In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al.,
Petitioners,
vs.
THE STANFORD DAILY, et al.,
Respondents.

LOUIS P. BERGNA, et al.,
Petitioners,
vs.
THE STANFORD DAILY, et al.,
Respondents.

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

Petition for Rehearing

Respondents respectfully move the Court for an order vacating its opinion and judgment rendered May 31, 1978 and granting this Petition for Rehearing. In support of this motion, Respondents state the following:

The opinion of this Court holds that the Fourth Amendment does not "forbid the States from issuing warrants to

search for evidence *simply* because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement." Slip Op. at 11 (emphasis added). The Court therefore "decline[d] to reinterpret the Amendment to impose a *general* constitutional barrier against warrants to search newspaper premises [or] to require resort to subpoenas *as a general* rule . . . ." Slip Op. at 19 (emphasis added). The Court has thus rejected a general or *per se* rule which the United States had characterized as a "subpoena first" rule. U.S. Brief at 24. While we firmly believe that these conclusions are in error, and urge the Court to reconsider them,[1] the thrust of this Petition is considerably narrower. Our immediate submission does not question the underlying premises of the Court's opinion. Rather, it contends that the Court has failed to apply them to the facts of this case. It argues simply that the Court's opinion fails to measure—or permit the courts below to assess—the overall reasonableness of the search herein in light of the constitutional standards now enunciated by the Court. Further, as a preliminary matter, we ask this Court to clarify an ambiguity in an important aspect of the Court's opinion.

I.

The Court's opinion acknowledges that the ultimate question in determining whether any search, with or without

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1. We understand that one or more briefs *amicus curiae* will be filed in support of this Petition, urging the Court to reconsider the whole of its decision on broader grounds than are stated here. We agree with that request and incorporate it here. But even if the Court is unprepared to re-examine the basic conclusions it has reached as to searches of the media and other third parties, questions remain—not answered by the Court's opinion—as to the search in *this* case. These are the subject of this Petition.

a warrant, is constitutionally valid is that of "reasonableness":

> "'[R]easonableness' is the overriding test of compliance with the Fourth Amendment . . . . [S]earches . . . may . . . be unreasonable [even] if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized." Slip Op. at 11.

In the same vein, the Court says that the "reasonableness" standard, together with "the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized . . . —should afford sufficient protection . . . ." Slip Op. at 17. And the Court made clear that it is the magistrate who, in the first instance, must apply these tests to ensure that searches of third parties do not exceed constitutional limits:

> "The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits." Slip Op. at 18.

One serious difficulty with the Court's opinion, however, is its ambiguity as to the magistrate's role. The language quoted above is unclear as to whether the magistrate is bound to apply the reasonableness standard in determining *whether* a warrant shall issue as well as in fixing the *scope* of the search and the conditions pursuant to which it will occur. This ambiguity, if uncorrected, will inevitably lead to confusion in the lower courts—especially at the magistrate level, where day-to-day decisions will be made whether or not to issue warrants for third party searches in conformity with this Court's decision. If magistrates incor-

rectly perceive the decision in this case as approving the issue of warrants for third party searches without regard to the overall reasonableness of the proposed search, and subject only to a duty to draft as narrow and precise a warrant as reasonably possible, needless intrusions of privacy will occur.

We cannot believe that this Court intended such a result, or that it meant to free magistrates from the threshhold inquiry of whether the proposed search is reasonable and therefore ought to be permitted, or whether it is unreasonable and therefore should not be authorized.

Yet the ambiguity of the Court's opinion on this point remains. That uncertainty is especially puzzling in light of other statements made by the Court and its members on the same subject. In an opinion announced the same day as the *Daily* decision, the Court said of the magistrate's role (in the context of inspections as to the cause of a fire):

> *"The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other.* For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. *The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors." Michigan v. Tyler,* .... U.S. ...., 46 U.S.L.W. 4533, 4536 (1978) (emphasis added).

