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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, *et al.*,
Petitioners,

v.

THE STANFORD DAILY, *et al.*,
Respondents.

LOUIS P. BERGNA, *et al.*,
Petitioners,

v.

THE STANFORD DAILY, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR AMICI CURIAE

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
THE NATIONAL NEWSPAPER ASSOCIATION
THE NATIONAL ASSOCIATION OF BROADCASTERS
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS
THE ASSOCIATED PRESS MANAGING EDITORS
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
THE STUDENT PRESS LAW CENTER
THE SOCIETY OF PROFESSIONAL JOURNALISTS (SIGMA DELTA CHI)
THE NEWSPAPER GUILD (AFL-CIO)
THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFL-CIO)
THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION

QUESTIONS PRESENTED

1. Whether the First Amendment permits police officers to perform a surprise search of a news organization's offices, without notice or opportunity to raise a judicial challenge, where there is no showing that the news organization is involved in criminal activity or is likely to destroy evidence in its possession.

2. Whether the Civil Rights Attorney's Fees Awards Act of 1976 authorizes an award of fees to a news organization that has successfully vindicated its First Amendment rights in a suit under 42 U.S.C. § 1983.

INTEREST OF AMICI CURIAE

This Brief Amicus Curiae is submitted with the consent of the parties by:

The Reporters Committee for Freedom of the Press

The American Newspaper Publishers Association

The National Newspaper Association

The National Association of Broadcasters

The American Society of Newspaper Editors

The Associated Press Managing Editors

The Radio-Television News Directors Association

The Student Press Law Center

The Society of Professional Journalists (Sigma Delta Chi)

The Newspaper Guild (AFL-CIO)

The American Federation of Television and Radio Artists (AFL-CIO)

The California Newspaper Publishers Association

The Reporters Committee for Freedom of the Press is a legal research and defense fund organization established to protect the First Amendment interests of the working press. Its members include news reporters active in both the written and broadcast media.

The American Newspaper Publishers Association ("ANPA") is a nonprofit membership corporation, whose more than 1,250 member newspapers constitute over 90 percent of the total daily and Sunday newspaper circulation, and a significant portion of the weekly newspaper circulation, in the United States. Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, seek both to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest, and to maintain the primary function of newspapers: the gathering of information for dissemination to the people.

The National Newspaper Association is a national organization of 6,500 newspapers with members in all 50 states. Its purpose is to preserve the constitutional guarantee of freedom of the press.

The National Association of Broadcasters is a nonprofit, incorporated association of radio and television broadcast stations and networks. As of December 2,

1977, NAB's membership included 2504 AM radio stations, 1857 FM radio stations, 548 television stations, and all nationwide commercial broadcast networks. The object of NAB, according to its by-laws:

> ". . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

Among NAB's primary concerns is maintaining the vitality of the First Amendment guarantee of "freedom of the press."

The American Society of Newspaper Editors is a nationwide professional organization of more than 800 persons who are directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of the "dignity and rights of the profession."

The Associated Press Managing Editors is an organization of 600 editors of newspapers affiliated with the Associated Press, which is the largest news collection organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The Radio-Television News Directors Association is a nonprofit professional organization of journalists. It includes approximately 1,300 members who are active in the supervision, reporting, and editing of news and other information broadcast by the national networks and by local radio and television stations throughout the United States.

The Student Press Law Center is the only national organization devoted exclusively to protecting the First Amendment rights of the nation's high school and college press. The Center, which is cosponsored by the Reporters Committee and the Robert F. Kennedy Memorial, provides direct legal assistance to high school and college students suffering First Amendment violations. The Center also serves as a national clearinghouse to collect and distribute information on the First Amendment rights of the student press.

The Newspaper Guild ("TNG") is an international labor organization, affiliated with the AFL-CIO and the Canadian Labour Congress, that represents some 40,000 persons employed principally by newspapers, magazines, and broadcasting companies in the United States, Canada, and Puerto Rico. TNG has been and continues to be actively involved and interested in protecting and preserving the First Amendment rights of its members.

The American Federation of Television and Radio Artists, AFL-CIO, is a labor union with a membership of 30,000, including all radio and television network news correspondents and reporters and the vast majority of correspondents and reporters employed at local radio and television stations in the United States. This union has long engaged in efforts to secure the efficacy and service of electronic journalism against inroads on First Amendment rights and the right of the people to see and hear the news.

The Society of Professional Journalists (Sigma Delta Chi) is the largest, oldest, and most representative organization serving the field of journalism. It has 27,000 professional members in print and broadcast journalism and the teaching of journalism and another 7,000 campus members. The society's objective is "to work to safeguard the flow of information from all sources to the

public so that it has access to the truths required to make democracy function and to protect our freedoms."

The California Newspaper Publishers Association is an organization of 454 daily and weekly newspapers of general circulation. Founded in 1927, the association has long been interested in First Amendment and freedom of information problems as they relate to the press and has been active in both the legislature and the courts in these areas.

Amici have a vital interest in the resolution of the question whether the First Amendment protects news organizations against surprise searches that would seriously hinder their function of gathering and disseminating the news. Amici also have a vital interest in the availability of attorneys' fees awards to members of the press who successfully sue under 42 U.S.C. § 1983 to vindicate their rights under the First, Fourth, and Fourteenth Amendments.

STATEMENT OF FACTS

The facts, stated more fully in respondents' brief, are as follows:

In April 1971, a political sit-in demonstration occurred at the Stanford University Hospital in Palo Alto. The *Stanford Daily*, an independent student-published newspaper, had reporters and photographers at the sit-in, during which several police officers allegedly were assaulted in a scuffle with the demonstrators.

Several days later, without notice to or prior demand on the newspaper, police officers appeared at the newspaper's offices with a search warrant issued by the local municipal court. The police had explained to the issuing judge that the reason for the search was that they believed the newspaper possessed unpublished photographs that would be helpful in identifying persons who allegedly caused the disorders at the hospital.

There was no claim that any of the newspaper's staff participated in the disorders. Nor was there any claim that the *Daily* would destroy the photographs if the police sought them by subpoena instead of by a surprise search. And there was no claim that the police had tried to identify the troublemakers by questioning or arranging for subpoenas to be served on the dozens of non-press witnesses, demonstrators, and hospital employees at the scene.

The police entered the newspaper's offices and examined the contents of filing cabinets, desks, shelves, and wastebaskets. They inspected reporters' confidential notes, unpublished film, and other internal newsroom information, some of which had been received in confidence and involved news stories unrelated to the hospital incident.

The search did not produce the unpublished photos sought by the police. The *Stanford Daily* then filed this action for declaratory and injunctive relief.

The courts below held that the search of the *Daily*'s offices was invalid under the First and Fourth Amendments. They ruled that the police must give a news organization notice, through a subpoena, and an opportunity to litigate the request, before compelling the disclosure of confidential materials. And the courts awarded the plaintiffs $47,000 in attorneys' fees.

The law enforcement officers sought review in this Court, which granted certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is of extreme importance to the press and all of us who benefit from freedom of the press. This Court has been asked to rule that law enforcement officials armed with *ex parte* search warrants may per-

form surprise searches of news media not suspected of any crime, without notice or opportunity to raise a judicial challenge. The Court is asked to permit law enforcement officials to rifle through desks, files, unpublished photos, confidential notes and internal correspondence, and other news-gathering material protected by the First Amendment in a search for any item specified in a warrant, without the procedural guarantees that the First Amendment requires.

The press in this case is not arguing that it has an absolute privilege to withhold information. It is seeking the modest assurance that law enforcement officers demanding news-gathering material from a news organization, not suspected of any crime, follow procedures that give advance notice of the effort to seize the information and an opportunity to appear in court to contest the seizure on both First Amendment and other grounds.

The power to perform surprise searches of news offices, if confirmed, would deprive the press of any opportunity to have its First Amendment interests balanced against asserted law enforcement needs—an opportunity required by *Branzburg* v. *Hayes*, 408 U.S. 665 (1972)—because law enforcement officers would already have seen or seized the protected material. Such searches would severely impair the ability of the press to gather and disseminate news, and physically disrupt its operations. This Court's decisions make clear that such an intrusion on First Amendment interests will not be tolerated, where, as here, law enforcement officers can accomplish their purposes through less intrusive procedures allowing notice and opportunity for a hearing.

