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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,

vs.

THE STANFORD DAILY, et al.,
Respondents.

LOUIS P. BERGNA, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

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

Brief for Respondents

QUESTIONS PRESENTED

1. In the circumstances of this case, did the search of a newspaper office, pursuant to a search warrant seeking photographs taken in the regular course of journalistic activities, violate the First and Fourth Amendments, where

(a) the purpose of the search was to obtain evidence for use in a criminal prosecution against unrelated persons, and

(b) the affidavit presented to the magistrate made no attempt, and therefore failed, to establish probable cause to believe that

(i) the newspaper or any person employed by it had committed a crime, (ii) contraband or instrumentalities of crime were located on the premises, or (iii) it would be impractical to obtain the evidence sought by subpoena duces tecum?

2. In the circumstances of this case, is declaratory relief against police officers under 42 U.S.C. § 1983 barred unless there is a showing that their unconstitutional actions were taken in bad faith? (Raised only in *Zurcher,* No. 76-1484).

3. Does the Civil Rights Attorney's Fees Awards Act (90 Stat. 2640, 42 U.S.C § 1988, last sentence)

(a) apply to cases pending at the time of its enactment?

(b) authorize the award of attorneys' fees in cases in which the defendants enjoy an absolute or qualified immunity from the imposition of money damages?

STATEMENT OF THE CASE

This case concerns a search of the offices of *The Stanford Daily,* a student-published newspaper at Stanford University, conducted by Petitioners pursuant to a search warrant. App. 31-32. The purpose of the search was to locate and seize certain photographs believed to be in the *Daily's* unpublished photograph files. App. 21-25. It is undisputed that, at the time of the search, Petitioners had no cause to believe that anyone connected with the *Daily* was involved in unlawful activity, that unlawful activity was being conducted at the *Daily's* offices, or that contraband was being stored there. See 353 F.Supp., at 127, Petition, App. "C", at 12.

On Monday, April 12, 1971, at approximately 5:45 p.m., four police officers appeared at the offices of the *Daily* and, pursuant to the warrant, proceeded to search its offices. App. 162-69. During the course of the search, the officers examined filing cabinets, the contents of desks, shelves and wastebaskets. App. 74 at ¶ 15; App. 130-32, at ¶¶ 2-5. The desks contained, and thus

the officers were in a position to see, notes taken by reporters in the course of interviews conducted for the purposes of gathering news, some of which contained information given in confidence and on the express understanding that the name of the source would not be disclosed. App. 88, at ¶ 25; App. 132, at ¶ 6. The officers were in a position to see and examine business and personal correspondence of the *Daily* and members of its staff. App. 74-75, at ¶¶ 20-21; App. 132, at ¶ 5; App. 140-41. The officers now maintain that none was actually read, and the courts below did not find it necessary to determine the truth of that assertion, although there was evidence to the contrary. App. 74-75, at ¶¶ 20-21; App. 140-41. The search did not locate the photographs sought, and no materials were seized. 353 F.Supp., at 127; Petition, App. "C", at 13.

Uncontroverted affidavits presented to the District Court established the adverse impact that this search had on the *Daily's* ability to gather news. In addition, affidavits of experienced and prominent journalists from around the country demonstrated the profoundly chilling effect which such a search would have on the ability of a journalistic organization to carry out its functions. These are more fully described in Part I, *infra,* at pp. 18-24. In summary, they established that (1) such a search totally disrupts the news gathering and disseminating activities of a paper; (2) to the extent confidential material is revealed (or even perceived by others to be vulnerable to such disclosure), vital sources of news will be impaired and access to events will be blocked; (3) materials *not* the object of the search—some of which may be highly confidential—are subjected to entirely unnecessary exposure despite the lack of *any* governmental interest in such inspection; (4) unlike the issuance of a subpoena, the *ex parte* issuance and execution of a search warrant deprives the newspaper of an opportunity for judicial review and control; (5) such a search

jeopardizes the newspaper's credibility; and (6) such a search creates a substantial risk of self-censorship.

Upon this record, the District Court granted Respondents' Motion for Summary Judgment. It held that the Fourth Amendment—considered in light of the especially stringent standards required for searches which threaten First Amendment interests—rendered unlawful Petitioners' search of *The Stanford Daily* offices. The District Court wrote:

> "[T]he Court holds that third parties [not suspected of a crime] are entitled to greater protection, particularly when First Amendment interests are involved. It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise "impractical", a search of a third party for materials in his possession is unreasonable per se, and therefore violative of the Fourth Amendment." (353 F.Supp., at 127, Petition, App. "C", at 14).

The District Court's reason for applying especially stringent Fourth Amendment standards to the search involved in the present case appears in subsequent portions of the District Court's opinion:

> "The other aspect of defendants' argument—that newspapers, reporters and photographers have no greater Fourth Amendment protection than other citizens—is also without merit. The First Amendment is *not* superfluous. Numerous cases have held that the First Amendment 'modifies' the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved. See, *e.g., A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L. Ed.2d 809 (1964); *Marcus v. Search Warrants,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); *Demich, Inc. v. Ferdon,* 426 F.2d 643 (9th Cir. 1960), *vacated and remanded on other grounds,* 401 U.S. 990, 91 S.Ct. 1223, 28 L.Ed.2d 528 (1971); *Bethview Amusement*

Corp. v. Cahn, 416 F.2d 410 (2nd Cir. 1969), *cert. denied,* 397 U.S. 920, 90 S.Ct. 929, 25 L.Ed.2d 101 (1970). See also *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)." (353 F.Supp., at 134, Petition, App. "C", at 30-31).

Therefore, the District Court concluded:

> "[L]aw enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical. Any evidence that a supoena is impractical must be presented in a sworn affidavit if the magistrate is to rely on it. [citation] In other words, even if facts and circumstances do exist that establish probable cause to believe a subpoena is impractical, they must be set forth in a sworn affidavit or else the warrant is defective." (353 F.Supp., at 132; Petition, App. "C", at 26-27).

The District Court recognized that circumstances could arise in which the use of a subpoena duces tecum would be impractical. For example, it noted that while a "court certainly possesses the power to issue a restraining order where it is presented with evidence that the materials are about to be taken from the jurisdiction or their destruction is imminent," a warrant may issue where "it appears that the materials will be destroyed or removed from the jurisdiction despite the restraining order." *Id.,* at 133; Petition, App. "C", at 27-28. But in this case no evidence of impracticality or threat of destruction was presented to the magistrate. *Id.*[1]

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1. Petitioners state that "[t]hough not mentioned in the search warrant affidavit, Brown had specific reasons . . . for recommending a search warrant rather than a subpoena duces tecum." Zurcher Brief, at 8. They state that in 1969, certain photographs subpoenaed from the *Daily* were improperly withheld and that it was the announced policy of the *Daily* to destroy negatives. The courts below properly ruled that allegations of this kind, which were not presented to the magistrate, could not validate an otherwise defective warrant. 353 F.Supp., at 135 n.16; Petition, App. "C", at 33. [footnote 1, continued]

At the time of its original decision on the merits, the District Court declined to enjoin similar future searches by Petitioners, expressing its belief that they would comply with the legal principles set forth in its decision. 353 F.Supp., at 136, Petition, App. "C", at 35-36. It added that "in the unlikely event that defendants do conduct such a search against plaintiffs in the future, plaintiffs are free to renew their motion for a permanent injunction." *Id.* The District Court also awarded Respondents the sum of $47,500 in attorneys' fees. 366 F.Supp. 18, 64 F.R.D. 680, Petition, App. "D" and "E".

On June 1, 1973, two investigators employed by Petitioner Bergna searched the patient files of the Psychiatry Clinic at Stanford University Medical Center. III C.T. 559-60; *id.*, at 567, ¶ 3; *id.*, at 569-70; *id.*, at 572, ¶ 5. The search warrant covered the medical file of Mr. Robert Carlino, a patient at the Clinic, and all other records prepared by Dr. Marguerite Lederberg, the psychiatrist who had seen Mr. Carlino on at least two occasions. These records were evidently sought in connection with a pending prosecution of a sex offense in which Mr. Carlino was the *victim*. See III C.T. 542-44. The search of the Clinic, a third party unsuspected of any crime, was conducted in spite of an outstanding subpoena duces tecum issued to Dr. Lederberg. The subpoena had not then become operative, and Dr. Lederberg's counsel was attempting to obtain a hearing on the validity of Mr. Carlino's

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Petitioners do not dispute the courts' conclusion as to the irrelevance of Brown's unstated "reasons" for seeking a search warrant, but nevertheless include them in their brief in an unsubtle attempt to cast doubts upon the integrity of the *Daily* and its staff. We shall therefore deal with this gratuitous slur hereafter. See note 21, *infra.* For the present, suffice it to say that (1) the editorial to which Brown referred was intended and understood by the *Daily* to contemplate the routine non-retention of photographs which, if retained, might prompt issuance of a subpoena and not to any material once a subpoena had issued; (2) the policy of the *Daily* was and is not to destroy any material covered by a judicially authorized subpoena; and (3) no such destruction has ever occurred.

consent to disclosure of his psychiatric records. III C.T. 561-65, especially ¶¶ 4-6, 8-9.

No effort was made before the magistrate to establish probable cause to believe that Dr. Lederberg would destroy Mr. Carlino's medical records, and the magistrate made no such finding. In the course of the search, police officers looked through the files of the Clinic. See III C.T. 572. Those files included patient records, wholly unrelated to those of patient Carlino, which were plainly covered by the physician-patient privilege.

Because this new search reflected an apparent disregard of the District Court's decision in this case, a renewed motion for an injunction was noticed. III C.T. 532. In connection with that motion, Petitioner Bergna made certain representations to the District Court, which thereupon ruled that "because the District Attorney assures the Court that the Daily will not be the object of a Third Party Search, the Motion for Preliminary Injunction is DENIED." III C.T. 670.

The Court of Appeals affirmed. 550 F.2d 464, Petition, App. "A". That court adopted the opinion of the District Court on the merits. Accordingly, the Court of Appeals' opinion discussed only certain procedural issues raised on appeal by Petitioners, some of which are now the subject of these petitions. The Court of Appeals rejected the contention that Petitioners' professed good faith insulates them from declaratory relief; found the Civil Rights Attorney's Fees Awards Act (hereafter called "the Act") applicable to cases pending on appeal at the time of its passage; and concluded that the Act applied to cases such as this one.

SUMMARY OF ARGUMENT

I.

Petitioners view this case as if only the Fourth Amendment is implicated. But the search of a newspaper must be judged by the more restrictive standards that apply where First and Fourth

Amendment interests coalesce. The issue in this case is procedural. It does not deal with *what* evidence the police may obtain from the files of a newspaper unsuspected of crime, but *how* that information should be obtained. In at least two fundamental respects, execution of a search warrant—in contrast with a subpoena—is needlessly destructive of interests protected by the First Amendment.

First, a search forecloses judicial consideration of any objections to production which the newspaper may have. Unlike a subpoena, which may be challenged by a motion to quash, a search warrant may not lawfully be resisted and is executed without prior notice. The *ex parte* consideration by a magistrate of a warrant application is an inadequate vehicle for resolution of the sensitive balances which must be struck. The newspaper's grounds for objection rarely will be appreciated by the police officer seeking the warrant, let alone fully made known to the magistrate. Accordingly, where compulsory production of the document sought is constitutionally offensive, exempt from production under a state "shield law", or otherwise improper, a search repudiates the assumption of *Branzburg v. Hayes,* 408 U.S. 665, 708 (1972) that "[g]rand juries are subject to judicial control and subpoenas to motions to quash."

Second, even where the police are entitled to demand production of particular evidence from a newspaper's files, a subpoena permits the newspaper to locate and transmit that evidence to the police. In contrast, a search exposes to police scrutiny unrelated materials, which may be highly confidential and sensitive, retained in the newpaper's offices and files. Wherever a subpoena would be effective to achieve production of the evidence sought, such a breach of privacy is unnecessary.

No substantial interests of law enforcement are jeopardized by a requirement that the police utilize a subpoena to obtain evidence from non-suspect newspapers. There is no basis for a

generalized suspicion that newspapers will not obey the law and produce that which is demanded. If, in the exceptional case, the police have reason to believe that a subpoena will not suffice—whether because the newspaper would destroy the evidence sought or otherwise—they must make that showing to the magistrate; if the magistrate finds upon a suitable record that a subpoena would be impractical, a search warrant may issue.

Where a subpoena is not found to be impractical, it is a "less drastic means" than a search for achieving production of evidence from a newspaper and must be utilized.

II.

Even when the third party from whom evidence is sought is not a newspaper entitled to the heightened protections of the First Amendment, where that party is unsuspected of criminal activity, the subpoena is the usual means by which evidence is obtained. In that setting, a search may impair particularly sensitive privacy interests. Among the likely targets of third party searches are those who maintain files relating to numerous individuals, such as lawyers, physicians, psychiatrists, banks, accounting firms, employers, and the like. Often such information is privileged. Even if it is not, the search of third parties for evidence relating to a criminal suspect needlessly exposes the files of unrelated, non-suspects to police scrutiny.

Petitioners view the decision of the courts below as posing insurmountable impediments where the third party believed to possess evidence is a friend, relative or associate of a criminal suspect so that there is a risk that the third party will destroy the evidence sought. But often, as in this case, the converse is true, and what the magistrate is told about the third party in the warrant application provides assurance that a subpoena will be honored.

A search of a third party is unreasonable under the Fourth Amendment when it is plain that a subpoena would be no less efficacious. Such a search is impermissible where the evidence presented to the magistrate affirmatively shows that (1) the third party occupies no relationship to the suspect such as would suggest a risk that the evidence might be destroyed; (2) the third party's status, demonstrated behavior, or the circumstances by which the evidence came to be in its possession, negates the risk of destruction; (3) lawful grounds may exist to resist compelled production; (4) particularly sensitive privacy interests of the third party (and of others whose confidences may be reflected in documents possessed by it) will be impaired; and (5) a subpoena is not otherwise impractical.

III.

Declaratory relief against the police officers was proper. Even if the officers did not act in "bad faith" in obtaining or executing the warrant (so that a qualified immunity from money damages would be overcome), such immunity does not bar injunctive relief, let alone declaratory relief.

IV.

The award of attorneys' fees was authorized by the Civil Rights Attorney's Fees Awards Act. Congress clearly demonstrated its intent that the Act apply retroactively to all pending cases; indeed, absent a direction that it only apply prospectively, it would be applicable to pending cases. *Bradley v. Richmond School Board,* 416 U.S. 696 (1974).

Petitioners' contention that immunities from damages likewise bar a fee award is without merit. If a finding of "bad faith" were necessary, the Act would accomplish nothing, as the award of fees in "bad faith" cases has long been permitted. The legislative intent to broaden the availability of fees, and to eliminate the neces-

sity of showing "bad faith", is clear from the Act's history. Indeed, the Act was patterned after statutes which, on two occasions, the Court construed to authorize the award of attorneys' fees without regard to the good or bad faith of the defendants. *Bradley v. Richmond School Board, supra; Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968).

