

Case No. 06-16403

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOSHUA WOLF,

Subpoenaed Party-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States
District Court for the Northern District of California

No. CR 06-90064 WHA

Hon. William Alsup, United States District Judge

PETITION FOR REHEARING EN BANC

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Petition for Rehearing Currently before the Court

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INTRODUCTION

Joshua Wolf, a freelance video journalist, remains incarcerated although no court has actually reviewed the unpublished videotape that is the subject of a federal grand jury subpoena to determine its relevance to the grand jury's investigation. Wolf now seeks rehearing *en banc* of the motions panel's September 8, 2006, decision denying his recalcitrant witness appeal.

En banc review is warranted pursuant to Federal Rules of Appellate Procedure 35(b)(1)(A) and (B), for several reasons. The panel's decision conflicts with Supreme Court decisions, previous decisions of this Court, and decisions of other United States Courts of Appeals on two independent issues. First, the panel's rejection of a news gatherer's privilege pursuant to Federal Rule of Evidence 501 is inconsistent with *Jaffe v. Redmond*, 518 U.S. 1 (1996). Second, the panel's requirement that Wolf prove that the grand jury was operating in bad faith in order to avail himself of a the qualified constitutional privilege recognized by this court is inconsistent with the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and this Court's decisions in *In re grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir. 1993), and *In re Lewis*, 517 F.2d 236 (9th Cir. 1975), as well as rulings of the Third Circuit. The issue of the common law and constitutional protections due a newsgatherer whose unpublished information is sought by a federal grand jury is an issue of exceptional importance and relevance given the marked in increase in such subpoenas in recent years and the uncertainty in the law.

On August 1, 2006, the district court found Wolf in contempt [EOR 164]. A panel of this Court affirmed the contempt order by memorandum dated September 5, 2006.

I. THE ISSUE OF THE LEGAL PROTECTIONS DUE A NEWSGATHERER AGAINST A SUBPOENA SEEKING UNPUBLISHED INFORMATION IS ONE OF EXCEPTIONAL IMPORTANCE.

At issue in this appeal is the right of a reporter to conduct legal newsgathering activities without fear of being later turned into an instrument of governmental surveillance. This Court has previously recognized the compelling public benefit of providing newsgatherers with at least a qualified privilege in such situations. *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (*Shoen I*). Indeed, there is a strong consensus across the country by state legislatures and courts, and by federal courts outside of the grand jury context, that reporters enjoy at least a qualified privileged not to reveal their unpublished information. However, the possibility that no privilege will apply in one particular setting, the federal grand jury, preserves the precise chilling effect on newsgathering that these privileges were intended to eradicate. Given that the issuance of grand jury subpoenas is increasing in this and other circuits, the trial courts need uniform guidance on the precise contours of the rights of newsgatherers to protect their unpublished information from disclosure.

II. THE PANEL'S DECISION ON THE RULE 501 ISSUE IS OF EXCEPTIONAL IMPORTANCE AND IS IN CONFLICT WITH THE SUPREME COURT'S RULING IN *JAFFE V. REDMOND*, AND THE THIRD CIRCUIT'S RULING ON THE SAME ISSUE.

This case provides this Court with its first opportunity since *Jaffe v. Redmond*, 518 U.S. 1 (1996), to revisit the question of whether there is a qualified newsgatherers'

judge panel has some flexibility when an intervening Supreme Court decision is irreconcilable with the challenged decision, *Miller v. Gammie*, 335 F.3d at 893, a preference remains for *en banc* review.

B. EN BANC REVIEW IS NECESSARY BECAUSE THE PANEL'S DECISION IS INCONSISTENT WITH THE SUPREME COURT'S DECISION IN *JAFFE*.

1. THIS COURT'S OPINION IN *SCARCE*, UPON WHICH THE PANEL RELIED, IS INCONSISTENT WITH THE SUPREME COURT'S RECOGNITION OF EVOLVING PRIVILEGES.

