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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE GRAND JURY SUBPOENA SERVED ON THE AMERICAN CIVIL LIBERTIES UNION

MEMORANDUM OF LAW
IN SUPPORT OF THE ACLU'S MOTION TO QUASH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

PRELIMINARY STATEMENT

Pursuant to Fed. R. Crim. P. 17(c)(2), the American Civil Liberties Union ("ACLU") moves to quash a subpoena served on it on November 20, 2006, which by agreement was made returnable December 11, 2006. The subpoena (annexed as Exhibit 1 to the accompanying Declaration of Joshua L. Dratel ("Dratel Decl.") seeks no testimony and no information that the government does not already have, only "any and all copies of a document marked 'Secret,' dated 12/20/05, with the heading 'Information Paper' that was received by the ACLU on or about October 23, 2006." Since the subpoena has no investigatory purpose but only a confiscatory and information-suppressing one, and the subpoena power does not extend to confiscating "any and all" copies of any such documents, it should be quashed under longstanding law.

Prior to the service of any subpoena, in two conversations with counsel on November 20, 2006, Assistant United States Attorney Jennifer Rodgers demanded that the ACLU provide the government with any and all copies of a document that the ACLU had received a month earlier and detailed assurances that no copies whatever would be retained. She initially mentioned no subpoena, and the government's exclusive purpose appeared to be collecting any and all copies of a "secret" document that it knew had been provided to the ACLU (and apparently by whom and when). When the ACLU declined to comply voluntarily, the government promptly served the ACLU with a grand jury subpoena. By its express terms, the subpoena instructs the ACLU to turn over "any and all copies" of the identified document to the government. Like the prior calls from AUSA Rodgers, the unambiguous purpose of the subpoena is to eliminate any copies of the document from the ACLU's possession or control.

Such a subpoena is unprecedented: so far as research reveals, not a single reported decision even mentions, much less enforces, any such subpoena. If enforced, it would provide

the government with an easy expedient to avoid the rule of *New York Times Co. v. United States,* 403 U.S. 713 (1971) (the "*Pentagon Papers*" case), which prevents the government from obtaining injunctions barring publication of classified documents, unless publication would cause "direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart & White, JJ., concurring). The grand jury's concededly broad powers do not extend beyond investigative purposes to support subpoenas vacuuming up all copies of documents allegedly concerning the national defense (even if marked or classified "secret") that come into the possession of those engaged in reporting, public education, and public advocacy. No official secrets act has yet been enacted into law, and the grand jury's subpoena power cannot be employed to create one.

Furthermore, even if the subpoena were construed to seek what the government has not sought and does not need – a single copy of the identified document rather than "any and all copies" in the ACLU's possession – the subpoena should still be quashed because it has neither an evidentiary nor investigatory function. Under *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the qualified First Amendment privilege applied in this Circuit, the grand jury cannot be used, as it is being used here, for the purpose of suppressing information. Indeed, this case presents the very scenario described as unconstitutional by both Justice White's opinion for the Court in *Branzburg* and Justice Powell's concurrence: Where the subpoena is not "in good faith" because its purpose is not investigation but rather the suppression or harassment of activity protected by the First Amendment, the government cannot meet any of the tests for the qualified First Amendment privilege discussed and applied in *New York Times Co. v. Gonzales*, 459 F.3d 160, 173-74 (2d Cir. 2006) (the "*Gonzales*" case). Accordingly, the *Branzburg* majority's admonition

"that grand juries must operate within the limits of the First Amendment as well as the Fifth" requires quashing this subpoena in its entirety. 408 U.S. at 708.

STATEMENT OF FACTS

1. The ACLU's activities in support of civil liberties have increasingly focused, in the period after 9/11 and the engagement of U.S. troops in Afghanistan and Iraq, on the government's "war on terror" and its long-term detention of persons without process or judicial protection. Those activities have included, among many other things: (a) litigation under the Freedom of Information Act ("FOIA") seeking information about the government's policies and practices regarding torture and the government's compliance with the Geneva Conventions, a damages action against Donald Rumsfeld and three senior military commanders for the abuse of four Afghanis and five Iraqis while in American custody, a lawsuit against the CIA challenging the practice of so-called extraordinary rendition, and legal representation for government whistleblowers; (b) public education, including a searchable database on the ACLU website of government documents that now consists of more than 100,000 pages obtained through FOIA documenting the government's torture and detention policies; and (c) public advocacy on the same subjects, including press commentary, paid advertisements, town meetings, congressional briefings, and U.N. submissions. Declaration of Anthony D. Romero ¶6.

Through public education and public advocacy, the ACLU has pressed the Administration to comply with the Geneva Conventions, renounce torture and other forms of cruel, unusual and degrading treatment, and hold accountable senior officials who authorized or condoned such activities. The ACLU has also called on Congress to demand compliance with the Geneva Conventions, exercise meaningful oversight of the Administration's torture and detention practices, and restore the writ of habeas corpus for detainees that was

unconstitutionally abridged in the recently enacted Military Commissions Act. Romero Decl. ¶¶7-8.

