Zurcher: Third-Party Searches and Freedom of the Press

Charles Cantrell, Oklahoma City University School of Law

Available at: https://works.bepress.com/charles_cantrell/44/
ZURCHER: THIRD PARTY SEARCHES
AND FREEDOM OF THE PRESS

CHARLES L. CANTRELL*

INTRODUCTION

The recent case of Zurcher v. Stanford Daily¹ has provided the United States Supreme Court with the opportunity to resolve some crucial problems of interpretation in the areas of the first and fourth amendments. This case, perhaps more than any other, accurately establishes the Burger Court’s position in situations which involve a conflict of fourth and first amendment values.

The case arose from a controversial search of the newspaper offices of the Stanford Daily. The search was conducted by local police officers pursuant to a valid search warrant. The affidavit in support of the warrant established the fact that there was probable cause to believe that there were certain photographs of a violent demonstration in which some police officers were seriously injured. Neither the newspaper nor anyone else connected with the newspaper was ever considered a suspect in the investigation.

The procedure followed in the search was found to be unconstitutional by a federal district court in California.² Its opinion, which was subsequently adopted by the United States Court of Appeals for the Ninth Circuit,³ was far-reaching and highly controversial.

Both lower courts held that a subpoena duces tecum was the proper method for obtaining evidence from a third party not considered a suspect in the criminal investigation. The courts held that a search warrant could only be used if the requesting party established that a subpoena duces tecum would be impractical. Moreover, if important first amendment interests were involved, an even greater showing of impracticability would be necessary.

This article will address the Supreme Court’s opinion in Zurcher and attempt to analyze the Court’s rationale and rul-

* Assistant Professor of Law, Marquette University Law School; LL.M. 1976, University of Texas; J.D. 1972, Baylor University.
ing. The author believes that the Court gave insufficient consideration to several first amendment interests in the case and made some dubious presumptions about the motivations and inclinations of prosecutors. The resultant holding of the Court illustrates a marked insensitivity to press interests. These objections aside, the most serious inadequacy of the decision is the broad and wide ranging effect of its language. The complex issues involved deserve the serious attention of all those in the legal profession and the very real threat to the freedom of the press presented by Zurcher merits the concern of all individuals who value this constitutional liberty.

THIRD PARTY SEARCHES: A FOURTH AMENDMENT INTERPRETATION

Great difficulty ensues when a fourth amendment analysis is applied to third party searches. As a matter of precedent, no cases prior to Zurcher discussed when a subpoena duces tecum should be issued instead of a search warrant when law enforcement agencies wished to acquire criminal evidence from one unconnected to a crime.

Historically, the guarantees of the fourth amendment were viewed as protections enjoyed by the criminal suspect and, when viewed in a constitutional context, were considered to be "personal" in nature. Courts reinforced this personal rights doctrine by analyzing fourth amendment issues in terms of standing. When a law enforcement agency wanted information from an innocent third party, a subpoena duces tecum was normally employed. In cases where a search warrant was used, the third party rarely had standing to complain since the evidence obtained in the search was not to be used against him.

In arriving at the conclusion that a showing of impracticability had to be made with regard to a subpoena duces tecum before a search warrant could lawfully issue, the district court relied upon a number of factors. The first was an erroneous interpretation of prior case law. Although dicta may have generally supported some type of specialized protection of third parties, there certainly was no direct case law supporting the

5. 353 F. Supp. at 132.
[T]he power of an arresting officer to take the property of the defendant, to be used as evidence of the crime charged against him in the warrant, is quite different from the taking of the property of third persons by virtue of no other process save that of the warrant against the accused. The constitutional protec-
broad proposition that a showing of impracticability was necessary. Secondly, the lower court attempted to restrictively interpret Warden v. Hayden\textsuperscript{1} to mean that the abrogation of the "mere evidence" rule applied only in cases concerning the searches of "suspects." The court supported this dubious proposition by expressing its view that third parties did not possess adequate safeguards against searches.\textsuperscript{8} Reasoning further that

\begin{quote}
\textit{Id.} at 798, 82 S.E. at 133.

However, the Owens case dealt with the warrantless seizure of a third party's property when the ostensible authority was an arrest warrant for another person. In Commodity Mfg. Co. v. Moore, 198 N.Y.S. 45 (Sup. Ct. 1923), the court held:

No case has been cited where the court has gone so far as to say that property, not an instrument of a crime, but only evidence of its commission, and which was the property of some one besides the defendant, could be seized either under a search warrant or as an incident of the arrest of defendant.

