

Zurcher v. Stanford Daily

436 U.S. 547

Supreme Court of the United States

May 31, 1978

5 ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET AL. v. STANFORD DAILY ET AL. No. 76-1484.
Argued January 17, 1978. Decided May 31, 1978. CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT. Together with No. 76-1600, Bergna, District Attorney of Santa Clara
County, et al. v. Stanford Daily et al., also on certiorari to the same court. Robert K. Booth, Jr., argued the cause
10 for petitioners in No. 76-1484. With him on the briefs were Marilyn Norek Taketa, Melville A. Toff, and
Stephen L. Newton. Eric Collins, Deputy Attorney General of California, argued the cause for petitioners in No.
76-1600. With him on the briefs were Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant
Attorney General, Edward P. O'Brien, Assistant Attorney General, Patrick G. Golden and Eugene Kaster,
Deputy Attorneys General, Selby Brown, Jr., and Richard K. Abdalah. Jerome B. Falk, Jr., argued the cause for
15 respondents in both cases. With him on the briefs was Anthony G. Amsterdam. MR. JUSTICE BRENNAN took
no part in the consideration or decision of these cases.

MR. JUSTICE WHITE delivered the opinion of the Court.

The terms of the Fourth Amendment, applicable to the States by virtue of the
Fourteenth Amendment, are familiar:

20 "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."

25 As heretofore understood, the Amendment has not been a barrier to warrants
to search property on which there is probable cause to believe that fruits,
instrumentalities, or evidence of crime is located, whether or not the owner or
possessor of the premises to be searched is himself reasonably suspected of
complicity in the crime being investigated. We are now asked to reconstrue the
30 Fourth Amendment and to hold for the first time that when the place to be
searched is occupied by a person not then a suspect, a warrant to search for
criminal objects and evidence reasonably believed to be located there should not
issue except in the most unusual circumstances, and that except in such
circumstances, a subpoena *duces tecum* must be relied upon to recover the
objects or evidence sought.

35 Late in the day on Friday, April 9, 1971, officers of the Palo Alto Police
Department and of the Santa Clara County Sheriff's Department responded to a
call from the director of the Stanford University Hospital requesting the removal
of a large group of demonstrators who had seized the hospital's administrative
offices and occupied them since the previous afternoon. After several futile
40 efforts to persuade the demonstrators to leave peacefully, more drastic measures
were employed. The demonstrators had barricaded the doors at both ends of a
hall adjacent to the administrative offices. The police chose to force their way in
at the west end of the corridor. As they did so, a group of demonstrators emerged
through the doors at the east end and, armed with sticks and clubs, attacked the

group of nine police officers stationed there. One officer was knocked to the floor and struck repeatedly on the head; another suffered a broken shoulder. All nine were injured. There were no police photographers at the east doors, and most bystanders and reporters were on the west side. The officers themselves were able to identify only two of their assailants, but one of them did see at least one person photographing the assault at the east doors.

On Sunday, April 11, a special edition of the Stanford Daily (Daily), a student newspaper published at Stanford University, carried articles and photographs devoted to the hospital protest and the violent clash between demonstrators and police. The photographs carried the byline of a Daily staff member and indicated that he had been at the east end of the hospital hallway where he could have photographed the assault on the nine officers. The next day, the Santa Clara County District Attorney's Office secured a warrant from the Municipal Court for an immediate search of the Daily's offices for negatives, film, and pictures showing the events and occurrences at the hospital on the evening of April 9. The warrant issued on a finding of "just, probable and reasonable cause for believing that: Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with Deadly Weapon, will be located [on the premises of the Daily]." App. 31-32. The warrant affidavit contained no allegation or indication that members of the Daily staff were in any way involved in unlawful acts at the hospital.

The search pursuant to the warrant was conducted later that day by four police officers and took place in the presence of some members of the Daily staff. The Daily's photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched. Locked drawers and rooms were not opened. The officers apparently had opportunity to read notes and correspondence during the search; but, contrary to claims of the staff, the officers denied that they had exceeded the limits of the warrant. They had not been advised by the staff that the areas they were searching contained confidential materials. The search revealed only the photographs that had already been published on April 11, and no materials were removed from the Daily's office.

