-393. The reporters and the *Chronicle* moved to quash the subpoenas, explaining that compelling them to reveal sources to whom they had made promises of confidentiality would deter other confidential sources from speaking with them, and thereby damage their ability to gather and publish newsworthy information. ER 34-37, 118-122.

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[1] The government contends that possible criminal perjury, obstruction of justice, and Fed. R. Crim. P. 6(e) violations could also flow from the denial of the leaks. *See* ER 396. But it is undisputed that learning the reporters' sources was not connected to any criminal conduct being investigated independent of the supposed leaks themselves.

After briefing and argument, a district judge different from the referring judge denied the motions to quash and directed the reporters and the *Chronicle* to appear before the grand jury, produce documents, and answer questions. ER 361, 397. When the reporters and the *Chronicle*, citing the First Amendment, declined to comply, the judge held them in contempt. ER 403-410. The reporters were sentenced to up to 18 months imprisonment and the *Chronicle* was fined $1,000 per day, serious sanctions that have been stayed only for the pendency of this appeal. ER 407, 410.

B. The Arguments and Opinion Rejecting Constitutional Balancing.

In its brief to the district court, the government argued that *Branzburg v. Hayes*, 408 U.S. 665 (1972), requires that "courts should not be placed in the role of balancing law enforcement interests and the interests of reporters on a case-by-case basis." Government Opposition (hereinafter "Gov Opp"), CR 28, at 2. Instead, the government argued, "courts should intervene only in cases where it is shown that an investigation is being conducted in bad faith." *Id.* Indeed, the government flatly asked the district court to rely on "the executive branch's self-regulation" for protection of the First Amendment interests at stake. *Id.* at 34.[2]

[2] *Accord*, Transcript of Oral Argument (Aug. 4, 2006), CR 57, at 10 (Government counsel: "we disagree that there should be a [judicial] balancing"); *id.* at 78-79 ("we don't think . . . that this Court should go into that sort of ... weighing ....").

In its dispositive Order, the district court plainly adopted the government's arguments, stating that it was "bound by the law" to "subordinate [the reporters'] interests to the interests of the grand jury." ER 351 (Opinion at 5).[3] Judge White ruled categorically, stating that in every case involving a criminal grand jury, First Amendment interests "will be subordinate to the grand jury's" absent a showing of bad faith. ER 354 (Opinion at 8 n. 6). Thus the judge accepted the government's argument that when governmental claims for reporter disclosure are made in pursuit of a criminal grand jury investigation – regardless of the seriousness of the criminal conduct, the value of the reporting, the tangential nature of the investigation or the vigor of its "exhaustion" -- the court should play no independent role in evaluating the strength of the government's claims and balancing them against the strength of the First Amendment interests presented. *See also* ER 352 (Opinion at 6) (ruling that cases which apply a judicially-evaluated qualified reporter's privilege are "inapposite because those cases do not involve grand jury proceedings"). In short, the district court deferred categorically to the government's claimed needs.

If any doubt remained, the district court's refusal to consider (let alone balance) the important First Amendment interests at stake was made clear toward

[3] The principal opinion of the district court is published at 438 F. Supp. 2d 1111 (N.D. Cal. 2006).

the end of its Opinion, when it included a brief "even if" paragraph purporting to provide a "balancing" analysis. *See* ER 357 ("even if"), 358-359 (the balancing paragraph), Op. at 11, 12-13. The court gave great, but unanalyzed, weight to the government's claimed needs. ER 358-359 (Op. at 12-13). However, the district court expressly "decline[d]" to consider "the public interest in newsgathering" as part of the balance. ER 358 (Op. at 12). Respectfully, while we acknowledge Judge White's struggle with the issues, this one-sided approach constituted no "balance" at all.

III. SUMMARY OF ARGUMENT

Amici respectfully submit that any argument that denies the judiciary an independent evaluative and balancing role in grand jury "leak" cases is wrong, as a matter of interpreting *Branzburg* and, more significantly, as matter of general First Amendment principles. Such an argument subverts not only the heightened protections long required under the First Amendment, but also the fundamental principle of separation of powers that undergirds our constitutional framework. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1805).

The First Amendment to the United States Constitution represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S.