Moreover, surprise searches of news offices thwart the statutory protections expressly made available to the press by reporters' privilege laws in California and 25 other states. Many of these laws were passed in direct response to this Court's suggestion in *Branzburg* v.

Hayes, supra, 408 U.S. at 706 (1972), that appropriate protection for confidential press sources could be fashioned by legislation. These "shield" laws generally protect the press against forced disclosure of confidential information when the information is sought by subpoena. Neither the *Branzburg* Court nor the state legislatures conceived of the possibility that such laws could be evaded by resort to a search warrant, enabling the police to descend on news offices without notice, to seize confidential information, and thus to destroy any opportunity for the invocation of state shield laws or any other constitutional protection against compelled disclosure.

The second question in this case is equally important. As Mr. Justice Brennan observed in his concurring opinion in *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 608 n.35 (1976), the legal costs involved in litigating First Amendment cases can be considerable, and even prohibitive, for a small publisher.[1]

Congress had this problem in mind when it passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Congress passed that Act because of its concern that persons with limited financial resources would hesitate to vindicate their federal constitutional rights unless they were given some possibility of being made whole again if their claims prevailed. Indeed, the award of fees to the *Stanford Daily* in this very case was mentioned approvingly in the legislative history of the Act, making it clear that Congress intended to include the press among those encouraged to vindicate constitutional rights through litigation. Petitioners' attack on the attorneys' fees award is entirely foreclosed by the Act and its legislative history.

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[1] The costs to the press association of litigating that case exceeded $100,000, far beyond its ability to pay. *See* Appendix A to this Brief.

ARGUMENT

I. THE COURTS BELOW CORRECTLY HELD THAT THE SEARCH OF THE *STANFORD DAILY*'S OFFICES WAS INVALID ABSENT OPPORTUNITY FOR A PRIOR ADVERSARY HEARING.

In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court declined to establish an absolute privilege for newsmen generally to withhold information that is lawfully sought by a grand jury. The Court noted the deep-seated historical reluctance of the courts to create new testimonial privileges. It observed that

> "the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country, the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press." [2]

In marked contrast, the surprise search of press offices that occurred in this case has no such historical roots; nor will the procedural safeguards that respondents seek—the very safeguards present in *Branzburg*—deprive "the public [of its] . . . right to every man's evidence." [3] The undisputed affidavit testimony of experienced journalists in this case indicates that the search of the *Stanford Daily*'s offices for unpublished news-gathering materials may be unprecedented in our

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[2] 408 U.S. at 698-99 (footnote omitted). *See also id.* at 690 & n.29.

[3] *Id.* at 688, *quoting United States* v. *Bryan*, 339 U.S. 323, 331 (1950).

nation's constitutional history.[4] That testimony is confirmed by the absence of any reported case before this one concerning such a dragnet search against the press.[5]

If the 1971 search at the *Stanford Daily* was the first of its kind, however, there are disturbing signs that the practice it launched is growing in popularity.

Since 1971, there have been at least six other known searches directed against newspapers and broadcast stations. The basic facts of these cases were similar: The searches were authorized by warrants that were issued *ex parte* and usually executed without notice or opportunity for a prior adversary hearing before an impartial judicial officer. The warrants sought evidence in the form of photographs, outtakes, notes, or other information acquired in the process of gathering the news. So far as we are aware, the applications for warrants made no allegations that the press targets were suspected of any crime, or that the targets were likely to destroy the materials if given notice that the materials were sought. While the items sought were particularly described, execution of the warrants permitted extensive

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[4] *E.g.*, Affidavit of Frank P. Haven [managing editor, *Los Angeles Times*] ¶ 5, J.A. 62-63; Affidavit of Douglas E. Kneeland [national correspondent, *New York Times*] ¶ 3, J.A. 67; Affidavit of Gene Roberts [national news editor, *New York Times*] ¶ 6, J.A. 128.

[5] Wholesale searches of the press were not, of course, unknown in England during our colonial period. As this Court has noted, the inclusion of the Fourth Amendment in our Constitution was largely a response to "a struggle against oppression which had endured for centuries" in England—a struggle that was "largely a history of conflict between the Crown and the press," and in which "general warrants [were used] as instruments of oppression . . . ." *Stanford* v. *Texas*, 379 U.S. 476, 482 (1965). "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrant*, 367 U.S. 717,729 (1961). *See generally* N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 35-39 (1937).

and close examination of materials that were unrelated to the evidence sought. In at least one case, it is alleged that the search restricted a radio station in its ability to receive news feeds from outside news services, as well as in its ability to broadcast regular news programming.[6] Finally, in each case the target of the search was a comparatively small newspaper or broadcast station with relatively limited resources.[7]

At the time of this Court's decision in *Branzburg* v. *Hayes*, *supra*, 17 states had enacted statutory protections for confidential information obtained in the newsgathering process.[8] Since that decision, such shield laws

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[6] That search, of radio station KPFK-FM in Los Angeles, is alleged to have lasted for eight and one-half hours. *See* Verified Complaint for Injunctive and Declaratory Relief ¶¶ 15-17, in *Pacifica Foundation, Inc.* v. *Davis*, No. 117257 (Cal. Super. Ct. L.A. Cty., filed March 12, 1975).

[7] The targets of these searches have included: two affiliates of the Pacifica Radio Network, KPFA-FM, in Berkeley, California, and KPFK-FM in Los Angeles (IV Press Censorship Newsletter 25 (1974)); the *Berkeley Barb*, an underground newspaper (searched twice) (VI Press Censorship Newsletter 31 (1975)); the *Los Angeles Star*, a sexually explicit tabloid, (*id.*); and television station WJAR-TV, Providence, Rhode Island. *See generally* Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 Stan. L. Rev. 957 & n.3 (1976).

The surprise search practice that originated in this case might have become even more common if the courts below had not declared it unconstitutional. The court of appeals' decision is binding in the states of the Ninth Circuit, where the practice first occurred. The most recent known surprise search of the press occurred in September 1977 at television station WJAR-TV in Rhode Island.

[8] Ala. Code tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (Supp. 1971); Ariz. Rev. Stat. § 12-2237 (Supp. 1971-72); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code § 1070 (Deering) (Supp. 1977); Ind. Code Ann § 34-3-5-1 (1973); Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. Ann. §§ 45-1451-1454 (Supp. 1972); Md. Ann. Code art. 35, § 2 (1971); Mich. Comp. Laws § 767.5a (Supp. 1956), Mich. Stat. Ann. § 28.945(1) (1954); Mont. Rev. Codes Ann. § 93-601-2 (Cum. Supp. 1977); Nev. Rev. Stat. § 49.275 (as amended in 1975); N.J. Rev. Stat. §§ 2A:84A-21, 2A:84A-29 (Supp. 1972-73, as

have been enacted in nine additional states.[9] The California legislature also amended its statute in 1974 to provide for broader coverage.[10] The correlation between this expansion of statutory protections for the press and the advent of surprise police searches which foreclose the assertion of the statutory protections—as well as the right to judicial balancing guaranteed by *Branzburg* in states that lack shield laws—seems more than coincidental and may be the most ominous aspect of the record in this case.[11] Indeed, in the court of appeals, petitioners themselves suggested that their search procedure was developed to facilitate the rapid acquisition of information from potentially uncooperative reporters about criminal activity by others.[12]

The search practice challenged here not only lacks the historical justification found so persuasive in *Branzburg*; it also threatens to impinge far more certainly and directly on First Amendment interests, and indeed makes

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amended Oct. 5, 1977); N.M. Stat. Ann. § 20-1-12.1 (1973); N.Y. Civ. Rights Law (McKinney) § 79-h (1973); Ohio Rev. Code Ann. § 2739.12 (1954); Pa. Stat. Ann. tit. 28, § 330 (Purdon) (Cum. Supp. 1977); *see* 408 U.S. at 689 n.27.

[9] Del. Code tit. 10, §§ 4320-4326 (1974); Ill. Rev. Stat. ch. 51, §§ 111-119 (Supp. 1977); Minn. Stat. §§ 595.021-.025 (Supp. 1977); Neb. Rev. Stat. §§ 20:144-:147 (1974); N.D. Cent. Code §§ 31-01-06.2 (1976); Okla. Stat. tit. 12, §§ 385.1, 385.3 (Supp. 1977); Or. Rev. Stat. §§ 44.510-.540 (1973); R.I. Gen. Laws §§ 9-19.1-1 to -3 (Supp. 1977); Tenn. Code Ann. §§ 24.113-.115 (Supp. 1976).