I can well believe that property used in the commission of a crime, even though belonging to a third party, might properly be seized, and also that property not used in the commission of the crime, but containing evidence of the commission of the crime, might properly be seized, where it is the property of the person accused; but to sanction the seizure of the property of innocent persons, or persons not accused, not used in the commission of the crime, but merely because they contained evidence of the crime, would open the door to grave abuses of invasion of property rights. \textit{Id.} at 47.

The court's emphasis upon evidence which was not used in the commission of a crime severely undercuts the entire rationale. Since the discarding of the "mere evidence" rule, there is no meaningful distinction as to what may be seized. Warden v. Hayden, 387 U.S. 294 (1967).

The district court further stated that it was settled that an arrest warrant cannot issue for a material witness unless the magistrate has reason to believe that a subpoena is impractical. Bacon v. United States, 449 F.2d 933 (9th Cir. 1971). Citing scholarly works which indicate that unlawful seizures had been more protected under the fourth amendment than unlawful arrests, the court attempted to draw an analogy requiring a showing that a subpoena would be impractical. See Kaplan, \textit{Search and Seizure: A No-Man's Land in the Criminal Law}, 49 CALIF. L. REV. 474, 475 (1961); Orfield, \textit{Warrant of Arrest and Summons Upon Complaint in Federal Criminal Procedure}, 27 U. CIN. L. REV. 1 (1958).

The district court extended the Bacon holding far beyond its basis. Although there is a presumption that the Federal Rules of Criminal Procedure may implement some of the fourth amendment guarantees, Bacon was decided on a statutory and not a constitutional basis. See 18 U.S.C. § 3149 (1966); \textit{Fed. R. Crim. P.} 46(b).
\end{quote}

\textsuperscript{7} 387 U.S. 294 (1967).
\textsuperscript{8} 353 F. Supp. at 130.
the exclusionary rule was the underlying basis of the *Warden* opinion and that that rationale necessarily implied that the Supreme Court in *Warden* had considered only those individuals who could make use of the rule, the district court found that only "suspects" were affected by *Warden's* ruling. Finally, the district court found that, if law enforcement agencies were not obliged to exhaust the subpoena route, the fourth amendment rights of nonsuspects would be inadequately protected.\(^9\)

Although the Supreme Court categorically rejected these propositions,\(^10\) its own analysis was incomplete, especially in regard to third party interests. Relying on the *Alderman* rule of restricted standing,\(^11\) the Court found that the added deterrent to police misconduct did not justify further encroachment upon the public interest in the prosecution of those accused of crimes. While reaffirming its standing rule based on the public interest in furthering prosecutions, the Court ignored at least two vital societal interests.

The first important effect of this ruling is that it denies third parties a judicial forum in which a determination can be made regarding their claims for opposing the production of materials. Clearly, society would regard such third party relationships as attorney-client or doctor-patient to be justifiably entitled to a high degree of respect. Without a prior judicial determination, these privileges cannot be raised or enforced. Moreover, many other possible constitutional, common law and statutory privileges exist which would defeat a request for production under a subpoena.

These privileges have customarily been respected in past practice. The method employed to gain access to such information in the custody of third parties was traditionally the subpoena route.\(^12\) To allow search warrants to be issued in such cases denies the third party of his primary privilege or right. The relatively simple test for probable cause to search effec-

---

9. *Id.* at 131-32.
10. 98 S. Ct. at 1980 n.9.

We adhere . . . to the general rule that Fourth Amendment rights are personal rights which . . . may not be vicariously asserted . . . . There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.

*Id.* at 174.
tively precludes any meaningful review for the third party who is both uninformed and not present.\textsuperscript{13}

The use of search warrants in this context would constitute a deprivation of due process if an analogy could be drawn to other cases which have required a hearing before property is taken from a third party.\textsuperscript{14} Where any type of state or governmental action is involved, due process requires that, except in emergencies, no seizure of property may occur unless notice and an opportunity to oppose the seizure is provided.\textsuperscript{15} It would certainly seem appropriate that this principle be extended to ex parte searches of third parties. State action is at its highest concentration in criminal actions wherein the state is a principal party. In addition, there are no measures which serve to adequately safeguard the third party’s interest such as a replevin bond in prejudgment remedy cases. Moreover, the degree of intrusion is greater and the invasion of privacy is irreversible in third party search cases.

