ARTHUR B. HANSON
888 17th Street, N.W.
Washington, D.C.

The American Newspaper Publishers Association

JAMES R. CREGAN
529 14th Street, N.W.
National Press Building
Washington, D.C.

The National Newspaper Association

ERWIN G. KRASNOW
1771 N Street, N.W.
Washington, D.C.

The National Association of Broadcasters

RICHARD M. SCHMIDT, JR.
1920 L Street, N.W.
Washington, D.C.

The American Society of Newspaper Editors; and *The Associated Press Managing Editors*

J. LAURENT SCHARFF
1200 18th Street, N.W.
Washington, D.C.

The Radio-Television News Directors Association

CHRISTOPHER B. FAGER
MICHAEL SIMPSON
1750 Pennsylvania Avenue, N.W.
Washington, D.C.

The Student Press Law Center

DAVID S. BARR
1101 17th Street, N.W.
Washington, D.C.

The Newspaper Guild

MORTIMER BECKER
STANFORD I. WOLFF
1350 Avenue of the Americas
New York, New York

The American Federation of Television and Radio Artists

MICHAEL B. DORAIS
1127 11th Street
Sacramento, California

The California Newspaper Publishers Association

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, *et al.*,
Petitioners,

v.

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

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

v.

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

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

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

The press organizations listed below respectfully move this Court for leave to file a single brief as amici curiae

in support of respondents' petition for rehearing. Amici include twelve press organizations who, by consent of the parties, jointly filed a brief amicus curiae on the merits in this case. The organizations and their interest in the case are described in that brief. In addition to those organizations, amici request leave of the Court to include as signatories to this brief the Newspaper Association Managers, Inc. and the National Press Club.

The Newspaper Association Managers, Inc. is an organization of the executive directors of every state press association in the nation and Canadian press associations representing newspapers circulated in the United States. Its members represent about 90 percent of the 1,300 daily newspapers and over 5,000 weekly newspapers published in the United States. The Newspaper Association Managers, Inc. represents the executive directors of the following press associations not previously appearing as amici curiae in this case:

Alabama Press Association
Allied Daily Newspapers
Arizona Newspapers Association, Inc.
Arkansas Press Association
Canadian Community Newspapers Association
Colorado Press Association
Florida Press Association
Georgia Press Association
Hoosier State Press Association, Inc.
Idaho Newspaper Association
Illinois Press Association, Inc.
Inland Daily Press Association
Iowa Press Association, Inc.
Kansas Press Association
Kentucky Press Association
Louisiana Press Association
Maryland-Delware-D.C. Press Association, Inc.
Massachusetts Newspaper Publishers Association

Michigan Press Association
Minnesota Newspaper Association
Mississippi Press Association
Missouri Press Association, Inc.
Montana Press Association
Nebraska Press Association
Nevada State Press Association
New England Press Association
New Jersey Press Association
New Mexico Press Association, Inc.
New York Press Association
New York State Publishers Association
North Carolina Press Association, Inc.
North Dakota Newspaper Association
Ohio Newspaper Association
Oklahoma Press Association
Ontario Weekly Newspapers Association
Oregon Newspaper Publishers Association, Inc.
Pennsylvania Newspaper Publishers' Association
Publishers Bureau of New Jersey, Inc.
South Carolina Press Association
South Dakota Press Association
Southern Newspaper Publishers Association
Suburban Newspapers of America
Tennessee Press Association
Texas Press Association
Utah Press Association
Virginia Press Association, Inc.
Washington Newspaper Publishers' Association
Wisconsin Newspaper Association
Wyoming Press Association

The National Press Club is the largest press club in the United States, with 4,800 members in 49 states and the District of Columbia.

The Newspaper Association Managers, Inc. and the National Press Club share the interest of the original

press amici in the resolution of the vital First Amendment issues in this case.

Respondents have consented to the filing of the attached brief. The consent of petitioners was requested but denied.

Respectfully submitted,

Of Counsel:

JACK C. LANDAU
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1750 Pennsylvania Avenue, N.W.
Washington, D.C.

ARTHUR B. HANSON
888 17th Street, N.W.
Washington, D.C.

The American Newspaper Publishers Association

JAMES R. CREGAN
529 14th Street, N.W.
National Press Building
Washington, D.C.

The National Newspaper Association

ERWIN G. KRASNOW
1771 N Street, N.W.
Washington, D.C.

