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SUPREME COURT SLAMS THE DOOR ON THE PRESS: MEDIA "RIDE-ALONG" FOUND UNCONSTITUTIONAL IN *WILSON V. LAYNE*

INTRODUCTION

On May 24, 1999, the United States Supreme Court effectively canceled "Cops" and other like television shows.¹ In *Wilson v. Layne*, a unanimous Court held that it is a violation of the Fourth Amendment for law enforcement officers to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.² It appears, at the very least, the Court's ruling could crimp some "reality" television shows.³

The 1990's have seen an increase in societal interest in law enforcement activities, and with it, the demand for "reality" television.⁴ "Cops," for example, is syndicated to over 90% of the U.S. market.⁵ Now in its twelfth season, the series has profiled more than 120 law enforcement agencies in 140 different cities and counties and has filmed in Hong Kong, London, Moscow, Leningrad and Central and South America.⁶ The practice of media participation during the execution of a search warrant and other law enforcement activities, however, has become increasingly controversial. The Supreme Court's recent decision appears to have put an end to this controversy, at least with respect to private homes.

1 "Cops" is a FOX Television Broadcast, Barbour/Langley Productions, Inc. This show contains actual footage taken by camera crews that accompany police officers while on patrol.

2 *Wilson v. Layne*, No. 98-83, 1999 WL 320817 (U.S. May 27, 1999).

3 David G. Savage, *Police Can't Bring Media Into Homes, Court Rules Privacy: Search warrants allow officers to enter but not to waive rights, justices say. Decision could crimp some 'reality-based' TV shows*, L.A. Times, May 25, 1999 at A24. "Reality" television programs feature actual footage of police during the performance of their duties.

4 G. Beato, *CULTURE WATCH: Why Reality Based Entertainment is Bad For Reality*, Newsday, May 17, 1998 at B06.

5 Anne Torpey-Kemph, *Fox Renews Cops*, Mediaweek, April 5, 1999 (pg. unavailable).

6 *Id.*

This Comment will examine the Supreme Court's decision in *Wilson v. Layne*. Although no Federal Circuit decision has ever upheld the constitutionality of a warranted search where the media was present for non-law enforcement purposes, the Supreme Court's decision is notable in several respects. First, although finding the officers violated the Fourth Amendment by permitting the media ride-along, the Court failed to address whether the reporters too infringed on the Wilsons' right of privacy. Next, the Court's oversight of the clear purpose and history of the Fourth Amendment lead to an erroneous conclusion on the issue of qualified immunity. Furthermore, while obviously having a significant impact on media presence during the execution of a warrant, the Court's decision may also effect other third parties present but not aiding in the warrant's execution. In addition to addressing the decision's effect on the media, this paper will also examine the implications of the Court's holding on police trainees and other third parties who previously accompanied officers without express or implied authorization.

I. BACKGROUND

A. History and Purpose of the Fourth Amendment

The Fourth Amendment of the Constitution secures the right of citizens to be protected from unreasonable searches and seizures.⁷ It provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁸

7 U.S. CONST. amend. IV.

8 *Id.*

As noted in Supreme Court jurisprudence, "[t]he central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials,"⁹ especially from unreasonable intrusions of the home.¹⁰ When discussing the Fourth Amendment it is important not to lose sight of the core values it was designed to protect.¹¹ The Fourth Amendment is "an American extension of the English tradition that a man's house [is] his castle."¹² In 1766, William Pitt made an impassioned defense of private homeowners against discretionary governmental searches before Parliament:

The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement.¹³

These values and ideals have persisted and are still highly valued today, as evidenced by the Court's decision in *Wilson*. Although "[t]he government's right to intrude upon the privacy of the home is narrowly circumscribed by the Fourth Amendment's prohibition of unreasonable searches and seizures,"¹⁴ certain threshold requirements must be satisfied before the Amendment's protections are applicable to a particular situation.¹⁵

9 *South Dakota v. Opperman*, 428 U.S. 364, 377 (1975) (Powell, J., concurring) (citations omitted).

10 *Winston v. Lee*, 470 U.S. 753, 761-762 (1985) (holding that "the sanctity of private dwellings [is] normally afforded the most stringent Fourth Amendment protection").

11 *Wilson v. Layne*, 141 F.3d 111, 121 (4th Cir. 1998) (*en banc*) (Murnaghan, J., dissenting).

12 *Id.* (citing William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 *Wm. & Mary Q.* 371, 400 (1980)).

13 *Id.* (citing Cuddihy & Hardy, *supra* note 12, at 386).

14 *Id.* at 122.