Mr. Justice Stewart expressed this principle clearly in \textit{Fuentes v. Shevin}\textsuperscript{16} when he stated:

\begin{quote}

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. . . . [T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person’s right to enjoy what is his, free of governmental interference . . . .

The requirement of notice and an opportunity to be heard
\end{quote}

\textsuperscript{13} The Supreme Court quoted the following with approval in regard to probable cause: “‘[o]nce 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.’” 98 S. Ct. at 1978 (quoting United States v. Manufacturers Nat’l Bank, 536 F.2d 699, 703 (6th Cir. 1976), cert. denied, 429 U.S. 1039 (1977)). \textit{See also State v. Tunnel Citgo Services, 149 N.J. Super. 427, 433, 374 A.2d 32, 35 (1977).}


\textsuperscript{16} 407 U.S. 67 (1972).
raises no impenetrable barrier . . . . But the fair process of decisionmaking that it guarantees works, by itself, to protect against arbitrary deprivation of property . . . . [S]ubstantively unfair and simply mistaken deprivations of property interests can be prevented . . . ."\textsuperscript{17}

The second important societal interest at stake is the privacy interests of the innocent third party. Subsequent to \textit{Zurcher}, there is absolutely no rule prohibiting law enforcement agencies from regularly searching businesses that retain information on potential defendants and suspects. Groups such as credit agencies, computer companies, utilities or any other legitimate enterprise may now be searched without warning for any evidence related to a crime.

\textit{Zurcher}, then, does nothing less than shatter the privacy expectations of businesses and individuals everywhere. These types of searches will undoubtedly be thorough and will necessarily expose numerous files containing confidential information concerning other individuals to the eyes of the police. Such a needless invasion of privacy may now occur as a matter of routine police procedure. Furthermore, searches of this nature will involve the unnecessary invasion of innocent parties' privacy without any demonstration that a subpoena would be impractical.

\textbf{THE "REASONABLENESS" OF THIRD PARTY SEARCHES}

In determining the constitutionality of a search under the fourth amendment, the key question is whether, under the facts and circumstances, the search is "reasonable."\textsuperscript{18} In addition to considering all of the special circumstances of each case, "reasonableness" also includes a careful balancing of the needs of society against those of the individual.\textsuperscript{19} Such a test that considers all relevant factors does not lend itself to a set of rigid predetermined rules concerning "reasonableness."\textsuperscript{20}

In \textit{Zurcher}, the Supreme Court identified "probable cause" to search as the most critical element in determining whether

\textsuperscript{17} Id. at 80-81 (citation omitted).
\textsuperscript{18} Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).
\textsuperscript{19} United States v. Ortiz, 422 U.S. 891, 900 (1975) (Burger, C.J., concurring).
\textsuperscript{20} See South Dakota v. Opperman, 428 U.S. 364, 373 (1976); Roaden v. Kentucky, 413 U.S. 496, 501 (1973); Coolidge v. New Hampshire, 403 U.S. 433, 509-10 (1971) (Black, J., concurring and dissenting). \textit{See also} Cady v. Dombrowski, 413 U.S. 433, 439-42 (1973) (where an analysis is made of the type of factors often considered by the courts in determining whether a search was "reasonable").
a search was reasonable. A substantial body of scholarship exists with respect to the proposition that the tests for reasonable cause to arrest and probable cause to search are distinct and do not encompass the same elements. Reaffirming this principle, that neither the right to search nor the legality of the search is dependent on the right to arrest, the Court went on to find that no meaningful difference existed between the probable cause required to search a suspect's possessions and those of a third party. Justice White observed:

The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena ducès tecum, whether on the theory that the latter is a less intrusive alternative, or otherwise.

The majority opinion has thus fashioned a construction of the fourth amendment which categorically states that a showing of probable cause to search justifies the issuance of a search warrant against any third party, regardless of the extent and nature of his or her expectation of privacy. The Court hastily added that this rule did not foreclose the possibility that an otherwise proper search could be held unreasonable if the manner in which it was executed was found to be unreasonable.