[10] *See* pp. 18-19, *infra*; Cal. Evid. Code § 1070(c), at 151-52 (Deering) (Supp. 1977).

[11] *Compare* VI Press Censorship Newsletter 30 (1975).

[12] Appellants' Opening Brief at 25-26 (filed June 2, 1975). The affidavit supporting the warrant for the search involved in *Pacifica Foundation, Inc.* v. *Davis*, No. 117257 (Cal. Super. Ct., L.A. Cty., filed Mar. 12, 1975), recites that the police understood that the station manager refused to surrender the document sought on the basis of the California shield law. The search was thus obviously a device to circumvent whatever protection the statute afforded.

it impossible for the victim ever to vindicate those interests. As we show below, under these circumstances the First Amendment mandates the use of less intrusive law enforcement procedures which provide notice and opportunity to seek judicial protection before the material demanded is inspected or seized.

A. Surprise Searches of the Press Threaten Irreparable Injury to the Freedom of the Press Protected by the First Amendment.

This Court has often noted that full dissemination of information to the public is vital to enlightened discussion of events and to intelligent self-government.[13] The Court has also recognized the crucial role of the press in informing the body politic:

> "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." [14]

These principles undergird this Court's ruling in *Branzburg* v. *Hayes*, *supra*, that "news gathering is not without its First Amendment protections," and that journalists are therefore entitled to have courts balance First Amendment interests against claimed law enforcement needs, before confidential information must be produced.[15]

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[13] *See, e.g., Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972); *LaMont* v. *Postmaster General*, 381 U.S. 301 (1965); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). *See also* A. Meiklejohn, Free Speech 26 (1948).

[14] *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966). *See also New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964).

[15] 408 U.S. at 707. *See also* 28 C.F.R. § 50.10 (1976) (Department of Justice Guidelines):

This is not a case in which the government is asked "to make available to journalists sources of information not available to members of the public generally." [16] The respondents invoke the First Amendment not as a sword that gives "special access" to the press, *id.*, but as a shield to deny the police special access to seize news materials in the hands of the press.[17] Editorial materials located in press offices are entitled to First Amendment protection because they are necessary to the press function of informing the public—a function explicitly recognized in the amendment itself. As Mr. Justice Stewart has noted,

> "The publishing business is . . . the only organized private business that is given explicit constitutional protection." [18]

Press searches like the one directed against the *Stanford Daily*—not itself suspected of any crime—impermissibly threaten the performance by the press of its important news dissemination function.

1. *Searches Foreclose the Opportunity To Interpose First Amendment Protections and Other Lawful Objections to Disclosure of Materials.*

Branzburg established that confidential information in the possession of the press enjoys qualified First Amendment protection. While the Court refused to hold that

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"Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues."

[16] *Pell* v. *Procunier*, 417 U.S. 817, 834 (1974).

[17] *Cf. Herbert* v. *Lando*, No. 77-7142, slip op. at 227 n.11 (2d Cir. Nov. 7, 1977).

[18] Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 633 (1975).

reporters have "a virtually impenetrable constitutional shield, beyond legislative or judicial control," [19] it reaffirmed that "news gathering does . . . qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." [20] The Court recognized that to require the press "indiscriminately to disclose [its sources of information] on request" would seriously burden the news-gathering function in violation of the First Amendment.[21]

Under *Branzburg*, reporters must "respond to *relevant* questions put to them in the course of a *valid* grand jury investigation . . . ." [22] However, response is not required if "grand jury investigations are instituted or conducted other than in good faith." [23] Nor may a newsman be "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation." [24] The Court stressed that courts have a responsibility to ensure "that grand juries . . . operate within the limits of the First Amendment as well as the Fifth." [25] Mr. Justice Powell, who provided the fifth vote for the 5-4 majority in *Branzburg*, emphasized in his concurrence the need in each case to "strik[e] . . . a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." [26] A court cannot strike that balance

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[19] 408 U.S. at 697.

[20] *Id.* at 681. *See also Pell* v. *Procunier*, 417 U.S. 817, 834 (1974) ("a journalist . . . is entitled to some constitutional protection of the confidentiality of [his] sources").

[21] *Id.* at 682.

[22] *Id.* at 690-91 (emphasis added).

[23] *Id.* at 707.

[24] *Id.* at 710 (Powell, J., concurring).

[25] *Id.* at 708.

[26] *Id.* at 710 (Powell, J., concurring). Mr. Justice Powell has since noted that *Branzburg* "recognized explicitly that the consti-

without an opportunity to hear and evaluate the competing interests *before* the compelled disclosure occurs.

In short, *Branzburg* rests on the premise that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection," [27] because a newsman who believes his information is privileged "will have access to the court on a motion to quash [a subpoena] and an appropriate protective order may be entered." [28] This premise is readily evaded, however, if the police may resort to a warrant authorized by a magistrate *ex parte* to search a newspaper or broadcast station and so deprive it of any opportunity to assert its rights before they are lost.[29]

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tutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful." *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 859 (1974) (Powell, J., dissenting). Since *Branzburg*, the lower federal courts have reaffirmed that the First Amendment requires a case-by-case judicial balancing of interests *before* law enforcement officers seek to obtain confidential information from the news media. *See, e.g., Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

[27] *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 710 (Powell, J., concurring).

[28] *Id.* at 710 (Powell, J., concurring).

[29] Since the harm to First Amendment interests stems from the exposure of confidential information and the editorial process to public scrutiny, it is plain that these interests are irreparably compromised the moment the search takes place. Although petitioners suggest that after-the-fact remedies are available, the suggested remedies are wholly inadequate. For example, even if evidence unconstitutionally obtained from third parties is subject to exclusion in a state court trial in California, as petitioners argue (Zurcher Brief at 27; Bergna Brief at 24), application of the exclusionary rule is insufficient to repair the damage to news gathering. Suits for money damages (Zurcher Brief at 25-26) are similarly inadequate.

A surprise search also sweeps away all other lawful objections to the disclosure of confidential information. As noted, 26 states now have shield laws that protect the confidentiality of information possessed by the news media.[30] When the offices of the *Stanford Daily* were searched, California's shield law protected members of the press against being "adjudged in contempt by a judicial, legislative, [or] administrative body, or any other body having the power to issue subpoenas, for refusing to disclose . . . the source of any information procured [in connection with press activities]."[31] As amended in 1974, that law now extends also to "any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." Such "unpublished information" expressly includes "notes, outtakes, photographs, tapes or other data of whatever sort . . . ."[32] Indeed, present California law may protect the very materials that were the object of the search in this case.[33] Yet, if the police were to repeat their

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[30] *See* p. 12, *supra*. These 26 shield laws offer protection of varying degrees. Some laws protect absolutely those matters within their purview; others qualify the protection with a balancing standard or deny it altogether in libel cases. *See generally* Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 Stan.L.Rev. 957, 960-61 (1976).

Other, nonstatutory defenses that may be asserted to a subpoena include "undue breadth, . . . improper inclusion of irrelevant information, . . . lack of authority to conduct the investigation in issue, . . . and improper issuance of a given subpoena, ..." *In re Grand Jury Proceedings*, 486 F.2d 85, 91 (3d Cir. 1973) (citations omitted).

[31] Cal. Evid. Code § 1070(a), (b) (Deering) (Supp. 1977).

[32] Cal. Evid. Code § 1070(a), (b), (c) (Deering) (Supp. 1977).