In his concurring opinion in this case, Mr. Justice Powell stated that "the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case . . . ." Concurring Opinion, at 3. Where the search is of a newspaper, the magistrate "should take cognizance of those independent values protected by the First Amendment—such as those highlighted by MR. JUSTICE STEWART—when he weighs such factors." *Id.* Similar weighing should occur with respect to "a proposed search directed at *any* third party...." *Id.* at n.2.

If searches for evidence of non-suspect third parties are now to be constitutionally authorized by a decision of this Court, it is vitally important that there be no ambiguity as to the power, and *duty,* of magistrates to withhold a warrant where the proposed search would be unreasonable. The reasonableness standard is well-established. See cases cited in Resp. Brief at 41-42. The brief of the United States as *amicus curiae,* whose views were in general accepted by the Court in its opinion, agreed that this standard must be applied to proposed third-party searches before a magistrate can properly decide whether to issue a warrant. *Id.* at 30, 43.[2]

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2. The Government's brief states:
"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." *Id.* at 30.

The need for clarity on this point is illustrated by two examples:

> (1) A lawyer's file contains evidence relevant to a criminal investigation of his client. The documents sought are kept in a file room containing files of numerous clients. As would ordinarily be the case with an attorney's files, the specified documents are in a file surrounded by other documents, not sought by the warrant, protected by the attorney-client privilege. The police have no reason to believe the lawyer, who is believed to be reputable, would disregard a subpoena or destroy the evidence. They nevertheless obtain a warrant and appear, without warning, and demand immediate access to the file room. The lawyer's request that he be permitted to locate the documents sought by the subpoena is denied, the police explaining that they are entitled to look and select for themselves in accordance with the warrant.
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> (2) In furtherance of a criminal investigation of a sex offense, the police desire to examine the psychiatric records of the victim, who had sought help after the offense. There was no reason to believe that the psychiatrist would disregard a subpoena or destroy the evidence. Nevertheless, rather than afford the psychiatrist an opportunity to produce the records in response to a subpoena, the police obtain a warrant to search the file room of the psychiatric clinic where the victim was treated.[3] In an unsuccessful attempt to locate the records, the investigators look through all the patient files of the clinic, seeing (at the least) the names of each person who had sought psychiatric help at that facility.

We do not for a moment suppose that the Court meant to grant police officers *carte blanche* to conduct needless

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3. This "hypothetical" is anything but. Such a search was performed by investigators employed by Petitioner Bergna at the Stanford Psychiatric Clinic in 1973. See Resp. Brief at 6-7.

searches of this kind. But nothing found in the Court's opinion—unless there is a requirement of overall reasonableness—provides the slightest protection against such abuses. It will evidently be no answer to say that the records of a psychiatric patient or the files of a client are privileged, for the Court's opinion expressly rejects such considerations as "largely irrelevant to determining the legality of a search warrant under the Fourth Amendment." Slip Op. at 19. Nor is it any consolation to the victim of an objectively *unreasonable* search that "[w]here, in the real world, subpoenas would suffice, it can be expected that they will be employed by the rational prosecutor." (Slip Op. at 14). The Constitution and the courts surely provide protection against the needless intrusion upon privacy, and especially upon privileged precincts, in the case—hopefully rare—of a prosecutor or police investigator who fails to act as the Court has "expected." Yet only if the magistrate is empowered and required to determine that, on all the facts, the proposed search is reasonable is there even minimal protection for important privacy interests. The Court's opinion as it now stands fails clearly to instruct magistrates to perform that vital function.

II.

Assuming that the Court's understanding is that the magistrate is authorized and obliged to consider whether or not a proposed search is reasonable, and given its insistence that in all events that magistrate consider imposing reasonable conditions on the scope and manner of any such search (*see* Slip Op. at 17), its treatment of the search in *this* case—or rather, its failure to treat the search in this case—is inexplicable. Having rejected a flat prohibition against third party searches where a subpoena has not been shown

to be an inadequate tool, the Court's opinion and analysis virtually ends. The Court wholly fails to treat important issues which analytically must be faced before it can rightly conclude—even on the Court's own premises—that *this* search was "reasonable" within Fourth Amendment standards.