15 *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Fourth Amendment protection applies when the government conducts a search that violates a citizen's reasonable expectation of privacy.¹⁶ Therefore, for media presence during a search to violate the Fourth Amendment, one must demonstrate a subjective expectation of privacy that society is willing to recognize as reasonable.¹⁷ Furthermore, one must show that the person's present are governmental actors participating in the execution of the search warrant.¹⁸ When this two-prong test is satisfied, Fourth Amendment protections apply. If the Fourth Amendment is applicable to the search, one must demonstrate that the search was unreasonable to successfully prove a violation of his/her constitutional rights.¹⁹

B. Federal Courts Find Media Ride-Alongs Unconstitutional

Prior to the United States Supreme Court's decision in *Wilson*, three Federal Appellate Courts addressed the issue of whether a media ride-along in a home violate the Fourth Amendment.²⁰ None of the Circuits had ever upheld the constitutionality of a

¹⁶ *Id.*

¹⁷ *Id.* For a more complete discussion on the subjective expectation of privacy, see Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 384 (1972) (arguing subjective expectation has no place in Fourth Amendment analysis); Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 Syracuse L. Rev. 647, 665 (1988) (arguing that post-*Katz* cases reduce the scope of the amendment's protection); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 Ind. L.J. 549, 560 & nn.50-52 (1990) (discussing Harlan's view and cataloguing authorities).

¹⁸ *Burdeau v. McDonald*, 256 U.S. 465, 470-74 (1921); See also Brad M. Johnston, Note, *The Media's Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment*, 58 Ohio State L.J. 1499, 1509 (1997) (citing ROBERT M. BLOOM & MARK S. BRODIN, *CRIMINAL PROCEDURE EXAMPLES AND EXPLANATIONS* 20 (2d ed. 1996)).

¹⁹ U.S. CONST. amend. IV. The text of the Fourth Amendment makes it clear that all searches must be reasonable. *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994) *cert. denied*, -- U.S. --, 115 S.Ct. 1689 (1995).

²⁰ *Ayeni v. Mottola*, 35 F.3d 680; *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996) *cert. denied*, 117 S. Ct. 1081 (1997); *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, *Berger v. Hanlon*, No. 97-1927, 1999 WL 320818 (U.S. 1999).

warranted search where the media was present for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.²¹ Nonetheless, a brief review of these cases is important in that each court reached its holding through varying Fourth Amendment analysis, or a complete lack thereof.

1. *Ayeni v. Mottola*

The Second Circuit Court of Appeals addressed the issue of media ride-alongs in *Ayeni v. Mottola*.²² On March 5, 1992, Secret Service Agent Mottola obtained a warrant to search the Ayeni's home for evidence of credit card fraud.²³ At 6:00 p.m., Mrs. Ayeni and her son were home alone when six agents arrived, without a warrant, to search the home.²⁴ The officers knocked on the door and announced that they were police conducting an investigation.²⁵ Mrs. Ayeni, wearing a dressing gown, opened the door slightly when one agent pushed her out of the way and the first wave of agents entered the apartment.²⁶ The officers conducted an aggressive search of the premises before the warrant arrived some twenty-five minutes later.²⁷

At approximately 8:15 p.m., Mottola arrived with the warrant.²⁸ More importantly, he was accompanied by three members of a CBS television crew who filmed the agents as they searched the

21 *Berger*, 129 F.3d at 511; *See also Wilson*, 1999 WL 320817, at *10 n.1 (Stevens, J., concurring).

22 35 F.3d 680.

23 *Id.* at 683. The warrant was based on information obtained from a confidential source that Babatunde Ayeni, Tawa's husband, was engaged in credit card fraud.

24 *Id.* The six agents included four or five Secret Service agents and one or two Postal Service Inspectors.

25 *Id.*

26 *Ayeni v. Mottola*, 35 F.3d at 683.

27 *Id.* Mrs. Ayeni asked to see the warrant when the search began. An agent informed her that they were waiting for the warrant to arrive; whether the agents halted the search until its arrival is unclear. At 7:50 p.m., the agents were notified by radio that the warrant had just been signed, almost two hours after the search had begun.

28 *Id.* The warrant authorized Mottola and any authorized officer of the United States to enter and search the Ayenis' apartment.