[33] In *Pacifica Foundation, Inc.* v. *Davis*, No. 117257 (Cal. Super. Ct., L.A. Cty., filed March 12, 1975), the plaintiffs are seeking a judgment that the California statute as amended bars searches, as well as subpoenas, for materials that are protected against disclosure. *See* Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 Stan. L. Rev. 957,

surprise search of the *Stanford Daily* offices tomorrow, there would be no opportunity for the newspaper to interpose its statutory defenses.[34]

2. *Indiscriminate Searches Through Press Files Threaten Irreparable Injury to the Gathering and Dissemination of News.*

Notice and an opportunity to assert all available defenses before an impartial judicial officer are particularly crucial where a press search is threatened. By its very nature, a search is ordinarily limitless and indiscriminate; the range of items it exposes cannot be narrowed. Even if the police seek only specific materials in a press office to which no valid claim of privilege attaches, those materials usually cannot be located without reading or examining many other materials in the office —materials irrelevant to the investigation as well as those relevant, materials that may have been acquired under a pledge of confidence and materials otherwise acquired. But, without notice, the target of the search can neither test the government's right to the materials actually sought nor obviate the ransacking of an entire press office by locating and producing them itself. The result—as in this case—is an unnecessary, wholesale, and damaging disclosure of confidential materials.[35]

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963 (1976). If the state courts accept that argument, the 1974 amendment—which was enacted after the district court's decision here—will furnish an independent, nonconstitutional basis for invalidating a post-1974 search. In these circumstances, the Court may wish to dismiss the writs of certiorari as improvidently granted and reserve its ruling on the constitutional issues for some future case. *Cf. Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

[34] California law penalizes resistance to law enforcement officers in the execution of a search warrant. Cal. Penal Code §§ 69, 148 (Deering) (Supp. 1977).

[35] *See, e.g.*, Affidavit of Edward H. Kohn ¶¶-15-24, J.A. 73-75. In ordinary civil litigation, even where First Amendment interests are not implicated, a party seeking to discover specific documents

Such a search threatens First Amendment interests far more certainly and directly than the testimony by newsmen, under judicial supervision, that this Court required in *Branzburg* v. *Hayes*, *supra*. As the record in this case makes clear, indiscriminate press searches will harm protected First Amendment interests in three distinct ways.

Impairment of news gathering. Far more than the testimony required in *Branzburg*, press searches will inevitably expose to public scrutiny information confidentially obtained and the sources who supplied it.[36] It is by now common ground that reporters must and do rely on information provided to them in confidence.[37] The

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is not admitted to his adversary's offices to rummage until he finds them. Under the Federal Rules of Civil Procedure, for example, he requests the desired documents and, unless his request is successfully challenged, his adversary is required to locate and produce them. Fed.R.Civ.P. 26, 34, 37. The justification for a more intrusive search in the case of persons suspected of crime—the likelihood of destruction of evidence—cannot be presumed *ex parte* where the object of the search is a newspaper or broadcast station not suspected of any criminal involvement. First Amendment interests in the latter case weigh heavily against departure from the less intrusive procedure.

[36] Such "exposure" may, at least initially, be confined to police; but this does not immunize the resulting "blow to the First Amendment rights." *Bursey* v. *United States*, 466 F.2d 1059, 1086 (9th Cir. 1972). Like political dissidents, of whom the court of appeals spoke in *Bursey*, sources of confidential information "who criticize the Government may have more to fear about disclosure to the Government than to anyone else . . . ." *Id.* Indeed, some sources may be within the government itself and have special reason to fear disclosure. *See* Affidavit of Douglas E. Kneeland [national correspondent, *New York Times*] ¶¶ 3, 6, J.A. 67, 69-70.

[37] *E.g.*, *Farr* v. *Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Morgan* v. *State*, 337 So.2d 951 (1976); *Rosato* v. *Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown* v. *Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974).

record in the district court eloquently confirms that fact and the reasons for it.

As Walter Cronkite observed, "Broadcast news coverage, much like newspaper reporting, depends on the acquisition of facts, including those gained from confidential sources." [38] However, the likelihood of exposure will irreparably impair press access to these confidential sources. Douglas E. Kneeland of the *New York Times* testified by affidavit that:

> "If the government is permitted to search newspaper offices or even the homes of newsmen for unpublished photographs, notes, tape recordings or other materials, that trust [that prompts sources to disclose information] will be effectively destroyed." [39]

Newsmen will be unable to prevent this result:

> "It will matter not that the newspaper or the individual newsman is an unwilling accomplice of the government. An accomplice he will be, his hardwon reputation for independence shattered. Doors will be closed. And the public will be deprived of much that it has the need and right to know." [40]

No less harmful to the vital function of the press will be the disclosure of unpublished information itself.[41]

It is obviously no answer to say that reporters should cease to retain unpublished confidential information in their files. The retention of such information is vital

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[38] Affidavit of Walter Cronkite ¶ 5, J.A. 58.

[39] Affidavit of Douglas E. Kneeland [national correspondent, *New York Times*] ¶ 4, J.A. 68.

[40] *Id. See also* Affidavit of Gene Roberts ¶ 7, J.A. 128.

[41] *See* Affidavit of Douglas E. Kneeland ¶ 7, J.A. 70-71; Affidavit of Fred Mann [former Managing Editor, *Stanford Daily*] ¶ 22, J.A. 87.

to the quality and accuracy of published news. Unpublished information is kept for a variety of background purposes—for example, to facilitate future amplification or corrections—as well as to provide leads for future news stories.[42] If the press can no longer retain such information in its files lest it be seized, the quality and accuracy of news coverage will suffer, to the public detriment:

> "All reporters have taken notes of factual disclosures received in confidence. If such notes are subject to police seizure, it is likely the reporters will stop bringing them back to their offices and using them as aids in preparing their stories. I am obviously concerned for the quality and character of journalism if reporters refrain from taking notes or taping interviews for fear that this raw stuff might be easily available to government officials through the device of a search warrant." [43]

The threat of indiscriminate searches also creates a substantial risk of self-censorship. As Gene Roberts, *New York Times* national news editor, noted:

> "If reporters and photographers believe that the information they gather will be available to government officials, they will not be eager to get the sensitive story, or to track down the individual who will supply the critical information. And I, as an editor, will consider carefully before publishing facts, or a photograph, which might imply that there is more than appears." [44]

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[42] *See* Affidavit of Gordon Manning [Director for News, CBS News] ¶ 4, J.A. 124.

[43] Affidavit of Gene Roberts ¶ 9, J.A. 129. As Mr. Justice Powell has recognized, the promotion of accurate news reporting may, as here, be of constitutional significance. *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 854 (1974) (dissenting opinion).

[44] Affidavit of Gene Roberts ¶ 8, J.A. 128.

Press searches also threaten to compromise First Amendment interests in two other ways that were not directly at issue in *Branzburg*:

Exposure of the editorial process. The indiscriminate exposure of newsroom files to police in the course of a search will also jeopardize the editorial process. In any press search, the police will discover not only factual information, but also the written work product of reporters, editors, and publishers reflecting their appraisals and criticisms of the quality of the information available and the reports that have been published on the basis of that information. As courts have recognized, this kind of exposure

> "endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom. A reporter or editor . . . would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism." [45]

Physical disruption. Unlike lesser government intrusions into the news-gathering process, searches of press offices also threaten physical disruption of the business of the press, and a consequent interference with the dissemination of news. Because of the severe time deadlines under which the press must operate, an extensive search can play havoc with timely publication or broadcast. As Frank Haven of the *Los Angeles Times* testified:

> "The thorough disruption of day-to-day newspaper operations which would result from subjecting news-

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[45] *Herbert* v. *Lando*, No. 77-7142, slip op. at 232 (2d Cir. Nov. 7, 1977); *see id.* at 240. *See also Bursey* v. *United States*, *supra*, 466 F.2d at 1084 ("Questions about the identity of persons who were responsible for the editorial content and distribution of newspaper and pamphlets . . . cut deeply into press freedom.")

> papers to the use of search warrant procedures is too obvious to require much elaboration. If law enforcement officers have the power to at any time appear at the office of a newspaper with a search warrant, systematically go through the files of a newspaper relating to a particular event, confiscating those materials which appear to suit their needs, at that point the precise, and often tight, time requirements in publishing a newspaper are disrupted, personnel are diverted from their duties, materials necessary to publish the paper may be taken, and, in a word, the ability, not to mention the constitutional right, of the newspaper to determine what will be published, and when, is put in serious jeopardy." [46]

In fact, just such interference occurred as a result of the eight and one-half hour search of the offices of KPFK-FM in Los Angeles. (*See* p. 12, *supra.*)

B. Notice and Opportunity for an Adversary Hearing Must Precede a Search That Threatens Irreparable Injury to First Amendment Interests.

