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# The Supreme Court and the Press: Freedom or Privilege?

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## THE SUPREME COURT AND THE PRESS: FREEDOM OR PRIVILEGE?

### INTRODUCTION

**I**N 1971, a catalog of personal liberties was ratified by the states and adopted as the first ten amendments to the new Constitution of the United States. The Bill of Rights guaranteed in writing that the citizens of the new nation would have freedoms not previously provided by their colonial rulers. It began in part with the assurance that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."<sup>1</sup>

One hundred eighty-seven years later, the Supreme Court of the United States, in a series of opinions in the spring of 1978, declared that the "freedom" guaranteed by the first amendment was not necessarily synonymous with the "privilege" sought by the press. Nor, the Court seemed to declare, was it prevented by the prohibition against abridgement of the press from limiting the rights of the press to those held generally by the public.

The common refrain in the 1978 decisions is that the first amendment guarantees no greater rights to the press than to other citizens; that the press is but one of countless categories of Americans protected by, and subject to, the Constitution, with no greater protection than any other category, and that the first amendment is directed only at prohibiting the prior restraint of the press.

The limited application of the first amendment and the narrow view of the intent of its framers was reflected most sharply in the Court's decision that newsrooms could be made the subject of search warrants in criminal investigations despite possible disruption of the flow of news and interference with legitimate newsgathering processes.<sup>2</sup> The Court also held that members of the news media had no greater right of access to prisons than other citizens, thereby blocking a television station's attempts to investigate allegations of prisoner mistreatment in a California prison.<sup>3</sup> The Court stopped short of stifling press investigations altogether, holding that newspapers could not be prohibited from reporting on confidential inquiries into the conduct of a state judge, but in doing this, the Court rested its analysis on a balancing test

<sup>1</sup> U.S. CONST., amend. I.

<sup>2</sup> *Zurcher v. Stanford Daily*, 98 S. Ct. 1970 (1978), discussed *infra*, Part II.

<sup>3</sup> *Houchins v. KQED*, 98 S. Ct. 2588 (1978), discussed *infra*, Part III A.

which, in that particular case, tipped in favor of the press.<sup>4</sup> The common thread of the cases remained a balancing of interests, the Court asking itself in each case whether the interest of the press was outweighed by countervailing societal interests.<sup>5</sup> The scale appeared to tip heavily against the press.

The Court's attitude towards the press as reflected in its construction of the first amendment was expressed as much in what the Court chose not to do as in what it did. Asked to stay a contempt of court finding against a New York Times reporter who refused to turn over his notes in a criminal investigation, Justices White and Marshall both denied the request, stating they did not believe a majority of the Court would vote to grant certiorari to hear the newspaper's case.<sup>6</sup> Reporter Myron Farber went to jail after the case was returned to the state court. On a later appeal, the Supreme Court did, in fact, refuse to hear the case.<sup>7</sup>

The press was especially quick to react to the Court's stance in *Zurcher v. Stanford Daily*, terming it a blow to freedom of the press and a threat to the democratic process.<sup>8</sup> Congress responded quickly as well, with the introduction of several bills directed at third party searches in general and

<sup>4</sup> *Landmark Communications, Inc. v. Virginia*, 98 S. Ct. 1535, discussed *infra*, Part III B.

<sup>5</sup> *Id.* at 1542.

<sup>6</sup> *New York Times Co. v. Jascalevich*, 99 S. Ct. 6 (1978).

<sup>7</sup> *Id.* New York Times reporter Myron Farber was sentenced to an indefinite jail term after he was found in contempt for refusing to turn over his notes from the investigation of a doctor on trial in New Jersey on charges of murdering five patients. See *Piercing a Newsmen's "Shield"*, TIME, Aug. 7, 1978, at 74; *Reporter Begins Indefinite Jail Term for Contempt of Court*, Aug. 5, 1978, at 15 (from a UPI dispatch same date); *Times Continues Appeals to Keep Reporter Free*, EDITOR & PUBLISHER, Aug. 5, 1978, at 11; *What Is a Shield Law?*, EDITOR & PUBLISHER, July 29, 1978, at 6; *Times Fights to Keep Reporter Out of Jail*, EDITOR & PUBLISHER, July 29, 1978, at 9; *Justices Allow Subpoena for News Files to Stand*, EDITOR & PUBLISHER, July 15, 1978, at 9; *Legal Battle for Reporter's Notes Continues*, EDITOR & PUBLISHER, July 8, 1978, at 10; *Judge Orders Reporter to Surrender Notes*, EDITOR & PUBLISHER, June 17, 1978, 11.

<sup>8</sup> See Irving Dilliard, adviser to National News Council, concurring statement issued Sept. 12, 1978, to National News Council's "Statement on Search and Seizure," (June 27, 1978), in COLUM. JOURNALISM REV., Nov.-Dec. 1978, at 98. ("I have been following the Supreme Court's Bill of Rights decisions for more than fifty years. In all that time, I know of no decision that is more in step with police state conduct than this one . . . [Unannounced police raids] have no place in our constitutional democracy or our system of justice"); statement of Richard Salant, President of CBS News, to ABA panel on "Search and Seizure of the Media," that there was "no question" that newsgathering would be affected by the decision, 47 U.S.L.W. 2126 (Aug. 22, 1978); address by Allen H. Neuharth, chairman and president, American Newspaper Publishers Assoc. to ANPA conference June 5, 1978: "The decision . . . subjecting newspaper offices to ransacking puts a sledgehammer in the hands of those who would batter the American people's First Amendment rights. It authorizes harrassment and intimidation of the public's right to know . . ." See also *Rule of Rummage Decision*, EDITOR AND PUBLISHER, July 29, 1978, at 40; *Keep Out: Another Rebuff for Newsmen*, TIME,

at searches of newsrooms in particular.<sup>9</sup> The Senate Judiciary Subcommittee on the Constitution began hearings June 22, 1978, less than a month after the *Zurcher* decision was announced, to take testimony from representatives of the news media on the potential impact of the court-sanctioned newsroom searches.<sup>10</sup> Of major concern to the press was that the decisions authorizing newsroom searches and requiring reporters to turn over notes, even for in camera inspections by the courts, could seriously impair the newsgathering process, thereby inhibiting a free flow of the news. Confidential news sources upon whom the news media relied for information not readily available to the general public would "dry up" newsmen warned, once they learned their identities could be revealed during searches of newsroom files and examinations of reporters' notes.<sup>11</sup> Nor did the press miss the significance of the decisions in light of investigations and disclosures published by the media in recent years. One editor was said to proclaim that both the Vietnam War disclosures and the Watergate investigations could have been severely hampered, if not totally prevented, by the seizure of the Pentagon Papers during a newsroom search, and by "harrassment" through search warrant procedures in general.<sup>12</sup>

This comment will examine the Supreme Court's spring, 1978 decisions

July 10, 1978, at 73 (quoting Jack Landau, director of the Reporters Committee for Freedom of the Press: "The court feels the press is arrogant and greedy and powerful enough to get what it wants without help from the court. But most of the press is not the big, rich, influential media that the Justices see in Washington, and all those local reporters do need support from the court to do their job."); *Your Newsroom May Be Searched*, THE QUILL, July/August 1978 at 21; *Comment: Another Turn of the Screw*, COLUM. JOURNALISM REV., July/August 1978 at 22 ("it is disconcerting to find in the language of the [*Zurcher*] decision further evidence that the Supreme Court majority is seeking to minimize the functions of the press, not to mention the Bill of Rights, in American Society."); *Newspaper Editors Rap High Court Search Ruling*, EDITOR & PUBLISHER, June 17, 1978, at 9.