A month later the Daily and various members of its staff, respondents here, brought 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 against the police officers who conducted the search, the chief of police, the district attorney and one of his deputies, and the judge who had issued the warrant. The complaint alleged that the search of the Daily's office had deprived respondents under color of state law of rights secured to them by the First, Fourth, and Fourteenth Amendments of the United States Constitution.

The District Court denied the request for an injunction but, on respondents' motion for summary judgment, granted declaratory relief. 353 F. Supp. 124 (1972). The court did not question the existence of probable cause to believe that a crime had been committed and to believe that relevant evidence would be found on the Daily's premises. It held, however, that the Fourth and Fourteenth Amendments forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless there is probable cause to believe, based on facts presented in a sworn affidavit, that a subpoena *duces*

5 *tecum* would be impracticable. Moreover, the failure to honor a subpoena would not alone justify a warrant; it must also appear that the possessor of the objects sought would disregard a court order not to remove or destroy them. The District Court further held that where the innocent object of the search is a newspaper,
10 constitutionally permissible “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.” *Id.*, at 135. Since these preconditions to a valid warrant had not been satisfied here, the search of the Daily’s offices was declared to have been illegal. The Court of Appeals affirmed *per curiam*, adopting the opinion of the District Court. 550 F.2d 464 (CA9 1977). We issued the writs of certiorari requested by petitioners. 434 U.S. 816 (1977). We reverse.

15 The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific “things” to be searched for and seized are located on the property to which entry is sought. [I]t is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest.

20 Forbidding the warrant and insisting on the subpoena instead when the custodian of the object of the search is not then suspected of crime, involves hazards to criminal investigation much more serious than the District Court believed; and the record is barren of anything but the District Court’s assumptions to support its conclusions. At the very least, the burden of justifying a major revision of the Fourth Amendment has not been carried.

25 The District Court held, and respondents assert here, that whatever may be true of third-party searches generally, where the third party is a newspaper, there are additional factors derived from the First Amendment that justify a nearly *per se* rule forbidding the search warrant and permitting only the subpoena *duces tecum*. The general submission is that searches of newspaper offices for evidence of crime reasonably believed to be on the premises will seriously threaten the ability of the press to gather, analyze, and disseminate news. This is said to be true for several reasons: First, searches will be physically disruptive to such an extent that timely publication will be impeded. Second, confidential sources of information will dry up, and the press will also lose opportunities to cover various events because of fears of the participants that press files will be readily available to the authorities. Third, reporters will be deterred from recording and preserving their recollections for future use if such information is subject to seizure. Fourth, the processing of news and its dissemination will be chilled by the prospects that searches will disclose internal editorial deliberations. Fifth, the press will resort to self-censorship to conceal its possession of information of potential interest to the police.

30 It is true that the struggle from which the Fourth Amendment emerged “is largely a history of conflict between the Crown and the press,” *Stanford v. Texas*, 379 U.S. 476, 482 (1965), and that in issuing warrants and determining the reasonableness of a search, state and federal magistrates should be aware that “unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.” *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with “scrupulous exactitude.” *Stanford v. Texas*, *supra*, at 485. “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*, 413 U.S. 496, 501 (1973). Hence, in *Stanford v. Texas*, the Court invalidated a warrant authorizing the search of a private home for all books, records, and other materials relating to the Communist Party, on the ground that whether or not the warrant would have been sufficient in other contexts, it authorized the searchers to rummage among and make judgments about books and papers and was the functional equivalent of a general warrant, one of the principal targets of the Fourth Amendment. Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

Similarly, where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to “focus searchingly on the question of obscenity.” *Marcus v. Search Warrant*, *supra*, at 732; *A Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968); *Roaden v. Kentucky*, *supra*, at 502; *Heller v. New York*, 413 U.S. 483, 489 (1973).