254, 270 (1964). A "free press" is essential to this goal, and the First Amendment is designed to "preserve an untrammeled press as a vital source of public information." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). As such, "[t]he press [is] to serve the governed, not the governors." *New York Times Co. v. United States [Pentagon Papers]*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

Thus the Supreme Court has frequently noted that where First Amendment values are at stake, the judicial branch must play an essential part in ensuring their protection, even as the executive branch pursues its proper objectives. This evaluative role for the judiciary is recognized in a wide variety of contexts, many of which involve governmental interests more sensitive than those presented in the present case.

More specifically in the criminal investigative context, where "zealous officers" will normally place "single-minded attention" on law enforcement interests, the Court has ruled that constitutional evaluation must be performed "by a judicial officer, not by a policeman or government enforcement agent." *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (quoting Justice – and former U.S. Attorney General -- Jackson in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). Thus, to take but one example, when a governmental search of a newspaper office is proposed, independent judicial evaluation is required: "[t]he

procedure for determining probable cause must afford an opportunity for the judicial officer to 'focus searchingly'" on the First Amendment issues presented. *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (quoting *Marcus v. Search Warrant of Prop.*, 367 U.S. 717, 732 (1961)) (emphasis supplied). This need for independent judicial evaluation and balancing is even more essential in the one-sided criminal grand jury context, where the government exerts a uniquely unchecked and zealous authority.

In accord with these well-established First Amendment principles, the Supreme Court noted in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that "news gathering is not without its First Amendment protections." *Id.* at 707. Significantly, the Court recognized the essentiality of a judicial role: "[w]e do not expect courts will forget that grand juries must operate within the limits of the First Amendment ...." *Id.* at 708 (emphasis supplied). Thus, while the *Branzburg* Court was deeply divided on the question of an "absolute" reporter's privilege,[4] the Justices were unanimous in recognizing the central role that the judiciary must play in protecting First Amendment values when evaluating governmental claims. The district court erred when it "decline[d]" this task (ER 358).

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[4] As Justice Stewart later explained, "considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half" best describes the Court's division. Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 635 (1975).

If there were any doubt of this view, Justice Powell made it crystal clear in his concurring opinion (an opinion that was necessary to constitute the *Branzburg* majority and which expressly described the "limit[s] of the [majority's] holding").[5] When a reporter asserts a First Amendment privilege regarding the identity of confidential sources, "[t]he asserted claim should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony ...." 408 U.S. at 709-710 (emphasis supplied). Undoubtedly in Justice Powell's controlling view, the party doing the judging and balancing was to be a judge, not interested members of the prosecution team. Moreover, "[t]he balance of these vital constitutional . . . interests" should be "on a case-by-case basis," because it is the "tried and traditional way of adjudicating such questions." *Id.* at 710.

Justice Powell's controlling view was plainly not followed here. Indeed, to decide this appeal, this Court need look no further than its own initial decision applying *Branzburg*, where it stated its understanding of the *Branzburg* analysis in

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[5] As Justice Scalia explained in *McKoy v. North Carolina*, 494 U.S. 433, 462-463 n. 3 (1990) (Scalia, J., dissenting), where an "individual Justice is [] needed for the majority," then the Court's "opinion is *not* a majority opinion except to the extent that it accords with his views." Instead, "[t]he separate writing ... can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority." Thus, explained Justice Scalia, it has "never [been] asserted that four Justices of the Court have the power to fabricate a majority by binding a fifth to their interpretation of what they say, even though he writes separately to explain his more narrow understanding."

accord with Justice Powell's controlling opinion. In *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), this Court addressed the "no longer novel question" of how to review a reporter's source disclosure case. *Id.* at 466. This Court ruled that "[t]he district court properly considered the factual situation, and struck a balance," that is, a balance "between the protection afforded ... by the First Amendment and the necessity that the newsman's source be revealed." *Id.* at 469 (emphasis supplied). This is precisely the sort of specific, evaluative judicial balancing that the district judge here expressly declined to conduct.

For these reasons, *Amici* respectfully submit that it was error for the district court here to state categorically that it was "bound" (ER 351) to rule against the First Amendment interests presented by the reporters merely because the government advanced the competing interest of a criminal grand jury investigation. The constitutional requirement for judicial balancing of competing First Amendment values does not disappear in the face of a criminal investigation.