ARGUMENT

I. In Order for a Search Warrant to Issue Authorizing the Search of a Non-Suspect Newspaper for the Purpose of Obtaining Evidence, the Magistrate Must Be Furnished Evidence Establishing Probable Cause That a Subpoena Duces Tecum Would Be Impractical

One reading the briefs of Petitioners and the *amici* who support them could easily overlook that *The Stanford Daily* is a newspaper and that the items sought in the search were not weapons, contraband or instrumentalities of crime, but, rather, the fruits of journalists engaged in gathering and reporting the news to the public. Although Petitioners—and especially their supporting *amici*—appear to be more concerned with their right to search non-suspect third parties who are not engaged in journalistic activity protected by the First Amendment, *this* case involves only non-suspects who are.

It is well, therefore, to address at the outset the central issue presented by this record and, in so doing, to stress what this case does *not* involve. *First,* no question is presented here as to the power of law enforcement to seize, with or without a warrant, drugs, other contraband, unlawful weapons, or the fruits of illegal activity. As the Court observed in *Roaden v. Kentucky,* 413 U.S. 496, 502 (1973), "[t]he seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' . . . are to be distinguished from quantities of books and movie films." Presumably, any person—journalist or otherwise—possessing items of the former variety

is on notice of their illegality and is therefore not a "nonsuspect third party." The "nexus . . . between the item to be seized and criminal behavior" is "automatically provided in the case of fruits, instrumentalities or contraband." *Warden v. Hayden,* 387 U.S. 294, 307 (1967). Here, the items were photographs, obtained in the course of journalistic activity, sought for use in a criminal investigation.

Second, no emergency situation existed. Whatever may be the rule where life or property is threatened unless the police can act immediately, no claim is made here that the circumstances required instant access to the photographs.

Third, no question is presented as to the propriety of searching a newspaper office where the newspaper or a member of its staff is suspected of criminal activity. In this case, Petitioners entertained no doubts as to the *Daily's* noninvolvement in the unlawful activity which they were investigating. Whatever may be said in support of Petitioners' remarkable assertion that "[i]n many cases, the label 'nonsuspect' means only that the person's involvement in the crime has not as yet been established" (Zurcher Brief, at 18), the showing made to the magistrate in *this* case affirmatively demonstrated that the photographs sought were thought to be in the possession of the *Daily* precisely because it was a newspaper and had obtained them in the ordinary course of its journalistic activities.

It was against this background that the courts below ruled. They did not question the proposition that, in appropriate circumstances, the police may obtain information or documents possessed by the press. Viewing the issue as involving *how,* and not *what,* documents may be obtained from a newspaper's file, the courts concluded that, in comparison with the use of a search warrant, a subpoena was a far less intrusive means and therefore constitutionally preferred. Two basic reasons supported these conclusions.

In the first place, a subpoena only authorizes disclosure of the items sought. It preserves the privacy and confidentiality of all other files and documents not relevant to the investigation. "[T]he police do not go rummaging through one's home, office, or desk if armed only with a subpoena." 353 F.Supp., at 130; Petition, App. "C", at 21. In short, a subpoena must be precise and targeted, while a search is inherently "indiscriminate" in terms of what must be examined in quest of the object sought. 353 F.Supp. at 135; Petition, App. "C", at 31.

Secondly, a search denies the newspaper any opportunity to challenge the compelled disclosure of materials deemed by it to be confidential, privileged, or otherwise legally protected, and "deprives the newspaper . . . of that 'judicial control' thought so essential in *Branzburg.*" *Id.,* at 135; Petition, App. "C", at 32.

Accordingly, the courts below held that law enforcement agencies may not obtain a search warrant against a newspaper, itself not suspected of criminal activity, for the purpose of obtaining evidence,[2] without first furnishing to the magistrate probable cause to believe that a subpoena duces tecum is impractical. Where there is a showing that materials will "be destroyed or removed from the jurisdiction despite [a] restraining order", a magistrate may find that a subpoena is impractical and issue a warrant. 353 F.Supp., at 133; Petition, App. "C", at 28. The courts below articulated standards which fully preserve the interests of law enforcement while providing appropriate protection to important interests safeguarded by the First and Fourth Amendments.

A. WHERE A SEARCH AFFECTS FREEDOM OF SPEECH OR PRESS, THE FIRST AND FOURTH AMENDMENTS REQUIRE EXACTING AND DISCRIMINATING PROCEDURES.

Petitioners' preference for viewing this case as if the object of the search was not engaged in activities which lie at the core of

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2. We use the term "evidence" in the sense of the now-discarded "mere evidence" rule (see *Warden v. Hayden,* 387 U.S. 294 (1967)), to distinguish it from contraband, fruits of unlawful activity, or items dangerous in themselves.

the First Amendment cannot be indulged. An unbroken line of decisions firmly establishes that both the standards and procedures for the issuance and execution of search warrants and the conduct of searches are more restrictive when applied in the press context. *See, e.g., United States v. United States District Court,* 407 U.S. 297, 313-14 (1972); *Roaden v. Kentucky,* 413 U.S. 496, 501, 504 (1973); *Heller v. New York,* 413 U.S. 483, 489-94 (1973); *Stanford v. Texas,* 379 U.S. 476, 484-85 (1965); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Marcus v. Search Warrant,* 367 U.S. 717 (1961); *compare United States v. Ramsey,* ..... U.S. ....., 52 L.Ed.2d 617, 631 n. 18 (1977).

As the Court not long ago observed, cases which "reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime . . . [involve] greater jeopardy to constitutionally protected speech." *United States v. United States District Court, supra,* at 313. The Court also repeated the observation made previously in *Marcus v. Search Warrant, supra,* at 724, that "[h]istorically, the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." That history, carefully traced in the *Marcus* opinion, certainly confirms that statement and the Court's further observation that 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." *Id.,* at 729.

Presence of First Amendment interests therefore "calls for a higher hurdle in the evaluation of reasonableness." *Roaden v. Kentucky, supra,* at 504. In *Roaden,* a warrantless seizure of an allegedly pornographic film incident to a valid arrest was held unconstitutional. Uncontestably, such a seizure of material from the person of a validly arrested individual would have been sustained but for the First Amendment interests involved. See also *Lee Art Theatre v. Virginia,* 392 U.S. 636 (1968). Similarly, in cases involving the seizure of allegedly obscene books pursuant to

warrants, conventional Fourth Amendment standards have been held insufficient in evaluating searches under warrants issued without prior adversary hearing. *Marcus v. Search Warrant, supra; A Quantity of Books v. Kansas, supra;* see also *Heller v. New York, supra.* "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden v. Kentucky, supra,* 496, 501 (1973). Under the self-evident principle of *Roaden,* the courts below plainly were correct in taking the view that "[t]he First Amendment is *not* superfluous . . . to the extent that extra [Fourth Amendment] protections may be required when First Amendment interests are involved." 353 F.Supp. at 134, Petition, App. "C", at 30 (original emphasis).

B. POLICE SEARCHES OF NEWSPAPER OFFICES IMPAIR IMPORTANT INTERESTS PROTECTED BY THE FIRST AND FOURTH AMENDMENTS.

As the courts below recognized, the search of a newspaper severely threatens its ability to gather and report the news:

> "The threat to the press's newsgathering ability, however, is much more imposing with a search warrant than with a subpoena.
>
> "1) A reporter or photographer responding to a subpoena will bring to the grand jury hearing only those materials mentioned in the subpoena; the police officers executing a warrant, however, will be in a position to see notes and photographs not even mentioned in the warrant. As is apparent from the affidavits, newspaper offices are much more disorganized than, say, the average law office; a search for particular photographs or notes will mean rummaging through virtually all the drawers and cabinets in the office. The 'indiscriminate nature' of such a search renders vulnerable all confidential materials, whether or not identified in the warrant, and the concomitant threat to the gathering of news—which frequently depends on confidential relationships—is staggering.

"2) Unlike the issuance of a subpoena or subpoena duces tecum, the *ex parte* issuance and execution of a search warrant deprives the newspaper and newsman of that 'judicial control' thought so essential in *Branzburg* [*v. Hayes,* 408 U.S. 665 (1972)].

"3) There is also a possibility that police searches will jeopardize a newspaper's credibility and create a risk of self-censorship. [citation]

"Because a search presents an overwhelming threat to the press's ability to gather and disseminate the news, and because 'less drastic means exist to obtain the same information, third-party searches of a newspaper office are impermissible in all but a very few situations. A search warrant should be permitted only in the rare circumstance where there is a *clear showing* that 1) important materials will be destroyed or removed from the jurisdiction; *and* 2) a restraining order would be futile. To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society." (353 F.Supp., at 134-35, Petition, App. "C", at 31-33, emphasis in original.)

In so concluding, the courts below correctly identified the severe and needless harm to a free and independent press worked by searches such as that imposed upon *The Stanford Daily.* The First Amendment protects the freedom of the press to gather,[3] and disseminate the news and the correlative right of the public to receive it.[4] This constellation of freedoms—designed "to supply the public need for information and education with respect to the significant issues of the times" (*Thornhill v. Alabama,* 310

3. *See, e.g., Branzburg v. Hayes,* 408 U.S. 665, 681 (1972); *Associated Press v. KVOS,* 80 F.2d 575, 581 (9th Cir. 1935), *reversed on other grounds,* 299 U.S. 269 (1936); *Providence Journal Co. v. McCoy,* 94 F.Supp. 186, 195-96 (D.R.I. 1950), *aff'd on other grounds,* 190 F.2d 760 (1st Cir. 1951).

4. *See, e.g., Martin v. City of Struthers,* 319 U.S. 141, 143 (1943); *Lamont v. Postmaster General,* 381 U.S. 301 (1965); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969).

U.S. 88, 102 (1940))—is, simply, what the First Amendment is all about.[5]

The issue in this case is not *what* evidence the state may obtain from the files of a newspaper but *how* that information should be obtained. *Branzburg v. Hayes,* 408 U.S. 665 (1972) rejected broad claims of a First Amendment privilege to withhold testimony concerning illegal acts witnessed by newspersons. Under that decision, in many situations, a journalist may be compelled by subpoena to testify or to produce documents which he or she would prefer to hold in confidence. The Court's opinion in *Branzburg,* and the careful balance it struck between the interests of a free press and the needs of law enforcement, is mocked by the crude and unnecessary blunderbuss used by Petitioners to obtain materials from the *Daily's* files.

The "limited nature of the Court's holding" (Powell, J., concurring, *id.,* at 709) was emphasized by the concluding passage of the Court's opinion:

> "Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. *Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."* (*Id.,* at 707-08, emphasis added.)

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5. *See, e.g., Stromberg v. California,* 283 U.S. 359, 369 (1931); *Grosjean v. American Press Co.,* 297 U.S. 233, 250 (1936); *De Jonge v. Oregon,* 299 U.S. 353, 365 (1937); *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949); *Smith v. California,* 361 U.S. 147, 153 (1959); *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964); *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967).

Mr. Justice Powell stated in concurrence:

> "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. . . .
>
> . . . . If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. *Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court* on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests *on a case-by-case basis* accords with the tried and traditional way of adjudicating such questions." (*Id.*, at 709-10, emphasis added.)

Nothing in *Branzburg* does or could cast any doubt upon the grave injury inflicted by the search of a newspaper's offices. That injury poses a deadly threat to First Amendment freedoms—different, both in degree and in kind, from those factors considered and balanced in *Branzburg:*

(1) *Disruption and Interference.* The most obvious impact of a press search is the immediate interruption of the news gathering and disseminating activities of a newspaper. However inconvenient responding to a subpoena duces tecum may be from the standpoint of those engaged in journalism, the dislocations of a full-scale search are vastly greater. The point was compellingly made by Gordon Manning, Director of News for CBS News:

> "To allow this kind of free-wheeling search is to invite more searches, since a working newsroom contains an

> abundance of information, much of which would be argued by investigators to be useful . . . . Not only would the news gathering and reporting functions be inhibited in an exaggerated but a similar way to which the subpoena power inhibits, but also the very ability of a news organization to operate would be threatened. A search warrant presumes that material must be sifted before the needed material is located. I can imagine the workings of a newsroom being brought to a complete halt while the voluminous and as yet unorganized information is 'searched.' "

(App. 124, at ¶ 5.) CBS anchor man Walter Cronkite described the consequences of such a search as "total chaos in terms of the ability of the staff to produce honest professional news coverage." (App. 58, at ¶ 4.) For a newspaper, the consequences are equally disastrous. See Affidavit of Frank Haven, managing editor of the *Los Angeles Times,* App. 63, at ¶ 6.[6]

Palpably, the total disruption of a newspaper office necessarily caused by the execution of a search warrant is entirely different from the limited intrusion into the journalist's workday caused by requiring a timely response to a subpoena.

(2) *Chilling of Sources Through Needless Breaches of Confidentiality.* That the compelled disclosure by a journalist of information given in confidence, or the names of confidential sources, has the direct and devastating effect of impairing his

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6. These concerns prompted one commentator to state:
"A search may severely disrupt the functioning of the entire press facility for several hours. When the item sought is a letter or photograph, ingress to files, desks, broadcast booths, or paste-up rooms may be unavoidable. Newspapers in particular tend to accumulate notes, back issues, and photographs. The presence of police officers rifling through these files cannot but disrupt normal functions—functions that at many press facilities continue around the clock. This disruption . . . impedes timely publication or broadcast. . . ."

Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis,* 28 STAN. L. REV. 957, 989 (1976).

access to relevant news is well documented.[7] The record in this case fully confirms that conclusion. *See, e.g.* Kneeland Affidavit, App. 67, at ¶ 3. Haven Affidavit, App. 61, at ¶ 4(a).[8]

However grave the consequences of disclosure pursuant to a subpoena, the consequences of a search are far more damaging. *New York Times* reporter Douglas Kneeland stated:

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7. *See, e.g.,* Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources,* 64 NW. U. L. REV. 18 (1969); Goldstein (Abraham S.), *Newsmen and Their Confidential Sources,* THE NEW REPUBLIC, March 21, 1970, p. 13; Note, *The Right of the Press to Gather Information,* 71 COLUM. L. REV. 838 (1971). Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship,* 80 YALE L. J. 317 (1970); Comment, *The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation,* 58 CALIF. L. REV. 1198 (1970); Comment, *The Newsman's Privilege: Protection of Confidential Associations and Private Communications,* 4 J. LAW REFORM 85 (1970); Comment, *Constitutional Protection for the Newsman's Work Product,* 6 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 119 (1970); Blasi, *The Newsman's Privilege: An Empirical Study,* 70 MICH. L. REV. 229 (1971); Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath,* 52 TEX L. REV. 829, 856-66 (1974); Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege For Newsmen,* 26 HAST. L. J. 709 (1975); Comment, *The Newsman's Privilege After Branzburg: The Case For a Federal Shield Law,* 24 U.C.L.A. L. REV. 160 (1976).