<sup>9</sup> At least six bills were introduced in the House and Senate, although no action was taken on any of them before the Congress adjourned. See *Two Bills Introduced to Protect News Files*, EDITOR & PUBLISHER, June 10, 1978, at 9; *Your Newsroom May Be Searched*, THE QUILL, July/Aug. 1978, at 25; *Congress Ponders New Search Legislation*, EDITOR & PUBLISHER, July 8, 1978, at 8 ("At least half a dozen measures have now been introduced..."). The administration also responded to the decision by ordering a review by the White House and the Justice Department of all legislation introduced as a result of the *Zurcher* decision. See *Mondale Hints Carter Will Seek Search Safeguards*, EDITOR & PUBLISHER, June 24, 1978, at 7; *Words of Encouragement from the Vice-President*, THE QUILL, July/Aug. 1978, at 14.

<sup>10</sup> See *The Impact of the U.S. Supreme Court's Decision in Zurcher v. Stanford Daily and Corrective Legislation Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. (1978). *Congress Hears Media on Search Ruling*, EDITOR & PUBLISHER, July 29, 1978, at 13; *'Rule-of-Rummage' Decision*, EDITOR & PUBLISHER, July 29, 1978, at 40.

<sup>11</sup> See, e.g., Subcommittee testimony, *supra* note 10; Comment, *supra* note 8, at 22; *Scared of What Might Happen*, THE QUILL, July/Aug. 1978, at 2; see also 98 S. Ct. 1970, 1986 (Stewart, J., dissenting); *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 127 and 135 (E.D. Calif. 1972).

<sup>12</sup> Comment, *supra* note 8, quoting Benjamin C. Bradlee, editor, *The Washington Post*, at 22.

as they affected first amendment rights, and will assess their impact upon the press. Particular emphasis will be placed on *Zurcher v. Stanford Daily* as it affects first amendment, as well as fourth amendment, protections.

### I. DIVERGENT VIEWS OF THE FIRST AMENDMENT

The simple statement "Congress shall make no law . . . abridging . . . the freedom of the press" has prompted differences of opinion over its meaning since the ink with which it was penned was barely dry.

Were the framers merely prohibiting federal legislation restraining the gathering and publication of news? Was the act of placing the mandate in the first of the ten amendments in the Bill of Rights indicative of a greater weight to be given to that directive, or a mere matter of convenience in drafting? If its object was to prevent prior restraint of publication, what was embodied in the phrase "prior restraint"? Did it refer only to a prohibition against taxation and official censorship? Or did it have a more subtle meaning, prohibiting indirect acts as well as those which would have the long range effect of restraining the publication of news?<sup>13</sup>

Clearly, the concern at the time of the drafting of the amendment grew from the criminal libel laws imposed upon the colonies by the Crown of England. A half-century before the drafting of the amendment, a jury had voted for the acquittal of printer John Peter Zenger in the celebrated trial in which Zenger's attorney argued for truth as a defense to the charge that Zenger had criminally libeled the governor of New York.<sup>14</sup> Zenger's acquittal, however, did not settle the issue. In 1791, the states were still debating the truth-as-a-defense question. The Massachusetts courts were divided on the issue, but agreed with the Pennsylvania courts that a state constitutional guarantee of a free press meant no more than a prohibition against licensing.<sup>15</sup> Thomas Jefferson proposed a state constitutional free press provision for Virginia which prohibited prior restraint of the press, while establishing the

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<sup>13</sup> For a discussion of the debate over the meaning and intent of the press clause, see H. CROSS, *THE PEOPLE'S RIGHT TO KNOW*, (1953); Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES*, (1941); Z. CHAFFEE, *GOVERNMENT AND MASS COMMUNICATIONS*, (1947); W. HACHTEN, *THE SUPREME COURT ON FREEDOM OF THE PRESS*, (1968); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, (1948); Benzanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Bowers, *Jefferson and the Bill of Rights*, 41 VA. L. REV. 709 (1955); Lange, *The Speech and Press Clauses*, 33 UCLA L. REV. 77 (1975); Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?* 26 HASTINGS L.J. 639 (1975); Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975).

<sup>14</sup> L. LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON*, at 44 (1967).

<sup>15</sup> *Id.* at liii.

liability of the press for false publication. The implied truth-as-a-defense provision was recommended to James Madison as a federal constitutional amendment, but while Madison reportedly regarded it as a provision that "ought to be well considered," he did not include it in the final draft of the amendment.<sup>16</sup>

Nor did Madison urge that the Congress include in the draft a Virginia proposal freeing the press from abridgement "by any authority of the United States."<sup>17</sup> Madison's draft then could be read as meaning no more than what it said: *Congress* could pass no laws abridging the freedom of the press.

But the construction of the amendment has not been that simple. There developed two distinct views on construction of the free press provision, one side arguing for a balancing approach and the other maintaining the "preferred freedom" view, *i.e.*, that first amendment rights take priority over all other constitutional guarantees.<sup>18</sup> One strong proponent of the preferred freedom view was Justice Hugo Black, who maintained that the first amendment was unequivocal and that its freedoms were wholly "beyond reach" of any federal authority.<sup>19</sup> Representing the balancing view was Justice Felix Frankfurter, who argued that the competing interests of free speech and national security demand a "candid and informed weighing" of the interests.<sup>20</sup>

The writers have viewed a guarantee of a free press as essential to a democracy. Observing that citizens can no longer "assemble in the markets" to learn the news as did our forebears in simpler times, Francis Lieber wrote: "the journals are to modern freemen what the agora was to the Athenian, the forum to the Roman."<sup>21</sup> And DeTocqueville, observing the phenomenon of American democracy in 1835, commented that "the sovereignty of the people

<sup>16</sup> *Id.* at *liv*; see also 5 WRITINGS OF JAMES MADISON 269 (Hunt ed. 1904); BOWERS, *supra* note 13; see generally MASS MEDIA AND THE SUPREME COURT 14-15 (K. Devol ed. 1976).

<sup>17</sup> L. LEVY, *supra* note 14, at *lv*.

<sup>18</sup> W. HACHTEN, THE SUPREME COURT ON FREEDOM OF THE PRESS at 13 (1968); Sheppard v. Maxwell, 384 U.S. 333 (1966); see, *e.g.*, LETTERS OF THOMAS JEFFERSON, cited in Bridges v. California, 314 U.S. 252 (1941); see generally MASS MEDIA AND THE SUPREME COURT, *supra* note 16; *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 1068, nn.1141, 1144 (1972).

<sup>19</sup> W. HACHTEN, *supra* note 18, at 13; see Smith v. California, 361 U.S. 147 (1959), 314 U.S. 252.

<sup>20</sup> W. HACHTEN, *supra* note 18, at 13; see Dennis v. United States, 341 U.S. 494 (1951).

<sup>21</sup> H. NELSON, FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT at 378 (1967). For discussions of the press as a marketplace of ideas, see, *e.g.*, Red Lion Broadcasting v. Federal Communications Comm'n, 395 U.S. 367 (1969); Time Inc. v. Hill, 385 U.S. 374 (1967); Associated Press v. United States, 326 U.S. 1 (1945); Z. CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947); H. CROSS, *supra* note 13; A. MEIKLEJOHN, *supra* note 13; F. THAYER, LEGAL CONTROL OF THE PRESS (1956).

and the liberty of the press may . . . be looked upon as correlative institutions . . . .”<sup>22</sup> More recently, former Chief Justice Earl Warren observed that citizens cannot efficiently govern themselves unless they are first fully informed.<sup>23</sup> It has also been said that a victory for a free press is a victory for all Americans. “Freedom of the press is an individual right belonging to all Americans. When anyone wins a victory at the bar of the Supreme Court, it enhances and enlarges freedom for all.”<sup>24</sup>

The development of a body of case law interpreting “freedom of the press” began slowly and gained little momentum until the 1960’s. The early cases demonstrated a reluctance by the courts to restrict the press except in the most urgent circumstances.