This is particularly true in a "leak" investigation that – like the one at hand — is tangential to any underlying criminal case (indeed, this is an investigation that targets speech itself, not any separate criminal conduct), and in which the government failed to show that it has fully investigated its own agents and employees as the source of the leak (something the government is uniquely well-situated to do). See Appellants' Opening Brief at 52-53 & n.16. The unique

unchecked role of the government in grand jury investigations further counsels independent judicial balancing. The point is that, in practical terms, constitutional "balancing" matters and cannot be avoided, because the individual facts matter and have differing weight in different cases. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) ("We look instead to this particular case and the legal context in which it arises").

In sum, First Amendment precedents require individualized constitutional interest and fact balancing, before First Amendment values can be overridden. An Article III judge may not properly decline to perform this sensitive constitutional role. To the contrary, the "single-minded" executive-branch enterprise of criminal investigation, while of course entirely proper, makes particularly appropriate the independent judicial balancing role that the Supreme Court has time and again described when First Amendment values are at stake.

IV. ARGUMENT

THE FIRST AMENDMENT VALUES AT STAKE IN A LEAK INVESTIGATION REQUIRE THE JUDICIARY TO PLAY AN INDEPENDENT, EVALUATIVE ROLE AND TO BALANCE THE SPECIFIC INTERESTS PRESENTED

Beyond question, important First Amendment values are at stake in this case. Not only the First Amendment rights of the press, but also the public's interest in receiving information on important matters of public policy, are

diminished when news reporters are compelled to disclose confidential sources of newsworthy information. The district court so ruled, ER 351 (Opinion at 5: "Without question, confidential sources often are essential in assisting the press"), and the government did not argue to the contrary. In fact, as the authors of both the majority and the dissent in *Branzburg* had agreed just a year earlier in the "Pentagon Papers" case, "without an informed and free press there cannot be an enlightened people." *New York Times Co. v. United States*, 403 U.S. at 728 (Stewart, J., concurring with White, J.). *See also* ER 56 (quoting 28 C.F.R. 50.10, U.S. Dept. of Justice: "freedom of the press can be no broader than the freedom of reporters to investigate and report the news").

When such important First Amendment values are at stake, the Supreme Court's (and this Court's) precedents are uniform: the judicial branch has a constitutional obligation to perform an independent, evaluative role, examining and then "balancing" the government's specific claims of law enforcement needs against the First Amendment values that are implicated. As the Supreme Court has repeatedly explained (quoting from Chief Judge Learned Hand), "In each case, [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis v. United States*, 341 U.S. 494, 510 (1951); *accord, Nebraska Press Ass'n,* 427 U.S. at 562.

This judicial role flows not merely from general First Amendment principles, but also from the vital separation of powers rationale that applies to the government in criminal investigations. It was therefore error for the district judge to decline to recognize an independent evaluative role for the judiciary when examining the important First Amendment interests at stake when grand jury subpoenas are directed to reporters.

A. THE FIRST AMENDMENT GENERALLY REQUIRES INDEPENDENT JUDICIAL EVALUATION AND "BALANCING" OF GOVERNMENTAL CLAIMS.

As detailed below, when government action implicates First Amendment interests, the Supreme Court has consistently made clear that the judiciary must carefully scrutinize governmental claims of need, and balance them against the competing constitutional interests at stake. This requirement for evaluative judicial balancing has been expressed in widely differing contexts, many of which are more sensitive than the present case. This Court has similarly noted, in many contexts, that competing government claims of need and First Amendment values must be "judicially weighed ... and a balance struck." *Shoen v. Shoen (Shoen II)*, 48 F.3d 412, 415 (9th Cir. 1995) (quoting *Shoen v. Shoen (Shoen I)*, 5 F.3d 1289, 1292-93 (9th Cir. 1993)). A categorical rule that the First Amendment rights of the public and newsgatherers must always yield in the face of a grand jury

subpoena – if only relevance and no bad faith is shown – is inconsistent with these principles.

Thus, for example, in the national security context the Court has made it clear that courts must independently determine the proper constitutional balance even when the government claims "grave and irreparable" harm. *New York Times Co. v. United States* ("Pentagon Papers"), 403 U.S. at 732 (White, J., concurring). Indeed, even when the government claims a "clear and present danger" in the publication of news, the judiciary must weigh counterposed First Amendment values and determine where the proper balance lies – with a heavy weight in favor of First Amendment values. *Near v. Minnesota*, 283 U.S. 697 (1931); see *Schenck v. United States*, 249 U.S. 47, 52 (1919) (ruling in favor of the government but declaring that for First Amendment analysis, "the character of every act depends upon the circumstances .... The question in every case ... is a question of proximity and degree"); *Dennis v. United States*, 341 U.S. at 510.

