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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, ETC., ET AL., PETITIONERS

v.

THE STANFORD DAILY, ET AL.

No. 76-1600

LOUIS P. BERGNA, DISTRICT ATTORNEY, AND
CRAIG BROWN, PETITIONERS

v.

THE STANFORD DAILY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's request, received on December 15, 1977.

QUESTIONS PRESENTED

1. Whether a search of the office of a party not suspected of a crime, in particular, a search of the office

of a student newspaper, pursuant to a warrant supported by probable cause, is unreasonable under the Fourth Amendment, unless before conducting the search, law enforcement officers have attempted by subpoena duces tecum to obtain the materials they seek or have demonstrated to a magistrate that a subpoena would be impractical.

2. Whether the Civil Rights Attorney's Fees Award Act authorizes the award of fees in this case, although the services compensated were performed before the Act became law.

STATEMENT

1. Shortly before 6 p.m. on April 9, 1971, officers of the Palo Alto Police Department went to the Stanford University Hospital in response to a request from the hospital director that the police remove a group of demonstrators who had occupied the administrative offices of the hospital since the previous afternoon (A. 170–171, 176–177, 180–182). When the police arrived, they found that the demonstrators had chained and barricaded the glass doors at both ends of the hall adjacent to the administrative office area (A. 172). After a series of unsuccessful attempts to persuade the demonstrators to leave peacefully, police officers took forcible measures to gain entry through the doors at the west end of the corridor (A. 170–171, 177–178, 180, 182). A number of reporters, photographers and bystanders gathered at that end of the hall to watch the police evacuation efforts (Pet. App.

12).[1] As the police broke through the barricade blocking the west doorway, a number of demonstrators, armed with sticks and clubs, rushed out of the doors at the east end of the corridor and attacked a contingent of nine police officers positioned there. All nine officers were injured in the ensuing struggle, some seriously (A. 34, 104, 172–175, 179; Pet. App. 11). The police were able to identify only two of their assailants (A. 175, 179; Pet. App. 12).

On Sunday, April 11, 1971, respondent, *The Stanford Daily* (*"Daily"*), a newspaper published by students at Stanford University (A. 16), published a special edition containing articles and photographs devoted to the hospital protest and the violent clash between demonstrators and police (A. 20, 34–35, 100–116, 152). The published photographs carried the byline of a member of the *Daily's* staff (A. 35), and indicated that the *Daily's* photographer had been stationed near the scene of the assault upon the officers at the east end of the hospital hallway (A. 152–153; Pet. App. 12).

On April 12, 1971, the Santa Clara County District Attorney's office secured a warrant authorizing an immediate search of the *Daily's* offices for negatives, film, and pictures showing the events and occurrences

[1] The appendices to the petitions in these consolidated cases are identical, even as to pagination. Where it is necessary to refer to the petitions separately, the petition in No. 76–1484 will be cited as "Zurcher Pet." and the petition in No. 76–1600 as "Bergna Pet."

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at Stanford University Hospital on the evening of April 9, 1971 (A. 31–32; Pet. App. 12). The police officer's affidavit presented to the issuing magistrate in support of the warrant contained no evidence or allegation that any member of the *Daily* staff was involved in the unlawful activities at the hospital (A. 33–35; Pet. App. 12).

At approximately 5:45 p.m. the same day, the search warrant was executed by four members of the Palo Alto Police Department (A. 72–75, 130–132, 136–141, 155–169; Pet. App. 12–13). According to the police officers, the search lasted about 15 minutes (A. 158, 162, 165, 169). The police examined the *Daily's* photograph laboratory, file cabinets, desks, and wastepaper baskets. Locked drawers and rooms were left undisturbed (A. 141, 157, 165). Petitioners and respondents disagree over whether the police officers read or scanned any of the written materials located in the *Daily's* offices at the time of the search (A. 75, 132, 140–141, 157, 164–165, 168). Although the officers were apparently in a position to see reporters' notes containing information given in confidence, the police were not advised by *Daily* staff members present during the search that any of the materials examined were confidential in nature (A. 88, 132, 158, 161, 165, 168–169). The search apparently uncovered no useful photographs of the April 9 altercation between police and demonstrators, and the officers departed without seizing any property (A. 27, 43, 53).

2. On May 13, 1971, respondents commenced a civil action in the United States District Court for the

Northern District of California seeking declaratory and injunctive relief under 42 U.S.C. 1983. Respondents alleged that the search of the *Daily's* offices had deprived them, under color of state law, of rights secured by the First, Fourth and Fourteenth Amendments to the United States Constitution (A. 15–35). The district court granted respondents' motion for a declaratory judgment that the search of the *Daily's* offices was illegal; the court denied the request for injunctive relief (Pet. App. C; 353 F. Supp. 124).

The district court held that, before obtaining a search warrant for materials in the possession of a so-called "third-party," *i.e.*, a party not suspected of crime, law enforcement officials are required under the Fourth Amendment to demonstrate to the issuing magistrate not only probable cause to believe that the third party has in his possession evidence of a crime, but also probable cause to believe that a subpoena duces tecum would be an impractical means to obtain that evidence (Pet. App. 26). The court further stated that even where a subpoena is issued and the requisite materials are not produced, the mere failure to comply would not by itself constitute grounds sufficient to support issuance of a search warrant (Pet. App. 27).

Noting that destruction of evidence is a crime under California law, the court suggested that a restraining order would be the appropriate procedural device to use in the event police presented evidence that materials needed for a criminal investigation were in danger of destruction or removal from the juris-

diction (Pet. App. 27). The court declared that a subpoena should be found impractical and a search warrant issued for materials in the possession of a nonsuspect third party "[o]nly if it appears that the materials will be destroyed or removed from the jurisdiction despite the restraining order, or that there simply is not time to obtain a suitable order" (Pet. App. 28).

Finally, the court observed that in assessing the impracticality *vel non* of a subpoena, the magistrate "should consider * * * whether First Amendment interests are involved" (Pet. App. 28). A search of a newspaper office, the court said, "presents an overwhelming threat to the press's ability to gather and disseminate the news" (Pet. App. 32). In addition, the court opined, necessary information may be obtained from the press by means less drastic than a search. Therefore, the court concluded, "[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" (Pet. App. 33). Since petitioners had not alleged that any member of the *Daily* staff was suspected of a crime, the court explicitly refused to consider whether the same rule should apply in such a situation (Pet. App. 33 n. 15). On the basis of the undisputed facts, the court ruled that the search of the *Daily's* offices was unlawful (Pet. App. 33, 35).[2]

[2] The court noted that a Santa Clara County grand jury had convened on the evening of April 12, 1971, soon after the search

On August 10, 1973, the district court concluded that an award of attorney's fees to respondents was appropriate to encourage vindication of important constitutional rights (Pet. App. 49–50). The court later determined that $47,500 would constitute reasonable compensation for the services performed (Pet. App. 59–71).

The court of appeals affirmed, adopting the opinion of the district court on the Fourth Amendment issue (Pet. App. A; 550 F. 2d 464). With respect to the award of attorney's fees, the court of appeals noted that this Court's decision in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, which held that attorney's fees could not ordinarily be awarded by federal courts absent congressional authorization, invalidated the district court's nonstatutory basis for its award. However, the court of appeals held that

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warrant was executed. The court was plainly under the impression that local authorities could have issued the *Daily* a subpoena returnable before that grand jury (Pet. App. 13–14). In an affidavit submitted to the district court, however, petitioners sought to demonstrate that a subpoena would have been futile under the circumstances of this case. The affidavit alleged that in October 1969 photographs subpoenaed from the *Daily* had been reported lost or stolen, and that sometime prior to April 1971 the *Daily* had announced in an editorial that it would not retain any potentially incriminating photographic materials (A. 150–152; see A. 117–118 (*Daily* editorial, February 10, 1970)). The court remained unpersuaded, remarking first that the affidavit did not establish probable cause to believe that a subpoena was impractical, and second that the evidence allegedly establishing such probable cause had not been properly presented to the magistrate in affidavits supporting issuance of the search warrant (Pet. App. 33 n. 16).

the intervening passage of the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. 94–559, 90 Stat. 2641, 42 U.S.C. (1976 ed.) 1988, which authorized federal courts to award fees in cases filed under 42 U.S.C. 1983, "revalidated" the district court's judgment awarding fees (Pet. App. 6).