This position approaches the untenable. The Court, after rejecting the rule that a search based on a search warrant with probable cause was reasonable per se, resorted to the next best thing. It retained the overall test for "reasonableness," but foreclosed any showing of the competing privacy interests when utilizing the balancing test. Thus the determination as to "reasonableness" must necessarily be conducted post facto. Even if the scope of the search was later found to be unreasonable, the strict standing rules effectively allow the product of the

---

22. See T. Taylor, Two Studies in Constitutional Interpretation 48 (1969); La Fave, Search and Seizure: "The Course of True Law...Has Not... Run Smooth," 1966 U. Ill. L.F. 255, 260; Comment, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U. Chi. L. Rev. 664, 687 (1961). See also Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 359-60 (1974) (which contains a brief discussion of the different elements and which principally analyzes "reasonable searches").
23. 98 S. Ct. at 1977 (citing Carroll v. United States, 267 U.S. 132, 158 (1925)).
25. Id. at 1978-79.
unreasonable search to be admitted into evidence.\textsuperscript{26} Judging by the result in \textit{Zurcher}, grave doubts arise whether there is any remedy for the one who has suffered the consequences of a third party search.\textsuperscript{27} If probable cause to search always overcomes a recognized privacy right regardless of the type of evidence, crime or privacy right involved, then "reasonableness" has been effectively ousted as the touchstone of the fourth amendment. As far as third parties are concerned, the "reasonableness" standard, instead of being designed to protect against illegal searches, merely declares them to be unreasonable after the fact. Such a determination will be too late to rectify the invasion of privacy and, given the standing requirements of the exclusionary rule, will lack adequate judicial sanctions.

Apparently, the Supreme Court felt it necessary to articulate a token balancing test, which would consider the public's interest in efficient criminal prosecutions against the third parties' interests, before finally deciding that such searches were reasonable. In determining that the public's interest was superior to that of any third party interest, the Court developed three conclusions. First, the past decisions of the Supreme Court have established that a less strict standard of probable cause is required when a search is not intended to acquire evidence of crime against the possessor. Second, once the state informs the third party that illegal materials are to be found on his property, he becomes sufficiently culpable to justify the issuance of a search warrant. Third, irreparable harm to law

\textsuperscript{26} See text accompanying note 8 supra.

\textsuperscript{27} The Supreme Court did not pass on the question of whether attorneys' fees may be awarded to third parties under the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. \textsection\ 1988 (1976). The overriding issue is whether the absolute immunity enjoyed by prosecutors, magistrates and those who carry out judicial orders has been overturned by the new attorneys' fees legislation. In this regard, see the legislative history of the law which clearly establishes that the act was to be applied to all cases that were pending at the time of its enactment. 122 Cong. Rec. H12155 (daily ed. Oct. 1, 1976) (remarks of Rep. Anderson); \textit{id}. at H12160 (remarks of Rep. Drinan); \textit{id}. at S17052 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk).

Whether the act embodies the common law immunities to fee awards as set forth in Imbler v. Pachtman, 424 U.S. 409 (1976) is unclear. Lower courts have consistently rejected the principle that a showing of "bad faith" is necessary before attorneys' fees can be awarded. Alicia Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977); Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977); Martinez Rodriguez v. Jiminez, 551 F.2d 877 (1st Cir. 1977); Pennsylvania v. O'Neill, 431 F. Supp. 700 (E.D. Pa. 1977); Wade v. Mississippi Co-op Extension Serv., 424 F. Supp. 1242 (N.D. Miss. 1976).
enforcement would result if search warrants could not regularly issue against third parties.

A closer examination of these conclusions is appropriate. The first conclusion, that prior cases have held that third party searches are to be judged by some lesser standard of probable cause, was based upon Camara v. Municipal Court. The Court however placed too little emphasis on the fact that Camara dealt only with "area inspections" whose purpose was civil rather than criminal. Specifically, the Camara Court held that routine inspections for health, fire and housing programs were a less hostile intrusion than a search for criminal evidence. Something less than full fourth amendment protections were at stake in Camara because the purposes of the search were civil even though enforceable through criminal procedures. Ironically enough, the Court in Camara elevated, rather than restricted, the fourth amendment interests of the individual in municipal inspection situations by declaring that such interests were more than "peripheral."

Camara differs from Zurcher in one other important respect. In Camara, the probable cause necessary for an area inspection warrant was automatically satisfied if reasonable legislative or administrative standards for conducting the inspection were satisfied with respect to a particular dwelling. This method of meeting the probable cause standard in civil inspections is altogether different than the stricter standards necessary in criminal searches. The precise holding of Camara is that an overriding governmental interest, which is civil in nature, requires a less stringent standard of probable cause to justify a limited inspection, particularly if the intrusion is less than that occasioned by a search for criminal evidence. Zurcher is simply inapposite.