Justice Holmes’ “clear and present danger” test, under which no prior restraint could be imposed upon the press absent a clear and present danger to society, was set out in the World War One espionage case of *Schenck v. United States*.<sup>25</sup> Some thirty years later, the test was modified with the introduction of a balancing approach in *Dennis v. United States*, in which the Court adopted the test advocated by Judge Learned Hand in the lower court: “[I]n each case [the courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>26</sup>

The issue of prior restraint, undoubtedly because it is so near the “core” of the first amendment, is the one area of the law on freedom of the press where the Court has remained firm. This issue was first addressed in 1931 in the landmark case of *Near v. Minnesota*, where the Court examined a state statute which provided that publications found to be “malicious, scandalous and defamatory” could be “abated” as public nuisances. The Court held that the statute amounted to suppression of the press and was therefore invalid.<sup>27</sup> In the 1966 case of *Mills v. Alabama*, the Court held invalid a state statute which prohibited election day publication of editorials relating

<sup>22</sup> A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 118 (2 ed. 1946).

<sup>23</sup> Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A.J. 550 (1974).

<sup>24</sup> W. HACHTEN, *supra* note 18, at 6.

<sup>25</sup> *Schenck v. United States*, 249 U.S. 47 (1919) (“clear and present danger” test applied to leaflets sent to members of the military during World War I by officer of the Socialist Party urging resistance to military conscription).

<sup>26</sup> 341 U.S. 494.

<sup>27</sup> *Near v. Minnesota*, 283 U.S. 697 (1931); *see also* *New York Times v. Sullivan*, 376 U.S. 254 (1966) (“truth-as-a-defense” doctrine revived in libel actions; proof of actual malice held to be preferred alternative to statutory control); *Grosjean v. American Press*, 297 U.S. 233 (1936) (Louisiana tax on newspapers and magazines held discriminatory and intended as a means of controlling the press).

to pertinent election issues, finding the statute an "obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press."<sup>28</sup>

The Court's prior restraint position was again tested in 1971, when the Justice Department sought to enjoin publication of the "Pentagon Papers" by the *New York Times* and the *Washington Post*. The government based its case for the injunction on national security grounds, arguing that disclosure of the classified federal documents could undermine the nation's position in the Vietnam War. Nevertheless, the Supreme Court, in a brief per curiam opinion held that the government had failed to meet the "heavy burden" necessary to justify such a prior restraint.<sup>29</sup> It did not, however, reach this conclusion easily, as evidenced by the five concurring opinions and three dissenting opinions accompanying the decision. The dissenters objected to the speed of the decision, noting that in light of the fact that the *Times* had withheld publication of the documents for three months while preparing its stories, brief further delays for a trial on the merits would do no additional harm to the people's right to know.<sup>30</sup> In an opinion which seemed to foretell the Court's balancing view of the first amendment in the years to come, Justice Blackmun stated that, "the First Amendment, after all, is only one part of an entire Constitution. . . . What is needed here is a weighing . . . of the broad right of the press to print and of the very narrow right of the government to prevent . . . ."<sup>31</sup>

Tension was also growing in the decade between the mid-1960s and 1970s over conflicting first amendment and sixth amendment rights. In 1966, Dr. Sam Sheppard was granted a new trial twelve years after his conviction for the highly publicized murder of his wife in the Cleveland suburb of Bay Village. It was with some apparent reluctance, however, that the Court found the scales tipped in favor of Sheppard's sixth amendment rights to a fair trial; the majority observed that such an imbalance should be found only where there is a "serious and substantial" threat of harm.<sup>32</sup> Ten years later, the Court was again faced with the free press/fair trial conflict in *Nebraska Press Association v. Stuart*.<sup>33</sup> The point of contention was a "gag" order issued against the news media in a criminal trial. The Court rested its decision on

<sup>28</sup> *Mills v. Alabama*, 384 U.S. 214 (1966).

<sup>29</sup> *New York Times v. United States*, 403 U.S. 713 (1971); discussed in Benzanson, *supra* note 13, at 763; Note, *New York Times Co. v. United States: Confrontation Between Press and Presidential Power*, 20 *LOYOLA L. REV.* 140 (1973-74); Ervin, *Media and the First Amendment in a Free Society*, 60 *GEO. L.J.* 871, 916 (1972); see also Landau, *Free at Last, at Least*, in *MASS MEDIA AND THE SUPREME COURT*, *supra* note 16, at 61; *THE MEDIA AND THE LAW* (H. Simons and J. Califano ed. 1976).

<sup>30</sup> 403 U.S. 713.

<sup>31</sup> *Id.* (Blackmun, J., dissenting).

<sup>32</sup> 384 U.S. 333; see also 314 U.S. 252.

<sup>33</sup> *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976).



prior restraint grounds and found the order invalid, but did not overlook the free press/fair trial conflict entirely. It pointedly observed that no paramount rights inhere in the first amendment, and that under appropriate circumstances the scales could tip in the other direction.<sup>34</sup>

The subtle shift in the Court's attitude toward the press was equally apparent in the cases dealing with the press' right of access to the news. In the 1965 case of *Estes v. Texas*, which also involved free press/fair trial issues, the Court said positively that "all [reporters] are entitled to the same rights as the general public;"<sup>35</sup> it expressed the same view in the negative nine years later in the prison access cases of *Pell v. Procunier*<sup>36</sup> and *Saxbe v. Washington Post*,<sup>37</sup> that reporters are entitled to no greater access than members of the general public.

The greatest point of contention in the free press debate has been over the reporters' claimed privilege against disclosure of confidential sources and notes, the claim resting upon a view of newsgathering as an essential and protected element of first amendment free press rights. While at least one circuit court declared as early as 1958 that newsgathering was not protected under the first amendment,<sup>38</sup> the Supreme Court avoided comment on the issue until 1972 in the landmark case of *Branzburg v. Hayes*.<sup>39</sup> There, in a trilogy of cases involving newsmen who had refused to disclose sources or turn over notes to grand juries,<sup>40</sup> the Court addressed the twin issues of privilege and newsgathering, concluding that the first amendment did not encompass an absolute privilege for newsmen. While holding that the three reporters had no right to withhold the information, the Court, however, left the door open for the states to provide a reporter's privilege by statute.

On the broader issue of newsgathering, the *Branzburg* decision created an ambiguity which has yet to be resolved. While rejecting arguments for

<sup>34</sup> *Id.* The Court states, "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights . . . . It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances."

<sup>35</sup> *Estes v. Texas*, 381 U.S. 532 (1965).

<sup>36</sup> *Pell v. Procunier*, 417 U.S. 817 (1974).

<sup>37</sup> *Saxbe v. Washington Post*, 417 U.S. 843 (1974); see generally *THE MEDIA AND THE LAW*, note 29 *supra*, at 11.

<sup>38</sup> See *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910. This was a libel suit by singer Judy Garland against a CBS correspondent; the identity of the source was held to go to the "heart of the claim" and must be disclosed. The opinion was written by then Judge Potter Stewart. See generally *THE MEDIA AND THE LAW supra* note 29, at 11.

<sup>39</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>40</sup> In *Branzburg v. Hayes*, the reporter was subpoenaed to testify about drug violations he had witnessed in the course of his research for a story. In *In re Pappas*, the reporter was ordered to turn over information acquired in a personal visit to Black Panther headquarters. The reporter in *United States v. Caldwell* was subpoenaed to disclose the identity of informants and confidential information from an investigation of the Black Panthers.

a first amendment privilege, the Court observed that "newsgathering is not without its first amendment protections . . ." <sup>41</sup> *Branzburg* has been cited both for and against the proposition that newsgathering is a constitutionally protected right. The most recent evidence of that conflict can be seen in the opinions of the district court and the Supreme Court in *Zurcher v. Stanford Daily*, discussed in the following section.