Ayeni's apartment.²⁹ Mrs. Ayeni objected to the videotaping of the search and attempted to cover her son's and her own face with a magazine.³⁰ Mottola grabbed the magazine from Ayeni's hand, threw it on the ground, and told Ayeni's crying son to "shut up."³¹ A member of the search team explicitly instructed the CBS crew to videotape Mrs. Ayeni's face.³² During the twenty minute taping, the camera crew documented the agents searching Ayeni's books, photographs, financial statements, and personal letters.³³ The three-hour search recovered nothing more than a photograph of the Ayeni family.³⁴ CBS never broadcast the footage.³⁵

Mrs. Ayeni and her son filed suit against CBS and Mottola for violating their Fourth Amendment right to be free from unreasonable searches and seizures.³⁶ The Ayenis' claimed 1) their privacy was invaded by the presence of unauthorized persons in their home; and 2) the search was excessively intrusive.³⁷ Mottola filed a motion to dismiss based on qualified immunity.³⁸ After the district court denied his motion, Mottola filed an interlocutory appeal with the United States Court of Appeals for the Second

29 *Id.* The CBS television crew was from the weekly newsmagazine program "Street Stories."

30 *Id.*

31 *Ayeni v. Mottola*, 35 F.3d at 683.

32 *Id.* It is unclear whether Mottola or another agent instructed the crew to film Mrs. Ayeni's face.

33 *Id.*

34 *Id.* at 684.

35 *Id.*

36 *Id.*

37 *Id.*

38 *See Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 364 (E.D.N.Y. 1994) *aff'd*, *Ayeni v. Mottola*, 35 F.3d 680 *cert. denied*, -- U.S. --, 115 S.Ct. 1689 (1995). Government officials are entitled to qualified immunity from civil damages if their conduct does not violate clearly established federal rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For a complete discussion on the qualified immunity aspect of this case see Michael N. Levy, Comment, *The Price of Fame: Should Law Enforcement Officers Who Permit Camera Crews to Film The Execution of a Search Warrant in a Private Home Be Held Liable for Civil Damages?*, 92 NWU L.R. 1153 (Spring 1998).

Circuit.³⁹ The Second Circuit affirmed the decision of the District Court concluding the complaint sufficiently alleged Fourth Amendment violations to withstand a motion to dismiss based on qualified immunity.⁴⁰

The Second Circuit first addressed whether the Ayenis' Fourth Amendment rights were violated by the unauthorized presence of the film crew in their home.⁴¹ The opening line of its opinion recognized the tension between the public's right to information and the individuals' interest in privacy. "The quest of television reporters for on-the-scene coverage of dramatic events and the interest of law enforcement agencies in promoting their own image have combined to present for decision an appeal with important consequences for the right of privacy of those inside a home."⁴² In finding the officers violated the Fourth Amendment, the court emphasized the reasonableness prong of the analysis.⁴³ This requirement not only prevents government agents from conducting searches based on unreasonable grounds, but "ensure[s] reasonableness in the manner and scope of searches and seizures that are carried out...."⁴⁴ The court further noted "[t]he home has properly been regarded as among the most highly protected zones of privacy...."⁴⁵ When searches of the home are permitted, the officers in searching the home are limited to either "(a) actions expressly authorized by the warrant,⁴⁶ or (b) such further actions as are impliedly authorized because they are reasonably related to

39 *Ayeni v. Mottola*, 35 F.3d at 684.

40 *Id.* at 691.

41 *Id.* at 684.

42 *Id.* at 682-83.

43 *Id.*

44 *Id.* (citing *Graham v. Conner*, 490 U.S. 386, 395 (1989)); *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)).

45 *Id.* (citing *Winston v. Lee*, 470 U.S. 753, 761-62 (1985)); *Payton v. New York*, 445 U.S. 573, 585, 589-90 (1980) (stating that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

46 *Id.* (citing *Bivens v. Six Unknown Narcotic Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971) ("[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant....")).

accomplishing additional legitimate law enforcement objectives, such as ensuring the safety of the searching officers and effectively responding as law enforcement officers to circumstances that might arise during the course of the search."⁴⁷

The court held that the camera crew had neither express nor implied authorization to be present during the search of the Ayeni home.⁴⁸ With respect to express authorization, Mottola's warrant permitted "James Mottola and any Authorized Officer of the United States" to search the Ayeni home.⁴⁹ The warrant allowed for the search and seizure of any documents related to the suspected credit card fraud, but did not permit the presence of the crew or the video or audio taping of the search.⁵⁰ Furthermore, "there is no claim that the presence of the CBS camera crew served any legitimate law enforcement purpose."⁵¹ The presence of the camera crew was thus unreasonable because the warrant failed either to expressly or impliedly permit it.