30. Id. at 530.
31. Id. at 530-33.
32. Id. at 538.
33. The Court also alluded to the consistency of its position by citing Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) and United States v. Biswell, 406 U.S. 311 (1972) for the proposition that some limited searches may be accomplished without a warrant. Neither case can support the rule of Zurcher. In Colonnade the administrative search in question was one of an establishment which sold liquor. The search was justified as reasonable on the basis of the long history of governmental control of such businesses. 397 U.S. at 76.

Likewise, the Biswell case is not precedent for a lesser standard of probable cause
The second conclusion of the Zurcher Court was that the culpability of the third party increases when he is informed of the presence of illegal materials. This increased culpability then works to preclude his withholding of evidence.\textsuperscript{34} This unique proposition was apparently triggered by a concession of counsel for respondent newspaper.\textsuperscript{35} Regardless of its origin, it is inimical to an ordered and fair criminal justice system that, once a party is informed through legal process that there exists a reasonable belief that he possesses evidence of a crime, his assumed culpability works to foreclose any timely complaint regarding his privacy interests or evidentiary privileges. This is simply the Court’s final holding couched in a moral vein. However if it is reworded, it is certainly no more palatable.

The third conclusion of the Court was by far the most important. Stating that whatever may be the uncertain gain in privacy rights accruing to an individual by the protection of a subpoena duces tecum the Court believed that the demonstrated harm to effective law enforcement required a holding in the government’s favor.\textsuperscript{36} The main adverse effect of a subpoena duces tecum is the early warning of the police’s desire to obtain inculpatory evidence. This warning would obviously cause the disappearance of evidence in some cases. In addition to the possibility that a third party could take on the status of a suspect as the investigation proceeded, the fear that he could not be relied upon to preserve the evidence was responsible for the Court’s concern.\textsuperscript{37}

These fears are obviously justified in some cases. However, it is far-fetched to fashion a rule which presumes that every third party will destroy evidence. Is it really possible that lawyers, doctors and legitimate businesses are so potentially corrupt that they cannot be trusted to preserve evidence demanded through a subpoena?

Where the law enforcement agency has a justifiable concern over the impracticability of a subpoena, this fact may be shown to an appropriate magistrate. Mechanisms can be provided for

\begin{flushleft}
\textsuperscript{34} 98 S. Ct. at 1979.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\end{flushleft}
a speedy hearing on a motion to quash and the entire procedure may be subject to only a short delay. This procedure would seem to be appropriate, especially in matters which concern recognized evidentiary privileges and elevated constitutional rights.\(^{38}\)

**Searches of Newspapers**

Regardless of the merits of searching third parties without a prior judicial determination, searches of newspapers unconnected to criminal activity pose quite different problems. As a preface, it should be noted that newspapers would certainly be entitled to all of the arguments set forth in the prior section on the issue of reasonableness. In addition, other protections which would be invoked as actions involving questions of fourth and first amendment values are fundamentally different from cases of ordinary crime and present a special threat to constitutionally protected speech.\(^ {39}\) In recognition of this unique threat to first amendment values, the Supreme Court has consistently required strict compliance with the warrant requirements and procedures.\(^ {40}\)

In *Zurcher* the Supreme Court rejected all of these arguments and held that a long line of prior cases only established that the warrant requirements be applied with “particular exactitude.”\(^ {41}\) Thus, the Court granted the press only a shade greater protection than that enjoyed by third parties in general.\(^ {42}\)

When the Court did not accept the newspaper’s first amendment arguments against searches, it necessarily classified the press as a simple third party nonsuspect. Categorizing a newspaper as such, the arguments for allowing third party

---

38. The Court also expressed concern that a third party could resist a subpoena under the privilege against self-incrimination. *Id.* at 1979-80 n.8. *See* Andresen *v.* Maryland, 427 U.S. 463, 473-74 (1976), wherein it was said “the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information . . . .”


42. Exactly how much more protection is enjoyed by the press is unclear. Without doubt, the words of “particular exactitude” were added to prevent fishing expeditions in the newspaper’s files.
nonsuspects to be searched were equally applicable. However, several of the assumptions on which the Court based its decision must be questioned when applied to news organizations. For instance, it is difficult to believe that a newspaper would violate the law by secreting or destroying evidence. The Court's fears concerning true suspects having access to the property are likewise inapplicable in the cases of newspapers. Similar reservations about the culpability of the third party would seem to be equally inapposite.\textsuperscript{43} Regardless of these fears, there exists several theories which should have protected newspapers from unannounced searches.