In *Jaffe*, the Supreme Court interpreted Rule 501 as creating a continuously evolving system of new testimonial privileges. The Court established a methodology for determining whether a common law privilege has evolved over recent history. Three factors are considered: (1) whether the proposed privilege serves important public and private interests, *Jaffe*, 518 U.S. at 11; (2) whether there is a sufficient and likely evidentiary benefit that would result from the denial of the privilege, *Id.* at 11-12; and (3) whether “some form” of the proposed privilege is widely recognized by the states, either through judicial or legislative acts. *Id.* at 12-14 & n.13.

Rather than reconsider the existence of the privilege in light of *Jaffe*, the panel relied solely on this Court's previous disposition of the issue in *Scarce*; the panel did not discuss *Jaffe* at all. Memorandum at 5.

However, *Scarce*, and thus the panel's decision, are clearly inconsistent with *Jaffe*. The *Scarce* court, in conflict with *Jaffe*, specifically rejected the idea that Rule 501 empowered courts to consider the evolution of the legal landscape: “We discern nothing in the text of Rule 501, however, that sanctions the creation of privileges by federal

persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe, or even physically harassed if, for example, observed taking notes or photographs at a public rally.

Id.

These concerns are made manifest in the present case. As the record reflects, Wolf's compliance with the subpoena would severely impair his access to activist groups and damage his ability to gather and disseminate news about their activities. [EOPR 99-100] The federal government has given Wolf three untenable choices: either become an investigative arm of the police, stop collecting information to disseminate to the public, or go to jail.

**b. THERE WOULD BE LITTLE EVIDENTIARY
BENEFIT FROM THE DENIAL OF THE
PRIVILEGE.**

This Court has previously recognized that significant interests outweigh the evidentiary benefit that would result from denial of the privilege. *See Jaffe*, 518 U.S. at 11-12. "To the extent that compelled disclosure [of journalists' unpublished information] becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment." *Shoen I*, 5 F.3d at 1295. *Accord Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 35 n.5 (2d Cir. 1999). This reasoning is as equally applicable to the grand jury context as it was to the civil context in *Shoen I*. *See United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (applying privilege to all unpublished information sought in a criminal case). Moreover, reporters' access to

particularly instructive; but it has recognized a common law privilege even in the absence of such uniformity. *See Chase*, 340 F.3d at 985-89; *Oleszko*, 243 F.3d at 1158-59.

Jaffe does not require that the states' formulation of the privilege be identical. Rather, "variations in the scope of the protection are too limited to undermine the force of the States' unanimous judgment that some form of . . . privilege is appropriate." 518 U.S. at 14 n.13.

C. AN EN BANC DECISION ON THE RULE 501 ISSUE IS GREATLY NEEDED.

A clear statement from this Court on whether *Jaffe* requires it to recognize a reporter's privilege is greatly needed. The Third Circuit recognized a common law privilege in both civil and criminal proceedings prior to *Jaffe*, employing the very methodology the Supreme Court would later embrace. *Cuthbertson*, 630 F.2d at 146; *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979). *See also In re Williams*, 963 F.2d 567 (3d Cir. 1992), *affirming* 766 F.Supp. 358, 367 (W.D. Pa. 1991) (an equally divided *en banc* panel of the Third Circuit affirming a district court's recognition of the privilege in the grand jury setting). None of the other circuits has, post-*Jaffe*, reached a decisive conclusion on the issue. A panel of the D.C. Circuit recently split on the issue. *In re Miller*, 397 F.3d at 969-973, 987-991. The Second Circuit, reviewing a district decision that had recognized the privilege, declined to decide the issue. *New York Times Co. v. Gonzales*, 459 F.3d 160, 169 (2d Cir. 2006), *vacating New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 485-86 (S.D.N.Y. 2005).

protections for newsgatherers. The panel's decision reducing the First Amendment protections to protection only from bad faith conflicts not only with *Scarce*, but with this Court's decisions in *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972) and *In re Lewis*, 517 F.2d 236, 238 (9th Cir. 1975), and the Supreme Court's decision in *Branzburg*, 408 U.S. 665.