Similarly, even in the search warrant context where both secrecy and governmental speed are of the essence, the Court has made clear that where First Amendment materials (books, films, and the like) are the object, the "procedure[s] ... must afford an opportunity for the judicial officer to 'focus searchingly'" on the First Amendment values at stake. *Zurcher*, 436 U.S. at 565 (citations omitted). Reviewing judges must ensure that constitutional requirements are applied "with

'scrupulous exactitude,'" and the competing claims of zealous officers must be carefully examined. *Id.* at 564 (citation omitted).

In the same vein, in the defamatory libel context the Court has made clear in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that courts cannot avoid sensitive evaluation and balancing of First Amendment interests, even though the government claims institutional damage. Not only is "actual malice" required before libel damages may be awarded, but a court must find it with "convincing clarity" because the constitution "demands" a balance sensitive to the dangers of "self-censorship" and "deter[ence]" of speech in the public interest. *Id.* at 279-282, 285-286. The same concerns of deterrence and self-censorship are present in the case of reporter leak subpoenas. And *Sullivan* stressed that it is the judiciary that must engage in this sensitive First Amendment balancing. "We must 'make an independent examination of the whole record' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the fields of free expression." *Id.* at 285 (emphasis supplied, citation omitted).

In another criminal law context, pretrial publicity "gag orders", the Court noted that although a defendant's Sixth Amendment rights were constitutionally vital, "[t]he authors of the Bill of Rights did not undertake priorities as between First Amendment and Sixth Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 561. Rather – and in accord with the now-familiar First Amendment principles

described above – the Court demonstrated that a fact-specific balancing process must be engaged in by a reviewing court, individualized to each case. *Id.* at 562 (examining the "precise terms" of the order at issue and scrutinizing "the record" to determine "whether [it] supports the entry" of an order impacting First Amendment values). The Court in *Nebraska Press Ass'n* undertook a detailed eight-page assessment of the facts and stressed that its "holding" (that the record was inadequate to support the Order) was "confined to the record before us." *Id.* at 569. Of course, this conclusion was influenced by the "heavy burden" that First Amendment interests imposed on the government. *Id.*[6]

The Court's *Nebraska Press* analysis represents precisely the sort of independent, individualized, constitutional balancing that the district court declined to engage in here. This was error. More importantly, because the error resulted in no weight being assigned to the First Amendment values in the balance (see ER 358, "declin[ing]" to consider "the public interest in newsgathering" at all), the district court's error was significant. *Amici* respectfully submit that this Court should not affirm on such a record.

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[6] Similarly, in the context of closing a criminal preliminary hearing to public view, the Supreme Court explained in *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986), that the public's "First Amendment right of access" requires a judicial assessment of a fact-sensitive balance weighted against closing. *Id.* at 13-14; *accord, Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (First Amendment right of access to criminal trials prevails "[a]bsent an overriding interest articulated in findings" specific to the case).

Even in more mundane settings, the Supreme Court has explained that First Amendment claims demand sensitive and independent judicial evaluation. Categorical conclusions against First Amendment interests are disfavored; fact-sensitive judicial balancing is required. Thus in discussing standards of review on appeal for cases raising First Amendment issues, the Court has noted a heightened, case-specific "requirement of independent [judicial] review," "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567 (1995) (emphasis supplied).

Similarly, the Court has made clear that even the less demanding standard of review for content-neutral governmental regulations that impact First Amendment interests still requires careful judicial balancing. Even a content-neutral regulation will not be sustained unless a fact-specific judicial evaluation establishes that the regulation's impact on "First Amendment freedoms is no greater than is essential" to further a "substantial" government interest. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

Other First Amendment examples too numerous to discuss abound. *E.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (courts must "arrive at a

balance" between the First Amendment rights of public employees and governmental efficiency needs). Significantly, this Court's own precedents, in a myriad of contexts, similarly insist upon an independent, evaluative judicial role in First Amendment cases. *See, e.g., United States v. Richey*, 924 F.2d 857, 861 (9th Cir. 1990) (First Amendment rights versus confidentiality of tax information; the court's "task is to balance these competing interests"); *Sacramento Bee v. U.S. District Court*, 656 F.2d 477, 482 (9th Cir. 1981) (First Amendment rights "must be balanced"); *Hawk v. Cardoza*, 575 F.2d 732, 735 (9th Cir. 1978) (per curiam) ("first amendment rights ... must be balanced against the need" and the result "is not fixed but must be considered in the context of each case").

