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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al., *Petitioners,*

vs.

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

No. 76-1600

LOUIS P. BERGNA, District Attorney, 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

PETITIONERS' REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE AND RESPONDENTS' REPLY BRIEF

ARGUMENT

I.

RESPONDENTS MISTAKE THE POSITION OF THE UNITED STATES

A. The United States Clearly Opposes A Special Rule Governing Newspaper Searches.

Respondents claim that the United States has recommended a new constitutional rule for newspaper searches. This claim is not well-founded.

Respondents quote the brief of the United States to the effect that the search may be found 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." Resp. Reply Brief at 31. This quotation is wrenched from its context. The Government recommends this course if and only if this Court believes that a remand is appropriate because the summary judgment below was rendered on an erroneous theory. Even in that context the government states: "We therefore recommend that the judgment be reversed . . ." U.S. Brief at 31.

Moreover, the United States unequivocally opposes ". . . an-across-the-board modification of the warrant procedure as applied to searches of the press . . ." U.S. Brief at 24. They tell us in the heading that 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." U.S. Brief at 22. To guarantee the reasonableness of the search they advocate traditional dependence ". . . upon the discretion of executive officers and, more important, upon the detached judgment of a neutral magistrate . . ." U.S. Brief at 24. Lest there be any doubt we add from the Government's brief: ". . . we oppose the result of the Courts below . . ." U.S. Brief at 24.

B. Legitimate Governmental Interests Would Be Infringed By A Per Se Constitutional Rule.

Respondents next assert that in the Government's brief there is a ". . . total absence of any contention that the decision below, applied to newspaper searches would infringe legitimate law enforcement interests." Resp. Reply Brief at 4. This is not true. The United States simply agreed that under present federal practice and under present circumstances with a neutral press "federal law enforcement would not be seriously hampered." U.S. Brief at 24. But once the neutrality of the press is suspect in any way, every cost enumerated by the United States is fully applicable. For example, it then becomes difficult to distinguish between "suspects and nonsuspects." U.S. Brief at 14. If there are no suspects for a given crime, the "police would be hard-pressed to demonstrate that a subpoena is . . . impractical." U.S. Brief at 15. "Police may wish to inspect the premises or property of so-called third parties . . . related to, or friendly with, the likely perpetrator." U.S. Brief at 15.[1] The police may also need to search premises to which the criminal suspect "has or has had ready access." U.S. Brief at 15.[2] Thus, the "subpoena first" rule will compel the inclusion of additional material in search warrant applications, "information which . . . may not always

[1]Respondents' own editorials clearly show that half of the *Daily's* editorial board thought that the clubbing of the officers was warranted. A. 121-122.

[2]In 1969 criminal proceedings, the editor of the *Daily* testified that the defendants had been given full access to materials unsuccessfully sought by Government subpoena. A. 150-151.

be readily available[3] and which has not heretofore been thought constitutionally required." U.S. Brief at 16. Additionally, subpoenas are not always readily available, even to federal authorities, and even where they are, litigation by the third party may prevent the discharge of the Government's duty to afford the accused a speedy trial. *See* U.S. Brief at 18; *see also United States v. Dionisio,* 410 U.S. 1 (1973).

C. First Amendment Interests Are Amply Protected By Traditional Requirements.

Respondents contend that "certainly the United States does not say . . . that the allowance of newspaper office searches will not do substantial damage to First Amendment interests." Resp. Reply Brief at 5. To the contrary, the Government relied on Mr. Justice White's opinion in *Branzburg* that "the empirical likelihood of any or all of these occurrences is extremely difficult to predict" (U.S. Brief at 29) and in any case are outweighed by the Government's compelling interest in the arrest and convictions of felons. *Branzburg v. Hayes, supra,* 408 U.S. at 693-695, 700. The Government's overwhelming concern is that the "subpoena first" rule, even in a press context, not be frozen into constitutional law. U.S. Brief at 24. Rather, we should rely on traditional protections applied by the magistrate with scrupulous

[3]The "sham" press (*see Branzburg v. Hayes,* 408 U.S. 665, 704, n. 40 (1972)) is most unlikely to proclaim its sympathy as did the *Stanford Daily*. *See* U.S. Brief at 27, n. .....

exactitude. U.S. Brief at 25; *Stanford v. Texas,* 379 U.S. 476, 485 (1965).[4]

II.

THE GOVERNMENT DID NOT ENDORSE RESPONDENTS' SECONDARY "FIVE POINT" PLAN

The Government's brief contains this statement: "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." Respondents attribute to this statement the quality of an affirmative suggestion for a new constitutional principle. Resp. Reply Brief at 7. In fact the Government argues strenuously against any new constitutional third-party principle. U.S. Brief at 20-21. What the Government plainly intends by the above statement is a plea for minimizing the damage if their argument against a new constitutional principle is rejected. *See* U.S. Brief at 14-15.