Neither the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants, however, call for imposing the regime ordered by the District Court. Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated. Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant – probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness – should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The warrant issued in this case authorized nothing of this sort. Nor are

we convinced, any more than we were in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

The fact is that respondents and *amici* have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it. Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated – nor should it be.

Respondents also insist that the press should be afforded opportunity to litigate the State's entitlement to the material it seeks before it is turned over or seized and that whereas the search warrant procedure is defective in this respect, resort to the subpoena would solve the problem. The Court has held that a restraining order imposing a prior restraint upon free expression is invalid for want of notice and opportunity for a hearing, *Carroll v. Princess Anne*, 393 U.S. 175 (1968), and that seizures not merely for use as evidence but entirely removing arguably protected materials from circulation may be effected only after an adversary hearing and a judicial finding of obscenity. *A Quantity of Books v. Kansas*, *supra*. But presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial. Not every such seizure, and not even most, will impose a prior restraint. *Heller v. New York*, *supra*. And surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the Daily or on its communication of ideas. 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.

We note finally that if the evidence sought by warrant is sufficiently connected with the crime to satisfy the probable-cause requirement, it will very likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash. Further, Fifth Amendment and state shield-law objections that might be asserted in opposition to compliance with a subpoena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment. Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants.

We accordingly reject the reasons given by the District Court and adopted by the Court of Appeals for holding the search for photographs at the Stanford Daily to have been unreasonable within the meaning of the Fourth Amendment and in violation of the First Amendment. Nor has anything else presented here

persuaded us that the Amendments forbade this search. It follows that the judgment of the Court of Appeals is reversed.

So ordered.

5 **MR. JUSTICE POWELL, concurring.**

I join the opinion of the Court, and I write simply to emphasize what I take to be the fundamental error of MR. JUSTICE STEWART'S dissenting opinion. As I understand that opinion, it would read into the Fourth Amendment, as a new and *per se* exception, the rule that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena could be used as a substitute procedure. Even aside from the difficulties involved in deciding on a case-by-case basis whether a subpoena can serve as an adequate substitute, I agree with the Court that there is no constitutional basis for such a reading.

15 If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief. As the opinion of the Court points out, the struggle from which the Fourth Amendment emerged was that between Crown and press. *Ante*, at 564. The Framers were painfully aware of that history, and their response to it was the Fourth Amendment. *Ante*, at 565. Hence, there is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press, as to every other person.

25 This is not to say that a warrant which would be sufficient to support the search of an apartment or an automobile necessarily would be reasonable in supporting the search of a newspaper office. As the Court's opinion makes clear, *ante*, at 564-565, 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. While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment – such as those highlighted by MR. JUSTICE STEWART – when he weighs such factors. If the reasonableness and particularity requirements are thus applied, the dangers are likely to be minimal.

35 In any event, considerations such as these are the province of the Fourth Amendment. There is no authority either in history or in the Constitution itself for exempting certain classes of persons or entities from its reach.

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MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, dissenting.

45 Believing that the search by the police of the offices of the Stanford Daily infringed the First and Fourteenth Amendments' guarantee of a free press, I respectfully dissent.

It seems to me self-evident that police searches of newspaper offices burden the freedom of the press. The most immediate and obvious First Amendment injury caused by such a visitation by the police is physical disruption of the operation of the newspaper. Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing. By contrast, a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it.

But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves. Protection of those sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public, because important information can often be obtained only by an assurance that the source will not be revealed. *Branzburg v. Hayes*, 408 U.S. 665, 725-736 (dissenting opinion). And the Court has recognized that “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Pell v. Procunier*, 417 U.S. 817, 833.

Today the Court does not question the existence of this constitutional protection, but says only that it is not “convinced. . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches.”⁶ This facile conclusion seems to me to ignore common experience. It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist’s assurance, his identity may in fact be disclosed. And it cannot be denied that confidential information may be exposed to the eyes of police officers who execute a search warrant by rummaging through the files, cabinets, desks, and wastebaskets of a newsroom. Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist’s access to information, and thus the public’s, will thereby be impaired.