Like all useful public education and advocacy, these activities depend on the facts. Without a clear understanding of what the government is doing, it is difficult to assess what should be done differently or to advocate for change. Fact-gathering and fact-reporting are therefore an essential part of the ACLU's mission, *Id.* ¶9.

2. On October 23, 2006, the ACLU received "over the transom" (*i.e.*, without having solicited it) a three-and-one-half page document, marked "Secret," which provides a set of general policy guidelines on a matter of longstanding concern to the ACLU. Its date of promulgation also raises important questions. The ACLU did not release or otherwise disseminate the document upon receipt, and it has not done so since. However, the ACLU reserves the right to do so in the future, and retained the document for further consideration. Although the word "Secret" is printed as part of the text on each page, the document does not indicate by whom, or pursuant to what authority, the marking was made.

3. Nearly a month later, on Friday, November 17, Terence Dougherty, ACLU's in-house counsel, received a voicemail message from AUSA Rodgers. The voicemail message mentioned no subpoena, or investigation, or need for evidence, and asked for Mr. Dougherty to return her call. Dougherty Decl. ¶2. Ms. Rodgers later left another voicemail message explaining that the ACLU was in possession of a classified document sent to the ACLU on October 23, 2006, which had to be returned to the government. *Id.*

When Mr. Dougherty returned the call on Monday morning November 20, AUSA Rodgers again explained that a document had been delivered to the ACLU on October 23, gave him the impression that the government already had the document and knew to whom it had been

sent by email, and insisted that the ACLU deliver to the government any and all copies it had of the document, together with information as to whether the document had been disseminated by the ACLU and assurances, to be negotiated and discussed, that all copies were in fact returned (leaving none extant at the ACLU). *Id.* ¶3. AUSA Rodgers said that it was illegal to possess or disclose the document, and when asked for authority identified 18 U.S.C. §§ 793 and 798.[1] *Id.* Noting that she did not know the parameters of the ACLU's computer systems, she said that the assurances being sought would have to account for the ACLU's computer system configuration and provide the government certainty that all copies had been delivered to the government or destroyed and that no copies were left at the ACLU. She asked for a response that day. *Id.*

Later that day, Joshua L. Dratel, an attorney whom the ACLU engaged to represent it, called AUSA Rodgers and advised her that the ACLU would not be complying with the government's request. Dratel Decl. ¶6. The subpoena quoted above at page 1 (Dratel Decl., Ex. 1) was faxed to Mr. Dratel on behalf of the ACLU still later that day. *Id.* Mr. Dratel asked

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[1] As is explained below at Point I(B), neither statute has any application here. Section 793(e) subjects to punishment, in pertinent part:

> Whoever having unauthorized possession of, access to, or control over any document . . . or note relating to the national defense . . . willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . .

Section 798 applies to the communication (but not retention) only of classified information

> (1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or
>
> (2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or
>
> (3) concerning the communication intelligence activities of the United States or any foreign government; or
>
> (4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes . . . .

AUSA Rodgers if the ACLU was a target of any investigation, and she assured him that it was not. *Id.* ¶4.

4. At the time of AUSA Rodgers' call, the ACLU had a single paper copy of the document and an electronic copy on its computer systems. In view of the government's position, the ACLU secured the paper copy and isolated the electronic copy so that it could not be generally accessed on the ACLU's computer systems. No other copies had been made, and none have been made since (save for copies automatically made by the system's back-up function). Dougherty Decl. ¶¶4-5.

The subpoena also called for "any and all copies of any other documents marked 'Secret' that were received in October or November 2006 from the same source as provided the 12/20/05 document referenced above." Dratel Decl., Ex. 1. No other such documents are believed to exist. Dougherty Decl. ¶7.

5. As the Court will see when the government provides it a copy of the document sought by the subpoena, which we urge the government to submit or the Court to request that the government do so, the document is nothing more than a policy, promulgated in December 2005, that has nothing to do with national defense. Release of the document might perhaps be mildly embarrassing to the government, but the document contains no information concerning matters such as troop movements, communications methods, intelligence sources, or the like. Neither its retention nor publication by the ACLU could in any way potentially threaten the nation. To the contrary, the document appears to be a classic example of overclassification. It neither fits within the categories of documents subject to classification under the governing Executive Order

nor could its release reasonably be "expected to cause serious damage to the national security." *See* Executive Order No. 13,292, § 1.4, § 1.2(a)(2), 68 Fed. Reg. 15,315-17 (Mar. 25, 2003).[2]

ARGUMENT

I. BY SEEKING "ALL COPIES" OF THE IDENTIFIED DOCUMENT IN THE ACLU'S POSSESSION, THE SUBPOENA EXCEEDS THE GRAND JURY'S INVESTIGATORY POWERS AND VIOLATES THE FIRST AMENDMENT.

The subpoena in this case identifies a specific document in the ACLU's possession and demands the surrender of all copies of that document to the government. That demand serves no legitimate investigatory purpose and represents an unprecedented abuse of the grand jury process. It is unreasonable by definition under Rule 17(c) of the Federal Rules of Criminal Procedure and the Fourth Amendment. In addition, by depriving the ACLU of all copies of a document involving matters of public interest, and that directly relates to the ACLU's mission as a public advocacy organization, the subpoena operates as a prior restraint in violation of core First Amendment principles.