8. The needs of a newspaper to respect confidences and to withhold unpublished materials are particularly felt by news photographers. Their very safety frequently is imperiled when covering demonstrations or other tempestuous events. See Haven Aff., *supra,* App. 62, at ¶ 4(c); Kneeland Aff., *supra,* App. 70-71, at ¶ 7. The hazards of a *Daily* photographer, particularly after the search in question, are described in the Affidavits of Steven G. Ungar (App. 142-47), Charles Lyle (App. 78-79, at ¶¶ 4-5), and Don Tollefson (App. 133-35, at ¶ 9). Photographers (and particularly their cameras when the film contains photographs of lawlessness) are often the target of violence. Their ability to record events, and to place themselves in particularly advantageous positions, often depends upon the cooperation of those who may be photographed, which is more likely to be given if there is assurance that the media will not provide unpublished photographs to law enforcement authorities.

Of course any person photographed must hazard the risk that the picture will be published. That editorial decision, as former Editor Fred Mann's Affidavit makes clear, is made solely on grounds of newsworthiness "without regard to whether the photographs might be incriminating to the persons depicted therein." (App. 85, at ¶ 21).

> "The more sophisticated sources know that newsmen may be subject to subpoena; but they also know that recent court opinions provide a basis for lawful challenge to subpoenas. On the other hand the intrusion of a search is indiscriminate; its scope and propriety cannot be judicially tested in advance; and the mere possibility of its use renders vulnerable all confidential materials."

App. 69, at ¶ 5. Walter Cronkite likewise stated:

> "While the potential of such a chilling effect is great when more common tools such as the subpoena power are used, the 'fishing expedition' nature of a search warrant makes it a particularly dangerous threat."

App. 68-69, at ¶ 5; see also Roberts Aff., App. 128, at ¶ 7. A search, of course, is necessarily indiscriminate in what it looks through, however discriminating in what it looks *for*. While the police may seize only that material specified in the search warrant, the execution of the warrant requires a prior inspection of *all* documents and materials in the office. The confidentiality of information and materials *not* sought—and as to which no showing of probable cause even is attempted—is nevertheless breached. It is true that, given *Branzburg,* potential news sources must hazard the possibility of compelled disclosure upon the issuance of a subpoena, but only after appropriate judicial challenge by the newsperson and a careful judicial balancing in an adversary setting. Petitioners would require potential news sources also to risk the possibility of the inadvertent breach of their confidences as a consequence of a search for *wholly unrelated* materials.[9]

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9. The affidavits submitted to the District Court established that the search of the *Daily's* offices resulted in the inspection of filing cabinets, desks, shelves and wastebaskets. The desks contained, and thus the officers were in a position to see, notes taken by reporters in the course of interviews conducted for the purposes of gathering news (App. 88, at ¶ 25; App. 132, at ¶¶ 5-6), some of which contained information given in confidence and on the express understanding that the name of the source

To the extent that unrelated materials are examined, a search causes needless and irreparable breaches of the confidentiality of newspaper files. As the courts below recognized:

> "[A] search for particular photographs or notes will mean rummaging through virtually all the drawers and cabinets in the office. The 'indiscriminate nature' of such a search renders vulnerable all confidential materials, whether or not identified in the warrant. . . ." (353 F.Supp., at 134-35; Petition, App. "C", at 31-32).

(3) *Impairment of Press Independence.* There is a related danger that the press will cease to be perceived by the public as an independent, credible, and neutral communicator of the news. Mr. Haven of the *Los Angeles Times* put the point succinctly:

> "To the extent that a newspaper, its personnel and files are used by defense or prosecution, the objective informational role of the newspaper is severely damaged, the credibility of the newspaper is lost and it comes to be viewed as simply another agent of whichever side has chosen to involve the newspaper."

App. 61-62, at ¶ 4(b). Walter Cronkite commented with specific reference to this case:

> "Perhaps the most shocking aspect of *The Stanford Daily* search was the fact that the police were utilizing the offices

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would not be disclosed. *Id.* The officers saw, scanned or read business and personal correspondence of the *Daily* and members of its staff. App. 74-75, at ¶¶ 20-21; App. 132, at ¶ 6; App. 140-41. Ungar Aff., IIIA C.T. 939; Kohn Aff., I C.T. 351, Para. 21; Tollefson Aff., IIIA C.T. 925, Para. 5. Officers Peardon, Martin, Bonander, and Deisinger submitted affidavits in which they state that they only looked "carefully" at pictures, negatives and film, examined "only very briefly" (App. 168) other materials, and refrained from actually reading any written documents. See App. 155-69. The courts below did not find it necessary to resolve the point, for it was not disputed by Petitioners that, whether or not they actually did so, they were in a position to read and examine confidential materials not the subject of the warrant.

of the *Daily* to determine the availability of evidence. The extension of the news office from a news gathering function to an investigating agency of the authorities is terrifying. Professional news gathering facilities cannot be permitted to be used as evidence gathering agencies in either criminal or civil proceedings without losing all trace of the independence and integrity on which the journalistic profession is founded." (App. 59, at ¶ 6).[10]

(4) *Pressures For Self-Censorship.* The severe consequences to a free press discussed thus far and those hereafter to be chronicled—disruption, chilling of sources, denial of access to newsworthy events, disclosure of materials and information *not* the subject of the warrant, a denial of an opportunity for prior judicial challenge, and the destruction of journalistic independence—may inevitably lead a conscientious journalist to conduct himself so as to minimize the possibility that a subpoena will issue or a search be conducted. Gordon Manning, Director of News for CBS News, stated:

"[R]eporters may be tempted to be timid in choosing and preparing their reports through fear of themselves being subpoenaed, and the temptation arises to destroy outtake [i.e. unused film] material which might otherwise be useful for follow-up reports or historical preservation."

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10. The *Daily's* former Editor, Fred Mann, made the point compellingly:

"Furthermore, a paper loses all credibility when it acts or is compelled to act in the express interests of one group against another. The ideal of objectivity may be a myth, but the struggle to reach that idealistic goal is imperative for all papers from the New York Times to any college paper. . . . Whether the demonstrators at the Stanford Hospital or any other site were right or wrong in their protest is not the point; the Daily attempts to cover the story and present as clear a picture as possible. We do not attempt to 'bring law-breakers to justice' through our news coverage, although at times we might editorially think that that should be done. Any interference with the Daily's operation and its organizational philosophy truly cripples the newspaper as an effective and unbiased disseminator of information." (App. 88-89, at ¶ 26).

App. 124, at ¶ 4. The National News Editor of *The New York Times,* Gene Roberts, similarly stated:

> "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.
>
> "All reporters have taken written notes of factual disclosures received in confidence. If such notes are subject to police seizure, it is likely that 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." (App. 128-29, at ¶¶ 8-9).

In this case, the police affidavit upon which a search warrant for *The Stanford Daily's* offices was issued recited that the *Daily's* Sunday edition had published photographs over the byline of a *Daily* staff photographer, which led the affiant to conclude that the named staffer had been in a position to take photographs of what the police wanted. App. 35. The Sunday edition was submitted to the magistrate to support the warrant. *Id.* The message of all this is too clear for intelligent members of the working press to ignore: self-censorship is the price of security.

C. SEARCHES OF NON-SUSPECT NEWSPAPERS FOR EVIDENCE VIOLATE THE FIRST AND FOURTH AMENDMENTS BECAUSE OTHER LESS INTRUSIVE PROCEDURES ADEQUATELY SERVE THE LEGITIMATE INTERESTS OF LAW ENFORCEMENT AND BECAUSE SEARCHES ARE EXCESSIVELY DESTRUCTIVE OF PROTECTED INTERESTS.

In the previous section, we described a variety of interests which are impaired or completely frustrated by the use of press searches to obtain evidence. To the extent that any of these

factors also is implicated in the case of a subpoena, then of course the balance has been struck and, at least so far as the Constitution is concerned (see *Branzburg v. Hayes, supra,* at 706), the press must bear that burden. In many instances, absent a state "shield" law, the newspaper or reporter lawfully can be compelled by subpoena to produce material. But as the foregoing discussion demonstrates, the nature and degree of injury to First Amendment interests which is visited by execution of a search warrant differs markedly from that entailed by a subpoena. A search warrant in this setting is a blunderbuss where the Constitution commands "more sensitive tools." *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

1. Execution of a Search Warrant Forecloses the Newspaper's Opportunity for a Judicial Determination of Any Legal Objections to Production of the Evidence Sought.

A serious deficiency of the police search of newspaper offices is that it effectively forecloses judicial consideration of any legal objections which the newspaper may have to production. There are several available grounds, both constitutional and non-constitutional, for successful challenge to a subpoena duces tecum addressed to the press.

Branzburg rejected the notion of a broad, constitutionally grounded privilege to refuse to answer questions concerning confidential sources. But, as already noted (see pp. 17-18, *supra*), both the majority opinion and Mr. Justice Powell's concurring opinion make it plain that *Branzburg* did not announce an end to all constitutional limitations on the power of grand juries, courts and prosecutors to obtain information held in confidence by journalists. See *United States v. Dionisio,* 410 U.S. 1, 11-12 (1973). Justice Powell stressed the need for a case-by-case scrutiny of both the claimed need for the information sought and the potential injury to First Amendment freedoms if disclosure is compelled: "The asserted claim to privilege should be judged on its facts by

the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.*, at 710. Justice Powell and the majority opinion thus relied, for "the striking of a proper balance," upon the availability of judicial scrutiny *before* a newsman could be compelled to divulge information held by him in confidence. Accordingly, the lower federal and state courts have understood *Branzburg* to require a careful, case-by-case consideration and weighing of interests whenever legal process is sought to obtain confidential information from the news media.[11]

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11. *See, e.g., Silkwood v. Kerr McGee,* ..... F.2d ....., No. 77-1287 (10th Cir. 1977); *United States v. Doe,* 541 F.2d 490, 493 n.6 (5th Cir. 1976); *In re Grand Jury Proceedings,* 486 F.2d 85 (3d Cir. 1973); *United States v. Steelhammer,* 539 F.2d 373 (4th Cir. 1976); *Carey v. Hume,* 492 F.2d 631, 636 (D. C. Cir. 1974), *pet. for cert. dismissed,* 417 U.S. 938 (1974); *United States v. Liddy,* 478 F.2d 586, 587 (D.C. Cir. 1972); *Baker v. F. & F. Investment,* 470 F.2d 778 (2d Cir. 1972); *cert. den.* 411 U.S. 966 (1973); *Bursey v. United States,* 466 F.2d 1059, 1092 (9th Cir. 1972) (opinion on denial of rehearing); *Gilbert v. Allied Chemical Corp.,* 411 F.Supp. 505 (E.D. Va. 1976); *Apel v. Murphy,* 70 F.R.D. 651 (D.R.I. 1976); *Democratic National Committee v. McCord,* 356 F.Supp. 1394 (D.D.C. 1973); *State v. St. Peter,* 315 A.2d 254 (Vt. 1974); *Brown v. Commonwealth,* 204 S.E.2d 429 (Va. 1974); *Spiva v. Francouver,* 39 Fla. Supp. 49 (1973). Thus, in the *Baker* and *McCord* cases, the courts declined to enforce subpoenas where, on balance, it appeared that "the public interest in non-disclosure of journalists' confidential news sources" (*Baker v. F & F Investment, supra,* at 785) outweighed the need for disclosure. In *United States v. Steelhammer, supra,* the Court of Appeals reversed contempt convictions of reporters upon a determination that the information sought could be obtained from others without impairing the confidentiality of press sources. And in *In re Lewis,* 501 F.2d 418, 422 (9th Cir. 1974), *cert. den.,* 420 U.S. 913 (1975), the court, while finding the balance of interest resting on the side of enforcement of a press subpoena, acknowledged that under *Branzburg* a newsman "is not forsaken by the Constitution simply because a Federal Grand Jury would obtain information from him." See also *Farr v. Pitchess,* 522 F.2d 464 (9th Cir. 1975).

Numerous unreported lower court cases following *Branzburg* are collected in the *Press Censorship Newsletter* published by the Reporters Committee For Freedom of the Press, Legal Defense and Research Fund, Washington, D.C. (hereafter *"Newsletter"*). While the lower courts have exhibited considerable uncertainty since *Branzburg,* in numerous instances lower courts have recognized a qualified privilege for newsmen to refuse

The First Amendment is not, of course, the sole source of authority for lawful opposition to a press subpoena. The Court of Appeals for the Third Circuit recently listed some of the other grounds:

> "Among the defenses which may be presented in resisting a subpoena are the obvious constitutional defenses of unreasonable search and seizure [citations], and self incrimination [citation]. But many nonconstitutional defenses also are available, including undue breadth [citation], improper inclusion of irrelevant information [citation], lack of authority to conduct the investigation in issue [citation], and improper issuance of a given subpoena [citation]." (*In Re Grand Jury Proceedings,* 486 F.2d 85, 91 (3d Cir. 1973).)

In addition, of course, the newspaper which is served with a subpoena may respond, and may convince a court, that the subpoenaed material simply does not exist.

Moreover, at least 26 states have enacted "shield" laws which provide varying degrees of protection to the confidentiality of information and materials possessed by the news media. See generally, Comment, *Newsmen's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy,* 49 TUL. L. REV. 417, 436-38 (1975); Note, *supra* note 6, at 960-67. Section 1070 of the California Evidence Code is such a law. Although the unpublished photographs sought by the police in this case appeared to be outside the scope of California's "shield" law at

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to divulge sources or other confidential information. *See, e.g., Newsletter* No. II, July-August, 1973, at 15 (item 11); *Newsletter* No. III, November-December, 1973, at 10 (item 5); *id.,* at 11 (item 7); *Newsletter* No. V, August-September, 1974, at 13 (item 9); *id.,* at 34 (item 9); *id.* (item 10); *Newsletter* No. VI, December, 1974-January, 1975, at 33 (item 13); *id.* (item 14); *id.* (item 15); *id.,* at 35 (item 21); *id.,* at 38 (item 34); *Newsletter* No. VII, April-May, 1975, at 8-9 (item 11); *id.,* at 14 (item 29); *Newsletter* No. VIII, at 24 (item 12); *id.,* at 24-25 (item 16-17); *Newsletter* No. IX, April-May, 1976, at 39 (item (o)); *id.,* at 46 (item 34); *Newsletter* No. X, September-October, 1976, at 40 (item 9); *id.,* at 49 (item 39).

the time of the search, Section 1070 was amended in 1974 to protect unpublished information including "notes, outtakes, photographs, tapes or other data of whatever sort . . . ."[12] It plainly covers much of the material that would be found in a newsroom, in the files of a newspaper, or in the desk drawers of a reporter. A search of a newspaper inevitably requires the police officers to examine materials which Section 1070 protects against compelled disclosure; and often the object of the search would also be protected by Section 1070.[13]

Potential grounds will therefore exist in many cases for legal challenge to a subpoena duces tecum which calls for the production of unpublished information or materials in the files of a newspaper. For present purposes, the standards to be applied on the hearing of such a motion are irrelevant; it is enough to say that it will be for the court, after consideration of the arguments of all parties in an adversary setting, to strike the appropriate balance.