A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant, while a subpoena would permit the newspaper itself to produce only the specific documents requested. A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public.

One need not rely on mere intuition to reach this conclusion. The record in this case includes affidavits not only from members of the staff of the Stanford Daily but also from many professional journalists and editors, attesting to

precisely such personal experience.~ Despite the Court's rejection of this uncontroverted evidence, I believe it clearly establishes that unannounced police searches of newspaper offices will significantly burden the constitutionally protected function of the press to gather news and report it to the public.

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II

In *Branzburg v. Hayes, supra*, the more limited disclosure of a journalist's sources caused by compelling him to testify was held to be justified by the necessity of "pursuing and prosecuting those crimes reported to the press by informants and . . . thus deterring the commission of such crimes in the future." 10 408 U.S., at 695. The Court found that these important societal interests would be frustrated if a reporter were able to claim an absolute privilege for his confidential sources. In the present case, however, the respondents do not claim that any of the evidence sought was privileged from disclosure; they claim only that a subpoena would have served equally well to produce that evidence. Thus, 15 we are not concerned with the principle, central to *Branzburg*, that "the public . . . has a right to every man's evidence,"³ but only with whether any significant societal interest would be impaired if the police were generally required to obtain evidence from the press by means of a subpoena rather than a search.

It is well to recall the actual circumstances of this litigation. The application 20 for a warrant showed only that there was reason to believe that photographic evidence of assaults on the police would be found in the offices of the Stanford Daily. There was no emergency need to protect life or property by an immediate search. The evidence sought was not contraband, but material obtained by the Daily in the normal exercise of its journalistic function. Neither the Daily nor any 25 member of its staff was suspected of criminal activity. And there was no showing that the Daily would not respond to a subpoena commanding production of the photographs, or that for any other reason a subpoena could not be obtained. Surely, then, a subpoena *duces tecum* would have been just as effective as a police raid in obtaining the production of the material sought by the Santa Clara County District Attorney. 30

The District Court and the Court of Appeals clearly recognized that *if* the affidavits submitted with a search warrant application should demonstrate probable cause to believe that a subpoena would be impractical, the magistrate must have the authority to issue a warrant. In such a case, by definition, a subpoena would not be adequate to protect the relevant societal interest. But they 35 held, and I agree, that a warrant should issue only after the magistrate has performed the careful "balanc[ing] of these vital constitutional and societal interests." *Branzburg v. Hayes, supra*, at 710 (POWELL, J., concurring).~

The decisions of this Court establish that a prior adversary judicial hearing is 40 generally required to assess in advance any threatened invasion of First Amendment liberty.~ A search by police officers affords no timely opportunity for such a hearing, since a search warrant is ordinarily issued *ex parte* upon the affidavit of a policeman or prosecutor. There is no opportunity to challenge the necessity for the search until after it has occurred and the constitutional 45 protection of the newspaper has been irretrievably invaded.

On the other hand, a subpoena would allow a newspaper, through a motion to quash, an opportunity for an adversary hearing with respect to the production of any material which a prosecutor might think is in its possession. This very principle was emphasized in the *Branzburg* case:

5 “[I]f the newsman is called upon to give information bearing only a
remote and tenuous relationship to the subject of the investigation, or if
he has some other reason to believe that his testimony implicates
10 confidential source relationships without a legitimate need of law
enforcement, he will have access to the court on a motion to quash and
an appropriate protective order may be entered.” 408 U.S., at 710
(POWELL, J., concurring).

See also *id.*, at 707-708 (opinion of Court). If, in the present litigation, the Stanford Daily had been served with a subpoena, it would have had an opportunity to demonstrate to the court what the police ultimately found to be true – that the evidence sought did not exist. The legitimate needs of government thus would have been served without infringing the freedom of the press.

III

Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect the freedom of the press.

25 For these reasons I would affirm the judgment of the Court of Appeals.