A. The Challenged Subpoena Serves No Legitimate Investigatory Function And Must Therefore Be Quashed.

"The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991). *See also United States v. Calandra,* 414 U.S. 338, 343-44 (1974) (grand jury proceeding "is an *ex parte*

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[2] "Sec. 1.4. Classification Categories. Information shall not be considered for classification unless it concerns:
(a) military plans, weapons systems, or operations;
(b) foreign government information;
(c) intelligence activities (including special activities), intelligence sources or methods, or cryptology;
(d) foreign relations or foreign activities of the United States, including confidential sources;
(e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism;
(f) United States Government programs for safeguarding nuclear materials or facilities;
(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or
(h) weapons of mass destruction."

investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person"); *Costello v. United States,* 350 U.S. 359, 362 (1956) ("like its English progenitor," the role of the grand jury is "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes.")

Consistent with this purpose, the powers of the grand jury are broad, but they are "not unlimited." *R. Enterprises.* 498 U.S. at 299. Recognizing those limits, the Supreme Court has cautioned that a grand jury subpoena is unreasonable if "the subpoena . . . could not possibly serve any investigative purpose that the grand jury could legitimately be pursuing." *Id.* at 300, (quoting 1 S. Beale and W. Bryson, Grand Jury Law and Practice § 6.28 (1986)). That principle is embodied in Rule 17(c) of the Federal Rules of Criminal Procedure, which provides for a motion to quash grand jury subpoenas that are "unreasonable or oppressive." The Supreme Court has also stressed that when subpoenas are used in ways that function as seizures, "[t]he Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms 'to be regarded as reasonable.'" *United States v. Dionisio,* 410 U.S. 1, 11-12 (1973) (quoting *Hale v. Henkel,* 201 U.S. 43, 76 (1906)).

These concerns are further magnified when, as here, the subpoena intrudes upon sensitive First Amendment areas. *Cf. Marcus v. Search Warrant of Prop.*, 367 U.S. 717 (1961); *In re Grand Jury Subpoena*, 829 F.2d 1291, 1297 (4th Cir. 1987) ("the Court has made clear that the context of the first amendment intensifies the fourth amendment concerns that may be present in a sweeping subpoena *duces tecum*"). Thus, in *Branzburg v. Hayes,* 408 U.S. 665 (1972), the Court carefully cabined the government's authority to interfere with newsgathering through the grand jury process. Writing for the majority, Justice White stated:

> Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no

> justification. Grand juries are subject to judicial control and subpoenas to motions to quash.

Id. at 707-08. Justice Powell made a similar point in his concurrence:

> [N]o harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation 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 that his testimony implicates confidential source relationships 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.

Id. at 709-10.[3] *See also New York Times Co. v. Gonzales,* 459 F.3d 160, 177 (2d Cir. 2006) (Sack, J., concurring in relevant part).

The question of whether a grand jury subpoena has swept too far is not simply determined by the number of documents it seeks. Because its subpoena power is coextensive with its investigatory function, the grand jury lacks authority to seek any documents unless the "purpose of requesting the information is to ascertain whether probable cause exists." *R. Enterprises,* 498 U.S. at 297 (citation omitted). Indeed, the United States Attorneys' Manual expressly recognizes that "[t]he Grand Jury's power, though expansive, is limited by its function toward possible return of an indictment." § 9-11.120 (Sept. 2006).[4]

Thus, the Second Circuit has repeatedly held that "'[i]t is, of course, improper for the Government to use the grand jury for the sole or dominant purpose of preparing for trial under a pending indictment.'" *United States v. Jones*, 129 F.3d 718, 723 (2d Cir. 1997) (quoting *United States v. Leung*, 40 F.3d 577, 581 (2d Cir. 1994). *See also United States v. Vanwort*, 887 F.2d 375, 387 (2d Cir. 1989) ("[i]t is clearly 'improper to utilize a Grand Jury for the sole or

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[3] Because the dissenters in *Branzburg* would have gone even farther, the conclusion that the use of grand juries to suppress newsgathering or restrain publication (rather than for good faith investigation) would be unjustified and subject to a motion to quash represented the unanimous view of the Court.

[4] Available http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm.

dominating purpose of preparing an already pending indictment for trial'") (quoting *In re Grand Jury Subpoena Duces Tecum, (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985); *see United States v. Kovaleski*, 406 F. Supp. 267, 269 (E.D. Mich. 1976) ("calling of witnesses before a grand jury for the dominating purpose of gathering evidence for use in a pending case is improper").[5]

The investigatory role of the grand jury stands in stark contrast to the government's proposed use of the subpoena in this case as a seizure device to suppress speech. It is well established that a valid subpoena *duces tecum* involves instead

> a proper balance between the right of the grand jury to the 'temporary use of the books' and the right of a party to be protected against unreasonable and oppressive production of records . . . a problem which 'can be accommodated to the convenience of the parties' and the necessities of each situation.

Application of Kelly, 19 F.R.D. 269 (S.D.N.Y. 1956) (Weinfeld, J.), (citing *Hale v. Henkel*, 201 U.S. 43, 80 (1906) (McKenna, J., concurring) (describing the effect of subpoena *duces tecum* "at most but a temporary use")).