The National Association of Broadcasters

LLOYD N. CUTLER
WILLIAM T. LAKE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Amici Curiae
The Reporters Committee for Freedom of the Press
The American Newspaper Publishers Association
The National Newspaper Association
The National Association of Broadcasters
The American Society of Newspaper Editors
The Associated Press Managing Editors
The Radio-Television News Directors Association
The Student Press Law Center
The Society of Professional Journalists (Sigma Delta Chi)
The Newspaper Guild (AFL-CIO)
The American Federation of Television and Radio Artists (AFL-CIO)
The California Newspaper Publishers Association
The Newspaper Association Managers, Inc.
The National Press Club

RICHARD M. SCHMIDT, JR.
1920 L Street, N.W.
Washington, D.C.

The American Society of Newspaper Editors; and *The Associated Press Managing Editors*

J. LAURENT SCHARFF
1200 18th Street, N.W.
Washington, D.C.

The Radio-Television News Directors Association

CHRISTOPHER B. FAGER
MICHAEL SIMPSON
1750 Pennsylvania Avenue, N.W.
Washington, D.C.

The Student Press Law Center

DAVID S. BARR
1101 17th Street, N.W.
Washington, D.C.

The Newspaper Guild

MORTIMER BECKER
STANFORD I. WOLFF
1350 Avenue of the Americas
New York, New York

The American Federation of Television and Radio Artists

MICHAEL B. DORAIS
1127 11th Street
Sacramento, California

The California Newspaper Publishers Association

June 26, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, *et al.*,
Petitioners,

v.

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

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

v.

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

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

---

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

The Court ruled on May 31, 1978 that the First Amendment allows police officers to perform surprise searches of

news offices, without notice or opportunity to raise a judicial challenge, even where there is no showing that the news organization is involved in criminal activity or is likely to destroy evidence in its possession. Newspapers, broadcasters, and major press organizations—ranging across the entire spectrum of political opinion—have been unanimous in condemning the Court's decision as striking at the very foundations of freedom of the press. Since the press investigates virtually every crime of any consequence, the prospect exists that searches—and even wiretaps—of the press for evidence may become commonplace.[1]

The Court's decision may be the subject of congressional action.[2] However, respondents have asked this Court to reconsider its decision, and amici urge that a rehearing would be appropriate. This brief is filed to express the strong conviction of amici press organizations that the Court's ruling rests on an erroneous view of the ability of one-party proceedings before a magistrate to prevent damage to First Amendment interests from unreasonable surprise searches of the press.

---

[1] Wiretaps are subject to the Fourth Amendment's warrant requirement. *E.g., United States* v. *United States District Court*, 407 U.S. 297 (1972). The Court's decision may be read to uphold the constitutionality of wiretaps of news organizations on an application showing that the news organization may have information relating to a crime. The federal wiretapping law, in contrast, statutorily imposes limitations similar to those which this Court held not to be required by the First and Fourth Amendments. *See* 18 U.S.C. § 2518.

[2] The Court recognized that the Constitution "does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure . . . ." *Zurcher* v. *Stanford Daily*, 46 U.S.L.W. 4546, 4551 (Nos. 76-1484, *et al.*, May 31, 1978). Legislation has been introduced in Congress to provide the protections which the Court has held not constitutionally required. *E.g.*, S. 3162, S. 3164, H.R. 12952, 95th Cong., 2d Sess. (1978).

I. The Court Has Charged Magistrates with Responsibilities They Cannot Perform in Ex Parte Proceedings.

The Court's opinion and Mr. Justice Powell's concurring opinion recognize that press searches must be carefully controlled to prevent their becoming " 'an instrument for stifling liberty of expression.' " [3] Mr. Justice Powell noted that "a warrant which would be sufficient to support the search of an apartment or an automobile [would not] necessarily . . . be reasonable in supporting the search of a newspaper office." [4] To the contrary,

> "the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, *the situation of the premises, and the position and interests of the owner or occupant.*" [5]

In doing so, the magistrate "should take cognizance of the independent values protected by the First Amendment."[6]

A magistrate in an *ex parte* proceeding will seldom know the facts needed to perform this balancing process. This is not because law enforcement officers will deliberately withhold information, but because the facts about "the position and interests of the owner or occupant" will be largely unknown to the officers. Without that information, the magistrate cannot prevent, for example, "searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper." [7] Under the Court's decision, the magis-

---

[3] 46 U.S.L.W. at 4550, quoting *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 (1961).