SUMMARY OF ARGUMENT

1. This case involves a challenge to the legality of a search of a student newspaper, pursuant to a warrant issued upon a showing of probable cause. The courts below have awarded respondents a judgment declaring the search to have been illegal because the newspaper was a "third-party" not suspected of complicity in the offenses under investigation, and a warrant therefore should not have been issued in the absence of a showing that the use of a subpoena to acquire the evidence was "impractical." While we recognize that recourse to a subpoena rather than a search can in some cases avoid possibly unnecessary intrusion into personal privacy or risk to interests protected by the First Amendment, we cannot agree that the concerns justify the imposition of a broad procedural barrier to issuance of search warrants such as that adopted by the decision below. Rather, such considerations, which necessarily vary materially from case to case, should be taken into account by the magistrate in issuing the warrant and framing its terms and conditions.

a. Nothing in the language, development, or previous interpretation of the Fourth Amendment indicates that the impracticality of a subpoena must be estab-

lished before a valid warrant may issue authorizing a search of "third-party" premises. The primary evil feared by the Framers of the Fourth Amendment was an unfettered search pursuant to general warrant. Thus motivated, the Framers wrote into the Amendment substantial restrictions on warrants and their issuance. See, *e.g., Stanford* v. *Texas,* 379 U.S. 476, 481–485. This Court has recognized that those restrictions afford significant protections against unreasonable warranted searches. See, *e.g., United States* v. *Chadwick,* No. 75–1721, decided June 21, 1977, slip op. 7–8; *United States* v. *United States District Court,* 407 U.S. 297, 316–317. Neither the courts below nor respondents have been able to adduce any precedent supporting adoption of a "subpoena first" rule as a supplement to the traditional Warrant Clause requirements of a probable cause showing to a neutral magistrate and a specific description of the place to be searched and the things to be seized.

b. Apart from its lack of historical foundation, the result reached below could pose severe problems in implementation. The district court's opinion does not explain what it means by the terms "non-suspect" and "third-party." Nor does the ruling indicate what sort of evidence would suffice to establish a subpoena's impracticality. If the terms "non-suspect" and "third-party" are defined broadly or if the additional showing imposes a heavy burden of proof, legitimate law enforcement needs will suffer. To the extent that the courts below would require the use of subpoenas for obtaining materials from parties possibly engaged in

criminal conduct or potentially sympathetic with suspects, a serious and unjustifiable risk of loss of evidence would be created.

The lower courts' ruling is also deficient in its failure to recognize the practical difficulties involved in mandatory increased reliance upon subpoenas. In many federal jurisdictions, grand juries meet only infrequently. Initial resort to a subpoena will often mean significant delay in a criminal investigation. If compliance is postponed until after an unsuccessful judicial challenge to the subpoena's validity, further delay will be inevitable.

Thus, the costs associated with adoption of the rule propounded by the courts below could be high. Yet the corresponding benefits appear minimal. Prosecutors and police officers seldom, if ever, proceed by search warrant when they are reasonably confident that the materials they seek may be acquired through informal request or by subpoena. When executive officials do apply for a warrant, the Fourth Amendment's provisions protect against arbitrary invasion of a citizen's privacy. In addition, the issuing magistrate may in individual cases impose special restrictions on the manner of execution of a search, thereby limiting its intrusiveness to that justified by legitimate law enforcement concerns. The position summarized here is consistent with this Court's rejection of *per se* rules in the Fourth Amendment context in favor of a case-by-case approach better suited to a balancing of the conflicting interests implicated in

officially authorized searches and seizures. See *South Dakota* v. *Opperman,* 428 U.S. 364, 373.

c. The fact that the search here in dispute occurred at the offices of a newspaper does not materially affect the argument outlined above. Doubtless, serious First Amendment questions are raised by the search of a newspaper office or any comparable media facility. This Court has acknowledged on a variety of occasions that the protections afforded by the Fourth Amendment must be applied with special stringency in situations where First Amendment values may be at stake. See, *e.g., Roaden* v. *Kentucky,* 413 U.S. 496; *Marcus* v. *Search Warrant,* 367 U.S. 717. The careful weighing of interests that the Constitution requires is best accomplished, however, through a neutral magistrate's evaluation of the facts presented in particular warrant applications, not through adoption of a new procedural requirement, indiscriminately applicable whenever First Amendment interests are arguably involved.

The federal government's contention that the "subpoena first" rule fashioned by the courts below is not constitutionally compelled does not reflect a policy judgment that searches of press offices are desirable. On the contrary, no case has been found in which such a search has been conducted under federal auspices. Furthermore, Justice Department guidelines limiting the availability of newsmen's subpoenas evidence a continuing concern that First Amendment liberties be safeguarded. See 28 C.F.R.

50.10. In sum, the Fourth Amendment contemplates protection of freedom of the press, in the search and seizure context, through the guarantees of the Warrant Clause; if additional protections are deemed necessary or wise, they must be instituted by the political branches.

2. If this Court should affirm the decision below on the legality of the search, the award of attorney's fees should also be affirmed. The district court awarded those fees pursuant to a "private attorney general" rationale, now discredited in the wake of *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240. As the court of appeals correctly held, however, the district court's award of attorney's fees was "revalidated" by Congress' enactment of the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, 42 U.S.C. (1976 ed.) 1988, during the pendency of this suit in the court of appeals.

In *Bradley* v. *Richmond School Board*, 416 U.S. 696, this Court affirmed an award of attorney's fees for services performed before the statute authorizing the award was enacted. In that case, the statute's legislative history was ambiguous as to whether the new law's provisions were to be applied to pending cases. Here, by contrast, the congressional intent is clear that the courts were to have authority to award attorney's fees in pending cases. See S. Rep. No. 94–1011, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. No. 94–1558, 95th Cong., 2d Sess. 4 n. 6 (1976).

Moreover, the award of attorney's fees in this case works no injustice. The City of Palo Alto and the County of Santa Clara will be responsible respectively for any judgments against petitioner police officers and district attorneys. As in *Bradley,* the enactment of the statutory authorization of attorney's fees awards did not affect any unconditional right of a public entity to dispense funds as it chose, and did not have any impact on the substantive law of the case. Finally, the award of fees here does not violate any immunity that petitioners enjoy from damage actions. The legislative history of the 1976 statute leaves no uncertainty on this score. See S. Rep. No. 94–1011, *supra,* at 5; H.R. Rep. No. 94–1558, *supra,* at 7.

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT REQUIRE A SHOWING THAT A SUBPOENA IS IMPRACTICAL BEFORE A WARRANT MAY ISSUE TO SEARCH PREMISES OCCUPIED BY A NONSUSPECT THIRD PARTY

Petitioners challenge the following rule, formulated by the district court and endorsed by the court of appeals: "law 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" (Pet. App. 26). This broad holding constitutes a significant and ill-conceived departure from established Fourth Amendment principles. Neither the language of the Amendment, nor the history of its drafting and adoption,

nor subsequent judicial interpretation of its provisions supports the imposition of this additional prerequisite for the issuance of a valid search warrant. Moreover, the substantial practical difficulties that would attend the administration of such a requirement counsel against its acceptance by this Court.

A. THE RULING BELOW CONFLICTS WITH TRADITIONAL INTERPRETATIONS OF THE FOURTH AMENDMENT

The Fourth Amendment declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment thus places important restrictions on the issuance of search warrants. A neutral magistrate must determine, on the basis of sworn allegations, whether a sufficient showing has been made to justify the invasion of privacy that a search or seizure entails. The place to be searched and the persons or things to be seized must be specifically described in the warrant, in order to protect against unfettered police inspection of a person's home, office, or belongings. *Marron* v. *United States,* 275 U.S. 192, 196. By the same token, the magistrate's participation in the warrant process provides an opportunity for the imposition of salutary limits on the manner and extent of an authorized search. Finally, the warrant itself assures one whose property is subjected to search or

seizure that the executing officer is operating under lawful authority. *Camara* v. *Municipal Court,* 387 U.S. 523, 532. This Court has recognized repeatedly that these guarantees do afford meaningful safeguards against overreaching conduct by law enforcement officers. See, *e.g., United States* v. *Chadwick,* No. 75–1721, decided June 21, 1977, slip op. 7–8; *United States* v. *United States District Court,* 407 U.S. 297, 316–317; *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (plurality opinion); *Johnson* v. *United States,* 333 U.S. 10, 14; *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 356–357.

Nowhere in the Fourth Amendment, however, is it stated or implied that a sworn demonstration of the impracticality of a subpoena is a precondition for the issuance of a valid search warrant. This is not surprising in light of the history of the constitutional provision. That history, frequently canvassed in the opinions of the Court, reveals that "[t]he Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies." *Stone* v. *Powell,* 428 U.S. 465, 482. See also *United States* v. *Chadwick, supra,* slip op. 6, and cases there cited. The principal concern motivating the Framers of the Amendment was a desire to narrow and particularize the permissible scope of search warrants, in order "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte,* 428 U.S.