Indeed, in terms of this Court's own precedents, this Court need look no further than its opinion in *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975). Ruling soon after *Branzburg*, this Court noted that the question of how to proceed in a reporter's source disclosure case was "no longer novel," and then expressly ruled that evaluative judicial "balanc[ing]" is proper. *Id.* at 469. In reviewing a district court's disclosure order, this Court stated that "[t]he district court properly considered the factual situation, and struck a balance," that is, a balance "between the protection afforded ... by the First Amendment and the necessity that the newsman's source be revealed." *Id.* (emphasis supplied). This is precisely the sort of specific, evaluative, judicial balancing that the *Amici* assert here. This Court's

statement in *Pitchess* that the district court should first evaluate the constitutional interests and the claimed governmental "necessity" involved ("the factual situation"), and then "balance" them, should be dispositive in this appeal. It is clear that the district court did not so proceed below.

In sum, it was error for the district court to rule that the grand jury context categorically deprives the judiciary of its obligation to consider and balance competing First Amendment and governmental interests. Such a rule would be inconsistent with the unwavering First Amendment requirements detailed above. Without exception, these opinions describe a vital balancing role for judges in First Amendment cases. The district court's statements to the contrary would create a marked anomaly were this Court to endorse them.

B. *BRANZBURG v. HAYES* IS CONSISTENT WITH THE GENERAL FIRST AMENDMENT REQUIREMENT OF EVALUATIVE JUDICIAL BALANCING.

It misreads the *Branzburg* opinions to conclude that the Court stated a rule that no judicial balancing may be engaged when a grand jury subpoena is directed to a reporter. The majority opinion in the case does not so hold. Moreover, Justice Powell's concurrence expressly stated a contrary view, and because the Court had no majority without his views, his opinion necessarily describes "the limited nature of the [*Branzburg*] Court's holding." 408 U.S. at 709 (Powell, J., concurring). See n. 5, *supra*.

Because Appellant's brief provides ample exegesis of *Branzburg*, *Amici* will not belabor this point. It is clear that the reporters in *Branzburg* were advocating a privilege not "to appear before the grand jury at all." 408 U.S. at 679 (describing the ruling under review). The Supreme Court plainly rejected any such conception of a near absolute privilege. But as Justice White's opinion for the majority concluded, "news gathering is not without its First Amendment protections." Justice White made no attempt to catalogue these protections, other than to note that "grand jury investigations ... conducted other than in good faith" would not be tolerated. *Id.* But, he concluded, "[w]e do not expect that courts will forget that grand juries must operate within the limits of the First Amendment...." *Id.* at 708. This majority expectation was frustrated here.

Moreover, it was only Justice Powell's fifth vote that prevented Justice Stewart's dissenting opinion from commanding a majority. Thus, for reasons that Justice Scalia so lucidly explained in *McKoy*, *see supra* n.5, Justice Powell's separate opinion must be considered the dispositive description of the holding of the *Branzburg* majority. And Justice Powell described the "limited nature of the Court's holding" in terms that require independent judicial balancing when grand jury subpoenas are directed to reporters.

It is remarkable that Justice Powell's words require any explication at all. "If [a] newsman .... has some other reason[7] to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement," he has "access to the court." 408 U.S. at 710. Justice Powell then left no doubt that the "legitimacy" of the government's "need" must be evaluated by applying the very sort of balancing analysis the district judge here rejected: "The asserted claim ... should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony." *Id.* Note that "relevance" and good faith are here assumed -- and yet the judicial balancing assessment must go on. Justice Powell explained that "[t]he balance of these vital constitutional and societal interests" must proceed "on a case-by-case basis." *Id.* He concluded by recognizing that such judicial balancing was the "tried and traditional way of adjudicating" such First Amendment questions (*id.*) – just as the many cases cited above portray.