[4] *Id.* at 4552 (Powell, J., concurring).

[5] *Id.* (emphasis added).

[6] *Id.*

[7] *Id.* at 4551 (opinion of the Court).

trate faces the impossible task of balancing considerations of which he is not aware—such as the extent to which the search will expose private papers and whether it will cause publication deadlines to be missed. Newspersons across the country, responding to the Court's decision, have declared that a magistrate's *ex parte* review cannot assure the privacy of the newsroom that is needed for the press to do its job.

No remedy will exist if a magistrate errs in his *ex parte* determination. If a search warrant is wrongly issued against a criminal suspect, he may attack the sufficiency of the affidavit supporting the warrant when the seized evidence is sought to be used against him. Should the evidence be wrongly admitted, he can obtain judicial review of any conviction.[8] Even a nonsuspect whose property is seized may obtain relief through a judicial order to return the property. But in the case of a press search, the primary evil is not the seizure of one thing but the exposure of other items in the course of the search itself. The harm caused by disrupting and invading the privacy of the newsroom, once inflicted, cannot be undone. The First Amendment interests not adequately presented to the magistrate will have no later means of vindication. On the basis of one *ex parte* determination at the lowest judicial level,[9] and with no meaningful right of appeal, fundamental constitutional rights of the press can be

---

[8] *See, e.g., United States* v. *Harris,* 403 U.S. 573 (1971); *Spinelli* v. *United States,* 393 U.S. 410 (1969); *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Jones* v. *United States,* 362 U.S. 257 (1960); *Giordenello* v. *United States,* 375 U.S. 480 (1958); *Nathanson* v. *United States,* 290 U.S. 41 (1933); *Grau* v. *United States,* 287 U.S. 124 (1932); *Byars* v. *United States,* 273 U.S. 28 (1927); *United States* v. *Long,* 439 F.2d 628 (D.C. Cir. 1971); *United States* v. *Hood,* 422 F.2d 737 (7th Cir. 1970), *cert. denied,* 400 U.S. 820 (1970).

[9] It hardly needs emphasis that the informal atmosphere in which most magistrates sign search warrants is not conducive to thoughtful judicial deliberation on such a delicate issue as the balance between press freedom and police power.

abridged—even though the press itself is suspected of no crime.

This danger is especially real in light of the key role the press plays in monitoring the performance and honesty of government officials. Since the days of the colonial printers, the watchdog role of the press has tended to incur the hostility of local—and sometimes national—political officials. It is not unlikely that this hostility may sometimes spill over to the local magistrate, who is either elected or appointed through the political process. The safeguard of an adversary hearing—and the possibility of review by an appellate court farther from the local fray—are essential to assure against government oppression and intimidation, especially of smaller local press organizations.

As the affidavits in this case explain, the harm from a surprise search can be serious even if the police are entitled to seize the specific property they seek. There is an incompatibility between the privacy the press needs to do its job and the indiscriminacy of a surprise search. That incompatibility makes a prior adversary hearing the only way to prevent harm to the functioning of the press. In the great majority of press search cases, a prior adversary hearing would do no harm to any law enforcement interest. We urge the Court to reconsider its decision not to require such a hearing before press offices are searched.

II. The Court's Decision May Be Read to Authorize Unnecessarily Broad Searches in the Execution of Narrow Warrants.

Both the Court's opinion and Mr. Justice Powell's concurring opinion stress that warrants to search press offices must state "with particular exactitude" the place to be searched and the things to be seized.[10] However, a narrow

[10] 46 U.S.L.W. at 4551 (opinion of the Court); *see id.* at 4552 (Powell, J., concurring).

warrant does not guarantee a narrow search. The Court noted that "the warrant issued in this case" did not authorize the police officers "to rummage at large in newspaper files." [11] Yet such rummaging is precisely what occurred. Absent strict limitations on the manner of execution, a warrant to seize one document may occasion a search of a newspaper's entire files. The search thus exposes not only the papers of the reporter whose information is sought, but also those of other reporters and editors who are covering other stories and have separate privacy interests. Indeed, where (as here) the document sought does not turn up, the officers may think that searching *everything* is their duty before they leave the premises.