Simply to state the need for meaningful judicial consideration of these questions and thoughtful adjustment of the competing interests is to demonstrate the hopeless inadequacy of the search warrant practice in the First Amendment sphere. A search warrant is issued *ex parte,* upon a presentation (usually by affidavit) to a magistrate. It is executed by law enforcement officers against

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12. In light of the 1974 amendment, it has been argued that the search conducted in this case would no longer be permitted under the laws of California. See Note, *supra,* note 6, at 962-71.

13. *Farr v. Superior Court,* 22 Cal.App.3d 60 (1971) held the statute an unconstitutional interference with the judiciary's inherent powers where the information sought related to an apparent violation of court orders by one or more officers of the court. The court did not express an opinion as to the validity or scope of the statute when those special inherent powers were not involved. *See* 22 Cal.App.3d, at 71 n.5. The reasoning of *Farr* would seem to have no applicability to an ordinary criminal prosecution involving no separation-of-powers issues such as the court thought dispositive in *Farr.*

whom resistance is unlawful. CALIF. PEN. CODE §§ 69, 148; *cf. People v. Curtis,* 70 Cal.2d 347 (1969). A newspaper which is searched has no opportunity to demonstrate to any court that reasons exist why it should *not* be searched. As Mr. Justice Jackson once said: "There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is to quietly submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." *Brinegar v. United States,* 338 U.S. 160, 182 (1949) (dissenting opinion).

In contrast, the subpoena process provides an appropriate and important procedural safeguard. Unlike a newspaper faced with officers intent upon executing a warrant to search, the subpoenaed newspaper is not compelled immediately to acquiesce. Instead, it may make a motion to quash and obtain, after an adversary hearing, a judicial determination of the propriety of the subpoena.[14]

Where a "shield" law is applicable to the object sought by the police or prosecutor, the execution of a search warrant simply bypasses its protections and denies the newspaper the opportunity lawfully to resist production of protected materials. And where other and possibly less absolute grounds exist, under *Branzburg* or otherwise, to oppose compelled production, a careful sifting and weighing of the facts and circumstances can hardly be expected to occur in the *ex parte* submission of affidavits to a magistrate. It is the exceptional case where the basis for objection is known or at least fully appreciated by the police

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14. A California court not long ago observed:
"When police unjustifiably enter an office and seize papers, privacy is irrevocably destroyed. But the issuance and service of a subpoena do not, by themselves, invade the private papers of anyone. If the person having custody of the papers believes the subpoena is defective, . . . he may make a motion to quash the subpoena [citation] or he may refuse to comply and present his excuse when enforcement is attempted against him." (*People v. Warburton,* 7 Cal.App.3d 815, 824 (1970).)

officer or prosecutor seeking the warrant.[15] Even the most conscientious magistrate scarcely can be expected to perceive injuries not disclosed by the affidavits. But the warrant, once issued, cannot lawfully be resisted; and thus the assumption that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection" (*Branzburg v. Hayes, supra,* 408 U.S., at 710, Powell, J., concurring) is entirely frustrated. As Mr. Haven, managing editor of the *Los Angeles Times,* put it, "[t]he newspaper first knows about it when the police present the warrant at the office of the newspaper, at which point the newspaper is confronted with the choice of violating a court order or opening its files notwithstanding the disastrous consequences." App. 62-63, at ¶ 5.

In a variety of settings, the Court has condemned *ex parte* court orders which have the effect of significantly impairing First Amendment rights, and has required instead that such orders await an adversary hearing. *E.g., Marcus v. Search Warrant,* 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1968); *Heller v. New York,* 413 U.S. 483, 489-94 (1973). As these cases demonstrate, even a temporary abridgment of First Amendment rights may require a prior adversary hearing;[16] the

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15. It would be wholly infeasible to require prosecutors or police officers to demonstrate to a magistrate the *absence* of any grounds for opposition to compelled disclosure of the materials sought, for the nature of the materials and the grounds for asserting confidentiality rarely will be known to them. No such effort was made at the time the warrant was obtained for the search of the *Daily.*

16. *Heller v. New York, supra,* does allow a temporary seizure without a prior adversary hearing of a *single copy* of an allegedly obscene film "for the bona fide purpose of preserving it as evidence in a criminal proceeding." *Id.,* at 492. The Court's opinion carefully distinguished this situation from the seizure of a large quantity of films or books which will have the effect of precluding their distribution or exhibition, and approved the holdings of *Marcus* and *Books* which require a prior adversary hearing in such circumstances. The Court stressed that the seizure of even the single copy must be temporary, with a "prompt judicial determination of the obscenity issue in an adversary proceeding" (*id.*) to follow.

present case is stronger for the incontestable reason that any breach of confidentiality resulting from the execution of a search warrant is irreparable and therefore final. And "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final* restraint." *Freedman v. Maryland,* 380 U.S. 51, 58 (1965) (emphasis added); *accord, Heller v. New York, supra,* at 489; *United States v. Thirty-seven Photographs,* 402 U.S. 363, 367 (1971). The compelling need for an opportunity for a newspaper's lawful claims to be heard is wholly denied by a press search:

> "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. . . . In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." (*Carroll v. Commissioners of Princess Anne, supra,* 183 (1968).)

Because the *ex parte* issuance of a search warrant circumvents the adversary process and frustrates the right to object, on whatever factual or legal ground may be relevant, to the compelled production of materials or information which the newspaper regards as confidential, needless injury to First Amendment interests is encouraged.

2. The Search of a Newspaper Needlessly Breaches the Confidentiality of Unrelated Material Not Sought by the Police But Necessarily Examined in the Execution of the Warrant.

A destructive but inevitable effect of any search of a newspaper is that, in addition to disclosure of needed and unprivileged

evidence, the execution of a warrant exposes to police inspection all other materials in the newspaper's offices. This exposure occurs no matter how confidential and however irrelevant to the police investigation these other items are, and in complete disregard of the Court's admonition that "the First Amendment prevents the Government from using its power to investigate . . . to probe at will and without relation to existing need." *DeGregory v. Attorney General of New Hampshire,* 383 U.S. 825, 829 (1966). In the present case, the unsuccessful search for particular photographs led the police officers to examine the contents of filing cabinets, desks, shelves and wastebaskets, some of which contained journalistic confidences utterly unrelated to the investigation. See note 9, *supra.*

The breach of confidentiality and privacy in this circumstance is entirely unnecessary. A subpoena duces tecum is precise and targeted: those documents which the police have identified and are entitled to obtain will be located by the newspaper and produced; all other documents may remain private.

3. No Legitimate Law Enforcement Interest Is Impaired By Requiring a Subpoena When Evidence Is Sought From a Newspaper.

Petitioners' response to the invocation of the foregoing principles and concerns by the courts below is, to say the least, lame. It consists of nothing more than the usual litany that "if such . . . searches cannot be made, law enforcement will be more difficult and uncertain." *United States v. Di Re,* 332 U.S. 581, 595 (1948). Petitioners do not explain how law enforcement officials have managed to carry out their functions for the better part of this Nation's first 200 years without resorting to the search of a newspaper to obtain evidence of another's crime.[17] They do not explain

17. Although at the time of the decision below the search of the *Daily's* office was thought by the District Court and the parties to be unprecedented in the history of American journalism, regrettably it has since been repeated. Details of these searches are published in the *Press*

why journalists not implicated in the commission of a crime cannot ordinarily be expected to comply voluntarily with a lawful subpoena. Nor do they offer plausible objections to a requirement that, when probable cause exists to believe that a subpoena will not be a satisfactory means for the production of evidence believed to be possessed by a newspaper, such cause must be demonstrated by the submission of sworn evidence to a magistrate. Instead, against the substantial First Amendment considerations which we have canvassed, Petitioners array a variety of objections which, with all respect, border on the chimerical.

Petitioners argue that, under California law, a subpoena duces tecum prior to the filing of a criminal complaint can be issued only by a grand jury.[18] There is, of course, no constitutional

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Censorship Newsletter described in note 11, *supra*. *See also* Note, *supra* note 6, at 957-59.

One such search occurred in Berkeley, California, at the premises of radio station KPFA-FM. Pursuant to a warrant, police searched the station in order to obtain a tape recording received by the station. (Ironically, when the station manager subsequently appeared before a local grand jury, the trial judge ruled that, in view of the California "shield" law (CALIF. EVID. CODE § 1070), the manager did not have to answer any questions going beyond what he had said on a news broadcast. *Newsletter* No. IV, April-May, 1974, at 25 (item 19).)

In October, 1974, Los Angeles police searched radio station KPFK-FM pursuant to a warrant. The search lasted over eight hours and resulted in a search of all the station's files and facilities. *Newsletter* No. VI, at 30 (item 2). We understand that litigation respecting this search is pending.

Radio station KPOO was asked without court order to relinquish a letter received by it and declined to do so. San Francisco police returned the next day with a search warrant and obtained the letter. *Id.*

In addition, there has been a search of the *Los Angeles Star* (*id.*, at 31 (item 4)) and at least two *ex parte* warrants issued for search of the *Berkeley Barb*. *Id.* (item 5).

18. Appellants cite no authority, and in fact the matter is not entirely free from doubt. It is clear that once a criminal complaint is filed a magistrate, district attorney, court clerk, or judge can issue a subpoena. See CALIF. PEN. CODE § 1326. However, CALIF. GOVT. CODE § 12560 gives the Attorney General supervisory power over the sheriffs of the various counties of the State "concerning the investigation . . . of crime", in connection with which he has the power to "direct the service of subpoenas".

barrier to legislation authorizing issuance of a summons or subpoena, for proper investigative purposes, prior to the formal institution of criminal proceedings. See *Hale v. Henkel,* 201 U.S. 43 (1906) (pre-indictment subpoena by grand jury); *Fisher v. United States,* 425 U.S. 391 (1975) (Internal Revenue Service summons); *Beverly v. United States,* 468 F.2d 732 (5th Cir. 1972); *cf. McGarry v. Securities & Exchange Commission,* 147 F.2d 389 (10th Cir. 1945) (administrative subpoena); *Bowles v. Shawano Nat. Bank,* 151 F.2d 749 (7th Cir. 1945), *cert. den.,* 327 U.S. 781 (1946). That the California legislature has not authorized prosecutors to apply to a court[19] for a subpoena in aid of a pending investigation is no justification for resort to the vastly more intrusive and destructive press search employed in this case. *Cf. Davis v. Mississippi,* 394 U.S. 721, 727-28 (1969).

It is said that the subpoena process is insufficiently swift because subpoenas "entail notice and opportunity to challenge" in contrast to warrants which ordinarily are "promptly obtained and executed." Bergna Brief, at 16-17. But subpoenas may, and frequently do, require immediate production of documents or attendance of witnesses. Petitioners offer no explanation why the brief delay which might be necessitated by a motion to quash ordinarily would interfere with the legitimate interests of law enforcement (*cf. United States v. Wilson,* 421 U.S. 309, 318 (1975)); or, if

19. Indeed, in some jurisdictions, prosecutors have the power to issue subpoenas in aid of a criminal investigation. *See, e.g., In Re Blue Hen Country Network, Inc.,* 314 A.2d 197 (Del. 1973). That power was considered in a situation very similar to this case in *In Re McGowen,* 303 A.2d 645 (Del. 1973), where alleged law violations occurred at a demonstration and the police believed that news photographs might reveal the identity of the violator. While the court in that case found, on statutory grounds, that the subpoena was defective, it is clear from the opinion that the use of the subpoena in these circumstances was regarded as a constitutional means of attempting to obtain the information sought. Of course, such subpoenas would be subject to challenge before a neutral and detached court. *Compare Coolidge v. New Hampshire,* 403 U.S. 443, 450-516 (1971); *Mancusi v. DeForte,* 392 U.S. 364, 371 (1968).

such delay would in fact threaten an investigation, why the extraordinary need for immediate action could not be presented to and determined by a magistrate.[20]

The judgment of the courts below is "troublesome" to some of Petitioners "because, in several respects, the subpoena is less protective of the individual than is the search warrant." Bergna Brief, at 18. Among other things, it is noted that a subpoena need not specify the location of documents, and that the showing which must be made to justify its issuance need not be as extensive. *Id.* It is difficult to know if we are meant to take this seriously. The requisite showing for a subpoena is less rigorous than that required for a search warrant for the very reason that a search is vastly more intrusive than a legal command which may be judicially challenged before compliance is required and which permits the recipient rather than police officers to locate the item sought. Petitioners' professed regard for the search warrant as providing more sensitive protection of the First and Fourth Amendment privacy interests of a newspaper than a subpoena is fanciful and unsupported. *See, e.g.,* Note, *supra,* note 6, at 988-91; Comment, *The Newsman's Privilege After* Branzburg: *The Case For a Federal Shield Law,* 24 U.C.L.A. L. REV. 160, 183-84 (1976); Note, 86 HARV. L. REV. 1317, 1329 (1973); Comment, *Search Warrants and Journalists' Confidential Information,* 25 AM. UNIV. L. REV. 938, 962-66 (1966).

The crux of Petitioners' concern is that the issuance of a subpoena "is a warning that the criminal evidence is wanted" (Bergna Brief, at 17; emphasis omitted), following which destruction of the evidence may follow. The courts below held, and we quite agree, that where a magistrate is shown probable cause to believe

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20. In the rare case where such a showing of urgency could be made, then presumably the use of a subpoena would be "impractical" within the meaning of the judgment below, and a search warrant could be employed.

that a newspaper possessing needed evidence would destroy the evidence despite a subpoena and temporary restraining order, a subpoena would be "impractical" and a search warrant properly could issue. 353 F. Supp., at 133; Petition, App. "C", at 27-28. The decision below is evidently objectionable to Petitioners because it requires the determination of impracticability to be made by a magistrate rather than by prosecutors or police officers. But the whole thrust of our constitutional tradition demands that the basis for a search "be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.' " *Spinelli v. United States,* 393 U.S. 410, 415 (1969) quoting from *Johnson v. United States,* 333 U.S. 10, 14 (1948); see also *Coolidge v. New Hampshire,* 403 U.S. 443, 449-50 (1971); *Shadwick v. City of Tampa,* 407 U.S. 345, 350 (1972); *Connally v. Georgia,* ..... U.S. ....., 50 L.Ed.2d 444 (1977); *United States v. Chadwick,* ..... U.S. ....., 53 L.Ed.2d 538, 547 (1977).