We are also surprised that Respondents take the above statement as the equivalent of the five-factor

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[4]An additional concern of the Government is this: "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." U.S. Brief at 27.

test set forth in their main brief.[5] Respondents' five-factor test presumes responsibility simply from the "status" of the third party. As the Government shows in its brief, that presumption is not warranted. See U.S. Brief at 9-10, 12, 27 n. .....; Bergna Reply Brief at 8-10, n. 13. Because that presumption is not warranted, a third party qualifying under Respondents' five-factor test clearly is not "indisputably free of any culpable connection with the offense or relationship to possible offenders."

Finally, if we do accept Respondents' assertion that their five-factor test embodies the same test as the Government's statement, it is obvious that that test is not met in this case. The search warrant application presented to Judge Phelps made no affirmative showing that the *Daily* was "indisputably free of any culpable connection" with the criminals. That showing was not possible here because, as the record demonstrates, the *Daily* was culpably connected by its policy of evidence destruction and by the sympathy for the criminals that its editorial board announced after the crimes.

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[5]This five-factor test would prevent the issuance of the "third party" warrant despite the existence of probable cause, where the warrant application affirmatively shows (1) absence of special relationship to the suspect, (2) special "status" of the third party, (3) grounds to resist compelled production, (4) particularly sensitive privacy interests, and (5) that a subpoena is not otherwise impractical. *See* Bergna Reply Brief at 10, n. 13.

Respondents surprisingly assert that these factors *were* affirmatively shown in the affidavit herein. Resp. Brief at 41; Resp. Reply Brief at 7. Respondents, however, fail to quote specific language in the affidavit supporting any of the five factors, and we are unable to pinpoint such language. *See* A. 33-35.

III.

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, IT WOULD BE A MANIFEST INJUSTICE TO AWARD ATTORNEYS' FEES.

A. All Petitioners Must Be Dismissed From The Action Because They Are Not Proper Parties.

Nowhere does the United States dispute that Chief of Police Zurcher and District Attorney Bergna had no connection whatsoever with the acts complained of in this complaint. They are not proper parties to the action. Fees cannot therefore be awarded against them.

The Government also does not dispute that the warrant was duly issued by a neutral and detached magistrate who was dismissed at the Respondents' instance from this cause because there was no showing that he ". . . acted other than in good faith . . ." (A. 190). Elementary concepts of equity and justice demand that those who simply followed his lawful commands be treated in like fashion.

B. Petitioners Are Immune From An Attorney's Fee Award In This Context.

The Government states that the award of attorneys' fees is justified by the 1976 Civil Rights Attorneys' Fees Awards Act, and that it does not violate petitioners' immunity. U.S. Brief at 38. They then argue that the Act removes any common law immunity. U.S. Brief at 38. This petitioners submit is not so.

Clearly the award of fees can and does destroy judicial immunity.[6] This is particularly so where

[6]Judicial immunity clearly covers the Court's necessary agents.

fees reach the magnitude awarded in this case and, in addition, include $10,000 as a reward to counsel for having undertaken the case. In another context it has been said, "The power to tax is the power to destroy." By analogy petitioners assert that the power to award fees against state judges, acting through their agents, may well sound the death knell of an independent judiciary.

C. Fees Awards Should Not Depend On Indemnity.

It has been argued by the U.S. (U.S. Brief at 35, fn. 20) in support of the award that there is a right to indemnity under California law. This is by no means clear, because the statute applies to damages. It is silent regarding costs or attorneys' fees. It also may not apply to punitive damages or allow any indemnity for wilful, as distinguished from negligent, conduct.

It therefore follows that indemnification is currently applied only to damage awards under the Federal Civil Rights Act. Yet the Fees Award Act deals by its terms only with attorneys' fees. If indemnification is the touchstone of federal fee awards it seems that no award may lie in this matter. We submit that to posit fees awards on the existence of indemnification is to put the cart before the horse. Clearly federal jurisdiction should not be controlled by the acts of the state legislatures absent specific federal acquiescence.

CONCLUSION

We affirm our request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

ROBERT K. BOOTH, JR.,
City Attorney,
City of Palo Alto,
MARILYN NOREK TAKETA,
Senior Assistant City Attorney,
City of Palo Alto,
250 Hamilton Avenue,
Palo Alto, California 94301,
Telephone: (415) 329-2171,
MELVILLE A. TOFF, INC.,
MELVILLE A. TOFF,
STEPHEN L. NEWTON,
605 Castro Street,
Post Office Box 1059,
Mountain View, California 94040,
Telephone: (415) 967-7854,
SELBY BROWN, JR.,
County Counsel,
County of Santa Clara,
RICHARD K. ABDALAH,
Deputy County Counsel,
70 West Hedding Street,
San Jose, California 95110,
Telephone: (415) 299-2111,

EVELLE J. YOUNGER,
Attorney General of the
State of California,
JACK R. WINKLER,
Chief Assistant Attorney General,
Criminal Division,
EDWARD P. O'BRIEN,
Assistant Attorney General,
W. ERIC COLLINS,
Deputy Attorney General,
PATRICK G. GOLDEN,
Deputy Attorney General,
EUGENE W. KASTER,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-1289,

Attorneys for Petitioners.

January 24, 1978.