The Court's opinion virtually leaps from its discussion rejecting the District Court's general "subpoena-first" rule to a conclusion that nothing in the Constitution "forbade this search." Slip Op. at 19. But it is not enough to reject the *opinions* of the courts below. The judgment below was that the search of the *Daily* was unlawful; and the Court's own statement of the governing standard surely requires that, before this judgment can be reversed, there be an examination of *this* search on *these* facts to determine whether *it*—and not simply the idea of third party searches —passes constitutional muster. That inquiry is nowhere to be found in the Court's opinion. It appears that, having formulated an important constitutional principle of wide general application, the Court overlooked the less cosmic, but to these litigants nevertheless vitally important, question of how that principle applies to the facts of this case.

The issue has radiations far beyond the immediate parties, for the application of the "reasonableness" standard to this search will inevitably inform its application by lower courts to other cases. With the utmost respect, we must say that if the issuance and execution of the warrant for the search of the *Stanford Daily* meets this Court's requirement of "reasonableness", then this Court's assurances that those standards *"should* afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices" (Slip Op. at 17, emphasis added) are utterly without meaning. Surely the Court did not intend them to be so.

What inquiry did the magistrate make as to the "reasonableness" of this search? For all the record shows, and to the best of our knowledge, he made absolutely none. He did not inquire whether there were likely to be sensitive or constitutional or even privileged materials in the possession of the *Daily*. He did not examine the possibility of obtaining those materials by subpoena.[4] He did not inquire whether there were any reasons why a search was necessary. He did not explore, or for all the record reveals consider in any way, whether special limitations and conditions should be included in the warrant to minimize the disruption of the paper, the needless disclosure of any confidences, or injury to other First Amendment and privacy interests. Indeed, the magistrate did not even consider requiring—and the warrant plainly does not command—that the executing officers first inform the *Daily* precisely what items were sought, inquire as to whether they existed and where they were located, and afford the *Daily* an opportunity to produce them. Yet this is precisely what Mr. Justice Powell assumed would occur in cases of this kind. Concurring Opinion at 3 n.2. In short, the magistrate in this case performed *none* of the safeguarding func-

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4. The footnoted treatment of the published policy of the Daily in Mr. Justice Powell's concurring opinion reflects a very serious misunderstanding of that policy. See Brief for Resp. at 37 n.21. The uncontradicted evidence in the record is that the policy applied only to photographs that had *not* been subpoened, and that it had no application to photographs once a subpoena had been served. App. 84. The concurring opinion unfairly, though surely inadvertently, calls into question the integrity of honorable and law-abiding members of the *Daily* staff. Nothing in the policy would permit the inference that the *Daily* would destroy evidence covered by a subpoena or otherwise refuse to comply, and the uncontradicted evidence is to the contrary.

However, for present purposes the important point is that the record contains no evidence that the *Daily's* policy—and its possible significance in assessing the likelihood that the photographs sought might be obtained by subpoena—were disclosed to (let alone considered by) the magistrate.

tions which the Court assumed would serve to insure that the Fourth Amendment's "reasonableness" requirement will be satisfied.

We think that the record sustains the conclusion that the *Daily* search was unreasonable when judged by the standards established in this Court's opinion. But if the record—which of course comes here following the granting of summary judgment, and thus does not reflect an evidentiary hearing—is not thought to be sufficient to permit a meaningful assessment of the overall reasonableness of this search, then the proper course would be to remand the case for further proceedings consistent with the Court's opinion. This was the course advocated by the United States, whose basic view of the law and the case this Court otherwise appears to have embraced:

> "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. 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." U.S. Brief at 43.

CONCLUSION

The Petition for Rehearing should be granted, at a minimum to (1) clarify the opinion so as to clearly state the magistrate's obligation to determine the reasonableness of the proposed search before issuing a warrant, and (2) determine, or authorize the courts below to determine on remand, whether under all the facts and circumstances the search of the Daily in this case was "reasonable".

DATED: June 21, 1978

Respectfully,

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