543, 554. No attempt was made to rank, according to the degree of their intrusiveness, the various procedural devices that police might employ in their efforts to acquire information relevant to the investigation of a crime. *A fortiori,* the Framers imposed no requirement that law enforcement officers limit themselves to the least intrusive means by which necessary information might conceivably be obtained.[3] Rather, the Framers addressed themselves solely to searches and seizures, and struck a balance whereby "when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue." *Fisher* v. *United States,* 425 U.S. 391, 400.

A study of the origins of the Fourth Amendment discloses no intention to create separate and distinct categories of persons to whom varying measures of constitutional protection would apply, and the lower courts' differentiatation in this case between suspects and nonsuspects finds no support in the historical development of search and seizure law. One respected commentator has stated without qualification that "a warrant may issue to search the premises of anyone, without any showing that the occupant is guilty of any offense whatever." T. Taylor, *Two Studies in Constitutional Interpretation* 48–49 (1969). Similarly, this

[3] See *United States* v. *Martinez-Fuerte, supra,* 428 U.S. at 557 n. 12 ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers").

Court has said several times that the Fourth Amendment was designed to protect everyone, "both the innocent and the guilty." *Trupiano* v. *United States,* 334 U.S. 699, 709. See also *Wyman* v. *James,* 400 U.S. 309, 317; *Camara* v. *Municipal Court, supra,* 387 U.S. at 530; *McDonald* v. *United States,* 335 U.S. 451, 453; *Go-Bart Importing Co.* v. *United States, supra,* 282 U.S. at 356. On all these occasions, whether in a civil or criminal context, the Court has not advanced the slightest suggestion that the Fourth Amendment warrant requirements should be administered differently for suspects and non-suspects.

In the only recent judicial decision other than the instant case to consider the matter directly, the Sixth Circuit specifically rejected the argument that the Fourth Amendment rights of innocent third parties are violated when the government fails to utilize a subpoena duces tecum or establish its impracticality before applying for a search warrant. In *United States* v. *Manufacturers National Bank of Detroit,* 536 F. 2d 699 (C.A. 6), certiorari denied *sub nom. Wingate* v. *United States,* 429 U.S. 1039, agents of the Federal Bureau of Investigation obtained a warrant to search a bank safety deposit box registered in the names of the wife and daughter of the man the agents suspected of heading a large illegal gambling operation. After the warrant had been executed and the agents had discovered more than $500,000 in currency, the lessees of the safety deposit box moved for return of the seized property. In affirming the district court's denial of the motion, the court of appeals held

that the warrant was supported by probable cause and that no Fourth Amendment violation had occurred. Expressly disagreeing with the district court's decision in this case, the court concluded (536 F. 2d at 703):

> Once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime. The necessity that there be findings of probable cause as to two factors—the commission of a crime and the location of evidence—affords protection from unreasonable searches and seizures, which are the only ones forbidden by the Fourth Amendment.[4]

Respondents cite four state cases, none more recent than 1939, in support of their contention that the impracticality of a subpoena must be established before a third party search warrant may properly issue. As the opinion below reveals, these cases do not stand for the proposition asserted by respondents. In *Owens* v. *Way*, 141 Ga. 796, 82 S.E. 132 (1914), the police officers sought to justify a warrantless search of a third party's premises and seizure of his safe by arguing that the safe contained evidence that could be used to convict the third party's nephew, whom the police had arrested pursuant to a valid warrant. The Georgia

[4] See also *People ex rel. Carey* v. *Covelli*, 61 Ill. 2d 394, 336 N.E. 2d 759 (upholding validity of warrant to search belongings of deceased third party).

Supreme Court simply held that the officers' authority under the arrest warrant did not extend so far as to permit seizure of third party property. *Newberry* v. *Carpenter*, 107 Mich. 567, 65 N.W. 530 (1895), involved a court order authorizing a local procedure to seize the remnants of two boilers that had exploded, destroying the printing plant in which they were located and causing death or injury to numerous persons. Not only was the court order issued on the basis of unsworn allegations, but also the prosecutor's actions did not fall within one of the several categories of permissible seizures explicitly sanctioned by state statute. Hence, in neither case was the search and seizure invalidated by virtue of the courts conclusion that a constitutional provision governing searches should be interpreted to differentiate between suspects and nonsuspects. The other two cases cited by respondents, *People* v. *Carver*, 172 Misc. 820, 16 N.Y.S. 2d 268 (County Ct. 1939), and *Commodity Manufacturing Co., Inc.* v. *Moore*, 198 N.Y.S. 45 (Sup. Ct. 1923), are also not in point. The seizures in those cases failed to survive judicial scrutiny either because they were not authorized under state statute or because they involved "mere evidence," as opposed to fruits or instrumentalities, of crime. This latter dubious Fourth Amendment distinction was eventually abandoned by this Court in *Warden* v. *Hayden*, 387 U.S. 294.[5]

[5] Respondents also cite (Br. 46) several "due process" cases in which this Court has held some type of prior hearing must be

In short, existing Fourth Amendment jurisprudence amply demonstrates that the constitutional standard for the issuance of a search warrant is met when the magistrate is furnished with probable cause to believe that a crime has been committed and that evidence of that crime will be uncovered in a particular location. The protections of the Amendment do not vary with the identity of the party whose premises are to be searched or with that party's status as a suspect or nonsuspect.[6] Indeed a warrant may validly issue even where the identity of the owner or occupant of the premises is unknown. See, *e.g., United States* v. *Besase,* 521 F. 2d 1306, 1308 (C.A. 6); *Hanger* v. *United States,* 398 F. 2d 91, 99 (C.A. 8), certiorari de-

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afforded a citizen before he may be deprived of his property by the government. These cases are plainly inapposite, however, not only because they did not involve the lawfulness of police conduct during a criminal investigation but also because, unlike the procedures there under attack, the issuance of a search warrant *does* require that a substantial prior showing be made before a neutral magistrate.

[6] The courts below, relying on *Bacon* v. *United States*, 449 F. 2d 933 (C.A. 9), have attempted to draw an analogy between an arrest of a material witness and a search of the premises of a nonsuspect third party. The comparison is inapposite for two reasons. First, it is doubtful whether the rules regarding the arrest of material witnesses are constitutionally compelled. See Rule 46(b), Fed. R. Crim. P. Second, an arrest and a search are notably disparate in their respective impacts on the individual. Predictably, therefore, the criteria governing arrests and searches have never been equated in constitutional law. See Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 Stan. L. Rev. 957, 995–996 and nn. 222–224 (1976).

nied, 393 U.S. 1119. This result is both expected and correct, because, as one prominent commentator has explained, "[a] search warrant does not run against an individual, but to things in places" T. Taylor, *supra,* at p. 60 (footnote omitted). See also *United States* v. *Kahn,* 415 U.S. 143, 155 n. 15.

B. THE DECISION BELOW OVERLOOKS SIGNIFICANT DIFFICULTIES AND COSTS ASSOCIATED WITH ITS "THIRD-PARTY" SUBPOENA RULE

The statement of the broad rule adopted by the decision below is deceptively simple, but the rule masks a myriad of problems that would inevitably arise in the course of its application and that did not receive adequate consideration in the opinion. Because of these problems, adoption of the lower courts' innovation in Fourth Amendment law would be unwise, wholly apart from the lack of textual or precedential support for the rule propounded by the decision below.

In conducting a pragmatic inquiry into the desirability of a rule requiring an antecedent magisterial determination of the impracticality of a subpoena as a precondition to the issuance of a warrant to search premises belonging to a nonsuspect, it is necessary to balance the frequency and severity of the evils against which such a procedure would guard with the practical costs that the procedure would impose. We believe that the evil, while perhaps significant in occasional specific cases, is not in fact prevalent—a conclusion supported to some extent by the striking pau-

city of reported cases challenging the propriety of warranted, probable cause searches of "third-party" premises.