Correct police procedures would not allow such indiscriminate searching of private papers, even where the press was not the object of the search. The American Law Institute's Model Code of Pre-Arraignment Procedure declares that "the executing officer shall endeavor by all appropriate means to search for and identify the documents to be seized without examining the contents of documents not covered by the warrant." [12] The Code further states that, "if the documents to be seized cannot be searched for or identified without examining the contents of other documents," the officers should not proceed with the search. The possessor of the documents should be given the opportunity "to pick out those covered by the warrant, without consenting to the search and seizure, but in order to avoid invasion of his privacy with respect to the other intermingled documents." [13] Failing that, the

---

[11] *Id.* at 4551 (opinion of the Court).

[12] ALI, Model Code of Pre-Arraignment Procedure § SS 220.5(1) (1975).

[13] *Id.* § SS 220.5, Note at 136. Mr. Justice Powell observed that "there is no reason why police officers executing a warrant should not seek [such] cooperation of the suspect party . . . ." 46 U.S.L.W.

officer should merely safeguard the intermingled documents, pending a prompt adversary hearing to determine whether the search should be allowed and how it can be limited "to prevent excessive invasions of privacy." [14]

While the ALI Code is a recommendation for legislative action, it is plainly based on the ALI's reading of Fourth Amendment doctrine.[15] Where the papers to be searched are materials gathered by the press to inform the public, the First Amendment makes the need for such procedures especially clear. The Court's opinion, although referring to the Code's provision on the requirements for a warrant,[16] ignored its restrictions on the way in which a warrant should be executed.

The Court's opinion seems to approve the way in which the warrant was executed in this case, even though the officers took no steps to avoid seeing documents not described in the warrant. By relying entirely on the "particularity requirements" [17] for warrants, despite the broadside manner in which this warrant was executed, the Court may be taken to have held that the First Amendment does not constrain the way in which a warrant is executed against a news organization. We respectfully urge the Court to rehear the case and amend its opinion to make clear that a warrant to search press offices must constitutionally be executed in accordance with procedures, such as those in the ALI's Model Code, that will minimize unnecessary exposure of private papers. In the alternative, the Court should remand the case for a determina-

---

at 4552 n.2. However, the officers apparently did not do so here, and the warrant contained no restriction requiring them to.

[14] *Id.* § SS 220.5(3) & Note at 137.

[15] *See id.*, Commentary at 491-520. *See also United States* v. *Bennett*, 409 F.2d 888, 896-97 (2d Cir. 1969) (Friendly, J.).

[16] *See* 46 U.S.L.W. at 4549.

[17] *See id.* at 4552 (Powell, J., concurring).

tion whether the execution of the warrant here involved an impermissibly broad invasion of respondents' privacy as a news organization.

Respectfully submitted,

Of Counsel:

JACK C. LANDAU
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1750 Pennsylvania Avenue, N.W.
Washington, D.C.

ARTHUR B. HANSON
888 17th Street, N.W.
Washington, D.C.

The American Newspaper Publishers Association

JAMES R. CREGAN
529 14th Street, N.W.
National Press Building
Washington, D.C.

The National Newspaper Association

ERWIN G. KRASNOW
1771 N Street, N.W.
Washington, D.C.

The National Association of Broadcasters

LLOYD N. CUTLER
WILLIAM T. LAKE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Amici Curiae
The Reporters Committee for Freedom of the Press
The American Newspaper Publishers Association
The National Newspaper Association
The National Association of Broadcasters
The American Society of Newspaper Editors
The Associated Press Managing Editors
The Radio-Television News Directors Association
The Student Press Law Center
The Society of Professional Journalists (Sigma Delta Chi)
The Newspaper Guild (AFL-CIO)
The American Federation of Television and Radio Artists (AFL-CIO)
The California Newspaper Publishers Association
The Newspaper Association Managers, Inc.
The National Press Club

RICHARD M. SCHMIDT, JR.
1920 L Street, N.W.
Washington, D.C.

The American Society of Newspaper Editors; and *The Associated Press Managing Editors*

J. LAURENT SCHARFF
1200 18th Street, N.W.
Washington, D.C.

The Radio-Television News Directors Association

CHRISTOPHER B. FAGER
MICHAEL SIMPSON
1750 Pennsylvania Avenue, N.W.
Washington, D.C.

The Student Press Law Center

DAVID S. BARR
1101 17th Street, N.W.
Washington, D.C.

The Newspaper Guild

MORTIMER BECKER
STANFORD I. WOLFF
1350 Avenue of the Americas
New York, New York

The American Federation of Television and Radio Artists

MICHAEL B. DORAIS
1127 11th Street
Sacramento, California

The California Newspaper Publishers Association

June 26, 1978