As we have shown, much of the information typically found in a newspaper or broadcast office enjoys substantial legal protections against compelled disclosure. The First Amendment and state shield laws both protect against indiscriminate police rummaging through press files. But a surprise search negates these protections. Permitting the police to use procedures that foreclose any opportunity to invoke lawful defenses mocks this Court's assurance in *Branzburg* that judicial supervision will be available to prevent the evisceration of press freedom.

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[46] Affidavit of Frank Haven [managing editor, *Los Angeles Times*] ¶ 6, J.A. 63; Affidavit of Gordon Manning [Director for News, CBS News] ¶ 5, J.A. 124.

The question here is not how much substantive First Amendment protection any particular materials might enjoy, or under what circumstances. It is not even what standards should guide those determinations. The question is whether *all* protections can be swept aside by search procedures that leave no room for any protections to be invoked.[47]

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[47] Although this case presents an opportunity to decide whether *any* person not suspected of a crime is entitled to notice and an opportunity to be heard before his premises are searched, that question need not be decided at this time. The narrower question before this Court is whether the press, whose rights are specifically mentioned in the First Amendment and whose freedom is indispensable to all who enjoy a democratic system of government, is entitled to such protection. We note that the procedural prerequisites for a valid search and seizure under the Fourth Amendment are especially strict where First Amendment interests in "freedom of speech, or of the press" are implicated. In such cases, the Fourth Amendment imposes "a higher hurdle in the evaluation of reasonableness" for a search and seizure, *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973). *See United States* v. *Miller*, 425 U.S. 435, 444 n.6 (1976); *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968); *Stanford* v. *Texas*, 379 U.S. 476 (1965); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971). However, as we show in text, the First Amendment of its own force requires the procedures imposed by the courts below, whatever the reach of the Fourth Amendment.

If this Court reaches the broader question of the requirements imposed by the Fourth Amendment generally on searches of nonsuspects, we submit that the decision below is correct for the reasons stated in the district court's opinion and in Part II of respondents' brief. As respondents observe, if the state may search the premises of nonsuspects for evidence at will, then it may intrude without restraint upon private relationships protected by the federal Constitution, state statutes, and common law privileges. Such intrusions cannot be squared with the Fourth Amendment's prohibition against unreasonable searches. Consider, for example, the membership lists which this Court found protected by the First Amendment against disclosure compelled by court order in *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Even if those lists were not absolutely privileged against disclosure in a criminal investigation where the NAACP was not a suspect, *NAACP* v. *Alabama* makes clear that the state would have to show a compelling need before any court could require production. It is therefore inconceivable

[Footnote continued]

As we now show, in the circumstances of this case, the First Amendment requires one simple but effective procedural safeguard: The compelled disclosure must be preceded by notice and an opportunity for an adversary hearing. Only then can the courts tailor and confine the disclosure of confidential information to what is appropriate under *Branzburg* and other applicable authorities. Absent that procedural protection, even an indisputable claim of privilege or other defense will fail for lack of any opportunity to assert it.

"The history of liberty has largely been the history of the observance of procedural safeguards." [48] Nowhere has this been more true than for the liberties guaranteed by the First Amendment. Under numerous decisions of this Court, government action that threatens irreparable injury to First Amendment interests must be preceded by notice and an opportunity for an adversary hearing.

In *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Court invalidated an

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that, consistent with the reasonableness requirement of the Fourth Amendment, the state could evade this constitutional protection by the mere expedient of a search under warrant.

Indeed, Congress has recently shown that it is mindful of Fourth Amendment requirements in this respect. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-20, Congress imposed limitations on wiretapping similar to those imposed by the courts below on physical searches. The Act requires that wiretapping be directed only against persons suspected of committing a crime or communications facilities used by such persons, *id.* § 2518(3), not nonsuspects, such as journalists not suspected of any crime. It also requires that efforts be made to minimize the need for wiretapping by using other investigative alternatives prior to obtaining authorization for wiretapping, *id.* § 2518(3)(c), and that any wiretap "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." *Id.* § 2518(5).

[48] *McNabb* v. *United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.).

injunction issued *ex parte* against a political rally. The Court "insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of [the proposed action] which circumstances permit." [49] The Court reasoned that the only way to prevent unlawful suppression of protected activity was to give the proponents of the rally a prior opportunity to challenge the injunction or to seek a narrowing of its provisions. The need for that procedural safeguard was particularly acute because of the political nature of the speech involved, since "[i]t is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them." [50] As the Court in *Carroll* observed, "[here] the reasons for insisting upon an opportunity for hearing and notice . . . are even more compelling than in cases involving allegedly obscene books. The present case involves a rally and 'political' speech in which the element of timeliness may be important." 393 U.S. at 182.

As *Carroll* recognizes, the Court has consistently required the same procedural safeguard even in less compelling First Amendment contexts. In *A Quantity of Books* v. *Kansas*, *supra*, and *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), the Court required that the seizure of large quantities of books be tested in a prior adversary proceeding in order to avoid the danger that protected speech would needlessly and unlawfully be suppressed in the process of preventing obscene and unprotected expres-

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[49] 393 U.S. at 181.

[50] *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting); *see Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559-60 (1976); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-93 (1975); *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964).

sion.[51] Although those cases involved searches and seizures, the Court decided them under First Amendment standards and found it unnecessary to reach Fourth Amendment issues. Similarly, in other cases, the Court has insisted that censorship measures contain procedural safeguards that are adequate to "ensur[e] the necessary sensitivity to freedom of expression." [52] And the Court recently reaffirmed that "[c]ourts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of *A Quantity of Books* and *Marcus* are fully met." *Heller* v. *New York*, 413 U.S. 483, 491 (1973).[53]

The circumstances here are even more compelling than those in *Carroll*, *Marcus*, or *A Quantity of Books*, and the

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[51] The danger that protected conduct will be injured need not be certain. As in *Carroll* and in obscenity cases such as *A Quantity of Books* v. *Kansas*, *supra*, there need be only the likelihood of injury. "[O]pportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Board of Regents* v. *Roth*, 408 U.S. 546, 575 n.14 (1972).

[52] *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965); *see, e.g.*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

[53] In *Heller*, the police seized a single copy of an allegedly obscene film from a theater pursuant to a warrant issued and executed without a prior adversary hearing. This Court upheld the seizure but made clear that its decision proceeded on the assumption that a duplicate film was available to the theater, and that showing of the film could therefore continue. Hence, the danger of injury to speech interests under the particular circumstances of that case was virtually nonexistent. Where offices of a news organization are searched, however, the danger to its protected interests in confidentiality is severe and immediate. Once confidential sources or editorial materials are disclosed, the First Amendment interests at stake are irreparably harmed. *See* pp. 14-23, *supra*. The Court was at pains in *Heller* to make clear that the holdings of cases such as *A Quantity of Books* v. *Kansas*, *supra*, requiring notice and an adversary hearing prior to government action imperiling First Amendment interests, were left undisturbed. *Id.* at 491.

harm is irreparable. A surprise search of an entire news office intrudes on the freedom of the institution, expressly identified in the First Amendment, that is primarily responsible for disseminating information to the public. Where documentary materials are sought from the press by search, the risk of an unnecessarily "large-scale" search and seizure is substantial. And even where no extensive seizure occurs, the danger of wholesale obstruction to the circulation of information and ideas is great. The seizure, for example, of the only photographic negatives of a fast-breaking news event would be as effective a barrier to the dissemination of information as the seizure of the only copy of an allegedly obscene film possessed by a theater. Since the procedural safeguard of a prior adversary hearing is required in the latter case,[54] it is certainly required where information vital to the public is seized by means of a surprise press search.

As noted, the Court in *Branzburg* was careful to stress that government orders requiring journalists to produce evidence are subject to challenge by newsmen prior to disclosure, to allow First Amendment interests to be weighed against competing law enforcement interests.[55] The Court in *Branzburg* also observed that no danger there existed that the "grand juries were 'prob[ing] at will and without relation to existing need' " or "forcing wholesale disclosure of names and organizational affiliations." [56] By contrast, the *ex parte* search procedure followed in this case foreclosed the opportunity for prior judicial control. The participation of the magistrate in the warrant process did not provide the necessary con-

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[54] *Heller* v. *New York*, *supra*, 413 U.S. at 491-93.

[55] 408 U.S. at 678, 708; *id.* at 710 (Powell, J., concurring).