It is, moreover, in the nature of things that unnecessary or unjustifiable searches of truly disinterested third parties are rare. We canvassed a number of federal prosecutors' offices in connection with the preparation of this brief and were consistently told that there is a strong preference for proceeding by subpoena or, better yet, by informal request rather than by search whenever it appears feasible to do so (which is almost always in the case of indisputably disinterested third parties such as banks or telephone companies). This preference is predictable and understandable in light of the fact that the warrant mechanism is relatively cumbersome and demanding and that searches perceived as unnecessary by the citizenry can be destructive of police-community relations—considerations that make law enforcement officials unlikely to seek a warrant in the first instance unless they have some reason to fear that less drastic measures will prove inadequate. Respondents themselves cite (Br. 44) cases that exemplify prosecutors' tendency to subpoena files and records rather than attempting to obtain such materials through a judicially authorized search. Since the prosecutor's own interest in the efficient gathering of evidence militates in favor of reliance upon the voluntary cooperation of neutral third parties, it is reasonable to commit the original determination whether to proceed by subpoena or

search warrant to the discretion of those executive officials charged with law enforcement responsibilities.

While the evils perceived as justifying the decision below are thus not ubiquitous, the practical difficulties surrounding its implementation promise to be substantial. Foremost among these is the classification of particular persons as suspects or nonsuspects. We are particularly concerned in this connection with the implication in the opinion below—arising from its use of the analogy to arrests (Pet. App. 25–26)—that it may intend to encompass within the otherwise undefined concept of "third-parties" any person as to whom there is no probable cause to believe he or she is criminally implicated in the offense under investigation. If any new restriction is to be imposed upon the procedures antecedent to third party searches, it is imperative that the "third-party" concept be strictly limited to persons or organizations indisputably free of any culpable connection with the offense or relationship to possible offenders.

The need of police officers to inspect or seize items of private property arises in a vast variety of situations. At times, prosecutors and police may be certain that a given crime has been committed but may not yet have probable cause for an arrest or perhaps may not even have identified any suspects. In such circumstances, police would be hard-pressed to demonstrate that a subpoena is an impractical method of obtaining materials from any particular party. At the same time, the use of subpoenas that the courts

below would require might well result in premature notice to a guilty individual. Police may wish to inspect the premises or property of so-called third parties, not themselves suspected of any complicity in the unlawful conduct under investigation, but known to be related to, or friendly with, the likely perpetrator. Similarly, police may need to search areas belonging to or occupied by presumably innocent third parties, but to which a criminal suspect has or has had ready access. See, *e.g., Simmons* v. *United States,* 390 U.S. 377; *United States* v. *Jeffers,* 342 U.S. 48; *United States* v. *Miguel,* 340 F. 2d 812, 814 n. 2 (C.A. 2), certiorari denied, 382 U.S. 859; *United States* v. *Fernandez,* 430 F. Supp. 794 (N.D. Cal.). Where, as is often the case, the probable reaction of such third parties to a subpoena or police inquiry is unknown and unknowable, the rule adopted by the courts below would create an unjustifiable risk that valuable evidence would be lost.

The "subpoena first" rule will also require the frequent inclusion of additional material in search warrant applications. It will presumably be necessary in each instance to include, in addition to the constitutionally required specific identification of the place to be searched and things to be seized, some statement indicating the identity of the owners or occupants of the place to be searched and relating what is known of their connection to the crime and to any suspected perpetrators of the crime—information which, as indicated above, may not always be readily available

and which has not heretofore been thought constitutionally required (see *United States* v. *Kahn, supra,* 415 U.S. at 155, n. 15). And where premises of someone arguably a "third-party" are to be searched, prosecutors will confront the difficult task of presenting reliable information on the speculative question of the practicality of a subpoena. The opinion below fails to indicate what sort of evidence would suffice to satisfy this requirement. While such omissions from the analysis in the opinion make it impossible to predict how heavy an additional burden will be imposed on law enforcement officers by the "subpoena first" rule, the concerns expressed above are ones that must be reckoned with.

Apart from any burdens that may be imposed on the warrant procedure itself, the analysis of the opinion below is deficient in failing to consider the difficulties that may be associated with reliance upon subpoenas in many circumstances. As petitioners have indicated (Bergna Pet. 6 n. 4, 8 n. 6; Bergna Br. 19–20; A. 153–154), the limited functions and availability of grand juries in California and other states [7] would severely hamper prosecutorial efforts to use

[7] Since the Fifth Amendment requirement of a grand jury indictment for "capital, or otherwise infamous crime[s]" (see *Green* v. *United States*, 356 U.S. 165, 183; see also Rule 7(a), Fed. R. Crim. P.) does not apply to the states under the Fourteenth Amendment, *Hurtado* v. *California*, 110 U.S. 516, cited with approval in *Alexander* v. *Louisiana*, 405 U.S. 625, 633, the degree of reliance on, and thus availability of, grand juries varies widely from state to state. See *Branzburg* v. *Hayes*, 408 U.S. 665, 687–688 and nn. 24–25.

subpoenas to the extent that the lower courts' decision seems to envision. Likewise in the federal system, the infrequent meetings of grand juries in a significant number of sparsely populated or geographically large districts—in some districts federal grand juries meet as infrequently as once every 60 days—make routine resort to subpoenas highly problematical. Prosecutors might often be required to issue subpoenas returnable before a grand jury that will not convene for several days or even weeks. The delay inevitably associated with this process is incompatible with the imperatives of effective criminal investigation and the societal interest in prompt resolution of criminal cases reflected in the Speedy Trial Clause of the Sixth Amendment.

We do not mean by the foregoing to suggest that law enforcement authorities should be in any way discouraged from using subpoenas where feasible, or that there are no valuable interests that are served when a subpoena is used rather than a search, or even that there may not be occasions on which it would be appropriate to refuse issuance of a search warrant because it is unreasonable to proceed by those means rather than by subpoena or request for voluntary cooperation. One undeniable benefit of a subpoena, whenever prompt compliance is forthcoming, is that it avoids the necessity for police rummaging that may disclose private materials not subject to inspection or seizure under the terms of the warrant. (In many cases a police request for voluntary production at the time the warrant is served could accom-

plish the same objective, but that will not always be so; here, for example, it appears that the photographs might not have been producible because they did not exist at the time of the search.)

Another cited benefit of the use of the subpoena is that it affords the third party an opportunity to litigate his obligation to supply the requested materials. We recognize that this may be valuable in cases where the subpoenaed party can make a convincing showing that he does not possess the requested materials or that they are subject to some overriding privilege, such as the attorney-client privilege, that shields them from production even though they may contain evidence of a crime.[8] But the opportunity to litigate prior to seizure or disclosure of the materials is not an unmixed blessing. Litigation is a time-consuming process that is incompatible with the need for expedition in the conduct of criminal investigations. Especially insofar as a party may have objections to production or disclosure rooted in Fourth

[8] Respondents and the courts below apparently assume that if a subpoena for certain materials is quashed, those materials could not then be obtained by means of a legitimate warranted search. This is not necessarily so. For example, in recognition of the colorable Fifth Amendment self-incrimination objections which may be advanced against the active cooperation necessarily involved in an affirmative response to a subpoena, this Court has approved the use of search warrants for the acquisition of certain materials the production of which might not be subject to compulsion by subpoena. See *Andresen* v. *Maryland*, 427 U.S. 463; *Boyd* v. *United States*, 116 U.S. 616. See also *Fisher* v. *United States*, *supra*.

Amendment considerations, the general liberality with which grand jury subpoenas may be procured and enforced, and the very limited nature of Fourth Amendment objections to them that our legal system countenances, suggest that such objections will ordinarily be found to lack merit. See 86 Harv. L. Rev. 1317, 1324–1326 (1973).[9]

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[9] Thus, although subpoenas are theoretically subject to the Fourth Amendment requirement that the materials sought be described with particularity, see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208–209; *Hale* v. *Henkel*, 201 U.S. 43, in practice the expansive scope of the grand jury's investigative power has been invoked to justify subpoenas of notably broad reach. See, *e.g.*, *Brown* v. *United States*, 276 U.S. 134; *Wheeler* v. *United States*, 226 U.S. 478; *In re Grand Jury Subpoena Duces Tecum*, 203 F. Supp. 575 (S.D. N.Y.); *In re Borden Co.*, 75 F. Supp. 857 (N.D. Ill.)

Moreover, issuance of a valid subpoena does not require a probable cause showing that the materials sought constitute evidence of a crime under investigation The grand jury—or the prosecutor acting alone as agent for the grand jury—may issue a subpoena with no prior judicial scrutiny, and the commands of the Fourth Amendment will be found satisfied by a demonstration of simple relevance of the materials sought to the subject matter under consideration by the grand jury. See *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 208–209. The very statement of this test reveals one of the incongruities of the ruling below. The validity of a subpoena is tested in part through an evaluation of its connection to an ongoing grand jury inquiry. But, in most instances in which law enforcement officials seek to acquire information, no grand jury investigation of the matter is in progress. Either evidence gathering has not yet proceeded to the point where a prosecutor would present his case to a grand jury, or no request for a grand jury indictment is contemplated. Under such circumstances, assuming a grand jury were convened for the purpose of issuing the sort of subpoenas that the courts below would require, the test of relevancy to a grand jury inquiry would be meaningless.