## II. POLICE IN THE NEWSROOM

On the afternoon of April 12, 1971, members of the Palo Alto, California police department, armed with a search warrant, entered the office of the *Stanford Daily*, the student newspaper of Stanford University. They were searching for negatives, film and photographs alleged to constitute evidence of an April 9 confrontation between police and demonstrators at the Stanford University hospital. <sup>42</sup> Although the "quite thorough" search of the student newspaper offices included searches of file cabinets and reporters' desks, it produced only those photographs which had appeared in the newspaper the previous day. <sup>43</sup>

The police left the *Stanford Daily* office empty-handed that day, but their search was fruitful in the long run. Although it failed to produce hard evidence for one investigation, the search opened the doors for those to come. Seven years and one month after the *Stanford Daily* search, the United States Supreme Court ruled in a close but nonetheless binding decision that search warrants could be executed against innocent third parties in general and newspapers in particular. <sup>44</sup>

The newspaper responded to the search with an action in the federal district court under 28 U.S.C. 1983, alleging that its civil rights under the first and fourth amendments had been violated. <sup>45</sup> The thrust of the newspaper's objection was that in conducting the search, the officers had had access to reporters' notes containing confidential information supplied by sources whose identity had not been made public, and the granting of official access to these materials would have revealed the identities of confidential news sources, thus endangering future newsgathering efforts. <sup>46</sup> A former

<sup>41</sup> 408 U.S. 665. The *Branzburg* trilogy has been discussed extensively. See, e.g., MASS MEDIA AND THE SUPREME COURT, *supra* note 29, at 12, 23-24; Benzanson, *supra* note 13, at 759-61; Comment, *The Journalist's Prerogative of Non-Disclosure: Fact or Fantasy?*, 20 LOYOLA L. REV. 120, 128, 131, 135 (1973-74).

<sup>42</sup> 98 S. Ct. at 1974; 353 F. Supp. at 126.

<sup>43</sup> 98 S. Ct. at 1974; 353 F. Supp. at 127.

<sup>44</sup> 98 S. Ct. 1970. The case was decided by a vote of 5-3, with Justices White, Burger, Blackmun, Rehnquist and Powell voting for reversal of the lower court decision, and Justices Stewart, Marshall, and Stevens dissenting. Justice Brennan took no part in the decision.

<sup>45</sup> *Id.* at 1974.

<sup>46</sup> 353 F. Supp. at 127, 136.

*Stanford Daily* editor later wrote that following the police search, staff photographers were harrassed when they attempted to photograph other demonstrations and office policies on the use of the newspaper's files had to be changed.<sup>47</sup>

In granting declaratory relief, the district court held that search warrants for materials in the possession of third parties could not issue in the absence of a showing of probable cause to believe that the materials would be destroyed, or that a subpoena duces tecum, the usual procedure for acquiring evidence from third parties, would be impractical. Grounds for such a belief, the district court maintained, would have to be shown through affidavits submitted to the magistrate from whom the search warrant was sought.<sup>48</sup> Most important to the newspaper's interest and its first amendment claim, the district court concluded that the first amendment had been held to modify the fourth amendment "to the extent that extra protections may be required when first amendment interests are involved."<sup>49</sup>

In reaching its conclusion, the district court rejected the defendants' reliance on *Branzburg v. Hayes* for the proposition that the first amendment did not protect newsgathering.<sup>50</sup> The Court, in fact, used *Branzburg* to its own end to argue (1) that newsgathering was a protected element under the first amendment and (2) that subpoenas, as opposed to ex parte search warrants, granted newspapers access to the courts to protest threatened seizure of confidential materials through the device of a motion to quash.<sup>51</sup> The Court felt that the issuance of a search warrant ex parte afforded no opportunity for the newspaper in an adversarial setting to object to the search or to present its arguments on first amendment grounds, or otherwise, for that objection. It "deprives the newspaper and newsman of that 'judicial control' thought so essential in *Branzburg*."<sup>52</sup>

The district court was no more sympathetic to the defendants' claim that *Warden v. Hayden*<sup>53</sup> compelled the conclusion that third parties were entitled to no greater protections than suspects in the search for evidence of a crime. The defendants argued that in reversing the line of cases prohibiting the use of warrants for "mere evidence," the Supreme Court in *Warden* authorized searches of any place where any evidence of a crime might be found. The district court disagreed, viewing *Warden* as focusing "on what

<sup>47</sup> *Your Newsroom May be Searched*, THE QUILL, *supra* note 9, at 24; see also 353 F. Supp. at 136.

<sup>48</sup> 353 F. Supp. 124.

<sup>49</sup> *Id.* at 124.

<sup>50</sup> *Id.* at 133.

<sup>51</sup> *Id.* at 133-34, citing 408 U.S. 665.

<sup>52</sup> *Id.* at 130, 136.

<sup>53</sup> *Warden v. Hayden*, 387 U.S. 294 (1967).

may be seized, rather than who may be made the subject of a warrant."<sup>54</sup> The Court's position was that the only effect of *Warden* was to strike down the "mere evidence" rule as it related to suspects, and that it did not operate to expand search warrant powers to innocent third parties.

Instead the Court looked to the Ninth Circuit's decision in *Bacon v. United States*,<sup>55</sup> and compared that holding as to arrest warrants for material witnesses with the third party search situation. Since *Bacon* held that it was necessary to show probable cause that a subpoena would be impractical in securing the presence of a material witness before an arrest warrant could issue, and since "historically, the right against unlawful seizures has if anything been more protected . . . than the right against unlawful arrest,"<sup>56</sup> it followed, said the court, that the stringent probable cause requirement must be followed in the third party search area as well.

Any cause for celebration by the press over the district court's decision and its affirmation by the Ninth Circuit Court of Appeals,<sup>57</sup> was shortlived. On May 31, 1978, the Supreme Court, in a five to three decision, reversed the district and circuit courts.<sup>58</sup> The fourth and fourteenth amendments did not prohibit third party searches, said the Court, noting that the critical element in a search was the "thing" sought and not the owner of property subject to the search. Nor were first amendment interests endangered by third party searches. The Supreme Court concluded that the probable cause and reasonableness requirements for the issuance of search warrants under the fourth amendment provided the necessary safeguards against threats to newspapers' rights to gather and publish the news.<sup>59</sup>

The majority was clearly unconvinced that the threat of newsroom searches would cause confidential sources to have second thoughts about talking to the news media, or that journalists would resort to a self-imposed censorship out of a fear of possible searches. Seeing no hard evidence that newsroom searches had increased since the *Stanford Daily* search, the Court concluded that there had been no abuse of the search warrant powers, and

<sup>54</sup> 353 F. Supp. at 130.

<sup>55</sup> *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971).

<sup>56</sup> 353 F. Supp. at 130.

<sup>57</sup> *Zurcher v. Stanford Daily*, 550 F.2d 464 (9th Cir. 1977).

<sup>58</sup> 98 S. Ct. 1970.

<sup>59</sup> *Id.* at 1972, 1977, citing *Carroll v. United States*, 267 U.S. 132, 158-59 (1925). "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for believing that the contents . . . offend against the law."

it would not deal with such abuse as a potentiality only. "[I]f abuse occurs, there will be time enough to deal with it."<sup>60</sup>

By reaching its conclusion, the Court was able to state that newsroom searches, actual or threatened, imposed no prior restraints on the news media which could fall within the prohibitions of the first amendment.<sup>61</sup> In so doing, the Court echoed its finding in *Branzburg* where Justice White, the author of both the *Zurcher* and *Branzburg* opinions, observed that there was no evidence of any abuse of power by a grand jury in its efforts to question a newsman in a criminal investigation.<sup>62</sup> Clearly, the Court intended in *Zurcher*, as it intended six years earlier in *Branzburg*, to deal with questions of abuse and their concomitant threats to first amendment interests only on a case by case basis, and then only where clear and actual abuse was evident. As Justice White observed in *Branzburg*, a blanket extension of a constitutional privilege to newsmen beyond strict interpretations of first amendment prohibitions against restraint was something which the Court did not want, or intend, to create. "The administration of a newsman's constitutional privilege would present practical and conceptual difficulties of a high order."<sup>63</sup>