**UNNECESSARY SOURCE DISCLOSURE**

One of the primary complaints of the press is that searches will unnecessarily divulge the identity of confidential sources and lead to a chilling effect on the process of news gathering. The Court's majority perfunctorily dismissed this argument by stating that they were unconvinced that confidential sources would disappear because of the possibility that newspapers could be searched without warning.\textsuperscript{44} This statement overlooks the realities of the confidential relationship that serves as the basis of much news gathering. If this confidentiality is broken, then vital channels to facts will be closed.\textsuperscript{45}

The Court cited *Branzburg v. Hayes*\textsuperscript{46} in reaffirmance of its position that confidential sources would not disappear. It further stated that whatever "incremental" difference existed between

\textsuperscript{43} Justice Powell's concurring opinion contained the announced editorial position of the Stanford Daily which was to destroy any evidence which would aid in the prosecution of demonstrators. This policy was not presented to the magistrate who initially issued the search warrant. 353 F. Supp. at 135 n.16. Thus, the editorial policy was never an issue in the case, but certainly influenced the decision in the Supreme Court. 98 S. Ct. at 1983 n.I. (Powell, J., concurring).

\textsuperscript{44} 98 S. Ct. at 1982.


\textsuperscript{46} 408 U.S. 665 (1972).
tween the *Branzburg* subpoena and the *Zurcher* search warrant had no constitutional significance.47 However, this incremental difference spoken of in *Zurcher* is more fundamental than the Court wished to acknowledge.

The *Branzburg* case48 dealt with the issue of whether a reporter who had witnessed criminal acts could refuse to honor a grand jury subpoena concerning those acts. The Court held that the investigatory needs of the grand jury usually established a compelling state interest which justified the indirect and uncertain burden on the first amendment freedoms at stake.49 In addition, the *Branzburg* majority opinion recognized that some type of constitutional protection for the function of news gathering by the press was necesssary.50 The concurring opinion by Justice Powell shed some light on the exact holding of the Court. He asserted that the newsman's privilege must be judged by a balancing of the freedom of the press against the obligation of a citizen to give evidence concerning crimes.51 This balancing would take place after the reporter appeared before the grand jury and refused to answer questions. A judge would then decide whether the newspaperman's claim was justified.

One major difference in the two cases is that *Branzburg* involved only the press function of news gathering. *Zurcher* not only deals with the function of news gathering, but also includes the constitutionally protected roles of editing52 and distributing.53 It should be remembered that a search of a newspaper office must necessarily be physically disruptive of the news offices. It is highly doubtful that a law enforcement agent will be able to quickly locate the desired materials without first uncovering and scanning sundry unrelated memos, files and other documents. Thus, the search will undoubtedly include material that will have to be read and analyzed before the information sought is located.54 This probability of physical

---

47. 98 S. Ct. at 1982.
49. 408 U.S. at 700-01.
50. *Id.* at 681.
51. *Id.* at 710 (Powell, J., concurring).
52. New York Times Co. v. United States, 403 U.S. 713 (1971) (where the Court clearly protects "publication" which presumably would include the editing role).
54. There is obviously no set time limit in which a search must be conducted.
disruption of the newsroom is present only during a search. The use of a subpoena would allow the press sufficient time to locate the material and decide whether to file a motion to quash.

Zurcher and Branzburg can be distinguished further. In the latter case, only the method of acquiring information through a subpoena was at issue. A search warrant, on the other hand, represents a much more serious invasion of the newspaper's privacy interests. These interests are neither vague nor indefinite and represent innumerable pledges of confidentiality made to various sources. A subpoena, unlike a warrant, would not disturb these vital privacy interests. Moreover, if a particularly important confidential relationship were at issue, then the newspaper would have an adequate opportunity to present its position through a motion to quash.

In addition to the needless disclosure of confidential sources that would necessarily occur through the execution of search warrants, more drastic consequences will undoubtedly flow from press searches. The primary fear is that newspapers will experience a loss in credibility and independence. Subsequent to Zurcher, a pledge of confidentiality must be viewed with some misgivings. Since unannounced searches will expose the protected confidences at stake, a reporter's pledge will be both unsupportable and ineffectual.