[56] *Id.* at 700, *citing DeGregory* v. *Attorney General*, 383 U.S. 825, 829 (1966). "No attempt [was] made to require the press to publish its sources of information or indiscriminately to disclose them on request." *Id.* at 682.

trol, because the magistrate had no knowledge of the nature of the materials in the files of the newspaper or of the First Amendment interests jeopardized by disclosure. Moreover, the indiscriminate search of the *Stanford Daily*'s offices—with no opportunity for the staff to locate and produce the requested photograph itself—made the danger of "wholesale disclosure" of "names" and "affiliations" an ominous reality.

The procedural rights afforded to the press by the courts below are no greater than those enjoyed in *Branzburg* and no greater than politicians, book dealers, and theater owners enjoy under *Carroll*, *A Quantity of Books*, and *Heller*. They are notice and an opportunity for an adversary hearing *before* an irreparable invasion of First Amendment interests occurs, to permit the validity and scope of that invasion to be judicially tested *before* the invasion occurs.[57] Such a procedure will permit the press to seek to establish that the materials sought are privileged, or at least to narrow the compelled disclosure to that which the court finds is justified.[58]

Surprise searches of press offices are presumptively unnecessary to effectuate legitimate law enforcement needs. This Court's decisions make clear that such a serious impairment of First Amendment interests can be upheld, if at all, only "if the State demonstrates a sufficiently im-

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[57] "No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). Notice and opportunity for a hearing are, in many contexts, the core of the protection afforded by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g.*, *Goss* v. *Lopez*, 419 U.S. 565 (1975) (school suspension); *Bell* v. *Burson*, 402 U.S. 535 (1971) (driver's license suspension); *Londoner* v. *Denver*, 210 U.S. 373 (1908) (tax assessment).

[58] *Carroll* v. *President & Commissioners of Princess Anne*, *supra*, 393 U.S. at 183.

portant interest and employs means closely drawn to avoid unnecessary abridgement" of those freedoms.[59] A very heavy burden—proof that establishes reasonable cause to believe that the press would destroy evidence in the face of a subpoena or other compulsory process—must be sustained before any such search could be validated.[60] Unless such a showing can be made, law enforcement officers have less intrusive means to achieve their interests, and those means must be pursued. As the Court said in *Carroll*:

> "In this sensitive field, the state may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case. The participation of both sides is necessary for this purpose. Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure." [61]

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[59] *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976). *See also United States* v. *Robel*, 389 U.S. 258, 268 (1967).

[60] Because of the danger that a search of press offices will result in a prior restraint on publication or otherwise obstruct the flow of information to the public, the procedural safeguard of notice and opportunity for a hearing should be dispensed with only where there is a substantiated and convincing showing to a magistrate of a danger that evidence will be destroyed. The courts below expressly recognized an exception for that rare situation. *See* 353 F. Supp. at 133.

However, there was nothing before the magistrate in this case that even suggested a danger that evidence would be destroyed in the face of compulsory process. And there is no basis for any assumption that the press generally would defy the law by destroying evidence that has been requested by subpoena or similar process, in the face of criminal penalties for such conduct.

[61] 393 U.S. at 183-84.

Law enforcement officials can follow procedures that include notice and opportunity for an adversary hearing without impairing in any way legitimate law enforcement interests. Experience with civil discovery and criminal subpoenas shows conclusively that it is feasible to obtain evidence by means that permit orderly assertion of objections and effective containment of the materials disclosed. Use of such means will not deprive law enforcement officers of any evidence to which they are legally entitled; at most, it will briefly postpone access to that evidence until entitlement can be determined by an impartial judicial officer in light of the facts known to all of the parties.[62] In this respect the procedural issue here contrasts markedly with the assertions of substantive protection for news gathering that were made in cases like *Branzburg* v. *Hayes*, *supra*, and *Pell* v. *Procunier*, *supra*. Respondents here seek only a fair opportunity to assert already recognized legal protections in advance of disclosure of protected materials. They can be afforded that opportunity without depriving law enforcement officers of any evidence to which they have been heretofore allowed access.

The subpoena procedure required by the courts below affords the minimum procedural safeguards consistent with the First Amendment and the decisions of this Court. It is certainly within the remedial power of the federal courts to require that procedure.[63] The Constitution does not, of course, prescribe the precise manner in which notice and an opportunity for hearing must be provided or the label to be given to the procedure. Public agencies retain the flexibility to adopt procedures that will accom-

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[62] *See* 86 Harv.L.Rev. 1317, 1333 (1973).

[63] *See Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

modate their needs to constitutional requirements.[64] The guiding principle, established by this Court's decisions and adopted by the courts below, is that governmental seizure of information in the hands of the press must be preceded by notice and opportunity for an adversary hearing. "[T]here is no place within the area of basic freedoms guaranteed by the First Amendment for [*ex parte*] orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll* v. *President & Commissioners of Princess Anne, supra,* 393 U.S. at 180.

II. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 AUTHORIZES THE FEES AWARD IN THIS CASE.

In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 262 (1975), this Court held that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." Congress reached just such a determination in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("the Act").[65] As Senator Tunney stated in introducing the bill before the Senate, "The purpose and effect of [the Act] is simple":

> "[I]t is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate

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[64] *See Freedman* v. *Maryland, supra,* 380 U.S. at 58-60.

[65] *See* 122 Cong. Rec. H12,159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan); *id.* at H12,161 (remarks of Rep. Railsback); *id.* at H12,163 (remarks of Rep. Kastenmeier); *id.* at H12,165 (remarks of Rep. Seiberling); 122 Cong. Rec. S16,251 (daily ed. Sept. 21, 1976) (remarks of Sen. Scott); *id.* at S16,252 (remarks of Sen. Kennedy); 122 Cong. Rec. S16,431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway); 122 Cong. Rec. S16,491 (daily ed. Sept. 23, 1976) (remarks of Sen. Tunney).

> their rights under our civil rights statutes. The Supreme Court's recent Alyeska decision has required specific statutory authorization if Federal courts are to continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of 'fee shifting' provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards." [66]

Congress plainly intended that prevailing plaintiffs should, barring special circumstances, recover attorneys' fees under the Act. The language of the Act closely parallels the attorneys' fees award provisions of Title II of the Civil Rights Act of 1964 and of the Emergency School Aid Act of 1972.[67] In decisions interpreting the language of those two statutes, this Court has held that "the successful plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " [68] Congress cited those decisions as incorporating the approach it wanted courts to take in construing the 1976 legislation.[69]

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[66] 121 Cong. Rec. S14,975 (daily ed. Aug. 1, 1975). *See also* 122 Cong. Rec. H12,154 (daily ed. Oct. 1, 1976) (remarks of Rep. Railsback) ("[s]o what we are really doing is codifying the practice that was going on prior to the *Alyeska* case"); *id.* at H12,159 (remarks of Rep. Drinan); *id.* at H12,161 (remarks of Rep. Railsback); *id.* at H12,163 (remarks of Rep. Kastenmeier); 122 Cong. Rec. S16,252 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy) ("it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the Alyeska decision"); 122 Cong. Rec. S16,431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway).

[67] § 204(a), 78 Stat. 244, 42 U.S.C. § 2000a-3; 20 U.S.C. § 1617.

[68] *Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973), *quoting Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

[69] *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (hereinafter "S. Rep."); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (hereinafter

In enacting the Civil Rights Attorney's Fees Awards Act, Congress exercised its "power and judgment" [70] to award attorneys' fees to prevailing plaintiffs in Section 1983 actions. Petitioners seek to avoid that judgment by arguing (1) that the Act may not be retroactively applied to them and (2) that fees may not be awarded against a defendant who enjoys an absolute immunity from damage liability or a defendant who enjoys a qualified immunity and who has acted in good faith. Both arguments are diametrically opposed to the plain language and legislative history of the Act and are contrary to the decision of every federal court of appeals that has ruled on the issues. They are arguments that petitioners should address to Congress and not to this Court.

A. The Legislative History of the Act Plainly Manifests a Congressional Intent To Apply the Act to all Cases Pending on the Date of Its Enactment.

Petitioners have argued that the Act should not be applied retroactively to provide for an award of attorneys' fees for services rendered before the effective date of the Act. The principal argument advanced is that a retroactive application of the Act would result in a "manifest injustice" and would, therefore, be inconsistent with the analysis of this Court in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974). However, that argument totally misperceives the thrust of *Bradley*. Indeed, the *Bradley* decision compels a retroactive application of the Act to all cases pending on the date of its enactment.