Petitioners insist, however, that "there will be many instances where, though probable cause to arrest cannot be shown, the apparent non-suspect is in fact the criminal" or at best a "sympathizer" who is likely to "destroy or dispose of the evidence." Bergna Brief, at 17; see also Zurcher Brief, at 18. While this statement seems largely directed to the broader implications of the lower courts' opinions (see Part II, *infra*), the problem at hand concerns a newspaper and not persons about whom the police knew little or nothing. The affidavit furnished to the magistrate in this case *affirmatively* demonstrated that the party to be searched was a newspaper and that the photographs sought were believed to have been taken by members of the *Daily* staff in the ordinary course of their journalistic duties. There was not the slightest reason to suppose that the *Daily* was either a suspect or a "sympathizer." It is unthinkable that the search of a newspaper office might be based upon an unproven suspicion—which

no one troubles to explain, let alone prove, to a magistrate—that the newspaper or its staff might "destroy or dispose of the evidence."[21]

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21. Petitioners suggest in their briefs that a subpoena would have been impractical in this case. They refer to an affidavit of Petitioner Brown—*not* presented to the magistrate, but prepared subsequently for purposes of the litigation in the District Court—which sought to justify the search. In that affidavit, Brown asserted that in 1969 (two years prior to the search in this case), he had attempted unsuccessfully to subpoena photographs believed to be in the possession of the *Daily* and that he felt that certain photographs sought which, although he had never seen them, he nevertheless believed to be incriminating, had been "deleted" from those produced. App. 150. He also referred to a "policy statement" issued by the *Daily* "indicating that it would not retain any potentially incriminating photographs." App. 152. Accordingly, Brown concluded that the *Daily* would "strongly resist any Subpoena Duces Tecum" and would, "if served with such a subpoena, . . . destroy or remove any incriminating photographs from its premises." *Id.* The courts below properly gave no weight to this after-the-fact rationalization.

In the first place, a search warrant cannot be validated by information never presented to the magistrate. *See, e.g., Whiteley v. Warden,* 401 U.S. 560, 564-66 & n. 8 (1971); *Spinelli v. United States,* 393 U.S. 410, 413 n. 3 (1969); *Aguilar v. Texas,* 378 U.S. 108, 109 n. 1, 111-15 (1964); *Giordenello v. United States,* 357 U.S. 480, 486-87 (1958); *Nathanson v. United States,* 290 U.S. 41, 46-47 (1933). Whether Brown's affidavit, if presented to a magistrate, might have been sufficient to demonstrate that a subpoena would have been impractical is therefore not presented on this record.

In any event, the suggestion that the *Daily* would have destroyed evidence or refused to comply with lawful, final court orders is preposterous. The Brown affidavit was based "mainly on hearsay." 353 F. Supp., at 135 n. 16; Petition, App. "C", at 33. Despite Brown's belated contention that the 1969 subpoena was not honored, it appears that no action was taken by his office against the *Daily* or any member of its staff. Surely such action would have been taken if there had been grounds to believe a subpoena had been dishonored. The suggestion that a published editorial indicated that the *Daily* would destroy evidence rather than comply with a subpoena is equally without merit. The editorial to which Brown refers is reprinted at App. 117-18. It described incidents in which, for fear that photographs would be subpoenaed by law enforcement authorities, certain campus groups had excluded *Daily* photographers from meetings. In response to these problems, the *Daily* announced that (1) it intended to cover newsworthy events and would resist efforts to exclude *Daily* news personnel; (2) if any staff members or equipment were harmed, it would press charges; (3) the *Daily* would print newsworthy photographs "regardless of their potential for incrimination"; and (4)

4. A Subpoena Is a Less Drastic Alternative to the Search of a Newspaper Which Must be Utilized Unless Shown to be Impractical.

The essence of the lower courts' decision lies in their recognition that press searches constitute deployment of the proverbial elephant gun to kill a squirrel. In summary, a search is excessive in contrast to a subpoena for several reasons. *First,* it precludes the opportunity for a reasoned judicial determination of the propriety of compelled production of the evidence sought. *Second,* if the evidence sought does not exist, the newspaper's privacy—and that of those who have reposed confidences with it—will be infringed needlessly because police officers instructed to execute a warrant will not be in a position to accept that explanation. *Third,* even if the newspaper is willing to produce such evidence as it possesses, its offices will nonetheless be searched and, for that reason too, its privacy needlessly breached. *Fourth,* a search cannot be confined to inspection of the materials actually sought.

These considerations properly compelled the courts below to invoke the familiar principle that constitutional rights may not be infringed when "less drastic means" are available to accomplish the same legitimate governmental objective:

> "[T]he tremendous value that our society places on privacy, indicates that intrusions should take place only when

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after publication, it would destroy photographs which might be used in criminal proceedings. The language of the editorial—though in retrospect not as precise as one might wish—left no doubt that the *Daily* meant to announce a policy of routine non-retention of negatives as a means of deterring the issuance of subpoenas, and did not in any way imply an intent to destroy evidence following receipt of a subpoena. Thus, the editorial stated: "Once a story has been printed, pictures taken with it are rarely used again." App. 118. The undisputed evidence was that this editorial policy referred only to materials *not* the subject of a subpoena; that it "is the policy of the *Daily* not to destroy any material covered by a judicially authorized subpoena"; and that, to the knowledge of the affiant, "no such destruction has ever occurred." App. 84. If at the time of the search, Petitioners had entertained the slightest good faith doubt as to whether the *Daily's* published non-retention policy extended to materials after a subpoena had been served, a telephone call would have resolved that uncertainty.

> 'necessary'. The history and importance of the Fourth Amendment have been well documented. . . . The intrusion from the execution of a warrant—a paramount concern of the Founding Fathers—is simply 'unnecessary' in most situations involving non-suspects, since a 'less drastic means' exists to achieve the same end." (353 F.Supp., at 130-31; see also *id.*, at 135 and n.14; Petition, App. "C", at 22, 32).

This Court has succinctly stated the governing principle: "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960); see also *Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293, 296-97 (1961); *Elfbrandt v. Russell,* 384 U.S. 11, 18 (1966); *N.A.A.C.P. v. Alabama ex rel. Flowers,* 377 U.S. 288, 307-08 (1964); *Aptheker v. Secretary of State,* 378 U.S. 500, 508 (1964); *United States v. Robel,* 389 U.S. 258, 267-68 (1967); *Elrod v. Burns,* 427 U.S. 347, 363 (1976); Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969). The principle is not confined to the First Amendment setting; indeed, "its origins lie in the area of the commerce clause." Note, 86 HARV. L. REV. 1317, 1322 n.30 (1973). *See e.g., Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *see generally* Wormouth & Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L. REV. 254 (1964). The proposition that the narrowest possible means must be used where constitutional rights are at stake is no stranger to Fourth Amendment cases. *See, e.g., Davis v. Mississippi,* 394 U.S. 721, 727-28 (1969); *Nixon v. Administrator of General Services,* .... U.S. ...., 53 L.Ed.2d 867, 904 (1977). Indeed, the principle lies at the very heart of the prohibtion against an "unreasonable" search. *See, e.g., Terry v. Ohio,* 392 U.S. 1, 20-21, 28-29 (1968); *Sibron v. New York,* 392 U.S. 40, 65-66 (1968); *Cupp v. Murphy,* 412 U.S. 291, 295-96 and

n.2 (1973); *United States v. Chadwick,* .... U.S. ...., 53 L.Ed.2d 538, 550 (1977). Thus in *Terry* the Court stated:

> "In order to assess the reasonableness of [the police officer's] conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' [citation]" (*Id.,* at 20-21)

And, in striking this balance, "any . . . . search [must] be strictly circumscribed by the exigencies which justify its initiation." *Id.,* at 26; see also *Chimel v. California,* 395 U.S. 752, 762-64 (1969).

In this case, in which there is "a convergence of First and Fourth Amendment values" (*United States v. United States District Court, supra,* at 313 (1972)), the subpoena is an effective and constitutionally available means by which law enforcement can obtain evidence possessed by newspapers, subject only to whatever objections may lawfully be interposed upon a motion to quash. The judgment of the courts below was that, absent a showing that in the circumstances of a particular case a subpoena directed to a newspaper would be impractical, this "less drastic means" must be pursued. That judgment was correct.

II. In the Circumstances of This Case, the Search of The Stanford Daily Was Unreasonable Within the Meaning of the Fourth Amendment

In the previous section, we have demonstrated the unconstitutionality of police searches of newspapers for evidence. It seems to us unnecessary to go beyond that issue as presented on this record. However, because the briefs of Petitioners and their supporting *amici* largely have ignored the First Amendment conse-

quences of the *Daily* search, and have viewed the case as if their search had been conducted at the home or office of those not engaged in First Amendment activity, we think it appropriate to discuss briefly the constitutionality of the search conducted in this case without regard to the special considerations commanded by the First Amendment.

It will be helpful at the outset to state the position which we espouse. The search for evidence in this case was unreasonable, and therefore condemned by the Fourth Amendment, because it was directed at a party not suspected of crime, and the evidence presented to the magistrate affirmatively showed that (1) the third party to be searched occupied no relationship to any criminal suspect such as would suggest a risk that the evidence might be destroyed; (2) there was no likelihood of destruction arising from the third party's status, demonstrated behavior, or the circumstances by which the evidence sought came to be in its possession; (3) lawful grounds might have existed to resist compelled production of the evidence sought; (4) particularly sensitive privacy interests of the third party (and of others whose confidences were likely to be reflected in documents in its possession) were invaded by a peculiarly intrusive form of search; and (5) there was otherwise no apparent reason shown why a subpoena would be impractical.

The touchstone of the Fourth Amendment is whether under all of the "facts and circumstances" (*Go-Bart Importing Co. v. United States,* 282 U.S. 344, 357 (1931)), a search is "reasonable." As the Chief Justice said only recently, "reasonableness must take into account all the circumstances and balance the rights of the individual with the needs of society." *United States v. Ortiz,* 422 U.S. 891, 900 (1976) (Burger, C.J., concurring). In *South Dakota v. Opperman,* 428 U.S. 364, 373 (1976), the Court recalled Justice Black's statement in *Coolidge v. New Hampshire,* 403 U.S. 443, 509-10 (1971) that "[t]he test of reasonableness

cannot be fixed by per se rules; each case must be decided on its own facts."[22] Thus "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski,* 413 U.S. 433, 439 (1973); see also *Rios v. United States,* 364 U.S. 253, 255 (1960); *Ker v. California,* 374 U.S. 23, 33 (1963); *Wyman v. James,* 400 U.S. 309, 318-19 (1971); *Cooper v. California,* 386 U.S. 58, 59 (1967); *Roaden v. Kentucky,* 413 U.S. 496, 501-02 (1973); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976); *United States v. Chadwick,* ..... U.S. ....., 53 L.Ed.2d 538, 547 (1977). In *Roaden,* as we have noted earlier, a seizure made incident to arrest—and therefore within an established exception to the warrant requirement—was nevertheless held to be "unreasonable" under the circumstances of that case. The Court's observation there that the "Fourth Amendment proscription against 'unreasonable . . . seizures' . . . must not be read in a vacuum" (413 U.S., at 501) is, for similar reasons, applicable to this case.

We do not doubt that courts have the right and power to compel the production of evidence by persons not themselves suspected of criminal activity. As Lord Ellenborough stated long ago: "The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence in constitution of a Court of common law." *Amey v. Long,* 9 East 484. But the conventional means of compelling the production of such evidence is a subpoena duces

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22. Whether a search conducted without a warrant, and not within any of the recognized exceptions to the warrant requirement, may nevertheless be sustained as "reasonable" has generated considerable disagreement. *Compare, e.g., United States v. Rabinowitz,* 339 U.S. 56 (1950); *South Dakota v. Opperman, supra, with G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). As the search in this case was conducted pursuant to warrant, it is unnecessary to address that question. See generally *South Dakota v. Opperman, supra,* at 381-82 (Powell, J., concurring). The question presented here is the converse: whether the search, even though purportedly authorized by a warrant, was reasonable under all the facts and circumstances.

tecum, not a search warrant. In *Wilson v. United States,* 221 U.S. 361 (1911), while acknowledging the longstanding power to compel by subpoena "the production of documents material to the cause, though in the possession of a stranger" (*id.,* at 373, quoting *Summers v. Moseley,* 2 Cr. & M. 477, 4 Tyrw. 158, 3 L. J. Exch. N.S. 128), the Court noted that a subpoena to compel the production of evidence "does not impair any right either of the opposing party or of the person responding to the subpoena . . . of showing under oath the reasons why he should *not* be compelled to produce the document." *Id.,* at 374 (emphasis added). At the time of the search in this case, there was no authority in the decisions of this or any other federal or state court approving the search for evidence of a person not suspected of crime.[23]

A search for evidence often invades particularly sensitive privacy interests even though the third party searched is not engaged in activities entitled to heightened First Amendment protection. While every citizen is entitled to the protections of the Fourth Amendment, privacy interests and expectations are not uniform; some circumstances require greater solicitude than others. *Roaden v. Kentucky, supra,* at 501; *United States v. Martinez-Fuerte,* 428 U.S. 543, 561 (1976); *Whalen v. Roe,* ..... U.S. ....., 51 L.Ed.2d 64 (1977). Many of those circumstances in which society's respect for confidentiality ought to be scrupulously honored are especially vulnerable to third-party searches. The files of a lawyer, for example, often may contain information that may be of interest to

23. Those few cases in which courts had dealt with the seizure of evidence from third parties all condemned the practice. *Newberry v. Carpenter,* 107 Mich. 567, 65 (N.W. 530 (1895); *Owens v. Way,* 82 S.E. 132 (Ga. Sup. Ct. 1914); *Commodity Manufacturing Co. v. Moore,* 198 N.Y. Supp. 45 (1923); *People v. Carver,* 16 N.Y.S. 2d 268 (1939). Recently, a federal Court of Appeals has disagreed. *United States v. Manufacturers National Bank,* 536 F.2d 699 (6th Cir. 1976), *cert. den. sub. nom. Wingate v. United States,* ..... U.S. ....., 50 L.Ed.2d 749 (1977).

law enforcement authorities. Those files may be subpoenaed (see *Fisher v. United States,* 425 U.S. 391 (1976); see also *Couch v. United States,* 409 U.S. 322 (1973)); but the use of a search warrant to achieve their production would expose all of the confidences of the attorney's other clients (to say nothing of the attorney's own work product and personal records) to police scrutiny. Similarly, while bank records of persons under investigations frequently are subpoenaed (see *United States v. Miller,* 425 U.S. 435 (1976); *California Bankers Association v. Schultz,* 416 U.S. 21, 53 (1974)), a search warrant would lay bare to the executing officers the financial confidences of other and unrelated customers of the bank. The same jeopardy to expectations of privacy on the part of persons who never have been and never will be suspected of criminal activity exists if the police are free to conduct third-party searches of the files and records of physicians, psychiatrists, telephone business offices, accounting firms, employment agencies, credit bureaus, large employers, private investigators, security services, or any other place where confidential personal or financial information relating to many persons is routinely kept.