For that reason, parties responding to subpoenas for documents have the right to make and retain copies, and for various compelling reasons, it is standard to do so.[6] The grand jury may insist on originals where it has some investigatory reason to obtain them, but even then parties have the right to make and retain copies and generally do so. *See, e.g.*, Goldstein, GRAND JURY PRACTICE § 5.05[1] (1998) ("[w]here the government insists upon the production of

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[5] The Second Circuit explained in *Simels*, "[t]he question of a grand jury's dominant purpose is not the typical question of historical fact nor even the typical inquiry as to the state of mind of a witness or a party." 767 F.2d at 29. Rather, as the Court continued, "[i]t is the application of a legal standard designed to ensure that the grand jury, a body operating peculiarly under court supervision, is not misused by the prosecutor for trial preparation." *Id.* (internal citations omitted).

[6] As one practice guide summarizes,

> (1) the documents frequently are necessary for the conduct of a business . . . (2) a record of what was produced - avoids or is necessary to resolve - later disputes with the government about what materials were produced, and (3) adequate preparation of a defense (where the subpoenaed party is a subject or target) requires counsel who know the information that is in the government's hands.

Howard W. Goldstein, GRAND JURY PRACTICE § 5.05[1], at 5-55 and 5-56 (1998).

original documents, counsel for the subpoenaed party must make sure that copies of everything produced are kept by his client"); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1130, n.65 (E.D. Pa. 1975) (holding that where a party failed to copy records in its possession before turning them over, and complained about the duration of the distraint, the government "may retain the plaintiff's original documents while they are performing their lawful criminal investigatory functions, so long as the plaintiff's legitimate business need for the documents is at all time accommodated in some reasonable way," such as, "for example, by permitting access to the originals from time to time, *or by returning a full set of copies*") (emphasis added); *United States v. Doe (In re Grand Jury Investigation)*, 59 F.3d 17, 19 (2d Cir. 1995) ("[d]ocuments subpoenaed during a grand jury investigation remain the property of the entity that produced them").

Here, it is clear that the government is not seeking a temporary use of the subpoenaed items and that compliance with the subpoena requires the ACLU to forfeit all copies of it. *See* Dougherty Decl. ¶4; Dratel Decl. ¶5. There can be only one purpose to a subpoena seeking each and every copy of the same document – to deprive the target of the subpoena of possession. *A fortiori,* that is true when the government already has a copy of the document in its possession and knows how and when it was transmitted to the subpoenaed party. As the Second Circuit has noted, the grand jury is "not meant to be the private tool of a prosecutor," *United States v. Fisher,* 455 F.2d. 1101, 1105 (2d Cir. 1972), and "practices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden." *In re Antitrust Grand Jury Investigation (Under Seal),* 714 F.2d. 347, 349-50 (2d Cir. 1983).

Despite extensive research, we have been unable to find a single reported decision even mentioning, much less enforcing, a subpoena purporting to preclude the subpoenaed party from

retaining a copy of subpoenaed documents. There is no possible argument that there is an investigative purpose to such a subpoena. Depriving third parties of the right to make and retain copies of subpoenaed documents serves a transparently confiscatory, suppressive purpose, not an investigative one. There are no reported cases of any such subpoenas ever being directed to the press, notwithstanding that the nation's newspapers almost daily publish articles on national security and defense issues based on classified documents that have been given to them.[7]

In short, there is no lawful basis for a grand jury subpoena to confiscate "any and all" copies of documents in the hands of any person and thereby deprive the subpoenaed party and its counsel of copies. For that reason alone, the subpoena served on the ACLU should be quashed as beyond the grand jury's subpoena power.

B. A Grand Jury Subpoena That Is Not Seeking Evidence, But Confiscation of Any and All Copies of Documents Possessed by Persons Engaged in Public Advocacy and Reporting, Violates the First Amendment.

The subpoena the government served when its telephonic demand failed not only commands what the prosecutor may not lawfully command (that the party subpoenaed deliver up "any and all" copies of specified documents) and prohibits what the prosecutor has no power to prohibit (the copying and retention that is standard), but does so in order to prevent publication, study, and analysis of truthful information now in the ACLU's possession, which was provided to it without any wrongdoing by the ACLU. Accordingly, the subpoena is not only *ultra vires*,

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[7] *See, e.g.* , Michael R. Gordon, *Bush Adviser's Memo Cites Doubts About Iraqi Leader*, N.Y. Times, Nov. 29, 2006, at A1 (concerning information learned from a classified government memorandum leaked to the New York Times by an administration official) ; *National Security Adviser's Memorandum on the Political Situation in Iraq*, N.Y. Times, Nov. 29, 2006, at 19 (publishing the text of the leaked, classified government memorandum); John F. Burns and Kirk Semple, *Iraq Insurgency Has Funds to Sustain Itself, U.S. Finds*, N.Y. Times, Nov. 26, 2006, at 1 (reporting on information obtained from a classified government report provided to the New York Times by U.S. officials).

but also a violation of the ACLU's First Amendment rights, subject to being quashed under *Branzburg*, 408 U.S. at 707-08 (majority opinion) and *id.* at 709-10 (Powell, J., concurring).[8]

Every aspect of and circumstance surrounding this subpoena makes plain that it has no legitimate investigatory purpose but solely an improper confiscatory, information-suppressive one. The government already has the specific document it seeks, and indeed appears to know the identity of the person who provided it to the ACLU, and when. Accordingly, even assuming that the grand jury ever had power to demand "any and all copies" of specified documents and to prohibit the subpoenaed third party and its counsel from making and retaining copies, three separate lines of cases each independently make plain that this subpoena for "any and all copies" of a document that the ACLU lawfully received is unlawful under the First Amendment.