A similar loss of credibility will be established if a newspaper loses its independence in news gathering and reporting. If the press is informally and involuntarily impressed into the service of law enforcement agencies as a subsidiary fact gathering agent, it will lose its credibility as being the independent eye and ear of the citizenry. The media's proper function is to report the news in an independent and unbiased manner. To the extent that the press favors one interest group over another, however unwillingly, it loses its credibility. Favoritism for effective law enforcement should be an editorial function of the press and not a news or reporting function.

It is certainly not difficult to believe that the newsroom of a major network or newspaper contains an inordinate amount of "mere evidence" concerning many crimes. It is a rare night that a major network does not report some details of suspected

Because of this, the potential for physical disruption cannot be discounted. One search of a radio station in California lasted over eight hours which reportedly disrupted the operation of the station. Note, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 Stan. L. Rev. 957, 959 (1976).
criminal activity by a public figure. On a reduced scale it is undoubtedly true that most reputable newspapers and media outlets have special sources that they have nurtured through the years in order that inside stories may be developed and printed. If these sources disappear, then so too will the information which is so vitally needed for an informed and enlightened public. If this happens, the loss will be felt by everyone. The public will be deprived of relevant and truthful stories, the press will lose its independence and will fail to perform its primary task and law enforcement agencies will, ironically enough, lose important information and clues regarding misconduct which they could otherwise have read in the paper. Indeed, this latter situation existed in the Watergate scandal and to a lesser extent in Koreagate. When police and other agencies read about suspected criminal activity in the newspaper, they were naturally compelled to follow up on these stories with their own investigations. When the press performs its ordinary function of news gathering, it also collaterally serves as a political impetus for local prosecutors to vigorously pursue uncovered cases. This is the manner in which the system has worked since the beginning of the nation.

**THE FEASIBILITY OF A PRIOR HEARING**

In *Zurcher* the Court came to the conclusion that a search of a pressroom for criminal evidence would not necessarily constitute a prior restraint.\(^{55}\) In so holding, the Court apparently distinguished cases where a seizure was used to temporarily preserve materials for use as evidence in a criminal trial and those cases where a seizure was for the purpose of confiscating a large quantity of books or materials thereby effectively removing them from circulation.\(^{56}\)

Justice White chose to view the situation as having “no realistic threat of prior restraint . . . whatsoever . . . on . . . [the] communication of ideas.”\(^{57}\) Regardless of the peculiar facts of the *Zurcher* case, it is difficult to believe that seizing a journalist’s work product is not a prior restraint. In the sense that the newspaper would be unable to publish the work product of the journalist, it would arguably constitute a “final” restraint on the newspaper.

---

55. 98 S. Ct. at 1982.
56. Id.
57. Id.
This decision also signaled an apparent change in the Court’s reasoning in situations where the execution of a state law threatens first amendment freedoms. A consistent line of cases had previously established that a prior adversary hearing was required when a seizure of presumptively protected materials endangered their exhibition or circulation.\(^{58}\) In \textit{Zurcher} the Court required no prior adversary hearing because the hazards of infringing upon the first amendment could be adequately monitored and controlled by the magistrate issuing the search warrant.\(^{59}\) This certainly signals a change of course since the time when the Court held:

The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is \textit{ex parte}, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate . . . . In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.\(^{60}\)

The approval of \textit{ex parte} hearings obviously bypasses any argument which the press could use at the hearing and further reduces the information which is made available to the magistrate. It is inconceivable that the police would or could carefully explain the newspaper’s constitutional objections.

An \textit{ex parte} hearing also is a departure from the \textit{Branzburg} rationale which mandated a prior judicial hearing before a newsman could be compelled to divulge confidential information. Indeed, Justice Powell’s concurrence required the striking of a proper balance by adjudicating the claims on a case-by-case basis:

[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 confidential source relationships without a legitimate need of law enforcement, he will have


\(^{59}\) 98 S. Ct. at 1982.

\(^{60}\) Carroll v. President & Comm’rs of Princess Anne, 393 U.S. 175, 183 (1968) (footnote omitted).
access to the court on a motion to quash. . . . The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony. . . .

As previously stated, Justice White felt that an ex parte hearing would be acceptable since the issuing magistrate would have sufficient control over the scope of the search warrant. The warrant requirements must be applied by the magistrate with “particular exactitude” when first amendment freedoms are endangered by a search. The concurring opinion of Justice Powell importantly added that a magistrate should consider the “independent values protected by the First Amendment.”