The courts below assigned great weight to the fact that innocent third parties, subjected to an unlawful search but not prosecuted on criminal charges, would have no occasion to invoke the exclusionary rule to suppress evidence produced by the illegal search. Reasoning from this premise, they decided that adoption of the prophylactic "subpoena first" rule was the only way to afford third parties "meaningful protection" against unlawful searches (Pet. App. 23). This conclusion is incorrect. As demonstrated above, substantial guarantees that warranted searches will be lawful are provided by the requirements of the warrant procedure itself. It is the Warrant Clause, and not the exclusionary rule, that is the principal protection of the privacy rights of innocent citizens. Furthermore, persons aggrieved by violations of their Fourth Amendment rights may in some cases initiate legal proceedings, including damage actions, to vindicate those rights and deter future misconduct. See 42 U.S.C. 1983; *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388.[10] Additional legal recourse is available in an action for return of property wrongfully held by public officials. See *Warden* v. *Hayden, supra,* 387 U.S. at 307–308; Rule 41(e), Fed. R. Crim. P.

In sum, we submit that the courts below erred in concluding that whenever third parties are involved, an additional procedural requirement—demonstration of a subpoena's impracticality—is mandated by the

[10] We recognize that damage actions will not always be an available remedy because of the "good faith" defense, which is especially potent in cases involving warranted searches.

Fourth Amendment's prohibition of unreasonable searches. The reasonableness of searching premises of third parties is most appropriately ensured not by a sweeping prophylactic modification of the traditional warrant procedures, but by the sensitivity of executive and judicial officers to the specific circumstances of each proposed search. This Court has recognized that, in search and seizure cases, "[t]he test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts." *South Dakota* v. *Opperman,* 428 U.S. 364, 373, quoting with approval from *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 509–510 (concurring and dissenting opinion of Black, J.) The initial assessment that a warranted search is reasonable under all the circumstances should be and currently is made by executive officials in the course of their decision to apply for a warrant. That assessment is ratified by a neutral magistrate when and if he determines that a warrant should issue.

In addition, we emphasize that the magistrate remains free to impose any special restrictions on the manner of the warrant's execution that he believes are necessary to guarantee the reasonableness of the authorized search. In an appropriate case, for example, the magistrate may direct that police refrain from searching particular areas until after an informal request addressed to the owner or occupant has failed to inspire production of the materials sought. Finally, if in a given case a party whose premises have been searched believes that the lack

of a prior opportunity for voluntary cooperation rendered the subsequent search unlawful, judicial remedies are available to vindicate Fourth Amendment rights. See p. 29, *supra*. Those remedies are properly applied on a case-by-case basis after review of all the circumstances. Proliferation of procedural barriers to the issuance of warrants that fall into certain artificially created categories would prove an unwise and unworkable means of enforcing the Fourth Amendment.

C. THE FIRST AMENDMENT CONCERNS IMPLICATED IN THE SEARCH OF A NEWSPAPER OFFICE DO NOT NECESSITATE INTERPOSITION OF ADDITIONAL PROCEDURAL OBSTACLES TO THE ISSUANCE OF SEARCH WARRANTS

As is clear from the foregoing discussion, the federal government's principal concern in this case arises from the broad sweep of the decision below, which would alter the existing procedures for securing evidence by warranted search in cases involving a potentially large, albeit undefined, class of "third-parties." In the course of the opinion, however, the courts below did indicate that adherence to the "subpoena first" rule is especially important where First Amendment interests are involved (Pet. App. 14, 28), and by far the bulk of respondents' argument (Br. 11–40) on the merits of their Fourth Amendment claim is devoted to a defense of the rule promulgated by the courts below as applied in the context of a search of a newspaper office. We now turn, accordingly, to a discussion of the question whether the Fourth Amendment requires a general rule barring the issuance of a warrant

to search "press" premises in all cases in which it has not been demonstrated to the magistrate that a subpoena or restraining order would not succeed in securing production of the materials sought.

This Court has often acknowledged that the protection of First Amendment liberties is an important element of the law of search and seizure. See, *e.g.*, *Roaden* v. *Kentucky*, 413 U.S. 496; *Stanford* v. *Texas*, 379 U.S. 476; *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Marcus* v. *Search Warrant*, 367 U.S. 717. Indeed, widespread abhorrence for general warrants authorizing indiscriminate search and seizure of private books and papers, and concern for the impact of such actions on freedom of expression, lie at the very origin of the Fourth Amendment. See *Stanford* v. *Texas*, *supra*, 379 U.S. at 481–485; *Entick* v. *Carrington*, 19 How. St. Tr. 1030, 95 Eng. Rep. 807; *Wilkes* v. *Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489; T. Taylor, *supra*, at 29–35. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrant*, *supra*, 367 U.S. at 729. Certainly one may infer from the foregoing authorities and consideration of the history of the Fourth Amendment that where a search of newspaper offices is contemplated, the readily identifiable First Amendment interests involved are entitled to thorough consideration.

In this regard, it should be noted at the outset that federal law enforcement officials rarely if ever engage

in the practice of searching newspaper offices. No case has been found in which any media facility has been searched under federal auspices. The solicitude of the federal government for legitimate press interests is reflected in Justice Department guidelines for the issuance of subpoenas to newsmen. See *Branzburg* v. *Hayes,* 408 U.S. 665, 706–707 and n.41. These guidelines, codified at 28 C.F.R. 50.10, provide that "[a]ll reasonable attempts should be made to obtain information from nonmedia sources before there is any consideration of subpoenaing a representative of the news media" (subsection (b)). They further provide that "[n]egotiations with the media shall be pursued in all cases in which a subpoena is contemplated" (subsection (c)) and that "no Justice Department official shall request, or make arrangements for, a subpoena to any member of the news media without the express authorization of the Attorney General" (subsection (d)).[11] While the guidelines are silent on the subject of obtaining warrants to search news media premises, it may reasonably be inferred from the policies relating to subpoenas that great care would similarly be exercised in the case of searches.

In light of the policy determinations underlying the guidelines and the history of relevant federal practices, it can fairly be supposed that federal law enforcement efforts would not be seriously hampered by

[11] Justice Department records reveal that the Attorney General authorized 23 subpoenas to members of the news media in 1976 and 17 in 1977.

a decision of this Court approving the "subpoena first" rule of the courts below in the limited context of searches of the press as a neutral "third-party" believed to be in possession of evidence bearing upon a criminal investigation.

Nevertheless, the observation that such a rule would not be damaging, or the conclusion that it is generally a good idea, does not lead inexorably to the result that the rule is constitutionally required, and we oppose the result of the courts below insofar as it is embodied in an across-the-board modification of the warrant procedure as applied to searches of the press. We submit that the course selected by the Framers, embodied in the Warrant Clause of the Fourth Amendment, depends upon the discretion of executive officers and, more important, upon the detached judgment of a neutral magistrate to guarantee in the first instance that a warranted search is reasonable under all the circumstances, including the possible impact of the proposed search on values protected by the First Amendment.

Thus, in acting upon an application for a warrant, a magistrate may and should consider a number of factors, including the nature of the items that the police intend to seize, the nature of the place that the police intend to search, the importance of the materials sought to overall law enforcement efforts, and even the necessity for proceeding by search rather than by available alternative means that may be less intrusive on interests of privacy or freedom of expression. Furthermore, the magistrate may restrict or

adjust the manner and conditions of a warranted search in order to avoid unnecessary infringement on privacy and other constitutionally protected values.

This Court has held in a First Amendment context that "[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,* 413 U.S. at 501. It has similarly indicated that a search warrant's description of items to be seized may be impermissibly general when the items have potential First Amendment protection even though the same description might be sufficiently particular for other items. *Stanford* v. *Texas, supra,* 379 U.S. at 486. Accordingly, where a prosecutor or police officer seeks a warrant authorizing the seizure of material involving some kind of expression, such as a photograph, and where the application further reveals that the search for that material may well affect significant First Amendment activity, such as the publication of a newspaper, the magistrate should and ordinarily will recognize that special care must be taken in assessing the reasonableness of the proposed search and seizure. At a minimum, he should satisfy himself that the search is intended to achieve bona fide law enforcement aims and is not designed to provide an opportunity for harassment.