First, the subpoena runs afoul of the fundamental principle that the First Amendment protects the right to print truthful information concerning matters of public concern, even when the information has entered the private sector due to some initial unlawful conduct. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) ("Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully. . . the government [may not] punish the ensuing publication of that information"); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) ("where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order"). In *Bartnicki*, the

[8] The ACLU, as an organization engaged in information gathering for, among other purposes, public dissemination and promotion of discourse and advocacy regarding issues of political import, is protected by the First Amendment and entitled to whatever protection is afforded by *Branzburg* and its progeny. *Branzburg*, 408 U.S. at 703; *Gonzales v. Nat'l Broadcasting Corp.*, 194 F.3d 29, 34 (2d Cir. 1999) (the "*NBC*" case) (protection applies to any "entity that gathers information with 'intent to disseminate to the public'" (citation omitted); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142, 143 (2d Cir. 1987) ("an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press").

Supreme Court characterized the *Pentagon Papers* case as upholding "the right of the press to publish information of great public concern obtained from documents stolen by a third party" and held that "[w]here the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, . . . the government [may not] punish the ensuing publication of that information based on the defect in a chain," and that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." 532 U.S. at 528, 535. The First Amendment principle which in *Bartnicki* precluded awarding damages from persons who published wire recordings made (by others) in violation of federal law would *a fortiori* have barred an injunction against their publication – and, here, necessarily bars a grand jury subpoena that would wrest "any and all copies" of the document from the ACLU.[9]

Second, the subpoena runs aground on the rule that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and the corollary that courts will not imply any executive power to seek or impose prior restraint. *See, e.g., Pentagon Papers*, 403 U.S. 713 (1971); *see also id.* at 732 (White and Stewart, J.J., concurring) ("At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press").

As the Court explained in *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976):

> A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has

[9] The government well knows, and we believe that there is no dispute, that the ACLU is an entirely innocent recipient of the document, just as was The New York Times Company in the *Pentagon Papers* case and as defendants were in *Bartnicki*.

> become final, correct or otherwise, does the law's sanction become fully operative. A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.

While not framed as a classic prior restraint, the subpoena in this case seeks to achieve the same result with even fewer procedural safeguards. Many of the most important news articles of the past year (such as those concerning NSA eavesdropping, rendition of foreign prisoners of our nation to other nations, Defense Secretary Rumsfeld's views on the deteriorating situation in Iraq, National Security Advisor Hadley's assessment of Iraqi Prime Minister Maliki, and the report on the Iraq insurgency's funding sources) have been based on classified documents leaked to reporters, which could not be prepared and published as they have been were the government allowed to use subpoenas to confiscate "any and all" copies of classified documents it learns are in the hands of journalists and other public advocates and critics. The power of government to punish employees who breach obligations of employment is not symmetrical with its power to punish the press and other First Amendment actors when they obtain possession of such articles or choose to print them. *See, e.g., Pentagon Papers,* 403 U.S. at 727-30 (Stewart, J., concurring) (noting that the Executive's power to prevent and police leaks internally neither implies nor creates any remedies enforceable by courts); *cf. Gonzales*, 459 F.3d at 183 (Sack, J., concurring and dissenting) ("[s]ome unauthorized disclosures . . . likely contribute to the general welfare"); *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 991 (D.C. Cir.), *cert. denied*, 125 S. Ct. 2977 (2005) (Tatel, J., concurring in judgment) ("the public harm that would flow from undermining all source relationships would be immense").

Third, the subpoena is condemned by the rule that in considering First Amendment questions courts have "regard to substance and not to mere matters of form," and that the subpoena must therefore "be tested by its operation and effect." *Near v. Minnesota,* 283 U.S.

697, 697, 708 (1931). Thus, courts have been careful to assess the practical impact of warrants or subpoenas where they have the likely purpose, or effect, of suppressing First Amendment interests. *See, e.g., Heller v. New York*, 413 U.S. 483, 490 (1973), discussing such prior cases as *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964) and *Marcus v. Search Warrant of Prop.*, 367 U.S. 717 (1961); *see also In re Grand Jury Subpoena*, 829 F. 2d 1291, 1297 (4th Cir. 1987). *Heller*, in words that could have been written with the subpoena at issue in mind, summarized a decade of such cases by observing that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding . . . ." 413 U.S. at 492. The Court perceived no First Amendment obstacle to "[a] copy of [a] film . . . temporarily detained in order *to preserve it as evidence*" (emphasis in original), but insuperable objection to seizure as "a form of censorship." *Heller*, 413 U.S. at 490 (emphasis added, citation omitted).