It is doubtful whether an ex parte hearing can satisfactorily safeguard the first amendment interests at stake in press searches. In relying on the magistrate’s discretion in fashioning the scope of the warrant, the Court has probably misplaced its reliance for a variety of reasons.

First, as Zurcher and Branzburg both illustrate, cases that concern a conflict of first and fourth amendment values are most difficult to reconcile. The close vote in each case highlights the fact that the Court itself is troubled concerning the proper combination of first and fourth amendment values to weigh in the decision. Thus, the Court while requiring a magistrate to balance these competing interests, has not formed any guidelines other than that the requirements of specificity and reasonableness be strictly followed.

The absence of definitive guidelines is problem enough, but when the magistrate must balance the respective interests without any input from the press, the entire process becomes unworkable. By stating that the newspaper’s objections are not needed, the Court has assured a process that will consistently work in favor of law enforcement.

Thirdly, many states allow search warrants to be issued by judicial officeholders at many levels. These include the various judges of municipal, police and city courts. Indeed, state laws

61. 408 U.S. at 710 (Powell, J., concurring).
63. Id.
64. Id. at 1984.
65. The vote was 5-3 in Zurcher with Justices Marshall, Stewart and Stevens dissenting and Justice Brennan not taking part. In Branzburg the vote was 5-4 with Justices Marshall, Brennan, Stewart and Douglas dissenting.
vary to such an extent that there is no uniform requirement that judges or justices of the peace be lawyers or even that they ever studied law. The notion of allowing these "magistrates" to balance the competing constitutional interests when one of the involved parties is absent is irrational.

Moreover, in many instances, magistrates and law enforcement officials establish a relationship over a period of time that presupposes the police officer's good faith in seeking the warrant. This type of imperfect relationship is even more dangerous in an *ex parte* proceeding where the magistrate must assume the necessary neutral and detached posture. Even if a magistrate were to deny a search warrant, there is nothing to prevent another magistrate more sympathetic to law enforcement from issuing another. The absence of any uniform rules and the use of *ex parte* hearings will undoubtedly highlight these deficiencies.

**Conclusion**

The ultimate effect of the *Zurcher* decision will probably not be felt for some length of time. It is difficult to imagine that police forces will suddenly resort to large scale searches of newspapers and media outlets in order to secure information of suspected crimes. However, giving law enforcement officials carte blanche to search the press destroys the careful balance which has characterized press-police relations. That balance was reached through the mutual respect of the law enforcement authorities and the press for one another. When the Court chooses to ignore the very real threat to the freedom of the press presented by *Zurcher*, it necessarily upsets that delicate balance. One certainly does not have to be enamored with the press to understand and respect its important role in modern American society. Strangely enough, if the law enforcement authorities begin to make use of this new search rule in newspaper cases, they will undoubtedly find that the procedure is counterproductive. Arbitrary and wholesale searches of news gathering organizations will undoubtedly constitute the most destructive element in the area of police-community relations.

Since the constitutional question has apparently been settled, the remedy lies in an appropriate legislative response. Only through the mechanism of legislation can the proper balance be reinstated between the press and law enforcement. In view of the danger of a search warrant bypassing relevant state
shield laws, \(^{66}\) the necessity of a legislatively mandated hearing becomes apparent. Without the opportunity to appear and claim one's statutory privilege, the privilege is meaningless because a mere demonstration of probable cause will always take precedence in an *ex parte* hearing. After the Court's decision in *Zurcher*, the need for protective legislation for the press is essential. The initiative is now with the legislature of each state. If the representatives of the several states act accordingly, this unwise judicial decision may yet be remedied.\(^ {67} \)

\(^{66}\) Shield laws which protect confidential information are currently in force in at least 26 states. However, the protection of these various statutes can be easily circumvented by the acquiring of a search warrant. *See generally* Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 *Stan. L. Rev.* 957, 960-71 (1976).

\(^{67}\) At this writing, substantial efforts are underway on the federal level to afford protection to the print and broadcast media. Two bills introduced in the United States House of Representatives provide that a prior adversary court proceeding must take place before a third party search of a print or broadcast news organization is undertaken. H.R. 13284, 95th Cong., 2d Sess., 124 *Cong. Rec.* 6081 (1978); H.R. 13285, 95th Cong., 2d Sess., 124 *Cong. Rec.* 6081 (1978).