Thus, while it is clear that the Supreme Court in *Branzburg* rejected the claim of a newsman's absolute privilege against grand jury proceedings, it is just as clear that the Court did not reject the concept of evaluative judicial balancing. To the contrary, Justice Powell's controlling concurrence expressly required it.

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[7] That is, some reason "other" than the reasons Justice Powell expressly mentioned: "harassment," lack of "good faith," or "remote and tenuous relationship" to the investigation, 408 U.S. at 710.

C. EVALUATIVE JUDICIAL BALANCING IN THE CRIMINAL INVESTIGATIVE CONTEXT IS VITAL AS A MATTER OF SEPARATION OF POWERS.

The Constitution's separation of powers principle, fundamental to every part of that document, was endorsed by the Framers "as a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965). "For if governmental power is franctionalized, ... no man or group of men will be able to impose its unchecked will." *Id.* And as the Court noted in *Brown*, "the Executive Department is the branch most likely to forget the bounds of its authority." *Id.*

When the Executive branch is pursuing a criminal investigation, the Supreme Court has recognized that its investigating agents are likely to be distracted from fully honoring competing constitutional values. Thus an independent judicial role, evaluating competing concerns and neutrally determining the proper balance, is essential in the grand jury "leak" context as a corollary to the separation of powers, as well as the First Amendment.

That the need for evaluative judicial balancing is based on separation of powers concerns is best described in Justice Jackson's classic statement in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), of the judiciary's independent role in checking the executive branch's investigative zeal. Having previously served as the nation's top prosecutor (Attorney General), Justice Jackson spoke from personal experience in describing the constitutional "point ..., which often is not

grasped by zealous officers." *Id.* at 13. His discussion of the Fourth Amendment's "balance" between privacy and the need for effective law enforcement is directly relevant to the heightened judicial balancing also required to protect the First Amendment in the crucible of a criminal investigation.

As Justice Jackson explained in *Johnson*, the Fourth Amendment does not deny criminal investigators the ability to search (just as *Branzburg* recognized that the First Amendment does not deny investigators the right to subpoena). However, when an investigator's authority to search depends on inferences about probable cause and law enforcement need, the Fourth Amendment "require[s] that those inferences be drawn by a neutral ... magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." 333 U.S. at 14. Just as the First Amendment embodies certain values that require balance, the implicit task of the Fourth Amendment is "balancing the need for effective law enforcement against the right of privacy." *Id.* at 14-15 (emphasis supplied). In addition, Justice Jackson recognized that such constitutional balancing is a judicial function: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* at 14.

Over two decades later, the Supreme Court again expressed, in the Fourth Amendment context, the separation of powers rationale for a judicial role in

policing the boundaries of criminal investigations. *Coolidge v. New Hampshire*, 403 U.S. at 450:

> "Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule ... is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations – the 'competitive enterprise' that must rightly engage their single-minded attention."

The rationale is the same where First Amendment values are involved. Law enforcement officers are properly focused on their investigative goals. Human nature naturally leads to a lessened focus on competing values that may be important but are undoubtedly tangential to, or in tension with, the "single-minded" investigative focus. The constitutional principle that distributing powers among the branches in most likely to preserve important constitutional freedoms, is thus particularly important here.

Yet in this case, the government explicitly argued that the district court should rely on "the executive branch's self-regulation," rather than engage in any independent judicial balancing. Gov't Opp. (CR 28), at 34. In light of the constitutional separation of powers principle, this claim would exhibit gall in any constitutional context. Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-537 (2004). But a claim that the reviewing court should rely on the executive's self-regulation is particularly breathtaking in the grand jury context, especially when a stated policy

of "executive branch self regulation" exists for subpoenas to reporters but the government rather plainly did not abide by it.

Thirty-six years ago, when the press last faced a spate of threatening grand-jury subpoenas, the U.S. Attorney General promulgated the policy found at 28 C.F.R. 50.10 (ER 56). See *In Re: Williams*, 766 F. Supp.358, 371 (W.D.Pa.1991), *aff'd by equally divided en banc court*, 963 F.2d 564 (3rd Cir. 1992). That policy, had it been complied with here, would almost certainly have resulted in no issuance of the grand jury subpoenas now at issue, at least not without a far greater showing of need, exigency, and exhaustion. See ER 16, 51 (declarations of former U.S. Department of Justice officials). While these regulations may not provide an enforceable right to the reporters, this Court and others have previously noted these regulations as protective "self-regulation" likely to avoid most constitutional confrontations in this area. *See Lewis v. United* States, 517 F.2d 236, 238-239 (9th Cir. 1975); *Williams*, 766 F. Supp. At 371. Indeed, the *Branzburg* Court itself took solace in the existence of this policy for this same reason. 408 U.S. at 706-707 & n.41 (DOJ regulations "may prove wholly sufficient" to avoid First Amendment disagreements).