The subpoena in this case goes far beyond the "powerful chilling effect" that led the Fourth Circuit to quash a subpoena requiring video distributors to scour their inventory for allegedly obscene material. *In re Grand Jury Subpoena*, 829 F.2d at 1299. Here the government is using the subpoena power in a way that is immeasurably worse under the First Amendment: to confiscate information that the ACLU obtained without any wrongdoing on its part and thus impose a *de facto* prior restraint. The clear purpose and effect of the subpoena is to foreclose analysis of, writing about, quotation from, and publication of material that the ACLU lawfully received, without even an allegation, much less proof, that publication would in fact result in "direct, immediate, and irreparable damage to our Nation or its people." *Pentagon Papers*, 403 U.S. at 730 (Stewart and White, JJ., concurring).

These objections are fatal, and cannot be overcome by mere reference to 18 U.S.C. § 793(e). The statute confers no authority to confiscate classified documents through the grand jury process, separation of powers principles prevent such authority from being judicially inferred, and any such authority would be void for substantial overbreadth.

a. Section 793(e) is a criminal statute. It nowhere confers on prosecutors or grand juries the power to issue subpoenas demanding that anyone (including the press and others engaged in reporting and advocacy) surrender "any and all" copies of documents relating to the "national defense," or to confiscate and thereby suppress any such information which may have leaked to the general public. Neither the statute on its face nor any case we have seen authorizes prior restraints of any kind, including orders directing defendants or potential defendants to "return" "any and all copies" of documents containing information "relating to the national defense." Congress directed that §793(e) be enforced by the norms of the criminal law, and there is no basis for enforcing it in any other form of proceeding.

b. Certainly the Executive may not confiscate from private hands all copies of "document[s] . . . relating to the national defense" unless and until such power is provided by law (and the law is consistent with the First Amendment). The narrowest holding of the *Pentagon Papers* case is that the Executive may not conscript the courts to restrain speech which the Executive failed to maintain within the Executive branch, "at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these." 403 U.S. at 731 (Stewart and White, J.J., concurring).[10]

c. Applying as it does on its face to all "documents" "relating to the national defense" regardless of any Executive classification or even whether they created within the government,

[10] Justice Douglas, in his concurring opinion in *Pentagon Papers* (403 U.S. at 723), noted that long ago the Court had rejected "in no uncertain terms" any argument that the government "has inherent powers to go into court and obtain an injunction to protect the national interest." (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)).

the government's implicit suggestion that §793(e) justifies confiscation of "any and all copies" of the document provided to the ACLU is an overbroad misapplication of that law. Even as a criminal statute, § 793 is widely considered unconstitutional,[11] and all of the courts considering it or its analogues have agreed that it requires considerable judicial surgery to meet constitutional standards, particularly as to those outside the government.[12] The proposition that the U.S. Attorney may subpoena the press to obtain "any and all copies" they may have of "document[s] . . . relating to the national defense," regardless of any classification or reason to believe that their retention or publication poses any clear and present risk of grave injury to the nation, condemns itself under the First Amendment. *See, e.g., Pentagon Papers, supra.*

Even in the Fourth Circuit, which has taken the broadest view of the espionage statutes, a district court has held, in the course of denying a motion to dismiss the indictment of two AIPAC lobbyists under 18 U.S.C. § 793(g) for conspiring to violate § 793(e), that the statute violates the First Amendment unless the government shoulders the burden of proving, beyond a reasonable doubt, that the

> national security is genuinely at risk; without this limitation, Congress loses its justification for limiting free expression. It was for this reason that the concurrences of Judge Wilkinson and Judge Phillips in *[United States v.] Morison* insisted on the need for a jury instruction limiting 'information relating to the national defense' to information 'potentially damaging to the United States or . . . useful to an enemy of the United States.' As Judge Wilkinson pointed out, use of this limiting instruction avoids 'the possibility that the broad language of this

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[11] *See, e.g.*, Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 930, 1031-1058 (1973); Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R. – C.L L. Rev. 349, 401 (1986); Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311, 324-27 (1974); Association of the Bar of the City of New York, *Free Public Debate and the Espionage Acts,* 42 Rec. Ass'n Bar City of N.Y. 215 (1987); *cf.* Espionage Laws and Leaks: Hearings Before the Subcomm. On Legislation of the House Permanent Select Comm. On Intelligence, 96th Cong., 1st Sess. 146 (1979) (statement of former Director of Central Intelligence William Colby (Congress "has drawn a line between espionage for a foreign power and simple disclosure of our foreign policy and defense secrets, and decided that the latter problems are an acceptable cost of the kind of society we prefer").

[12] *See United States v. Rosen*, 445 F. Supp. 2d 620, 620-27, 636-41 (E.D. Va. 2006) (citing cases).

> statute would ever be used as a means of publishing mere criticism of incompetence in and corruption in the government.' [844 F.2d] at 1084. . . . Thus, the requirement that the information potentially damage the United States properly 'confine[s] prosecution [under § 793] to cases of serious consequence to our national security.' *Id.* (Wilkinson, J., concurring).