These views are reflected in a recent statement of this Court in *Andersen* v. *Maryland, supra,* 427 U.S. at 482 n. 11:

> [T]here are grave dangers inherent in executing a warrant authorizing a search and seizure

> of a person's papers * * *. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. * * * [R]esponsible officials, including judicial officials, must take care to assure that [such searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy.

Heeding this exhortation, a magistrate may shape and structure a warranted search in a way calculated to render the search reasonable. In this connection he may, before authorizing a search, require a showing that the desired material cannot safely be sought by less intrusive means. In extreme cases, he may even conclude that although a warrant application fulfills the probable cause and particularity requirements of the Fourth Amendment, no feasible restrictions on the manner of execution of the proposed search would suffice to ensure its reasonableness. Under such circumstances, the magistrate may simply decline to issue the warrant.

We submit that these protections, comprehended within the traditional scope of a judicial officer's review of an application for authority to search, are the only ones mandated by the Constitution for safeguarding First Amendment freedoms in the warrant process. This is not to say that the political branches of government cannot or should not impose additional restrictions on searches of media premises. The executive may, by regulation, install procedures requiring

that press searches receive the advance approval of high-ranking executive officials. As a substitute or supplement, it may sharply circumscribe the occasions upon which resort to such law enforcement tactics will be permitted. Or it may choose informally to eschew searches of press offices and to rely exclusively on alternate means of acquiring information necessary for criminal investigations and prosecutions. For its part, the legislature may enact similar restrictions on press searches.[12]

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[12] A recent study reports that 26 states have adopted legislation conferring upon newsmen some degree of statutory immunity from subpoenas seeking the source or substance of information acquired in the course of news gathering activities. See Note, *supra*, note 6, 28 Stan. L. Rev. at 960–967 and n. 20; see also Comment, *Newsmen's Privilege Two Years After Branzburg* v. *Hayes: The First Amendment in Jeopardy*, 49 Tul. L. Rev. 417, 429 and n. 100 (1975). A law of this kind is currently in effect in California. Ann. Cal. Evid. Code 1070 (West Cum. Supp. 1977).

None of the so-called "reporter's shield" laws addresses itself explicitly to the subject of searches of press offices. Nevertheless, at least one commentator has suggested that some shield statutes, and in particular the currently effective amended version of California's law, might be read to cover both subpoenas and searches. See Note, *supra*, 28 Stan. L. Rev. at 962–971. Respondents themselves have acknowledged this argument without fully embracing it. Br. 27–28 and n. 12.

The version of the California shield law in effect at the time of the district court's decision in this case insulated newsmen from adjudications of contempt based upon refusals "to disclose the source of any information procured for publication and published in a newspaper." Ann. Cal. Evid. Code 1070 (West 1966). In 1974, the statute was amended to provide identical protection for newsmen's refusals "to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." The phrase "unpublished infor-

The government's limited contention here is that no such measures are constitutionally compelled. Adoption of the "subpoena first" rule, modified to apply only to searches of media offices, would represent a judicial endorsement of two classes of First Amendment freedoms, one designed for the majority of American society and one tailored specially for the press. Such a result would run counter to recent decisions of this Court rejecting in different contexts assertions of a newsmen's right to preferential treatment. See, *e.g., Branzburg* v. *Hayes, supra; Pell* v. *Procunier,* 417 U.S. 817; *Saxbe* v. *Washington Post Co.,* 417 U.S. 843.[13]

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mation" was broadly defined and would clearly cover the photographs sought in this case. Ann. Cal. Evid. Code 1079(c) (West Cum. Supp. 1977). Nonetheless, the applicability of California's shield law to searches of news facilities remains problematical. The statute guards against contempt adjudications for refusals to disclose information in any proceeding "in which, pursuant to law, testimony can be compelled to be given." Ann. Cal. Evid. Code 1070 (West Cum. Supp. 1977), 901 (West 1966). Arguably, a search is not such a proceeding. Cf. *Andresen* v. *Maryland, supra.* In any event, the permissibility of the search here at issue under present California law may be sufficiently debatable to persuade this Court that this case is not an appropriate vehicle for the announcement of an important constitutional rule.

[13] Moreover, approval of a constitutional rule making satisfaction of extraordinary procedural requirements an obligatory prelude to the issuance of valid warrants for press searches would inevitably spawn knotty problems in determining when the subject of a proposed search is sufficiently similar or related to the mass media to invoke the special protection provided.

In their attempt to defend the rule fashioned by the courts below, respondents rely heavily on the facts of this case. They stress (Br. 12) that in this case the affidavit submitted in support of the search warrant did not allege that any staff member of the *Daily* was suspected of criminal behavior. They further observe (Br. 11–12) that the photographs sought constituted mere evidence of a crime rather than weapons, contraband, or stolen property. Moreover, probable cause to believe that the photographs existed and that they were located at the *Daily's* offices was produced not by independent police investigation but by the *Daily's* own publication of its April 11, 1971 edition, an activity plainly encompassed within First Amendment freedoms. Finally, the evidence sought was itself communicative material deserving First Amendment protection.

On the basis of these facts, respondents maintain that rejection of the decision below will produce a host of consequences detrimental to press activities. Valuable sources of information who wish to preserve their anonymity or the confidentiality of their communications may refuse to deal with newsmen. Newsmen themselves will hesitate to record and save their recollections of conversations and events, for fear that later police searches will result in breaches of confidence. Vigorous participation in the editorial process may be chilled by the threat that subsequent searches will reveal unpopular positions. It is also suggested

that news media may censor their own publications or programs in an effort to avoid creating the impression that they possess materials of interest to law enforcement officials. Last but not least, a search itself may so thoroughly disrupt ordinary media activity that a particular edition or broadcast is delayed, damaged, or eliminated altogether.

As Justice White has accurately explained in his opinion for the Court in *Branzburg* v. *Hayes, supra,* 408 U.S. at 693–695, the empirical likelihood of any or all of these occurrences is extremely difficult to predict. In any event, the probability and severity of possible negative effects on press interests will undoubtedly vary substantially from case-to-case, as will the factual settings in which search warrant applications are presented to magistrates. This observation suggests that the *per se* rule fashioned by the courts below is poorly suited to ensuring that First Amendment freedoms and legitimate law enforcement needs are properly accommodated.[14]

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[14] The courts below did not comment upon the possible interaction between state shield statutes and the "subpoena first" rule. Assuming that the impracticality of a subpoena must be established before a valid search warrant may issue, a serious question arises concerning the impact of an applicable shield law on a magistrate's impracticality determination. It could be argued that the mere existence of such a law should suffice to convince a magistrate that a subpoena would be impractical, since no contempt sanction could be imposed on a newsman choosing to disobey a judicial demand for production of certain materials. A less extreme position might be that the existence of an applicable shield statute combined with one or more prior refusals by a particular media representative to deliver information in response to a subpoena

The argument that the Fourth Amendment comprehends protection of First Amendment interests within the case-by-case magisterial evaluation implicit in the Warrant Clause is fully consistent with earlier decisions of this Court concerning searches and seizures that potentially impinge on First Amendment freedoms. For example, in *Stanford* v. *Texas, supra,* this Court relied upon the particularity requirement of the Warrant Clause to invalidate a seizure of some 2,000 books belonging to the petitioner, Mr. Justice Stewart's opinion for the Court clearly demonstrated that the assurances included in the Warrant Clause are sufficiently flexible to take account of First Amendment values.

> [T]he constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. * * * We need not decide in the present case whether the description of the things to

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should be enough to establish the impracticality of further subpoenas to the same party. A third conceivable stance would be that, in the absence of any indication that evidence will be destroyed, a subpoena should be served before a search is authorized, even where the magistrate has every reason to believe that the newsman subpoenaed will rely on the shield law to protect his noncompliance. Interpretation and application of the various state shield statutes are, of course, exclusively matters of state concern, and the federal government accordingly expresses no views on the subject. The issue raised in this footnote does, however, illustrate one set of problems likely to be created by adoption of the "subpoena first" rule in the press context.

> be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or * * * [other] contraband of that kind * * *.

379 U.S. at 485–486; footnotes omitted. In *Heller* v. *New York,* 413 U.S. 483, this Court sustained the warranted seizure of an allegedly obscene film, even though the warrant had been issued in the usual *ex parte* manner and no prior adversary hearing had been conducted on the character of the film. The Court again emphasized that the necessity for a prior judicial determination of probable cause provides meaningful safeguards even in the First Amendment area. *Id.* at 492–493.[15] Other decisions are not to the contrary. As the Court noted in *Heller, supra,* 413 U.S. at 491; footnote omitted, both a *Quantity of Books* v. *Kansas, supra,* and *Marcus* v. *Search Warrant, supra,* involved "the seizure of large quantities of books for the sole purpose of their destruction * * *." The official action in those cases plainly obstructed the circulation of material arguably entitled to First Amendment protection, thereby invoking the need for a prior adversary hearing. By contrast, in *Heller* and the present case, no limitation was imposed on dissemination.