"H.R. Rep.") ("prevailing plaintiffs should ordinarily recover their counsel fees. *Newman* v. *Piggie Park Enterprises, supra; Northcross* v. *Memphis Board of Education, supra*").

[70] *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 263.

The central principle of the *Bradley* decision is "that a court is to apply the law in effect at the time that it renders its decision unless doing so would result in manifest injustice *or there is statutory direction or legislative history to the contrary.*" [71] Applying that principle to the attorneys' fees award provision of the Emergency School Aid Act of 1972, the Court in *Bradley* looked first to the legislative history of that Act. After finding that the legislative history was not clear on the retroactivity question, the Court inquired into whether a retroactive application of the statute would result in a "manifest injustice," and concluded that no such injustice would result. This Court then reversed the court of appeals' refusal to authorize an award of attorneys' fees.

In contrast to the statute considered in *Bradley*, the legislative history of the Civil Rights Attorney's Fees Awards Act is not silent on the retroactivity question. Rather, it is unmistakably clear that Congress intended the Act to apply to all cases pending at the time of its enactment. The House Report plainly states:

> "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974)." [72]

During the course of the House debates Congressman Drinan, the sponsor of the House bill, noted, without objection:

> "This bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation." [73]

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[71] *Id.* at 711 (emphasis added).

[72] H.R. Rep. at 4 n.6. *See also* S. Rep. at 5.

[73] 122 Cong. Rec. H12,160 (daily ed. Oct. 1, 1976).

A similar point was made by Congressman Anderson:

> "MR. BEARD of Tennessee. . . . is there any retroactive nature of this piece of legislation . . . ?
>
> MR. ANDERSON of Illinois. Mr. Speaker, if the gentleman will yield, it would apply to cases now pending . . . ." [74]

In the Senate debates Senator Abourezk, manager of the bill, observed, again without contradiction:

> "The Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits presently pending in the Federal courts." [75]

Indeed, the House defeated by a vote of 268-104 a motion to recommit the bill for the purpose of obtaining an amendment to make the Act prospective only.[76]

As this Court held in *Bradley*, a clear manifestation of legislative intent is dispositive of whether a statute should be given retroactive application. In this case the unambiguous legislative history compels a retroactive application of the Civil Rights Attorney's Fees Awards Act. Indeed, every court of appeals that has addressed the retroactivity question has so held.[77]

This legislative history also fully answers petitioners' claim that the retroactive award of attorneys' fees against public officials who did not knowingly violate constitu-

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[74] *Id.* at H12,155.

[75] 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976).

[76] 122 Cong. Rec. H12,166 (daily ed. Oct. 1, 1976).

[77] *Wheaton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977); *Gates* v. *Collier*, 559 F.2d 241 (5th Cir. 1977); *Beazer* v. *New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977); *Bond* v. *Stanton*, 555 F.2d 172 (7th Cir. 1977); *Martinez Rodriquez* v. *Jiminez*, 551 F.2d 877 (1st Cir. 1977). Two circuit courts have applied the Act retroactively to cases pending on the date of its enactment without discussing the retroactivity issue. *Franklin* v. *Shields*, No. 75-2057, slip op. (4th Cir., Sept. 19, 1977); *Seals* v. *Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977).

tional standards gives rise to a "manifest injustice" within the meaning of *Bradley*. *Bradley* holds that claims of "manifest injustice," such as those raised here, are simply not germane where Congress has clearly expressed its will. Thus, an analysis of the purported impact of the Act is plainly not appropriate in this case.[78]

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[78] Aside from its lack of materiality in this case, petitioners' manifest injustice assertion has four fatal flaws:

(1) *Bradley*, far from supporting petitioners' argument, refutes it. In rejecting the school board's manifest injustice claim in that case, the Court emphasized (a) that plaintiffs had rendered a substantial social service by bringing the school board into compliance with its constitutional mandate; (b) that no matured or unconditional right would be infringed by a retroactive application of the Act; and (c) that "there is no indication that the obligations under [the attorneys' fee provision] if known, rather than simply the common-law availability of an award, would have caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs." 416 U.S. at 721. Similar considerations undercut any claim of manifest injustice in the instant case. Plaintiffs have vindicated an important social interest; and petitioners can assert no matured rights that would be adversely impacted by a retroactive application of the Act. Moreover, at all relevant times in this lawsuit the possibility of an attorneys' fees award to plaintiffs was a known risk of litigation. *See, e.g., La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973). *See also Brandenberger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974). Petitioners cannot, therefore, assert that the Act imposed on them an unforeseen liability which, if known, would have altered their course of conduct.

(2) Petitioners' suggestion that they will bear the expense of the attorneys' fees award is factually incorrect. The record demonstrates that under the California indemnification statute, the city and county (not petitioners) will pay the award.

(3) The legislative history of the Act plainly indicates that Congress intended to allow for the imposition of attorneys' fees against public officials in both their official and individual capacities. *See* S. Rep. at 5: "[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." (footnotes omitted).

(4) Congress cited this very case as an example of a case that correctly applied "appropriate standards" in awarding attorneys' fees. S. Rep. at 6.

B. Congress Did Not Intend the Common Law Immunity Doctrines To Insulate Public Officials From Attorneys' Fees Awards.

Petitioners argue that the common law immunities that protect certain public officials from damage liability under Section 1983 [79] should be extended so as to insulate such officials from an attorneys' fees award under the Act.[80] That argument is addressed to the wrong forum:

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[79] *See, e.g., Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutor against damage liability); *Wood* v. *Strickland*, 420 U.S. 308 (1975) (qualified immunity for school officials against damage liability); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (qualified immunity for state executive officials against damage liability); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (absolute immunity for judges and qualified immunity for police officers against damage liability); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (absolute immunity for legislators against damage liability).

[80] Petitioners press no claim that the Eleventh Amendment bars the award of attorneys' fees in this case. Nor could they. This Court has clearly held that the Eleventh Amendment does not preclude a monetary recovery from counties or other political subdivisions of the state. *Edelman* v. *Jordan*, 415 U.S. 651, 667 n.12 (1974); *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890); *see Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1195 (1977). This action was brought against city and county officials, and any recovery will be paid by those political subdivisions. The Eleventh Amendment is not, therefore, involved in this lawsuit.

This case does not raise the Eleventh Amendment considerations posed by *Finney* v. *Hutto*, 548 F.2d 740 (8th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3261 (U.S. Oct. 18, 1977). In *Hutto*, the Eighth Circuit held that an award of attorneys' fees under the Act against a *state* is not barred by the Eleventh Amendment. Every other circuit that has addressed the issue has agreed. *Seals* v. *Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977); *Gates* v. *Collier*, 559 F.2d 241 (5th Cir. 1977); *Bond* v. *Stanton*, 555 F.2d 172 (7th Cir. 1977); *Martinez Rodriquez* v. *Jiminez*, 551 F.2d 877 (1st Cir. 1977). That result is, we submit, correct for two reasons:

(1) The Act is " 'appropriate legislation' for the purposes of enforcing the provisions of the Fourteenth Amendment . . ." and the Eleventh Amendment does not, therefore, bar an attorneys' fees award against the state. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976).

[Footnote continued]

The issue is one for Congress, which has squarely rejected petitioners' view.

The thrust of petitioners' argument appears to be that the financial impact of an attorneys' fees award is no different from that of the monetary damage claims that are barred by the common law immunities, and that the Act therefore should be construed to preclude fees awards against a defendant who is covered by one of those immunities.[81] That argument is misguided and should be rejected.

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(2) An award of attorneys' fees to a prevailing plaintiff is not a monetary judgment against the state of a type that is barred by the Eleventh Amendment. The financial burden imposed on the state by a fees award is merely an ancillary effect of prospective compliance with constitutional standards. *Compare Edelman* v. *Jordan*, 415 U.S. 651 (1974), *with Ex parte Young*, 209 U.S. 123 (1908). *See also* Note, *Attorneys' Fee Awards and the Eleventh Amendment*, 88 Harv. L. Rev. 1875, 1896 (1975).