The *Zurcher* Court prefaced its conclusion that newsroom searches posed no threat of prior restraint with an examination of the climate in which the Bill of Rights had been written. The Court acknowledged that the Bill of Rights, and particularly the fourth amendment, developed from the "conflict between the Crown and the press,"<sup>64</sup> and a fear that the powers of search and seizure, if left unchecked, would stifle free expression.<sup>65</sup> The Court then took the narrow view that, despite the framers' concern that searches could endanger the right of free expression, the fourth amendment did not expressly forbid search warrants in areas protected by the first amendment, nor did it expressly provide special protections in those areas. The Court concluded that in general, the search warrant requirements provided the necessary protection against abuse by imposing the probable cause test and permitting warrants to be issued only by magistrates.<sup>66</sup>

<sup>60</sup> *Id.* at 1982; but see *Scared of What Might Happen*, THE QUILL, *supra* note 11 (at least 14 other search warrants executed since the Stanford Daily search); *Your Newsroom May be Searched*, THE QUILL, *supra* note 9, at 23 (at least 14 police searches of newsrooms since the Stanford Daily search); *How to Cope With Newsroom Search Warrants*, EDITOR & PUBLISHER, July 29, 1978, at 17 (15 incidents of media searches since 1970).

<sup>61</sup> 98 S. Ct. at 1982. The Court states, "and surely a warrant to search newspaper premises for criminal evidence . . . carries no threat of prior restraint or any direct restraint whatsoever on the publication of the Daily or on its communication of ideas." (*emphasis added*).

<sup>62</sup> 408 U.S. at 685, 688, 701.

<sup>63</sup> *Id.* at 703-04.

<sup>64</sup> 98 S. Ct. at 1981, citing *Stanford v. Texas*, 379 U.S. 476, 482 (1965); see also *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

<sup>65</sup> *Id.* citing 367 U.S. at 729. The Court explained that the "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."

<sup>66</sup> *Id.* at 1981.

With the majority's assumption that all magistrates would always be impartial, that all prosecutors would attempt to search newsrooms only with probable cause to believe they would find evidence which could be removed or destroyed before the subpoena process could be completed, lies the fatal flaw in its reasoning. The majority assumed that the "rational prosecutor" would employ subpoenas, rather than searches, where a subpoena would suffice.<sup>67</sup> It assumed that magistrates would consider the dangers of interference with the publication schedules of newspapers in examining the reasonableness of the warrant, and that operating under properly specific and reasonable warrants, police would not have cause to "rummage" through newspaper files.<sup>68</sup> But what of warrants which are not properly specific? And how can even the most reasonable warrant specify where in the disorder of a newsroom a particular document is to be found? The district court observed that newspaper offices were generally "much more disorganized" than other professional offices and that any search would necessarily entail "rummaging" through drawers and files,<sup>69</sup> a statement with which not only journalists but anyone who has visited a typical newsroom would have to agree. Even reporters intimately acquainted with their newsrooms have on occasion had to resort to "rummaging" in order to find needed documents. In the Court's opinion, if "properly administered," the prerequisites for a search warrant would provide sufficient protection. It apparently assumed that search warrant applications would always be "properly administered," or that in any event, it would not deal with the issue of an improperly administered warrant until it was faced with it square on, and then presumably only on the facts of that particular case.

Even assuming that federal magistrates follow fourth amendment requirements with religious zeal, the majority opinion appeared not to take into account decisions which might imprudently be made by local judges. Journalists have expressed fears of what would happen to newspapers which have incurred the wrath of the local police or judiciary, noting with concern that newsroom searches could be used as retaliatory measures for reports or editorials with which local officials disagree.<sup>70</sup> The editor of the *Washington Post* maintained in an interview following the announcement of the *Zurcher* opinion that had the ruling been in force earlier, officials could have used search warrant techniques to prevent, or at least hinder, both the Pentagon Papers reports and the Watergate investigations.<sup>71</sup>

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<sup>67</sup> *Id.* at 1980.

<sup>68</sup> *Id.* at 1982.

<sup>69</sup> 353 F. Supp. at 134-35.

<sup>70</sup> Subcommittee testimony, *supra* note 10; COLUM. JOURNALISM REV. *supra* note 8; *What Is A Shield Law*, EDITOR & PUBLISHER, *supra* note 7; *Scared of What Might Happen*, THE QUILL, *supra* note 11.

<sup>71</sup> COLUM. JOURNALISM REV., *supra* note 8; *see* note 11 *supra*.

The *Zurcher* dissenters were also concerned with the possible aftershocks of the decision. Search warrants would allow police to “ransack” newsrooms files, read confidential materials and disrupt publication schedules, said Justices Stewart and Marshall. The mere knowledge that this could happen could not help but serve as a prior restraint and would have “a deterrent effect on the availability of confidential news sources.”<sup>72</sup> Justice Stevens, in a separate dissent, saw “extremely serious” consequences in permitting third party searches, noting that they would allow prosecutors and police to examine privileged materials which they would otherwise be denied under the subpoena process.<sup>73</sup> Stevens also saw a more critical flaw in the majority’s reasoning, arguing the majority was “abdicating” the Court’s responsibility for overseeing the performance of the search warrant process. In Stevens’ opinion the majority decision contradicted the Court’s long standing philosophy of setting standards and acting as supervisor of the process, rather than merely relying upon “the good judgment of the magistrate to prevent abuse.”<sup>74</sup>

Justice Powell, while joining the majority to tip the vote for reversal of the district and circuit court decisions, acknowledged the potential dangers of the third party search warrant procedures in his concurring opinion. He observed that the dangers were “likely to be minimal” if “the reasonableness and particularity requirements [were] . . . applied.”<sup>75</sup> In this context, Justice Powell’s qualifying “if” becomes a very big word.

In maintaining that the search warrant requirements of reasonableness and specificity provided sufficient safeguards to first amendment rights, the majority apparently overlooked its own previous holdings calling for careful procedural protections through the subpoena process where constitutionally protected interests were at stake.<sup>76</sup> The Court rejected the newspaper’s argument that such reasoning called for a hearing where it could litigate the issue of the state’s right to the materials sought. Through the use of tight construction, the Court distinguished the obscenity cases where it had held that protected materials could not be seized without a prior adversary hearing.<sup>77</sup> Those

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<sup>72</sup> 98 S. Ct. at 1986 (Stewart, J., dissenting).

<sup>73</sup> *Id.* at 1989 (Stevens, J., dissenting).

<sup>74</sup> *Id.* n.6; see *Aguilar v. Texas*, 378 U.S. 108 (1964).

<sup>75</sup> 98 S. Ct. at 1984 (Powell, J., concurring).

<sup>76</sup> See *id.* at 1987 (Stewart, J., dissenting). Justice Stewart remarked, “The decisions of this court establish that a prior adversary judicial hearing is generally required to assess in advance any threatened invasion of First Amendment liberty.” See, e.g., *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *Carroll v. Princess Anne*, 393 U.S. 51 (1965). See also *A Quantity of Books v. Kansas*, 378 U.S. 205 (1974); *Roaden v. Kentucky*, 413 U.S. 496 (1972); 367 U.S. 717; 427 U.S. 539; *United States v. Washington Post*, 403 U.S. 713 (1971); 361 U.S. 147; *Watkins v. United States*, 354 U.S. 178 (1957); *Joseph Burstyn, Inc. v. Williams*, 343 U.S. 495 (1952); 314 U.S. 252.

<sup>77</sup> 98 S. Ct. at 1982, citing 378 U.S. 205.

decisions, the majority said, merely meant that protected materials could not be removed from circulation altogether without a prior hearing and a finding of obscenity.<sup>78</sup> Apparently, the Court felt that it was permissible to remove such materials as long as they could somehow still be published. However, if they had not been published, how could they be if they were removed to the prosecutor's evidence locker; and if they had been published, why seize them through the warrant process when there would be little reason at that point for the newspaper to refuse to comply with a subpoena duces tecum?