As promulgation of these regulations indicates, the criminal grand jury context requires protective policies stated in advance, because of the very "single-minded" incentives in a secret investigation that can too easily lead prosecutors to

substitute zealousness for judgment. The government has uniquely authoritative power in the grand jury context, largely unchecked by any judicial or other supervision. See generally *Williams v. United States*, 504 U.S. 36, 47 (1992) (noting absence of judicial supervision of the grand jury). Indeed, because grand jury investigations are secret, whether the government's zeal is being tempered by good judgment is largely impossible to determine.

Thus, when subpoenas are issued to witnesses who are not bound by Rule 6(e)'s secrecy rule, requests for judicial enforcement are one of the few opportunities for the judicial branch to exercise its constitutionally fundamental power-checking role in the grand jury context. It therefore seems clear that the grand jury context requires more independent judicial review, when constitutional values are plainly at issue, not less (and certainly not, as the district court here ruled, none at all). The dangers of excessive executive branch zeal are greater in the grand jury context than in most others.

Thus, *Amici* submit, independent judicial evaluation and balancing is essential in the grand jury context, so that governmental power is effectively and neutrally measured against the Constitution's demands. The ruling below that a judge can "decline" this important role ignores the separation of powers rationale upon which our constitutional system, and particularly Article III, is founded. This Court should not affirm a "grand jury exception" to the First Amendment and

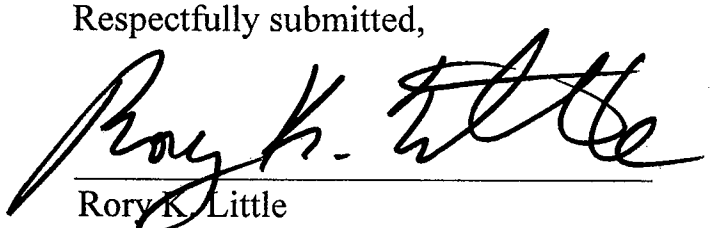
separation of powers precedents that consistently require evaluative judicial balancing in other contexts.

CONCLUSION

Although this case does not appear to be a strong one for overriding the reporters' and the public's essential First amendment rights, *Amicii* do not here express a conclusion regarding how the fact-specific constitutional balance should come out. That is because the district court failed *ab initio* to engage in the proper First Amendment analysis of the question. Instead, the court "decline[d]" to do so, thereby honoring the government's request to allow "executive branch self regulation." *Branzburg* was not complied with, nor was this Court's decision in *Pitchess*. Nor were the many First Amendment precedents that require independent judicial evaluation and balancing of the constitutional and governmental interests involved. The district court's approach failed to provide the "balance" to prosecutorial zeal that Justice Jackson so eloquently described in *Johnson*. That failure is sufficient to reverse here.

We thank the Court for the opportunity to present the foregoing views.

Respectfully submitted,



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December 8, 2006

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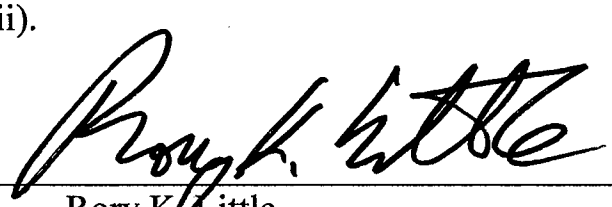
CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that this brief is printed in a 14-point font, and that according to the word-count function in our Microsoft Word software, the body of the brief contains 5825 words, exclusive of the material excludable under Rule 32(a) (7) (b) (iii).



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CERTIFICATE OF SERVICE

I, Aimee Leonetti, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 3150 Porter Drive, Palo Alto, CA 94304. On December 8, 2006, I served 2 copies of the following:

BRIEF OF ERWIN CHEMERINSKY, VINCENT BLASI, SUSAN ESTRICH, KENNETH KARST, LAURIE LEVENSON AND RODNEY SMOLLA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as set forth below.

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