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[15] This case, like *Heller*, involves no prior restraint on expression. Neither case presents a situation in which police officers have seized or attempted to seize a party's only copy of a film or photograph, thus preventing further exhibition or publication. To guard against such an eventuality, the Court in *Heller* directed that "prompt copying of seized material should be permitted. If copying is denied, return of the seized material should be required." 413 U.S. at 493 n. 11.

The district court decided this case on respondent's motion for summary judgment. We have argued that the declaratory relief granted to respondents was awarded on the basis of an erroneous legal theory. Under the approach outlined in this brief, the courts below might still find that the search of the *Daily's* offices, though authorized by warrant, was unreasonable, either because the warrant did not contain necessary restrictions on the manner of its execution or because under the circumstances no search should have been permitted at all. The primarily factual nature of such a determination—and the present controversy among the parties regarding the factual inferences to be drawn from the record as it now stands—suggest that summary judgment is an inappropriate procedure for resolution of the underlying dispute in this case.[16] We therefore recommend that the judgment be reversed and the case remanded to the court of appeals for whatever further proceedings that court may deem fitting in light of this Court's opinion. The court of appeals should be invited to consider whether, in view of the revised posture of the case, any constitutional barriers prevent the award of declaratory relief. See *Ashcroft* v. *Mattis,* 431 U.S. 171. Likewise, the court of appeals should be asked to examine whether, even in the absence of constitutional obstacles, a federal court should exercise its statutory discretion to grant

[16] The precise details of the search itself, for example, could be highly relevant to the result, irrespective of the inclusion *vel non* of salutary conditions in the warrant.

a declaratory judgment announcing the unreasonableness of an individual search. See 28 U.S.C. 2201.

II. ASSUMING RESPONDENTS WERE ENTITLED TO PREVAIL ON THE MERITS, THE AWARD OF ATTORNEY'S FEES WAS PROPER

A. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT AUTHORIZED THE AWARD OF FEES FOR SERVICES PERFORMED BEFORE THE ACT BECAME LAW

If this Court should affirm the decision below on the merits, the award of attorney's fees should also be affirmed.

The district court awarded attorney's fees to the respondents here because (Pet. App. 50; footnote omitted):

> [F]ee shifting is necessary to insure the vindication of important constitutional rights and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorney's fees at costs is essential, lest these important rights be relegated to a mere platitude.

Although the court's award was consistent with the decisions of many federal courts awarding attorney's fees to plaintiffs on similar "private attorney general" rationales,[17] this Court subsequently found such awards

[17] See, *e.g.*, *Souza* v. *Travisono*, 512 F. 2d 1137 (C.A. 1), vacated and remanded, 423 U.S. 809, *Cornist* v. *Richland Parish School Board*, 495 F. 2d 189 (C.A. 5); *Taylor* v. *Perini*, 503 F. 2d 899 (C.A. 6), vacated and remanded, 421 U.S. 982; *Donahue* v. *Staunton*, 471 F. 2d 475 (C.A. 7), certiorari denied, 410 U.S. 955; *Fowler* v. *Schwarzwalder*, 498 F. 2d 143 (C.A. 8); *Brandenburger* v. *Thompson*, 494 F. 2d 885 (C.A. 9).

improper in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240. In that case, this Court held that exceptions to the general American rule that litigants pay their own attorney's fees are for Congress to enact,[18] and while Congress had enacted several provisions in selected statutes permitting a federal court to award fees to a successful litigant, it had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." 421 U.S. at 260.

While this case was still pending in the court of appeals, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, 42 U.S.C. (1976 ed.) 1988. That Act provides: "In any action * * * to enforce a provision of section * * * 1979 * * * of the Revised Statutes [42 U.S.C. 1983] * * * the court, in its discretion, may allow the prevailing party * * * reasonable attorney's fees as part of the costs." It was specifically designed to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,*" S. Rep. No. 94–1011, 94th Cong., 2d Sess. 1 (1976).

The court of appeals correctly held that the passage of the Act "revalidated" the district court's award of attorney's fees (Pet. App. 6). This conclusion is amply

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[18] The court in *Alyeska* specifically approved (421 U.S. at 259) the "inherent power in the courts to allow attorney's fees in particular situations"—including when the losing party has acted in bad faith.

supported by the legislative history of the Act and by the decisions of this Court.

In *Bradley* v. *Richmond School Board,* 416 U.S. 696, this Court affirmed an award of attorney's fees for services performed before the statute authorizing the award was enacted. Although the legislative history of 20 U.S.C. (Supp. V) 1617, the statute involved in *Bradley,* was ambiguous concerning whether it was to be applied to pending cases (416 U.S. at 716 n. 22), the Court applied the general rule followed when there is a change of law while a case is pending on appeal: it applied the law in effect at the time of decision, in the absence of clear indication of a contrary legislative intent or a showing that manifest injustice would result from application of the new law. 416 U.S. at 711; *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268; *United States* v. *The Schooner Peggy,* 1 Cranch 102.

In contrast to the legislative history of the statute involved in *Bradley,* the legislative history here is clear. In passing the Civil Rights Attorney's Fees Awards Act, Congress repeatedly indicated its intent that the courts were to have authority to award attorney's fees in pending cases, as well as those instituted after enactment of the Act. The House specifically rejected an amendment making the Act applicable only to cases filed after the effective date of the Act (122 Cong. Rec. H12160 (daily ed., October 1, 1976)). The committee reports both expressly state that the bill permits awards in pending cases, referring to *Bradley* as authority. S. Rep. No. 94–1011, 94th

Cong., 2d Sess. 5 (1976); H.R Rep. 94–1558, 94th Cong., 2d Sess. 4 n. 6 (1976). Moreover, during the floor debate, members of Congress consistently stated that the Act would apply to cases pending at the time of enactment, and cited *Bradley* as support for that point. See, 122 Cong. Rec. H.12160 (daily ed., October 1, 1976) (remarks of Rep. Drinan, floor leader of the legislation in the House); 122 Cong. Rec. S.17052 (daily ed., September 29, 1976) (remarks of Sen. Abourezk). See also, 122 Cong. Rec. H.12155 (daily ed., October 1, 1976) (remarks of Rep. Anderson).[19]

In light of this compelling legislative history, the court of appeals did not consider whether interpreting the statute to apply as Congress intended would

[19] The suggestion of petitioners in No. 76–1484 (Br. 41–42) that an award of attorney's fees in pending cases may not cover services performed before the passage of the Act is flatly inconsistent with *Bradley*, in which this Court focused on the propriety of "the application of the statute to an award of fees for services rendered prior to its effective date" (416 U.S. at 721), and specifically held that the district court was authorized to allow reasonable attorney's fees from a date preceding the enactment of the statute (*id.* at 724). Nothing in the legislative history of the 1976 Attorney's Fees Awards Act suggests that Congress intended the limitation petitioners suggest. Instead, both the extensive reliance on *Bradley* and the congressional intent to undo the effects of the *Alyeska* decision, *supra* at 45, strongly indicate that Congress intended to authorize fee awards for all services performed in pending cases. The courts of appeals agree. See *Rainey* v. *Jackson State College*, 551 F. 2d 672 (C.A. 5); *Martinez Rodriquez* v. *Jiminez*, 551 F. 2d 877 (C.A. 1); *Bond* v. *Stanton*, 555 F. 2d 172 (C.A. 7); *Finney* v. *Hutto*, 548 F. 2d 740 (C.A. 8), certiorari granted, October 17, 1977, No. 76–1660.

result in manifest injustice. Nor do we think that *Bradley* suggests that such an inquiry is required in these circumstances.[20]

In any event, here, as in *Bradley,* an award of attorney's fees for services performed before the Act became effective works no injustice. In concluding that the retroactive award in *Bradley* worked no injustice, the court considered "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. The Court's analysis in *Bradley* supports the award of fees here.

(a) In *Bradley,* the Court noted a disparity in the ability of the publicly funded school board and the plaintiff school children to protect their rights, and noted that the suit rendered the Board a substantial service by bringing it into conformity with the Constitution. Similarly, here the respondent is a university newspaper, while the petitioners, although named individually, are defended by their employers, the City of Palo Alto and the County of Santa Clara, and these entities will be responsible for any judgments against them (Ann. Cal. Gov. Code 825 (West.