The Court also distinguished its holding ten years earlier in *Carroll v. Princess Anne*, in which it said that a restraining order imposed upon a protected area such as free expression was invalid in the absence of notice and hearing.<sup>79</sup> An order in "this sensitive field," the *Carroll* Court said, had to be as narrow as possible to meet only the precise needs of a particular case. Most significantly, the Court held that such a purpose could not be accomplished without full participation by all of the parties involved. "[T]he failure to invite participation of the party seeking to exercise First Amendment rights . . . substantially imperils the protection which the Amendment seeks to assure."<sup>80</sup>

The majority in *Zurcher* also appeared not to see the significance of the Court's observation in *Branzburg* that first amendment interests were protected in the grand jury setting because "grand juries are subject to judicial control and subpoenas to motions to quash."<sup>81</sup> Justice Powell in his concurring opinion in *Branzburg* added that a newsman was "not without remedy" when he believed a grand jury investigation was not being conducted in good faith, because he had access to the court to seek a protective order.<sup>82</sup> In the search warrant area, those protections dissolve. The newsman's only remedy is after the fact. He may ultimately convince the court that the prosecutor abused his authority, or that the materials seized or examined were, in fact, protected. But the harm will already have been done and sources whose identities were disclosed due to the search could not then be protected. "[T]he reporter's loyalty to his informant is meaningless in the face of a search; should the reporter block the search, the police will force him aside."<sup>83</sup>

An overriding public interest in law enforcement was cited by the majority in its balancing of the interests to reach its decision in favor of the

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* citing 393 U.S. 175. The Court held that an ex parte injunction against rallies by National States Rights Party was incompatible with the free speech provision of the first amendment.

<sup>80</sup> 393 U.S. 175 citing *Shelton v. Tucker*, 364 U.S. 479 (1960); see 380 U.S. 51; *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

<sup>81</sup> 408 U.S. 665. The Court stated, "We do not expect the courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."

<sup>82</sup> *Id.* at 710 (Powell, J., concurring).

<sup>83</sup> Note, *Search and Seizure and the Media*, 28 *STAN. L. REV.* 957, 990 (1976).



third party search warrant. Because of this "fundamental" public interest, the majority felt that search warrants should not be suppressed "on the basis of surmise and without solid evidence supporting the change."<sup>84</sup> Apparently in the majority's opinion, the newspaper's first amendment arguments, its fears of losing its confidential sources, and its concern with the possible disruption of the publication process during a police search, all amounted to no more than "surmise." When valuable sources do turn away, when publication schedules are seriously impeded, and when first amendment guarantees are effectively trammled, that, the Court seems to say, will be "time enough" to consider the issue. In the interim, the balance apparently will continue to tip in favor of the problems of law enforcement in the present.

Philosophical arguments and potentialities aside, a strong question arises as to whether such strong societal interests were even present in the facts of the *Zurcher* case. Justice Stewart points out in his dissent that there was no emergency requiring the issuance of a search warrant to protect life or property; the search did not involve contraband or fruits of a crime; and there was no indication that the newspaper would not have responded to a subpoena.<sup>85</sup> In fact, the district court noted that the county grand jury met the very day of the search, only two hours after the search warrant was executed.<sup>86</sup> Although it would only have meant a two hour delay, the prosecutor apparently did not first attempt to secure the evidence through a subpoena duces tecum.

### III. THE COURT SHOWS CONSISTENCY

#### A. *Barring the prison gates*

On June 26, 1978, nearly one month after the *Zurcher v. Stanford Daily* decision was handed down, the Supreme Court reasserted its position that the press was entitled to no greater privileges than the rest of society. In *Houchins v. KQED* the Court held, again in a split decision, that the news media have no greater right of access to prisons than do other members of the public.<sup>87</sup>

The television station which sought access to the maximum security wing of a county jail argued for a constitutionally protected right to gather news, maintaining the Court had upheld such a right in previous cases.<sup>88</sup> But while the station, and apparently the lower courts, thought the central issue

<sup>84</sup> 98 S. Ct. at 1979.

<sup>85</sup> *Id.* at 1986 (Stewart, J., dissenting).

<sup>86</sup> 353 F. Supp. at 127.

<sup>87</sup> 98 S. Ct. 2588 (1978). The vote was 4-3 on the decision, with Justices Burger, White, Rehnquist and Stewart voting for reversal of the lower court, and Justices Stevens, Brennan and Powell dissenting. Justices Marshall and Blackmun took no part in the decision.

<sup>88</sup> *Id.*; see, e.g., 408 U.S. 665; 417 U.S. 817; see also 384 U.S. 214; 297 U.S. 233.

of the case was the protection of newsgathering, the Supreme Court disagreed. The only issue, the majority said, was whether the press had a special right of access to the news. It concluded that it did not.<sup>89</sup> Once again, the Court seemed to have dodged the crucial issue of first amendment protections for newsgathering functions.

With echoes of the *Zurcher* rationale, the Court struck a balance between the societal interests in a free press and an efficient prison administration, and an interest in unimpeded administration of the prisons was found to have the greater weight.

The Court relied heavily upon the earlier prison access case of *Saxbe v. Washington Post*,<sup>90</sup> wherein it was observed that newsmen could obtain information on prison conditions through such means as correspondence with prisoners and interviews with prison officials. To those means, the Court now added another: regular reports from the State Board of Corrections.<sup>91</sup> Presumably here, as in the case of the always-fair magistrates in *Zurcher*, public officials could always be relied upon to supply all necessary information about prison conditions, apparently even when they themselves might be responsible for the poor conditions. The faith in the honesty and objectivity of officialdom was not born, nor did it die, with *Zurcher*.

While acknowledging that the press had a constitutionally protected right to disseminate the news, the majority in *Houchins* reached the anomalous conclusion that there was no parallel protection for acquiring the news to disseminate. In distinguishing those earlier cases in which it had stressed the role of a free press in keeping the public informed,<sup>92</sup> the Court now said that what it had meant was only that the press had the freedom to "communicate information once it [was] obtained."<sup>93</sup> Referring to another decision from the same term,<sup>94</sup> the Court said that its recent statement that the public was entitled to information was intended only to mean that the government could not prevent the press from publishing that information which it happened to acquire.<sup>95</sup>

#### B. *One narrow decision for the press*

On May 1 of its 1978 term, the Supreme Court announced a seven to zero decision which overturned a Virginia statute providing for criminal sanctions against the press for reporting on confidential proceedings of the

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<sup>89</sup> 98 S. Ct. 2588, 2596.

<sup>90</sup> 417 U.S. 843.

<sup>91</sup> 98 S. Ct. 2588, 2597.

<sup>92</sup> *Id.* at 2594; see 384 U.S. 214; 297 U.S. 233.

<sup>93</sup> 98 S. Ct. 2588, 2594.

<sup>94</sup> 98 S. Ct. 1535.