The record in this case contains a chilling example of the potential for mischief. Not long after the District Court's original ruling in this case, some of the Petitioners participated in the search of the patient files of the Psychiatry Clinic of the Stanford Hospital. See pp. ....., *supra.* The object of the search was the patient records of an individual who was the *victim* of a crime. A subpoena had been served; there was no attempt to demonstrate to the magistrate that the psychiatrist to whom it was directed would disregard it; and her counsel was attempting to arrange for a hearing as to its validity. The effect of the search was that, before any judicial determination of whether the records were privileged could be had, the intrusion was completed and the confidential patient records of every patient of the psychiatric unit—which

were of course privileged under California law (see CALIF. EVID. CODE §§ 1010-26; *In re Lifschutz,* 2 Cal. 3d 415 (1970))—were exposed to the scrutiny of the executing officers.

The two major vices of a press search for evidence are also relevant when the search is directed against a non-journalist third party. As noted, the privacy of that person—and of unrelated persons whose confidences are reflected in documents in his or her possession—is needlessly invaded whenever a supoena would be equally effective to vindicate the needs of law enforcement. And lest there be any doubt as to the degree of that intrusion, it bears emphasis that a search for evidence ordinarily takes the officers executing the warrant into desks, wastebaskets, filing cabinets, closets, and other intimate precincts of the home or office. That, of course, is precisely what occurred in this case. See note 9, *supra.*

The second principal defect of a third party search for evidence is that it wholly denies the opportunity for a judicial determination of whatever grounds may exist to oppose production of the evidence sought. The evidence may be protected by an attorney-client privilege, a physician-patient privilege, or some other statutory, constitutional, or common-law privilege. Reasonable cause for production may be lacking. *See, e.g., United States v. Dionisio,* 410 U.S. 1, 11-12 (1973); *Hale v. Henkel,* 201 U.S. 43, 76-77 (1906). Or it may simply be that, under all the circumstances, a court might find the demand for production unreasonable or oppressive. But a warrant cannot be resisted (see pp. 28-29, *supra*), and whatever objections, whatever privacy interests, and whatever claims to confidential treatment may have existed will be irretrievably lost once it is executed.[24]

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24. In nearly every jurisdiction, there will be no meaningful and available judicial forum for determining the validity of a third party search. The defendant against whom evidence seized in such a search is used will not have standing to challenge the search. *See, e.g., Brown v. United States,* 411 U.S. 223 (1973); *contra, Kaplan v. Superior Court,* 6 Cal.3d

The superiority of a procedure which offers an opportunity for a prior determination of the propriety of a proposed, and contested, governmental action against a citizen is obvious. In a variety of settings, the Court has imposed it as a constitutional imperative. *See, e.g., North Georgia Finishing v. Di-Chem,* 419 U.S. 601 (1975); *Board of Regents v. Roth,* 408 U.S. 564, 570 n.7 (1972); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Bell v. Burson,* 402 U.S. 535 (1971). The critical factor in these cases is that "except in emergency situations" (*Bell v. Burson, supra,* at 542), the opportunity to be heard must be afforded *before* the adverse governmental action occurs. This is so because "[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin, supra,* at 81, and cases cited at 82. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (quoting from *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)).

It will not do to say that the *ex parte* presentation to a magistrate of affidavits establishing probable cause to believe that an individual is in possession of relevant evidence is a sufficient protection. A hearing on a motion to quash would provide an opportunity for a judicial determination of whatever grounds of objection may exist; but a search warrant issued *ex parte* makes that procedural course impossible. As the Court said in *Fuentes:*

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150 (1971). Even a "vicarious" exclusionary rule affords no relief to the third party whose privacy was invaded. While it is true that in theory a suit for damages might be brought if the warrant was invalid, the inadequacies of that remedy are by now well-known, not the least of which is the absolute immunity claimed by prosecutors (see *Imbler v. Pachtman,* 424 U.S. 409 (1976) and the qualified immunity applicable to police officers who acted in good faith (see *Pierson v. Ray,* 386 U.S. 547 (1967)).

> "The purpose of this requirement [of a prior opportunity to be heard] is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary enroachment —to minimize substantively unfair or mistaken deprivations of property. . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. [citation]
>
> "The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decisionmaking that it guarantees works, by itself, to protect against arbitrary deprivations of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' [citation]" (407 U.S., at 80-81.)

See also *Alderman v. United States,* 394 U.S. 165, 183-84 (1969).

The need in the present context for a meaningful opportunity to be heard is far more compelling than in the cases involving challenges to pre-judgment remedies such as attachment. Those cases arise in the context of a dispute between two parties, as to which the state provides a neutral mechanism for its resolution. In those situations, despite the force of the argument for an opportunity to be heard *before* adverse action is taken, the rights of the creditor may be signficantly prejudiced by the delay. See *Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974). Moreover, if the temporary deprivation of property proves to have

been unwarranted, it can be returned; and there are available means, such as bonding, for providing redress to the individual wrongly deprived of his property for a period. See *id.*, at 610, 616-18. In the case of a search warrant issued *ex parte* and directed against a third party not suspected of crime, the state is not neutral but a party to the controversy. At least where there is no likelihood of non-compliance and destruction of the evidence sought, it will not be prejudiced if the third party is afforded an opportunity to be heard before the evidence is produced. Moreover, and most fundamentally, more is at stake than a *temporary* deprivation of one's property: execution of a search warrant results in an irreparable invasion of privacy, for there will be no means of undoing the breach of that privacy should it later be determined that the search was not legally justified.

These principles yield, as they must, in the case of search warrants directed at persons suspected of crime. A prior adversary hearing, of course, ordinarily would be impractical since it can be presumed that "a criminal will destroy or hide evidence or fruits of his crime if given any prior notice." *Fuentes v. Shevin, supra,* at 93-94 n.30 (1972). Petitioners urge that, in some circumstances, there is also a danger that a third party possessing evidence will destroy or conceal it following issuance of a subpoena. But surely there is no significant risk that a bank, a lawyer, an accountant, a physician, a psychiatrist, or a newspaper—itself not suspected of crime—will "destroy or hide evidence." Such persons may have reasonable grounds lawfully to resist a subpoena by obtaining a judicial determination of its validity, but they cannot be presumed likely to flout the law once that determination is rendered. Such a case is a far cry from a situation where "the person subpoenaed may be a friend, a relative, or a criminal associate of the perpetrator . . . [who] may be highly motivated to destroy evidence linking the criminal to the crime." Brief of the National District Attorneys Association et al., at 17;

see *United States v. Manufacturers National Bank, supra* note 23. When an application for a search warrant affirmatively demonstrates that its object would not likely disregard a subpoena or destroy evidence, Petitioners' concerns are simply inapplicable, and the magistrate's issuance of a warrant is plainly unreasonable because a "less drastic means" (see pp. 39-40, *supra*)—a subpoena—should be utilized. See Note, 86 HARV. L. REV. 1317, 1330-31 (1973).

These considerations coalesce in this case to render the *Daily* search unreasonable. *First,* the police knew—and the materials submitted to the magistrate affirmatively showed—that the *Daily* occupied no relationship to the persons who were being investigated. To the contrary, the *Daily* was thought to possess useful evidence precisely because it was engaged in an independent, arms'-length activity: gathering and reporting of news. *Second,* substantial grounds existed then[25] and exist now[26] for objection to the compelled production of the evidence sought. *Third,* particularly sensitive privacy interests of the *Daily,* and of persons whose confidences were reflected in its files and notes, were threatened by execution of the search warrant. *Fourth,* the magistrate was provided with *no* evidence tending to suggest that the *Daily* might disregard a subpoena or destroy the evidence. In these circumstances, the search was constitutionally "unreasonable."[27]

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25. At the time of the search, both the District Court and the Court of Appeals for the Ninth Circuit had found a constitutional privilege applicable to confidential information in the possession of journalists. See *Caldwell v. United States,* 434 F.2d 1081 (9th Cir. 1970), *reversed,* 408 U.S. 665 (1972).

26. Apart from any federal constitutional grounds for objecting to production, the materials now plainly are protected by Section 1070 of the California Evidence Code. See pp. 27-28, *supra.*

27. Petitioners cite a number of cases for the proposition that "warrantless searches are the norm in third-party cases" (Zurcher Brief, at 32-33). Contrary to Petitioners' view of them, these cases reinforce our contention that the search in this case was unnecessary and therefore "un-

III. The Granting of Declaratory Relief as to the Police Officer Defendants Was Proper

The police officer defendants contend that they are immune from suit under 42 U.S.C. § 1983 because their search of the *Daily* was performed in good faith, "in full compliance" with "then existing law." Zurcher Brief, at 35; but see note 25, *supra.* This insupportable assertion amounts to the bald proposition that Section 1983 can never be a vehicle for deciding constitutional questions of "first impression," since, in so doing, relief is granted

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reasonable" under Fourth Amendment standards. The lower court cases upholding airport screening procedures (*e.g., People v. Hyde,* 12 Cal.3d 158 (1974)) permit no greater intrusion of privacy than is necessary to protect against a serious threat to life and property; thus "[p]reboarding inspections must be confined to minimally intrusive techniques designed solely to disclose the presence of weapons or explosives." *Id.,* at 168. *Camera v. Municipal Court,* 387 U.S. 523 (1967) permits an inspection by municipal health or housing inspectors without a showing of probable cause to believe that there have been criminal law violations for the self-evident reason that the purpose of the inspection is civil. *Camera* does require a warrant and a showing of probable cause with respect to both the area being searched and selection of specific structures within it. 387 U.S., at 538-39. The decision thus requires as specific a showing of necessity as can feasibly be given. In each of these situations, then, the intrusion which is permitted is necessary to further important public interests relating to safety or health and is no greater than that necessary to achieve its purpose; no "less drastic means"—such as a subpoena—is available.

Equally inapposite are the "regulated business" cases, which authorize routine inspections without warrant or probable cause of enterprises, such as liquor or gun vendors, which "pose only limited threats to the dealer's justifiable expectations of privacy" because such businesses which choose "to engage in [a] pervasively regulated business . . . do so with the knowledge that [their] business records [and premises] will be subject to effective inspection." *United States v. Biswell,* 406 U.S. 311, 316 (1972); see also *Almeida-Sanchez v. United States,* 413 U.S. 266, 270-72 (1973). A newspaper is the antithesis of a regulated enterprise. *See, e.g., Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); see also *id.,* at 259 (White, J. concurring).

Finally, little need be said of the reference to the warrantless search without probable cause of "persons and objects crossing our international borders." Zurcher Brief, at 33. The offices of the *Daily* are a good distance from any international boundary, and the border search exception plainly does not reach as far as Palo Alto. See *Almeida-Sanchez v. United States, supra,* at 272-74; *United States v. Ortiz,* 422 U.S. 891 (1975).

"without fault" in cases where defendants may have been acting in good faith. *Id.* at 35, 38 n.22.

Not surprisingly, no cases are cited for this remarkable conclusion. This Court has never held or even intimated that the conduct of police officers or other public officials not provably in bad faith is beyond the scrutiny of courts in cases seeking injunctive or declaratory relief. To the contrary, an unbroken line of decisions from *Ex Parte Young,* 209 U.S. 123 (1908) to *Linmark Associates, Inc. v. Township of Willingboro,* .... U.S. ...., 52 L.Ed.2d 155 (1977) allows injunctive relief (to say nothing of the less drastic remedy of declaratory relief afforded in this case) against the unconstitutional acts of government officials regardless of the defendants' subjective "good faith" or whether they could be held accountable for money damages. *See Illinois v. City of Milwaukee,* 406 U.S. 91, 108 n.10 (1972) (sovereign immunity against damages does not bar injunctive relief). As the Court of Appeals said, "[e]xtension of [the qualified immunity] rule to suits like the present one, seeking injunctive and declaratory relief, has been rejected by the courts." Petition, App. "A", at 3, citing *Rowley v. McMillan,* 502 F.2d 1326, 1332 (4th Cir. 1974); *Hodge v. Henrick,* 391 F.Supp. 91 (E.D. Va. 1975), *Wood v. Strickland,* 420 U.S. 308, 315 n.6 (1975); *National Treasury Employees Union v. Nixon,* 492 F.2d 587, 609 (D.C. Cir. 1974); *Gouge v. Joint School Dist. No. 1,* 310 F.Supp. 984, 990 (W.D. Wis. 1970); *Richmond Black Police Officers Ass'n v. City of Richmond,* 386 F.Supp. 151, 154 (E.D. Va. 1974); *Saffron v. Wilson,* ..... F.Supp. ..... (D.D.C. decided Jan. 2, 1975); *Safeguard Mutual Ins. Co. v. Miller,* 472 F.2d 732, 734 (3d Cir. 1973). In addition to the cases cited by the Court of Appeals, see *Peek v. Mitchell,* 419 F.2d 575, 578 (6th Cir. 1970); *United States v. Clark,* 249 F.Supp. 720, 727 (S.D. Ala. 1965).

Petitioners' misguided focus on their alleged good faith leads them to several erroneous conclusions. They assert, for example,

that they are immune from suit because they were merely executing a judicially-issued search warrant. Zurcher Brief, at 35-39. As the Court of Appeals noted, this claim was not timely presented to the District Court. Petition, App. "A", at 2. Moreover, it does not apply to Petitioner Peardon who, like Petitioner Brown, participated in applying for the warrant. App. 22-25. In any event, although the good-faith execution of a warrant would immunize these petitioners from an award of damages—which were neither sought nor obtained in this case—no reasoned explanation or authority is offered for the indigestible proposition that courts can neither enjoin unconstitutional police conduct nor declare rights for the future simply because a defendant's unconstitutional conduct was in accordance with then-existing state law or court order.[28] If petitioners were correct, this Court could not have granted injunctive relief against school officials who, as required by state statutes (and as formerly authorized by decisions of this Court), operated dual school systems segregated by race. *Brown v. Board of Education,* 347 U.S. 483 (1954).