United States v. Rosen, 445 F. Supp. 2d 602, 639 (E.D. Va. 2006) (some internal citations omitted). *See also* Transcript in *United States v. Rosen* (November 16, 2006), at 9-10, denying the government's motion for reconsideration, available at http://www.fas.org/sgp/jud/rosen111606.pdf.[13]

The subpoena here is not predicated on any such assertion, and its speech-suppressing impact cannot be reconciled with *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), *Pentagon Papers*, 403 U.S. 713 (1971), and *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Confiscation of any and all copies of the document by subpoena deprives the ACLU, engaged in First Amendment activity, of the right to retain, analyze, write about, and publish in whole or in part information that came into its possession without wrongdoing and prohibit publication when unnecessary to serve a compelling interest of "the highest order" and without any justification of a clear and present danger to the nation and its people that alone might justify any such interference with First Amendment freedoms. That burden could not possibly be met with regard to the document in question.

Moreover, the subpoena for any and all copies is not only unconstitutional as applied here; the power the government asserts so substantially overbroad as to be impermissible and unenforceable under the First Amendment. The government's position apparently is that 18 U.S.C. § 793(e) licenses prosecutors nationwide to compel the press and others engaged in

[13] In relying on Judge Ellis's decision in *Rosen,* we do not suggest that the decision accurately states the law in all respects; indeed, we believe it (and the other Fourth Circuit opinions that compelled its decision) to be insufficiently protective of First Amendment interests. The point is rather that the government's attempt to punish or suppress the document here under §793(e) would not pass even the test applied in the Fourth Circuit, which has been notably more hospitable to the government's claims and less sensitive to First Amendment concerns than other courts.

public dialogue and advocacy to surrender "any and all copies" of all "document[s] . . . relating to the national defense," with those challenging the subpoenas evidently left with the burden, under *R. Enterprises,* 498 U.S. at 301, of demonstrating unreasonableness or oppression under Rule 17(c). That would turn upside down the burden of persuasion in cases implicating First Amendment rights, *see Freedman v. Maryland*, 380 U.S. 51, 57 (1965), violating the rule that "*[a]ny* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," with any restraint permissible if at all only when the government has carried the burden of proving clear, present, and grave danger to the nation. *Pentagon Papers*, 403 U.S. at 714 (per curiam), 730 (Stewart and White, JJ., concurring). Voters cannot be properly informed about the pressing public issues of war and peace and the nation's foreign policy if the Executive may confiscate by subpoena all documents in possession of the press and public advocates "relating to the national defense."[14]

II. EVEN IF THE SUBPOENA COULD BE CONSTRUED AS SEEKING ONLY A SINGLE COPY OF THE IDENTIFIED DOCUMENT, CONTRARY TO ITS PLAIN LANGUAGE AND THE GOVERNMENT'S DEMANDS, IT IS STILL AN ABUSE OF THE GRAND JURY PROCESS ON THE FACTS OF THIS CASE AND SHOULD BE QUASHED.

The subpoena served on the ACLU clearly demands production of every copy of the identified document in the ACLU's possession. Conversations between ACLU counsel and the government confirm that broad scope. But, even if the subpoena were limited (which it is not) to demanding disclosure of only *a copy* of the document that was provided to the ACLU, rather than *any and all* copies of what the ACLU has, it would be subject to quashing under Rule 17(c)

[14] AUSA Rodgers also mentioned § 798 as a basis for her demand that the ACLU surrender "any and all copies" of the document, but that provision is even farther afield than § 793(e), since it does not apply to possession or retention at all, and makes criminal only the "knowing and willful" communication or transmission or use of four narrowly defined categories of classified information not arguably contained in the document. *See Pentagon Papers*, 403 U.S. at 737 n. 7 (White, J., concurring) ("The narrow reach of the statute was explained as covering 'only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree'") (citation omitted).

because the government cannot meet its burden under the qualified First Amendment privilege established in *Branzburg* and followed by the Second Circuit applicable here.

As shown in Point I(A), *supra*, notwithstanding recognition of the constitutionally mandated role of grand juries and the principle that "'the public . . has a right to every man's evidence,'" *Branzburg*, 408 U.S. at 688 (quoting *United States v. Bryan*, 339 U.S. 323, 331, (1950)), courts from *Branzburg* on have been alerted to the misuse of grand jury subpoenas to harass or impede First Amendment activity. The Second Circuit in *New York Times Co. v. Gonzales*, 459 F.3d 160, 172 (2d Cir. 2006), recently acknowledged *Branzburg* as "the governing precedent" in circumstances such as these. Relying on both Justice White's majority and Justice Powell's concurring opinions in *Branzburg* (discussed on page 9, *supra)*, the Second Circuit held that the qualified First Amendment privilege established in *Branzburg* applies "if a subpoena were issued to a reporter in bad faith." *Id.* at 172-73.

Accordingly, courts recognize that they have both a duty and the power to scrutinize the good faith basis of a grand jury subpoena and quash it if such basis is lacking. Under the narrowest reading of *Branzburg*, where there is no good faith investigatory purpose for a subpoena, and there is reason to believe that the intention or effect of the subpoena is interference with the gathering or dissemination of information that is of public importance, courts can, and should, quash the subpoena. *Branzburg*, 408 U.S. 707; *id.* at 709 (Powell, J.) (concurring); *Gonzales*, 459 F.3d at 172-73.