[20] The question considered in *Bradley*, and here resolved by Congress, is whether the fact of retroactivity itself makes the award unjust. Of course, the district court must always consider whether shifting the costs of litigation in the particular case is just, as it did here (Pet. App. 43–53); petitioners are incorrect in suggesting that the award of attorney's fees is the inevitable result of a civil rights complaint (Bergna Br. 27).

[21] See also Cal. Gov. Code 995 *et seq.* and *Williams* v. *Horvath*, 16 Cal. 3d 834, 548 P. 2d 1125, in which the California Supreme Court cites the district court opinion in this case as support for a

Cum. Supp. 1977)).[21] And, as in *Bradley,* this action if affirmed on the merits, will have accomplished a substantial public service to the law enforcement community by bringing its actions into compliance with constitutional standard.

(b) In *Bradley,* the enactment of the statute permitting the award of attorney's fees did not affect any previously unconditional right of the School Board to determine the use of the funds the court required to be used to pay attorney's fees. The situation here is precisely similar. In both cases, "[t]hese funds were essentially held in trust for the public, and at all times the Board [or, here, the City and County] was subject to such conditions or instructions on the use of the funds as the public wished to make through its duly elected representatives." 416 U.S. at 720. Cf. *Greene* v. *United States,* 376 U.S. 149.

(c) Finally, the change in the law relating to the award of attorney's fees had no impact, either here or in *Bradley,* on the substantive law on the basis of which the case was decided—there, the application of

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holding that Section 825 applies to cases brought against state employees under 42 U.S.C. 1983. Petitioners' briefs do not dispute the district court's assertion (Pet. App. 52–53) that the public employers will pay any judgment for attorney's fees entered in this case. See Bergna Br. 32, and Zurcher Br. 40 and n. 23. Although the Zurcher brief states that holding the officers responsible for the award of fees would "punish them," that brief was filed by the City Attorney for the City of Palo Alto, employer of the defendant officers (see A. 16, 45), indicating that the City is defending the officers pursuant to Section 825 and will also, under that statute, be responsible for any award of fees against these petitioners.

the Constitution to school desegregation, and here, the responsibilities of law enforcement personnel under the Fourth Amendment. Moreover, when this case was filed and litigated in the district court and until the *Alyeska* decision, an award of attorney's fees was itself possible under the "private attorney general" theory. See *La Raza Unida* v. *Volpe,* 57 F.R.D. 94 (N.D. Calif.). Thus, as in *Bradley,* there is no indication that, if petitioners had known of their potential liability under the 1976 Act, this knowledge "would have caused [them] to order [their] conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs." 416 U.S. at 721.[22]

Petitioners argue (Zurcher Br. 43–45) that retroactive application of the Civil Rights Attorney's Fees Award Act is manifestly unjust in cases challenging actions taken in good faith in conformity with then-existing legal standards. But the defendants' good faith—either in taking the action alleged to violate the Constitution or in defending the suit—is not a proper basis for precluding application of the Act, either prospectively or retroactively. As this Court recognized in *Alyeska Supra,* 421 U.S. at 258–259, it has long been the rule that attorney's fees may be awarded against a party who has acted in bad faith, and *Alyeska* did not alter that rule. Accordingly, there would have been no purpose in enacting the Attorney's

[22] The California law under which the public employers of the petitioners provide representation and indemnification has been in effect since 1963.

Fees Awards Act if it were to apply only where the losing party had acted in bad faith.[23] Moreover, whether the Act is applied prospectively or retroactively, officials acting in good faith pursuant to valid laws and defending suits arising therefrom would scarcely be influenced by the possibility that their actions may eventually result in the award of attorney's fees against the public entities they represent. Awards of fees are appropriate under the Act when litigation vindicates public policy inherent in constitutional principles. It was therefore proper for the district court, after finding that this action had done so, to exercise its discretionary authority to award attorney's fees.

B. THE AWARD OF FEES HERE VIOLATES NO IMMUNITY FROM SUIT OF THE PETITIONERS

Petitioners in No. 76–1600 contend (Bergna Br. 26–35) that requiring them to pay respondents' attorney's

[23] A holding that attorney's fees should ordinarily not be awarded unless the actions of the party to be charged were in clear violation of constitutional or statutory principles would be inconsistent with the statutory purpose—which is to encourage plaintiffs to seek to vindicate constitutional principles, not merely to deter egregious and obvious violations. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 718 (C.A. 5), the Fifth Circuit stated that attorney's fees in cases presenting novel issues should appropriately compensate the attorney "for accepting the challenge." Congress, in passing the Attorney's Fees Awards Act, cited *Johnson* as correctly explaining standards governing awards of fees. See S. Rep. No. 94–1011, *supra*, at 6; H.R. Rep. No. 94–1558, *supra*, at 8. 122 Cong. Rec. H12160 (daily ed., October 1, 1976) (remarks of Rep. Drinan); 122 Cong. Rec. S16491 (daily ed., September 23, 1976) (remarks of Sen. Tunney).

fees is inconsistent with their immunity, as judicial and prosecuting officials, from suits for damages. The common law official immunity upon which petitioners rely is subject to limitation by statute, *Wood* v. *Strickland,* 420 U.S. 308, 316; *Imbler* v. *Pachtman,* 424 U.S. 409, 434 (White, J., concurring). Thus, the enactment of the Attorney's Fees Awards Act removed whatever immunity to the award of attorney's fees petitioners might have enjoyed in the absence of the Act.

The Act specifically authorizes an award of attorney's fees to "the prevailing party" in "any action" brought under 42 U.S.C. 1983, as was this one. Although Congress did not provide for the naming of municipalities as defendants in cases brought under 42 U.S.C. 1983 (*Monroe* v. *Pape,* 365 U.S. 167), state and local officials clearly are subject to that act as "persons" acting "under color of" state laws. As Congress noted in enacting the Attorney's Fees Awards Act (S. Rep. No. 94–1011, *supra,* at 5; footnote omitted):

> [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

The House Report is to the same effect (H.R. Rep. No. 94–1558, *supra,* at 7).[24]

In light of this legislative history, it would be inappropriate to construe the broad language of the Civil Rights Attorney's Fees Awards Act as incorporating an exception comparable to the common law immunity of certain officials from suits for damages that this Court has held to be preserved in 42 U.S.C. 1983 (see *Tenney* v. *Brandhove,* 341 U.S. 367; *Imbler* v. *Pachtman, supra*). That common law immunity, which protects the covered official only from personal suits for damages (see *Imbler* v. *Pachtman, supra,* 424 U.S. at 428–429), is entirely compatible with a statutory award of attorney's fees when equitable relief has been secured against such an official. Like an award of

[24] Contrary to petitioners' suggestion (Bergna Br. 31–32), it is not necessary that municipalities be subject to suit in order to impose on those entities the obligation to pay opposing attorney's fees.

There is no requirement that a governmental entity must be a named defendant for the court to issue an order requiring the expenditure of the funds of that entity. Indeed, in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 n. 4, this Court approved an award of backpay and attorney's fees to be paid from state funds, although neither the state nor any state agency was a named defendant. Since the public entity confers upon its officers the authority to act on its behalf, it is entirely appropriate to require the entity to pay attorney's fees in civil rights suits challenging those actions, regardless of whether the entity has been named as a defendant.

In any event, although the district court noted, and petitioners evidently agree (see *supra*, note 21) that the governmental entities employing petitioners would pay any fees awarded here, they are not subject to any court order to do so, and thus this case does not raise the question of a federal court's jurisdiction to enter such an order. That question is raised in *Hutto* v. *Finney*, No. 76–1660, certiorari granted, October 17, 1977, and will be discussed in the government's brief *amicus curiae* in that case.

court costs, the award is intended neither to compensate victims nor to punish the official for past illegal acts. Nor is the possibility of such an award, to be paid with public funds,[25] likely to deter public officials in the conscientious performance of their duties.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings. If, however, the judgment on the merits is affirmed, the award of attorney's fees should also be affirmed.

Respectfully submitted.

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[25] The committee reports referred to in the preceding paragraph obviously contemplate that awards under the Act will be paid with public funds. In the unlikely event that a court were to award attorney's fees without specifying that they were to be paid from public funds, and the employing governmental entity refused to pay them, the court might well reconsider the award against the official, or direct his employer to pay it. Although not all states specifically provide by statute for the indemnification of public employees, they evidently all do provide for legal assistance (Brief *amicus curiae* of Alabama, et al., App. A).

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