It makes little difference whether conduct challenged as unconstitutional was specifically required by state statute or authorized by state judicial authority, for, in either case, the paramount claims of federal law must prevail. *N.L.R.B. v. Nash-Finch Co.,* 404 U.S. 138 (1971); *Ex Parte Young, supra.* The suggestion that

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28. The cases cited by Petitioners for the proposition that police officers in such circumstances are absolutely immune from suit do not support it. *Rhodes v. Houston,* 202 F.Supp. 624 (D. Neb. 1962), *aff'd.,* 309 F.2d 959 (8th Cir. 1962), *cert. den.,* 383 U.S. 971 (1966) finds immunity from *damages* but bases the denial of injunctive relief (against future incarceration of a state prisoner) on other grounds. *Steinpreis v. Shook,* 377 F.2d 282 (4th Cir. 1967), *cert. den.,* 389 U.S. 1057 (1968) is hopelessly miscited, for it deals only with immunity from an award of damages. *Mackay v. Nesbett,* 285 F.Supp. 498 (D. Alaska 1968); *Atchley v. Greenhill,* 373 F.Supp. 512 (S.D. Tex. 1974); and *Hill v. McClennan,* 490 F.2d 859 (5th Cir. 1974), cited in Zurcher Brief, at 37, establish the unremarkable proposition that one may not litigate the validity of a state court decision by suing the state court judge in federal court under Section 1983.

state court judges or those acting under their commands are absolutely immune from federal injunctive or declaratory relief, even though other equitable prerequisites are met, flies in the face of the numerous decisions which have authorized such relief, as well as the explicit recognition in 28 U.S.C. § 2283 that federal restraint of judicial proceedings is permissible in limited circumstances. *See, e.g., Timmerman v. Brown,* 528 F.2d 811 (4th Cir. 1975); *Mitchum v. Foster,* original order granting temporary restraining order unreported, (N.D. Fla. 1970), *injunction dissolved,* 315 F.Supp. 1387, *reversed,* 407 U.S. 225 (1972); *Pugh v. Rainwater,* 332 F.Supp. 1107 (S.D. Fla. 1971), 336 F.Supp. 490 (1972), 355 F.Supp. 1286 (1973), *affirmed in part, vacated in part,* 483 F.2d 778 (5th Cir. 1973), *affirmed in part, reversed in part sub. nom. Gerstein v. Pugh,* 420 U.S. 103 (1975); *Medrano v. Allee,* 347 F.Supp. 605, 611 (S.D. Tex. 1972), *affirmed in part, vacated in part and remanded,* 416 U.S. 802 (1974); *Tucker v. City of Montgomery Board of Commissioners,* 410 F.Supp. 494 (M.D. Ala. 1976). Indeed, in *Hadnott v. Amos,* 394 U.S. 358 (1969), the Court ordered the federal district court to issue injunctive relief against a state probate judge who, as part of his statutory responsibilities, prepared election ballots. See also *Littleton v. Berbling,* 468 F.2d 389 (7th Cir. 1972), *cert. den.,* 414 U.S. 1143 (1974) (injunction against state judges not barred by absolute immunity from damages); *Person v. Association of Bar of City of New York,* 554 F.2d 534 (2d Cir. 1977), *cert. den.,* ..... U.S. ....., 46 U.S.L.W. 3293 (1977), and cases cited. Of course, no order was entered against any judge in this case, and no injunction was entered against anybody.[29]

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29. Petitioner Zurcher also argues that because he assertedly did not personally participate in the search of the *Daily,* he may not be made a defendant in an action for injunctive or declaratory relief. The contention, of course, is inapplicable to the four police officers who conducted the search, or to District Attorney Brown and officer Peardon, who obtained the warrant. In any event, this contention is without merit. [footnote continued]

IV. The Award of Fees Was Authorized by the Civil Rights Attorney's Fees Awards Act of 1976

The Court of Appeals affirmed the District Court's award of attorneys' fees under the authority of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, last sentence ("the Act"). The avowed legislative purpose in enacting the Act was to "remedy anomalous gaps in our civil rights laws created by the . . . recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) . . ." (S.Rep. No. 94-1011, 94th Cong., 2d Sess., at 1 (hereafter "S.Rep.") so that "private citizens [will] be able to assert their civil rights. . . ." *Id.* at 2. The Act was "designed to give . . . persons effective access to the judicial process where their grievances can be resolved according to law." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., at 1 (hereafter "H.R. Rep.").

Zurcher is the Chief of Police of the City of Palo Alto. The issue of his alleged non-involvement was not raised in the District Court before summary judgment was granted, and the record contains no evidence substantiating that claim. The Court of Appeals therefore held that the point was untimely. Petition, App. "A", at 2. Moreover, the search was conducted by Zurcher's subordinates, whose authority derives from him, and whose past conduct was and future conduct will be subject to his direction. Zurcher's alleged non-participation would doubtless be relevant to the question of damages, but here the District Court awarded no damages and, indeed, even refrained from issuing an injunction. It merely declared the rights of the *Daily* in relation to the District Attorney and the Palo Alto Police Department, and it was in that connection that Chief Zurcher was properly named as a defendant. *Lankford v. Gelston,* 364 F.2d 197, 205 (4th Cir. 1966); *Hernandez v. Noel,* 323 F.Supp. 779, 783 (D. Conn. 1970); *Houser v. Hill,* 278 F.Supp. 920, 928-29 (M.D. Ala. 1968); *Cottonreader v. Johnson,* 252 F.Supp. 492, 499 (M.D. Ala. 1966).

Petitioner Zurcher's invocation of *Rizzo v. Goode,* 423 U.S. 362 (1976) is similarly misplaced. In *Rizzo,* the Court found that a District Court injunction significantly revising the internal procedures of the Philadelphia Police Department exceeded the court's equitable power, at least where the named defendants had not themselves been implicated in the constitutional violations giving rise to the District Court's remedy.

The present case could not be more different. Here, of course, the District Court refrained from issuing any injunction and *Rizzo's* admonition

Petitioners nevertheless argue that the Act should not have been applied to this case, which was pending on appeal to the Court of Appeals at the time of the Act's passage. They further urge that fees in a declaratory judgment action may not be awarded against a defendant who enjoys absolute immunity from an award of money damages, or who enjoys qualified immunity from damages unless there has been a finding that he acted in bad faith. These contentions find no support in the text of the Act or its legislative history.

A. CONGRESS INTENDED THE ACT TO APPLY TO PENDING CASES.

Congress unmistakably demonstrated its intent that the Act apply to pending cases and authorize the award of fees for services rendered prior to the Act's effective date. The Report of the House Judiciary Committee unambiguously states:

> "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on

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against federal courts "inject [ing them] selves by injunctive decree into the internal . . . affairs of [a] State agency" (*id.* at 380) is therefore totally inapplicable. By contrast, the Court has long recognized that declaratory relief may issue where considerations of federalism and comity might render injunctive relief inappropriate. *Texas v. Florida,* 306 U.S. 398, 412 (1939); *Steffel v. Thompson,* 415 U.S. 452, 462-3 and n.12 (1974); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931 (1975). Moreover, nothing in *Rizzo* called into question the long line of cases commencing with *Ex Parte Young, supra,* in which senior prosecutorial or police officials are sued to restrain enforcement of unconstitutional statutes; it is common in such cases to sue the Attorney General (as was the case in *Ex Parte Young*), the police chief (as in *Steffel v. Thompson, supra*), or the District Attorney (as in *Doran v. Salem Inn, Inc., supra*), even though such persons did not pass the law which is challenged and were presumably acting in good faith. Finally, in *Rizzo,* the named defendants had neither authorized nor ratified the random unconstitutional conduct of their subordinates not named as defendants; here, by contrast, the District Court was confronted with a District Attorney's office and a police department which asserted, as a matter of constitutional law, the right to conduct searches of the press for evidence. The difference between *Rizzo* and this case is the difference between isolated individual, unauthorized conduct and official policy.

> the date of enactment as well as all future cases. *Bradley v. Richmond School Board,* 416 U.S. 696 (1974)." (H.R. Rep., at 4 n.6).

This same point was made without objection in both the House[30] and Senate[31] debates. Moreover, on the floor of the House, a motion to recommit the bill, offered by Congressman Ashbrook for the purpose of obtaining an amendment to make the Act prospective only, was defeated by a vote of 268-104. See 122 CONG.REC. H12166 (Oct. 1, 1976).

Petitioners argue that the application of the Act to cases pending on appeal works a "manifest injustice" under *Bradley v. Richmond School Board,* 416 U.S. 696 (1974). *Bradley,* of course, held that legislation authorizing attorneys' fees in Title VI cases was retroactive, and found no "manifest injustice" in doing so. *Bradley* does not suggest that a court's perception of unfairness might override a clear legislative intendment: rather, the rule it articulates governs where, as in that case, the legislative will on the question of retroactivity was uncertain. See *id.,* at 716 and n.23. Here, as already shown, Congress intended with unmistakable clarity that the Act apply retroactively to pending cases. Petitioners do not contend that application of the Act to pending cases is in some way unconstitutional.

In any event, this case involves anything but "manifest injustice." At the very outset, the complaint filed in this case sought attorneys' fees. App. 30. For nearly the entire time that it was pending in the District Court, the rule prevailing in the Northern District of California allowed for an award of attorneys' fees on the "private attorney general" theory. *See, e.g., La Raza Unida v. Volpe,* 57 F.R.D. 94 (N.D. Calif. 1972). While the

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30. See 122 CONG.REC. H12155 (Cong. Anderson); *id.,* at H12160 (Cong. Drinan).

31. 122 CONG.REC. S17052 (Sen. Abourezk).

matter was still before the District Court, the Court of Appeals for the Ninth Circuit, in common with decisions of numerous lower federal courts around the country, approved the rule of the *La Raza* case and held that attorneys' fees could be awarded in Civil Rights Act suits. *Brandenburger v. Thompson,* 494 F.2d 885 (9th Cir. 1974). While the *Daily* case was pending on appeal, *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) disapproved the rule of those cases. *Alyeska* in turn prompted Congress to reinstate the law as it existed at the time the District Court entered judgment in this case. Petitioners' expectations can, therefore, hardly be said to have been frustrated by the passage of the Act.[32]

Petitioners also view the fee award in this case as a "manifest injustice" because it imposes a financial exposure upon "individuals and . . . not publicly funded governmental entities . . . ." Zurcher Brief, at 43. Were that statement true, their quarrel

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32. Petitioners' complaints that a "sanction" has been imposed upon them "for performing duties legal at the time" (Zurcher Brief, at 14) and that the award of fees "will result in a chilling effect on [the] diligent search for relevant evidence" (Bergna Brief, at 29) are without basis in fact. While it is true that at the time of the *search,* the entitlement of a prevailing plaintiff in a Civil Rights Act suit to an award of fees was uncertain, no part of the award is either punishment or compensation for the actions of Petitioners on the date of the search. Rather, the fee award stems from the subsequent decision of Petitioners—essentially a continuing one—to *contest* this suit and to insist, as Petitioners Bergna, et al., did in their pleadings, that should the occasion be presented in the future they would again conduct a search of the type which prompted this action. App. 38, at ¶ 9.

This distinction—between penalties or damages for primary conduct, on the one hand, and an award of fees incurred in litigation to determine the legality of that conduct, on the other—is a significant one which Petitioners overlook. See Comment, *Awarding Attorneys Fees Against A State Official Sued in His Official Capacity After Edelman v. Jordan,* 55 BOSTON U.L.REV. 228 (1975). It is for that reason that the Act expressly provides that the fee award will be treated "as part of the costs." See S. Rep., at 5 & n.6 (1976) (hereafter "S. Rep."); *see also Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976) (Stevens, J., concurring) (fees are costs and thus not within Eleventh Amendment bar to damage recovery from a State).

would lie with Congress. But the specter of modestly paid governmental employees being compelled to bear the fee award in this case is altogether false. Petitioners surely have not forgotten that, as the District Court found (see Petition App. "D", at 52), under California law both the costs of defense and any fee award must be paid by the public entity which employed the public employees against whom the award is made where, as in this case, they were acting within the scope of their employment. CALIF. GOVT. CODE § 825.[33] Thus, the City of Palo Alto and the County of Santa Clara—not Petitioners—ultimately will bear these costs.[34]

Thus, the Court of Appeals was entirely correct in applying the Act to the present case. Its judgment conforms with decisions of every other federal court which has considered the question of whether Congress intended the Act to apply to all active pending cases and to services rendered before, as well as after, its passage. *See, e.g., Alicia Rosado v. Garcia Santiago,* 562 F.2d 114 (1st

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33. That the California indemnity statute is applicable to Civil Rights Act suits so that "the public, and not the individual officer, will bear the responsibility for litigation and pay any judgment for attorney's fees" (Petition, App. "D", at 53) is now settled; recently, the California Supreme Court expressly held the indemnification provisions applicable to Section 1983 actions against police officers, relying upon and citing with approval the District Court's analysis in the *Stanford Daily* case. *Williams v. Horvath,* 16 Cal.3d 834, 846-47 (1976).

Thus this case does not require consideration of whether, in the absence of an express indemnification statute, the federal court has the power under the Act to direct that the fee award be paid from public funds. See note 36, *infra; Finney v. Hutto,* 548 F.2d 740 (8th Cir. 1977), *cert.* granted, ... U.S. ....., 46 U.S.L.W. 3256 (Oct. 17, 1977), now before this court as 76-1660; *compare Skehan v. Board of Trustees of Bloomsburg State,* 436 F.Supp. 657, 666-67 (M.D. Pa. 1977).

34. To state that the fee award "would only serve to punish" Petitioners (Zurcher Brief, at 42) is an indulgence. It imposes no burden on Petitioners at all, and merely allocates the cost of litigating this case on their employer—the unsuccessful litigant—in accordance with a Congressional determination that private citizens should not have to bear the expense of successfully vindicating rights secured to them by the Constitution.

Cir. 1977); *Seals v. Quarterly County Court,* 562 F.2d 390 (6th Cir. 1977); *Wharton v. Knefel,* 562 F.2d 550 (8th Cir. 1977); *Gates v. Collier,* 559 F.2d 241 (5th Cir. 1977); *Gay Lib v. University of Missouri,* 558 F.2d 848 (8th Cir. 1977); *Hodge v. Seiler,* 558 F.2d 284 (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); *Cuneo v. Rumsfeld,* 553 F.2d 1360 (D.C. Cir. 1977); *Finney v. Hutto, supra* note 33; *Rainey v. Jackson State College,* 551 F.2d 672 (5th Cir. 1977); *Martinez Rodriguez v. Jimenez,* 551 F.2d 877 (1st Cir. 1977); *Wade v. Mississippi Co-Op Extension Service,* 424 F.Supp. 1242 (N.D. Miss. 1976); *Gary W. v. State of Louisiana,* 429 F.Supp. 711 (E.D. La. 1977); *White v. Crowell,* 434 F.Supp. 1119 (W.D. Tenn. 1977); *Schmidt v. Schubert,* 433 F.Supp. 1115 (E.D. Wisc. 1977).

B. THE ACT DOES NOT APPLY COMMON LAW IMMUNITIES TO FEE AWARDS AND DOES NOT REQUIRE A SHOWING OF "BAD FAITH" AS A CONDITION OF AWARDING FEES.

Petitioners Bergna and Brown argue that the absolute immunity of prosecutors from money damages (*Imbler v. Pachtman,* 424 U.S. 409 (1976)) likewise bars an award of attorneys' fees. Bergna Brief, at 26-31. Petitioners Zurcher, et al., apparently contend that police officers carrying out official orders also enjoy absolute immunity from fees. Zurcher Brief, at 36-38. Alternatively, it is argued that fee awards against police officers cannot be made where the defendants acted "in good faith" (*e.g.,* Brief of Americans for Effective Law Enforcement, Inc., at 9-13); this would extend to the Act a qualified immunity against fee awards *Cf. Pierson v. Ray,* 386 U.S. 547, 555-58 (1967). In short, Petitioners apparently contend that, in passing the Civil Rights Attorney's Fees Awards Act of 1976, Congress silently intended to embody in it all immunities applicable to money damages, thereby wholly exempting those, such as judges and prosecutors,

with absolute immunity, and limiting the availability of fee awards as to others, such as police officers (*Pierson v. Ray, supra*), school officials (*Wood v. Strickland,* 420 U.S. 308 (1975)), and executive officers (*Scheuer v. Rhodes,* 416 U.S. 232 (1974)), to cases in which the defendants have acted in bad faith.