In *Branzburg*, the Supreme Court held that the First Amendment required a balancing of interests when a grand jury subpoena was issued "*other than in good faith*" or for purposes of "harassment." 408 U.S. at 707 (emphasis added). Justice Powell, concurring, elaborated on this point. He identified four findings that could invoke a qualified privilege balancing test:

As indicated in the concluding portion of the opinion, the Court states that [1] *no harassment of newsmen* will be tolerated. If a newsman believes that [2] the grand jury investigation is *not being conducted in good faith* he is not without remedy. Indeed, if [3] 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 [4] some other reason to believe that his testimony implicates confidential source relationship *without a 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 to privilege 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 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 issues.

Id. at 709-710 (emphasis and numbering added).

In both *Scarce*, 5 F.3d at 401, and *Lewis*, 517 F.2d at 238, the Ninth Circuit explained that a finding of *any* one of those four factors required a court to employ the same qualified privilege balancing test used outside of the grand jury context. The *Scarce*

unpublished footage is apparently sought for some other, broader and unspecified, “ongoing investigation about what happened that day.” [EOR 135-36] It is, in other words, a fishing expedition. This is exactly the type of “remote and tenuous” relationship, lacking a “substantial connection” to the alleged criminal conduct, that the *Scarce* test was designed to address.

**2. THE SUBPOENA DOES NOT INVOLVE A
“LEGITIMATE NEED OF LAW ENFORCEMENT.”**

As the portion of the videotape depicting the protest at the proximate time of the alleged arson is already public, there is no “legitimate need” for Wolf’s unpublished footage of other events that day. However, there is a plainly “illegitimate” motive, and it is one that the *Branzburg* Court specifically contemplated as a situation in which a privilege would apply. Writing for the Court in *Branzburg*, Justice White noted a specific “illegitimate” motive for seeking unpublished testimony from a newsgatherer: that subpoenas from a grand jury “undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources.” 408 U.S. at 707-08.

That is precisely the situation here. Wolf has developed a level of trust as a journalist with a dissident group in our society. That trust is critical to his ability to secure access to their members, meetings, and public demonstrations. Without it he will be barred from filming. The subpoena here is a direct attack on that trust and, if satisfied, will destroy his ability to continue to cover his sources, in private as well as public places. [EOR 99:17-26]. Indeed there is testimony that the mere fact of the investigation, coupled with the government’s announced intention to use Wolf’s tape to identify

CONCLUSION

As this matter presents an issue of exceptional importance, and as the panel's decision conflicts with prior decisions of both the Supreme Court and this Court, and as there is a compelling need for uniformity, this Court should grant Wolf's petition for rehearing *en banc*.

Dated: October 9, 2006

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PROOF OF SERVICE

I, DAN SIEGEL, declare as follows:

I am an attorney duly licensed to practice law in the State of California. I am not a party to the within action. My business address is 499 14th Street, Suite 220, Oakland, CA 94612.

On October 10, 2006, I served copies of the following documents:

(1) Petition for Rehearing

on the parties to this action by email transmission to:

jeffrey.finigan@usdoj.gov

and by arranging for mail or messenger delivery on October 11, 2006, to:

Jeffrey R. Finigan

Assistant United States Attorney

450 Golden Gate Avenue

San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 11, 2006, at Oakland, California.

Dan Siegel

See Rachel Smolkin, *Under Fire*, American Journalism Review (Feb. Mar. 2005) at 18.

The district court declined to view the video *in camera*. [EOR 145]

Jaffe has been applied by this Court in other decisions. See *United States v. Chase*, 340 F.2d 978, 985-91 (9th Cir. 2003); *Oleszko v. State Compensation Insurance Fund*, 342 F.3d 1154, 1157-58 (9th Cir. 2001).

The Government contended in briefing to the panel that the *Jaffe* methodology applies only to confidential communications. However, there is nothing in either *Jaffe* or