[81] Petitioners Bergna and Brown also suggest that "[t]he reasons underlying the damages immunity of *Imbler* v. *Pachtman*, *supra*, also support an immunity against declaratory and/or injunctive actions for prosecutors and those who carry out judicial orders, at least when, as here, they participate in the good faith exercise of judicial functions." Bergna Brief at 30 n.21. That proposition has been uniformly rejected by the circuit courts. *See, e.g.*, *Universal Amusement Co.* v. *Vance*, 559 F.2d 1286 (5th Cir. 1977) (prosecutorial immunity against damages does not bar § 1983 injunctive action against prosecutor); *Person* v. *Association of the Bar*, 554 F.2d 534 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3293 (U.S. Oct. 31, 1977) (judicial immunity against damages does not bar § 1983 action for injunctive relief against Justices of Supreme Court, Appellate Division); *Drollinger* v. *Milligan*, 552 F.2d 1220 (7th Cir. 1977) (judges and officers of the court are not immune from § 1983 suits seeking equitable relief); *Timmerman* v. *Brown*, 528 F.2d 811 (4th Cir. 1975) (immunity doctrine does not protect qualified officials from § 1983 injunctive action); *Fowler* v. *Alexander*, 478 F.2d 694 (4th Cir. 1973) (judicial immunity against damages does not bar § 1983 action for injunctive relief); *Conover* v. *Montemuro*, 477 F.2d 1073 (3d Cir. 1973) (judicial immunity against damages does not bar § 1983 injunctive action against a family division judge and a district attorney). *See also* McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 Rut.-Cam. L.J. 65, 79 (1976) ("the lower courts generally have held that judicial immunity does

In the first place, petitioners' argument blurs some critical distinctions between damage awards and awards of attorneys' fees.[82] Unlike a damage award, an award of attorneys' fees does not purport to indemnify a victim for a loss or to punish a wrongdoer for his conduct. The award arises, not from the harm suffered by the plaintiff as the result of an alleged wrongdoing, but rather from expenses incurred in seeking vindication of his rights through court litigation.[83] Presumably for this reason, Congress correctly decided that attorneys' fees should be collected "like other items of costs," [84] and not as damages.

More significantly, the very cases on which petitioners rely in their argument recognize that the question of the availability of a common law immunity defense in Section 1983 actions was "one essentially of statutory construction." [85] In deciding whether such defenses could be asserted against Section 1983 damage claims, this Court identified as the threshold issue whether "Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials." *Imbler* v. *Pachtman*, 424 U.S. 409, 417-18

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not extend to actions for injunctive relief"). *See also* Note, *The Federal Injunction as a Remedy for Unconstitutional Conduct*, 78 Yale L.J. 143, 146 n.17 (1968) (listing numerous cases in which injunctive relief against constitutional violations by police was granted under § 1983).

[82] *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 460 (1976) (Stevens, J., concurring); *cf. Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927) (costs assessed against the state by the Supreme Court in case appealed to test the constitutional validity of a state criminal statute).

[83] *See generally* Note, *Attorneys' Fee Awards and the Eleventh Amendment*, 88 Harv. L. Rev. 1875, 1895 (1975).

[84] S. Rep. at 5 n.6.

[85] *Wood* v. *Strickland*, 420 U.S. 308, 316 (1975) (footnote omitted). *See, e.g., Imbler* v. *Pachtman, supra; Pierson* v. *Ray, supra.*

(1976). In answering that question, the Court concluded that the Congress which originally enacted Section 1983 did not intend to eliminate the traditional immunity against damage awards of several types of public officials.[86]

Notwithstanding the emphasis on legislative intent in the cases they cite, petitioners do not address the legislative history of the Act from which they seek immunity. Rather, they press considerations that were plainly before and rejected by Congress in its deliberations on the Civil Rights Attorney's Fees Awards Act. Indeed, the legislative history of the Act is unmistakably clear: Congress did not intend to extend the common law immunities of prosecutors and police officers to insulate them from an award of attorneys' fees made against them in their official capacities in Section 1983 actions.[87]

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[86] *Tenney* v. *Brandhove, supra* (legislators); *Pierson* v. *Ray, supra* (judges and police officers); *Scheuer* v. *Rhodes, supra* (executive officials); *Wood* v. *Strickland, supra* (school officials); *Imbler* v. *Pachtman, supra* (prosecutors).

[87] Without citation to authority, Petitioners Bergna and Brown challenge Congress' constitutional authority under § 5 of the Fourteenth Amendment to authorize the award of attorneys' fees against state public officials. However, the position petitioners advance would emasculate the broad grant of congressional authority in § 5 of the Fourteenth Amendment and simply cannot be reconciled with this Court's decisions upholding congressional exercise of that power. *See, e.g., Ex parte Virginia,* 100 U.S. 339 (1879); *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *Oregon* v. *Mitchell,* 400 U.S. 182 (1970); *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1975). In *Ex parte Virginia, supra,* the Court held:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." 100 U.S. at 345-46.

Congress enacted the Civil Rights Attorney's Fees Awards Act to protect private actions to enforce our civil rights laws. Congress

To the contrary, Congress perceived that the very unavailability of damage awards against such officials was an affirmative reason to authorize awards of attorneys' fees against them.

> "Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees." [88]

As a consequence, Congress was careful specifically to include public officials within the reach of the legislation.

> "As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." [89]

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reasonably believed that, without such legislation, those civil rights laws would "become mere hollow pronouncements." S. Rep. at 6. It is manifest that the Act is, in this Court's words, legislation that is "adapted to carry out the objects the amendments have in view."

[88] H.R. Rep. at 9 (footnote omitted).

[89] S. Rep. at 5 (footnotes omitted). In this case, by California statute, the fees will be paid by local government agencies, not by the individual petitioners. Since the immunity doctrines are rooted

[Footnote continued]

Circuit courts that have reviewed this legislative history have unanimously concluded that Congress did not intend to immunize public officials, sued in their official capacity, from awards of attorneys' fees under the Act.[90] Other circuit courts have approved such awards without discussion.[91]

Indeed, it cannot be questioned that petitioners are among the class of public officials against whom fees may be awarded under the Act. Twice the Senate cited this very case as exemplary of the "traditionally effective remedy of fee shifting" that the Act was intended to restore.[92] Such unusually direct congressional guidance provides a simple, but dispositive, answer to petitioners' immunity claim.

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in the view that law enforcement officials should not incur personal liability for certain public acts, those doctrines would be inapplicable here even if Congress had not specifically foreclosed them.

[90] *Bond* v. *Stanton*, 555 F.2d 172 (7th Cir. 1977); *Universal Amusement Co.* v. *Vance*, 559 F.2d 1286 (5th Cir. 1977).

[91] *See, e.g., Seals* v. *Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977); *Martinez Rodriquez* v. *Jiminez*, 551 F.2d 877 (1st Cir. 1977).

[92] S. Rep. at 4, 6. Congressional citation to this case also makes clear that the district court properly exercised its discretion in awarding fees:

> "It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards . . . are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) . . . ." *Id.* at 6.

CONCLUSION

For these reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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December 17, 1977

APPENDIX A

[Facsimile]

HAROLD W. ANDERSEN
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December 16, 1977

Mr. Jack C. Landau
Reporters Committee for Freedom of the Press
Room 1112
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Washington, D.C. 20006

Dear Mr. Landau:

You asked for my opinions about the problems of publishers who are faced with court orders that infringe on freedom of the press.

From our experience in *Nebraska Press Association* v. *Stuart*, I know that the legal costs required to fight invalid court orders can be high. The legal fees in *Nebraska Press Association* v. *Stuart* totaled $106,000.

When the Supreme Court agreed to review the Nebraska case, the financial burden became so great that publishers of the small newspapers in our state solicited help from other state press associations. The Nebraska Broadcasters Association also went outside for help.

Donations of $38,000 were eventually received, reducing the burden of the Nebraskans to $68,000.

As president of The Omaha World-Herald and former chairman of the American Newspaper Publishers Association, it is my opinion that a number of publishers who are faced with legal costs of that magnitude would be

extremely cautious about asserting their legal rights under the First Amendment, even if they were fairly sure they would eventually win.

For those reasons, I hope that the Supreme Court will uphold the award of $47,000 under the Civil Rights Attorneys Fees Act in the *Stanford Daily* case.

Sincerely,

/s/ Harold W. Andersen
HAROLD W. ANDERSEN

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