Petitioners seek an interpretation of the Act which would render this legislation literally meaningless, and which is demonstrably incorrect. As they construe the Act, it could not be applied at all to those with absolute immunity; and, as for defendants with only qualified immunity, it would modify the pre-Act law not one whit, for even without specific legislation the courts had uniformly asserted the power to award attorneys' fees in "bad faith" cases. Petitioners' interpretation is wholly inconsistent with the legislative history and at odds with lower court authority in attorneys' fees cases decided both prior and subsequent to the enactment of the Civil Rights Attorney's Fees Awards Act of 1976.

1. The question of whether attorneys' fees may be awarded to the prevailing plaintiff in a Civil Rights Act suit against a defendant who is absolutely immune from liability for money damages or, as to others, without a finding of "bad faith", is solely one of legislative intent.[35] None of this Court's decisions

35. It is plain that the Eleventh Amendment poses no barrier to this award of attorneys' fees, and Petitioners do not contend otherwise. In the first place, its immunity extends only to actions against a State and not to suits against municipalities or counties. *See, e.g., Lincoln County v. Luning,* 133 U.S. 529 (1890); *Edelman v. Jordan,* 415 U.S. 651, 667 n.12 (1974); *Incarcerated Men of Allen County Jail v. Fair,* 507 F.2d 281, 287 (6th Cir. 1974). In this case, the defendants were all employees of either the County of Santa Clara or the City of Palo Alto. Moreover, this Court held in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976) that actions brought under civil rights laws enacted pursuant to the Congressional authority conferred by Section 5 of the Fourteenth Amendment may be maintained "which are constitutionally impermissible in other contexts." *Id.,* at 456. The Court specifically held that, in such circumstances, the Eleventh Amendment does not preclude an award for attorneys' fees. The Civil Rights Attorney's Fees Awards Act of 1976 was unquestionably founded upon Section 5 of the Fourteenth Amendment. *See, e.g.,* S. Rep., at 5; H.R. Rep., at 7 n.14. Every court which has considered the issue has

finding either an absolute or a qualified immunity against money damages has ever held that such immunity was constitutionally compelled or that Congress was without power to legislate a broader exposure. See *Tenney v. Brandhove,* 341 U.S. 367, 372 (1951); *Pierson v. Ray, supra; Wood v. Strickland, supra; Scheuer v. Rhodes, supra; O'Connor v. Donaldson,* 422 U.S. 563, 576-77 (1975); *Imbler v. Pachtman, supra.* Thus in *Pierson v. Ray, supra,* at 554, the Court found that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." As the Court recently said, "*Tenney* [*v. Brandhove, supra*] squarely presented the issue of whether the

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held that fee awards authorized by the Act against state officers are not barred by the Eleventh Amendment. *E.g., Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977); *Finney v. Hutto, supra* note 33; *Rainey v. Jackson State College,* 551 F.2d 672 (5th Cir. 1977); *Martinez Rodriguez v. Jimenez,* 551 F.2d 877 (1st Cir. 1977); *Wade v. Mississippi Co-op Extension Service,* 424 F.Supp. 1242 (N.D. Miss. 1976); *Gary W. v. State of Louisiana,* 429 F.Supp. 711 (E.D. La. 1977); *but cf. Skehan v. Board of Trustees of Bloomsburg State, supra,* at 667.

Petitioner Bergna argues that to the extent the Act imposes liability for attorneys' fees on prosecutors with absolute immunity against damages, Congress exceeded its power under Section 5 of the Fourteenth Amendment. Bergna Brief, at 33-35. Understandably, no case is cited to support that crabbed view of Congressional power to enforce the Fourteenth Amendment. *Fitzpatrick v. Bitzer, supra,* refutes that contention:

> "[P]rinciple[s] of state sovereignty . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate Legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."

427 U.S., at 456; see also *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Ex Parte Virginia,* 100 U.S. 339 (1880).

Reconstruction 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, supra,* at 417-18. Yet Petitioners advance their theories of immunity in disregard of the legislative history of the Act and without attempting to address the controlling question of Congress' intent.

2. Petitioners' interpretation of the Act, which would permit the award of attorneys' fees only in cases involving "bad faith" where a qualified immunity against money damages might also be overcome, reduces this remedial legislation to a codification of the status quo. The Act was responsive to this Court's decision in *Alyeska,* in which the Court acknowledged that, even in the absence of legislative direction,

> "a court may assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .' [citations] These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress." (421 U.S., at 258-59).

See also *Hall v. Cole,* 412 U.S. 1, 5 (1973); *F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974); *Runyon v. McCrary,* 427 U.S. 160, 182-84 (1976); *Sims v. Amos,* 340 F.Supp. 691, 694 (M.D. Ala.), *aff'd.,* 409 U.S. 942 (1972) (per curiam); 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[2]. Petitioners' interpretation of the Act *contracts* the law governing fee awards in regard to defendants with absolute immunity from money damages (by denying judicial power to award fees in bad faith cases), and treats the Act as no more than a codification of the *status quo* in regard to all others. That view could be sustained only by ignoring its obvious legislative purpose.

Not a word of the extensive legislative history of the Act supports the Petitioners' construction, which perhaps explains their

disinclination to address it.[36] To the contrary, the record documents Congress' intention to go well beyond the "bad faith" exception acknowledged in *Alyeska,*[37] and to authorize the award of fees to prevailing plaintiffs in the usual—not the exceptional—case. Thus the Senate Judiciary Committee said:

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by [the Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968)." (S. Rep., at 4)

The legislative intent that fees be awarded as to defendants who might be immune from an award of money damages, and even though "bad faith" had not been shown, was stated explicitly in the House Judiciary Committee's Report:

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36. The closest Petitioners come to facing up to the legislative history of the Act is on pp. 30-31 of the Bergna Brief, which quotes from the Senate Judiciary Committee Report to the effect that fees may be collected either from (1) the official; (2) from his agency's funds; or (3) "from the State or local government (whether or not the agency or government is a named party)." That Congress may have sought to impose direct liability for fees upon the governmental entity (even though it is not a party to the suit) hardly evidences a desire to exempt the named defendant.

Petitioners' failure to come to grips with the legislative scheme is evidenced by their additional argument that the governmental entity is exempt from a fee award as well. See Bergna Brief, at 31-33. This question is before the Court in *Hutto v. Finney,* No. 76-1660, *supra,* note 33. As the fee award in this case was rendered only against the named, individual defendants, and not against any governmental entity, that question is not presented here. It is, however, worth noting that the sum of Petitioners' various arguments is that Congress labored mightily to produce a mouse: an Act which, despite its unequivocal language, authorizes a fee award enforceable against no one, unless there is an individual defendant who has only qualified immunity and who is shown to have acted in bad faith.

37. Congress was, of course, well aware that fees could, under *Alyeska,* be awarded in "bad faith" cases. *See, e.g.,* S. Rep., at 5 n.7; H.R. Rep., at 2 n.1.

> "[W]hile damages are theoretically available [in Civil Rights Act cases], 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. [Citing *Wood, Scheuer,* and *Pierson*]. 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." (H. Rep. at 9).

And on the floor of the Senate, Senator Abourezk stated that one of the Act's purposes was to eliminate the necessity, created by *Alyeska,* of adjudicating the good faith of the defendants:

> "[The Act] will also result in a significant saving of judicial resources. At present, due to the Alyeska decision, a court must analyze a party's actions to determine bad faith in order to award attorneys' fees. This is a complex, time-consuming process often requiring an extensive evidentiary hearing. The enactment of this legislation will make such an evidentiary hearing unnecessary in the many civil rights cases presently pending in the Federal courts." (122 CONG.REC. S17052).

That Congress deliberately meant to authorize the award of fees in cases of this type could hardly be made plainer than by the Judiciary Committee's explicit and approving reference to decisions—*including this very case*—awarding fees without regard to the good or bad faith of the defendant:

> "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 nonpecunicary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express,* 488

> F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles,* 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education,* 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' *Davis, supra; Stanford Daily, supra,* at 684." (S. Rep., at 6).

3. As the foregoing quotation from the Senate Judiciary Committee Report indicates, Congress intended the Act to restore the pre-*Alyeska* rules and standards for awarding fees in Civil Rights Act cases which had evolved in the lower courts.[38] This prior law provides no support for the notion that immunity from damages extends to an award of attorney's fees.

It has long been the rule that public entities or employees may be taxed costs even though liability for damages may be barred.[39] Congress was aware of that rule (see S. Rep., at 5) and reflected its intent that the statutory immunity from damages

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38. Thus the Senate Judiciary Committee Report added: "This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the court's [*Alyeska*] decision." *Id.,* at 6; see also H.R. Rep., at 6-9.

39. *See, e.g., Fairmont Creamery Co. v. State of Minnesota,* 275 U.S. 70 (1927); *Sims v. Amos,* 340 F.Supp. 691 (M.D. Ala.), *aff'd.,* 409 U.S. 942 (1972) (per curiam); *Boston Chapter N.A.A.C.P., Inc. v. Beecher,* 504 F.2d 1017, 1028-29 (1st Cir. 1974), *cert. denied sub nom. Director of Civil Service v. Boston Chapter N.A.A.C.P., Inc.,* 421 U.S. 910 (1975); *Class v. Norton,* 505 F.2d 123, 126 (2d Cir. 1974); *Samuel v. University of Pittsburgh,* 538 F.2d 991, 999 (3d Cir. 1976); *Gates v. Collier,* 70 F.R.D. 341, 347-48 (N.D. Miss. 1976); *Welsch v. Likins,* 68 F.R.D. 589, 594-95 (D. Minn. 1975), *aff'd.,* 525 F.2d 987 (8th Cir. 1975) (per curiam).

not bar a fee award by providing in the Act that fees be treated "as part of the costs."

Further, Congress was of course aware that, prior to *Alyeska,* those courts which had awarded attorneys' fees under the "private attorney general" rationale had done so without pausing to inquire whether the defendants had acted in "bad faith".[40] Moreover, the Act was patterned after previous fee award statutes which the Court on two occasions held to authorize fee awards without regard to the defendants' good or bad faith. *Bradley v. Richmond School Board, supra; Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968). In *Bradley,* the District Court had awarded attorney's fees on, *inter alia,* the ground of the school board's bad faith. See 53 F.R.D. 28, 39-40 (E.D. Va. 1971). The Court of Appeals reversed, finding that the board had not acted in bad faith or been "unreasonably obdurate." See 472 F.2d 318, 320-27 (4th Cir. 1972). This Court reversed the Court of Appeals, reinstating the District Court's fee award, on the basis of the recently enacted legislation authorizing fee awards in Title VI cases. In so doing, however, the Court did *not* discuss the "bad faith" issue, let alone disapprove the Court of Appeals' determination that the school board had not been in bad faith; it simply found that Congress had authorized fee awards, and that such

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40. *See, e.g., Brandenberger v. Thompson,* 494 F.2d 885, 888 (9th Cir. 1974); *Souza v. Travisono,* 512 F.2d 1137, 1138-39 (1st Cir. 1975), *vacated and remanded for further consideration in light of Alyeska,* 423 U.S. 809 (1976). Indeed, of the thirteen decisions cited by this Court in *Alyeska* as exemplars of those cases in which the "private attorney general" rationale had been applied (see 421 U.S., at 270 n.46), in all but three the question of the defendant's bad faith was treated as irrelevant to the question of awarding fees, and in the other three cases (*Fairley v. Patterson,* 493 F.2d 598, 606 (5th Cir. 1974); *Lee v. Southern Home Sites Corp.,* 444 F.2d 143, 144 (5th Cir. 1971); *Cornist v. Richland Parish School Board,* 495 F.2d 189, 192 (5th Cir. 1974)), the bad faith of the defendants was viewed as a possible alternative basis for the fee award.

authority applied to pending cases.[41] Similarly, in *Newman,* the Court of Appeals had allowed fees only to the extent that the defendants had proceeded in bad faith. The Court reversed, holding that the applicable fee statute was

> "enacted . . . not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals . . . to seek judicial relief. . . .
>
> It follows that one who succeeds in obtaining an injunction . . . should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (390 U.S., at 402).

Thus in both cases a finding of bad faith was found by this Court to be unnecessary for the award of attorneys' fees. Both *Bradley* and *Newman* were referred to throughout the legislative history of the Act, which is plainly modeled after the fee award provisions dealt with in those cases. *See e.g.,* S. Rep., at 3, 4, 5; H.R. Rep., at 2, 4 n.6, 6, 8, 9.

4. Petitioners cite no decision of any court in support of their interpretation of the Act. We know of none. The new Act has been uniformly applied to authorize fees against defendants sued in their official capacity without regard to their good faith or bad faith. *See, e.g., Alicia Rosado v. Garcia Santiago,* 562 F.2d 114 (1st Cir. 1977); *Brown v. Culpepper,* 559 F.2d 274 (5th Cir. 1977); *Finney v. Hutto, supra,* note 32; *Martinez Rodriguez v. Jimenez,* 551 F.2d 877 (1st Cir. 1977) (explicitly holding that claim of bad faith need not be considered in order to award fees); *Rainey v. Jackson State College,* 551 F.2d 672 (5th Cir. 1977); *Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977); *Wade v. Mississippi Co-op Extension Service,* 424 F.Supp. 1242 (N.D. Miss.

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41. The defendants in *Bradley* had, of course, an immunity against money damages absent a finding of bad faith. See *Wood v. Strickland, supra.*

1976);[42] *McCormick v. Attala City Board of Education,* 424 F.Supp. 1382 (N.D. Miss. 1976); *Gary W. v. State of Louisiana,* 429 F.Supp. 711 (E.D. La. 1977); *Wilson v. Chancellor,* 425 F.Supp. 1227 (D. Ore. 1977); *Georgia Association of Educators v. Nix,* ..... F.Supp. ..... No. C-74-1870 A, decided Jan. 26, 1977 (N.D. Ga.); *Commonwealth of Pennsylvania v. O'Neill,* 431 F.Supp. 700 (E.D. Pa. 1977); but *cf. Skehan v. Board of Trustees of Bloomsburg State,* 436 F.Supp. 657, 665-66 (M.D. Pa. 1977).

CONCLUSION

The judgment should be affirmed.

DATED: December 16, 1977.

Respectfully,

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42. In *Wade,* the District Court expressly found that certain individual defendants had not been in bad faith. It held that they could be liable for fees in their *official* capacities, but in light of their good faith could not be liable for fees in their *individual* capacities. As the District Court understood the effect of that distinction, the fees would be payable out of public funds but not out of the defendants' own resources. See also *Universal Amusement Co. v. Vance,* 559 F.2d 1286, 1300-01 (5th Cir. 1977). This distinction is not significant for purposes of the present case because the defendants were all sued in their official capacity and, under California law (see p. 58, *supra*), the fee award will be paid by public entities.