To illustrate the point, contrast the subpoena here with the government's demands for information from the press in *Branzburg* and *Gonzales*, where the government's disclosure demands were upheld because the Courts saw no doubt about the good faith investigatory basis for the demands. For example, in one of the cases resolved in *Branzburg,* two subpoenas were

served on a reporter who had published articles relating the reporter's first hand observations of individuals who possessed and used marijuana and hashish. 408 U.S. at 667-71, 708-09. The Court found that there was a proper basis for enforcement of the subpoena because the reporter "had direct information to provide the grand jury concerning the commission of serious crimes." *Id.* at 709.

Similarly, the grand jury investigation in *Gonzales* rested on very different premises. There the government was investigating suspected leaks of government plans to freeze and seize assets of two foundations which, following 9/11, were suspected of funding terrorist activities. Two reporters from *The New York Times* had learned of the government's plans prior to their execution and had contacted the foundations, thereby allegedly tipping them off and allowing the foundations to undermine the effectiveness of the government's efforts. 459 F.3d at 162. In the declaratory judgment action that *The New York Times* commenced after prosecutors threatened to subpoena a third party telephone provider for the reporters' telephone records, the Court held that any available privilege was overcome because of the important investigatory interest at stake. *Id.* In contrast to this case, the government did not already have what it was seeking with its subpoena, and it was not seeking "any and all" copies of anything. The Second Circuit emphasized that "[t]here [was] simply no substitute for the evidence [that the reporters] have." *Id.* at 170. *See also* 459 F.3d at 174 (holding that the "disclosure of an impending asset freeze and/or search that is communicated to the targets is of serious law enforcement concerns, and there is no suggestion of bad faith in the investigation or conduct of the investigation").

No such comparable showing could be made here. The government's purpose from the outset was suppressive, not investigatory. Nor can the government establish *any* good faith investigatory need, let alone a compelling one, for demanding copies of the document. It is clear

from the subpoena itself and the government's communications with the ACLU that the government already knows precisely what document was transmitted to the ACLU, who provided it, when and by what means. It also appears plain that the government has copies of its own document. The peculiar scope of the subpoena – seeking "any and all" copies of the document that the government already has – highlights the fact that the government's purpose here is to eliminate the information from the ACLU's possession, and not to obtain evidence for a legitimate investigatory purpose.

Any government for only "a copy" of the document would also fail under the qualified First Amendment privilege standard articulated by the Second Circuit prior to *Gonzales* in cases similar to this one, involving demands (albeit not grand jury subpoenas) for disclosure of non-confidential materials from the press.[15] In *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983), the court upheld the quashing of a trial subpoena served on a journalist by a defendant in a criminal matter because enforcement of trial subpoena where First Amendment concerns were implicated required "a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources," and the subpoena at issue sought merely "cumulative" evidence. *Id.* at 76-77 (citing *Baker v. F & F Investment*, 470 F.2d 778, 783 (2d Cir. 1972)). This standard was later refined in *Gonzales v. Nat'l Broadcasting Corp.*, 194 F.3d 29 (2d Cir. 1998) (the "*NBC*" case), which, like *Burke*, involved a demand for disclosure of nonconfidential information from the press, which was quashed. 194 F.3rd at 36.[16] The Court affirmed that nonconfidential

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[15] Such cases remain binding precedent following the decision in *Gonzales*, which focused exclusively on the applicable standard in the context of a grand jury subpoena. *Gonzales*, 459 F.3d at 173 (acknowledging prior precedent in the Circuit regarding the scope of the journalist's privilege under the First Amendment and seeing "no need to add a detailed analysis of [the Court's] precedents").

[16] The *Gonzales* court discussed the development of Second Circuit precedent extending the qualified First Amendment privilege to nonconfidential information. *Id.* at 33- 36.

information from the press is protected by a qualified privileged, which it held can only be overcome by a showing that "the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." *Id.* at 36.

The Court in *NBC* explained that even where a disclosure demand upon the press concerns nonconfidential information, the broader First Amendment concerns in "protecting the 'pivotal function of reporters to collect information for public dissemination'" and "the 'paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters'" are still relevant. *Id.* at 35 (citing *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir. 1982) and *Baker,* 470 F.2d at 782)). Among the harms the Court identified that could flow from "unrestricted, court enforced access to journalistic resources" was "the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties." *Id.*

Even if we assume a narrow reading of the subpoena and acknowledge that the demand for a copy of the document in the ACLU's possession does not concern the ACLU's confidential information, the subpoena still cannot pass muster under the *NBC* standard. The government, which apparently is fully aware of the facts surrounding the subpoenaed document -- *i.e.*, what was sent to the ACLU, by whom, and when -- clearly is not seeking further factual evidence from the ACLU that is "likely relevant to a significant issue" *and* "not reasonably obtainable from other available sources." Nor would a copy of what was provided to the ACLU provide the government with any information relevant to any investigation of the document's leak from the Executive branch in the first place.

CONCLUSION

For all the foregoing reasons, the motion to quash should be granted.

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