<sup>95</sup> 98 S. Ct. 2588, 2594.

state's Judicial Inquiry and Review Commission.<sup>96</sup> In overturning the conviction of a Virginia newspaper which had reported a pending inquiry of the Commission, the Court held that there was no clear and present danger posed by publication of the proceedings sufficient to warrant governmental encroachment on first amendment rights in *Landmark Communications, Inc. v. Virginia*.<sup>97</sup>

The decision, however, offered no cause for belief that the Court was adopting a liberalized attitude toward the press and the first amendment. The Court stressed that it was addressing only the "narrow and limited question" of the constitutionality of providing criminal sanctions against third persons, including the press, who divulge information about the Commission's confidential proceedings.<sup>98</sup> Since neither the issue of prior restraint nor that of right of access to the news was directly raised in the case, the Court would not deal with them.<sup>99</sup> It also disposed of the newspaper's reliance on the truth-as-a-defense theory as exemplified by the reasoning in *New York Times v. Sullivan*,<sup>100</sup> finding that approach unnecessary for the resolution of the case.<sup>101</sup>

The Court instead turned to the old balancing approach, and found that in this instance the publication subject to the state's criminal sanctions "[lay] near the core of the First Amendment," and the state's interests in protecting the confidentiality of judicial disciplinary proceedings was therefore outweighed by these first amendment interests.<sup>102</sup> The Court here did not have to concern itself with the access issue because the newspaper had acquired and published the information. The state's attempt to punish the newspaper for having published the report was much too similar to the very events which led to the drafting of the amendment.<sup>103</sup> The Court had little choice; the opinion implied that were it not for the criminal sanctions provided by the Virginia statute, it may have upheld the act, noting that of the forty-nine jurisdictions which have constitutional or statutory provisions for judicial oversight procedures, only two, Virginia and Hawaii, provided criminal sanctions for breach of confidentiality provisions.<sup>104</sup> Adopting the same attitude towards

<sup>96</sup> VA. CONST. art. VI, § 10; VA. CODE §§ 2.1 - 37.13.

<sup>97</sup> 98 S. Ct. 1535. The Court held that criminal sanctions against third persons, including newspapers, who disclose information about confidential proceedings of the state judicial review commission violate free speech and free press clauses of first amendment. Justices Brennan and Powell did not participate in the decision.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 283 U.S. 697.

<sup>101</sup> 98 S. Ct. 1535, 1541.

<sup>102</sup> *Id.*; see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976).

<sup>103</sup> See L. LEVY, *supra* note 14, at liv, 44.

<sup>104</sup> 98 S. Ct. 1535, 1540, 1545.

the access issue as it later did in *Houchins*, the Court further observed that the "risk" of disclosure of Commission activities "[could] be eliminated through careful internal procedures to protect the confidentiality" of the proceedings.<sup>105</sup>

It is difficult to see how the Court managed to avoid the prior restraint issue, despite the fact that it had not been raised directly by the parties. If the actual imposition of criminal sanctions upon a newspaper *after* publication of forbidden materials "lies near the core of the First Amendment," then where lies the threat of criminal sanctions *before* publication? If one newspaper was willing to defy the powers of the state's criminal justice system and disobey the statute, how many other newspapers, particularly small publications with few legal or financial resources to support a confrontation in the courts, had declined to report similar inquiries because of the statute?

Ironically, the Court used the very arguments to support its position in *Landmark* that it would so carefully distinguish in the first amendment cases to follow. The purpose of the amendment, the Court said, "was to protect the free discussion of governmental affairs."<sup>106</sup> The press serves "as the handmaiden of effective judicial administration," the public's guardian against injustice.<sup>107</sup> It serves to further public awareness and discussion of government.<sup>108</sup> It does all these things, but apparently only within the narrow confines of strict constitutional construction.

#### IV. THE IMPACT ON THE PRESS

Doubts about the status of newsgathering as a protected right under the first amendment have only been deepened by the Supreme Court's recent decisions.

The Court maintained its position that it would not decide the newsgathering question on its face, but would instead continue to deal with the issue on a case-by-case basis, favoring an ad hoc balancing approach to any sweeping rule of law. As a result, the press was again left in a state of uncertainty.

While the Court did not expressly state that newsgathering was not protected, it appeared to do so by implication in its 1978 decisions. Confidential information in newsroom files was not protected from examination by searching police officers.<sup>109</sup> Reporters would have to rely upon the normal channels of communication open to the general public for information on prison condi-

<sup>105</sup> *Id.* at 1545.

<sup>106</sup> *Id.* at 1541, citing 384 U.S. 214.

<sup>107</sup> *Id.*; 384 U.S. at 550.

<sup>108</sup> *Id.* at 1542; see 376 U.S. 254.

<sup>109</sup> 98 S. Ct. 1970.

tions.<sup>110</sup> Judicial inquiry commissions, and presumably, other governmental agencies, might act behind closed doors so long as they were careful not to let the media know what they were doing.<sup>111</sup>

One legal scholar observed that the Court's 1978 opinions do no more than declare that the press is entitled to no special treatment that is not afforded the general public; that they do not restrain the freedom of the press, but merely limit its privileges.<sup>112</sup> That view was also expressed by a commentator on an earlier line of press cases, who observed that the Court was merely adopting a position of "neutrality" towards the press when it declined to grant special privileges.<sup>113</sup> According to the neutrality theory, the Court, in a sense, protects the press when it denies special privilege, by insuring that the press will remain independent of government.<sup>114</sup>

This position, however, does not account for the framers' decision to grant special protection to one institution, the press, along with the first amendment's guarantees of individual rights.<sup>115</sup> If the press were meant to have no greater protection or privilege than any other citizen or institution, the press clause would seem to be little more than surplusage. If one accepts the view that if it is written in the Constitution, it must mean something, one is irresistably drawn back to the newsgathering argument. The dissenters in *Houchins v. KQED* pointed to Madison's position in drafting the amendment. He felt that a popular government could not exist without popular information "or the means of acquiring it."<sup>116</sup> Madison's view of a popular government, they argued, "would be stripped of its substance" without a constitutional protection for acquiring, as well as disseminating, the news.<sup>117</sup>

The perception of the press as the "eyes and ears" of the public has been expressed by other dissenters on the Court. Justice Powell, in his dissent to *Saxbe v. Washington Post*, argued that individuals alone could not acquire all of the knowledge essential for making intelligent decisions in a democratic system. "For most citizens, the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press

<sup>110</sup> 98 S. Ct. 2588.

<sup>111</sup> 98 S. Ct. 1535.

<sup>112</sup> *Commotion from the High Court?*, THE QUILL, July/Aug. 1978, at 6 quoting Philip Kurland, University of Chicago.

<sup>113</sup> Benzanson, *supra* note 13, at 761.

<sup>114</sup> *Id.*

<sup>115</sup> Justice Potter Stewart, in a 1974 speech to the Yale Law School, noted the distinction between the speech and press clauses and pointed out that since the press clause extends the amendment's guarantees to an institution, it permits the institution to receive special protections. See generally THE MEDIA AND THE LAW, *supra* note 29, at 24-25.

<sup>116</sup> 98 S. Ct. 2588, 2605-06 (Stevens, J., dissenting) citing G. HURST, WRITINGS OF JAMES MADISON (1910).

<sup>117</sup> *Id.*

therefore acts as an agent of the public at large."<sup>118</sup> Justice Douglas echoed those sentiments in a separate dissent to *Saxbe v. Washington Post* and *Pell v. Procunier*. The average citizen, Douglas said, was not likely to investigate prison conditions on his own by interviewing inmates, but instead was likely to rely upon the press for that information.<sup>119</sup>

Newsgathering was also viewed as a major societal interest by Chafee in his discourse, *Free Speech in the United States*.<sup>120</sup> Two types of interests were embodied in the first amendment, according to Chafee. The first was the interest of the individual in expressing his opinion on vital matters. The second was the "societal interest in the attainment of truth" in order for the public to acquire enough information to adopt and carry out "the wisest course of action" for the country.<sup>121</sup>

The current majority of the United States Supreme Court appears to view any societal interest in a free press as secondary to the greater interest in preserving law and order and the official status quo. The public's right and need to acquire information essential for operating an efficient democratic government apparently goes no farther than that information which the government would have it know.

Any illusions which remained about the first amendment harboring "paramount" rights have been put to rest in major post-*Zurcher* decisions. The dust had barely settled after the Court's declaration that the first and fourth amendments did not protect newsrooms from police searches when Myron Farber relied upon a New Jersey "shield" law<sup>122</sup> and refused to reveal his sources in an investigation of a doctor accused of murdering his patients. The New York Times reporter went to jail and the shield law, for all practical purposes, had been disregarded. In *New Jersey v. Jasclevich (Farber)*, the New Jersey Superior Court, having already found Farber in contempt, sentenced him to jail after two justices of the Supreme Court refused to hear the reporter's interlocutory appeals on first amendment grounds.<sup>123</sup> Interestingly, the Court did so after concluding that the state's shield law was not unconstitutional and that the reporter had acted quite within his rights in relying upon the statute. The only problem was that the statute and the protection it gave Farber had to give way to the criminal de-

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<sup>118</sup> 417 U.S. 843, 863 (Powell, J., dissenting).

<sup>119</sup> See dissenting opinion in 417 U.S. 817; 417 U.S. 843.

<sup>120</sup> Z. CHAFFEE, *supra* note 13.

<sup>121</sup> *Id.*

<sup>122</sup> N.J.S.A. §§ 2A: 84A-21, 21 a.

<sup>123</sup> *New Jersey v. Jasclevich (Farber)*, 78 N.J. Super. 259, 394 A.2d 330 (1978), *cert. denied, sub. nom. New York Times Co. v. New Jersey*, 99 S. Ct. 241 (1978). The impact of the *Farber* case was discussed by an ABA panel on the subject "Search and Seizure of the Media," reported in 47 U.S.L.W. 2126 (Aug. 22, 1978). The Supreme Court's refusal to

fendant's sixth amendment right to a fair trial.<sup>124</sup> What this does to the effectiveness of the shield laws which the press had viewed as at least a partial answer to the *Branzburg* dilemma was succinctly stated by the dissent in the New Jersey *Farber* decision: "To hold that the shield law is not applicable to a reporter who is also an investigator is to hold that the shield law will never be applicable, since all good reporting must be investigative."<sup>125</sup>

Ohio's shield law is similar to that of New Jersey, providing an assurance that reporters cannot be forced to reveal confidential sources.<sup>126</sup> Ohio's statute has remained unchallenged, but in the wake of *Zurcher*, *Houchins*, and *Landmark Communications, Inc. v. Virginia*, and the *Farber* Court's declaration that its own state law was ineffective in the face of sixth amendment challenges, it could be only a matter of time before the Ohio statute, and others like it, begin to fall.

The sixth amendment was not the only area found to overshadow certain claimed first amendment rights. In what appeared to be a broad extension of the *Zurcher* resolution of the first amendment/fourth amendment conflict, the District of Columbia Court of Appeals held that neither the first nor the fourth amendment had been violated by a telephone company's agreement to turn over to federal investigators the toll call records of reporters.<sup>127</sup> Echoing the law and order theme of *Zurcher v. Stanford Daily*, the circuit court engaged in what appeared to be a token balancing effort and concluded that freedom to gather news was "subject to general and incidental burdens that arise from good faith enforcement of otherwise valid criminal and civil laws that are themselves not solely directed at curtailing the free flow of information."<sup>128</sup> The circuit court offered little more guidance here than did the Supreme Court in *Zurcher* for dealing with law enforcement not conducted in "good faith." It did make clear, however, that prospective relief was not available in the absence of a showing of an imminent threat of harm which would be irreparable and without adequate remedy at law.<sup>129</sup>

The chances of showing "imminent harm" from a pending third party

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review the *Farber* case may have been a blessing in disguise for the press, for while it let stand the New Jersey court's ruling on the position of the shield law in that state, it left untouched the shield law decisions of other states. Considering the Court's position on press privilege in the Spring, 1978 cases, the chances of affirmance of the New Jersey decision in *Farber* appeared strong.

<sup>124</sup> *Id.* at 274, 394 A.2d at 337.

<sup>125</sup> *Id.* at 289, 394 A.2d at 345.

<sup>126</sup> OHIO REV. CODE ANN. § 2739.12 (Page 1954).

<sup>127</sup> *Reporters Comm. for Freedom of the Press v. American Telephone & Telegraph Co.*, F.2d (D.C. Cir. 1978).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

subpoena are even slimmer than in the search warrant situation, where the invasion is at least direct and newspaper employees have a chance of learning in advance that a warrant is being sought. Like trying to prevent a police search after the door has been kicked in, trying to quash a subpoena with which a third party has already complied is virtually meaningless.

Where does the press go from here? Despite cries for federal legislation to protect newspapers from *Zurcher*-type searches, legislation does not appear to be the answer. It is a well-worn maxim that what Congress gives, Congress can take away. Legislation was thought to be the answer in the concerns for the protection of confidential sources. Myron Farber's jail term after his reliance upon the New Jersey shield law laid that belief to rest. If shield laws can fall before the altar of law and order, so, too, can laws prohibiting newsroom searches.

The better approach, although perhaps not the most expedient, would appear to lie in another try at the divided Court. The one consolation for the press in the *Zurcher* decision was the fact that the Court was far from unanimous in its conclusion. This might be an indication, though only a slight one, that the pendulum could swing in the other direction given the proper impetus. Newspapers faced with threats to their perceived first amendment rights should not hesitate to press their cases before the courts. Although this method is by no means perfect and will involve time, expense and continued uncertainty in the interim, it appears to be the only sound course available.

### CONCLUSION

The modern Court has not missed the significance of Madison's omission of the "by any authority of the United States" clause<sup>130</sup> in the drafting of the first amendment. Congress may still be prohibited from making laws abridging the freedom of the press, but despite Justice Black's admonition that the phrase "no law" means just that,<sup>131</sup> court-made law is apparently viewed as a different matter.

The Court's balancing approach has left the area of press law in a state of chaos and confusion. Newsmen can surmise from the recent opinions that they still have a first amendment right and duty to inform the American public. However, the gathering of that information is viewed as a mere privilege which can be granted or taken away. The highest court of the land has declared it a national policy that the press should be permitted to publish

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<sup>130</sup> L. LEVY, *supra*, note 14.

<sup>131</sup> Cahn, *Dimensions of First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962) reprinted in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT (E. Dennis ed. 1978).



only that news which it is able to find outside the closed doors and locked files of officialdom.

If "a victory [for a free press] at the bar of the Supreme Court enhances and enlarges freedom for all,"<sup>132</sup> is the converse also true? Does a loss at the bar of the Supreme Court on the issue of first amendment free press rights diminish freedom for all?

"First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop," according to Justices Black and Douglas.<sup>133</sup> Nor are they any less taken away by a turn of semantics, by saying that a privilege is not a right, or that limiting is different from abridging. "Congress shall make no law . . . abridging the freedom . . . of the press." The first amendment still rings with the words. But that ring has a hollow tone to it these days.

SANDRA BRADLEY

<sup>132</sup> W. HATCHEN, *supra* note 18, at 6.

<sup>133</sup> 417 U.S. 817 (Douglas J., dissenting).

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## CONSTITUTIONAL LAW

### *First Amendment • Freedom of Speech* *Broadcasting • Obscenity*

*FCC v. Pacifica Foundation*, 98 S. Ct. 3026 (1978).

**I** WAS THINKING about the curse words and the swear words, the cuss words and the words you can't say . . . the words you couldn't say on the public, ah, airwaves . . . the ones that will curve your spine [and] grow hair on your hands. . . ."<sup>1</sup> While this is the satiric opinion of George Carlin, the Federal Communications Commission (FCC)<sup>2</sup> and a bare majority of the United States Supreme Court have embraced it as their genuine opinion.<sup>3</sup> They have decided to protect the public from the fate of hearing Carlin's social criticism regarding seven "dirty" words.<sup>4</sup>

Humorist George Carlin was recorded in a live performance in which he made the above quoted and other statements. He went on to analyze cur-

<sup>1</sup> Reference should be made to the appendix of the Court's opinion where the full text of Carlin's performance and the subject words are set forth. *FCC v. Pacifica Foundation*, 98 S. Ct. 3026, 3041 app. (1978).

<sup>2</sup> *In re WBAI (FM)*, 56 F.C.C.2d 94 (1975).

<sup>3</sup> 98 S. Ct. at 3029.

<sup>4</sup> *Id.* at 3041.