Mottola argued that there are no decisions that expressly forbid officers from allowing the media to join and film their search of a home, thus, there is no clearly established ruled prohibiting the act.⁵² The court found this argument to lack merit. According to the court, "it has been a long established principle that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties."⁵³ Mottola's actions "exceeded well-established principles" by allowing the CBS camera crew to accompany him on the search without express or implied authorization.⁵⁴

47 *Id.* (citing *Michigan v. Summers*, 452 U.S. 692 (1981) (detaining occupants while search is in progress); *United States v. Barlin*, 686 F.2d 81, 87 (2d Cir. 1982) (limited search of individual on premises as self-protective measure)).

48 *Ayeni v. Mottola*, 35 F.3d at 686.

49 *Id.*

50 *Id.*

51 *Ayeni v. Mottola*, 35 F.3d at 686.

52 *Id.*

53 *Id.*

54 *Id.*

The unauthorized presence of the media was not only lacking justification, but, according to the court, Mottola's conduct was "calculated to inflict injury on the very value that the Fourth Amendment seeks to protect - the right of privacy."⁵⁵ The filming of the search did nothing more than "magnify needlessly the impairment of their right of privacy."⁵⁶ The court concluded "a private home is not a soundstage for law enforcement theatricals."⁵⁷

Next, the Second Circuit addressed the issue of whether the officers conducted the search in an unreasonably intrusive manner.⁵⁸ The Court held the scope of the search was excessively broad because the camera crew videotaped Mrs. Ayeni and her son, personal documents and other items "unnecessary to the purpose of the search - to discover materials related to an alleged credit card fraud scheme."⁵⁹ Because the search for documents involves the review of personal materials and effects, such searches must be "conducted in a manner that minimizes unwarranted intrusions upon privacy."⁶⁰ The court was stunned that "unauthorized persons with no business being in the home at all," were viewing and recording the personal effects of a private citizen.⁶¹

In summary, the Second Circuit held that the presence of an unauthorized camera crew during the search was unreasonable and thus violated the Ayenis' Fourth Amendment rights. The court concluded that the presence of the camera crew was unreasonable because the warrant failed to expressly or impliedly permit the media's presence. Furthermore, the officers conducted the search in an unreasonably intrusive manner.

⁵⁵ *Ayeni v. Mottola*, 35 F.3d at 686.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Ayeni v. Mottola*, 35 F.3d at 688.

⁵⁹ *Id.* There were no claims that the videotaping served any legitimate law enforcement purpose. The sole purpose of the videotaping was "to seize images and sounds of the Ayeni home, and of the Ayenis themselves, that were intended for public viewing by television audiences across the country." *Id.*

⁶⁰ *Id.* (citation omitted).

⁶¹ *Id.*

2. *Parker v. Boyer*

In 1996, the Eighth Circuit addressed the issue of media ride-alongs in *Parker v. Boyer*.⁶² On February 9, 1994, at 9:30 p.m., a reporter and a cameraman from KSDK, a local St. Louis, Missouri, television station joined police officers on a search of Travis Martin's home.⁶³ The warrant authorized the police to search for drugs, weapons, currency and drug transaction records.⁶⁴ Although they found several weapons, the police never brought any charges against Mr. Martin.⁶⁵ Nonetheless, KSDK broadcast the tapes on several news programs.⁶⁶

Sandra and Dana Parker, relatives of Mr. Martin and residents of the home, filed claims under 42 U.S.C. § 1983 against the officers who conducted the search and the television station whose crew entered the home.⁶⁷ The district court granted summary judgment for the Parkers against the police on their Fourth Amendment claims and granted summary judgment in favor of the television station.⁶⁸ The parties appealed to the United States Court of Appeals for the Eighth Circuit.⁶⁹ The appellate court affirmed the district court's decision in favor of the television station.⁷⁰ It reasoned the reporting crew was not acting under color of state law when it entered the private home, and reversed the district court's finding of liability against the police officers on grounds of qualified immunity.⁷¹

The Eighth Circuit's opinion lacked any significant discussion on the constitutionality of allowing the media to accompany law

⁶² 93 F.3d 445.

⁶³ *Id.* at 446.

⁶⁴ See *Parker v. Clarke*, 905 F. Supp. 638, 640-41 (E.D. Mo. 1995), *aff'd in part, rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1995). *cert. denied*, 117 S. Ct. 1081 (1997).

⁶⁵ *Id.* All the weapons discovered were legally registered.

⁶⁶ *Id.*

⁶⁷ *Parker v. Boyer*, 93 F.3d at 446.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

enforcement officers during the execution of a search warrant.⁷² Although neglecting to answer the question of whether a Fourth Amendment violation occurred, the court did note that “most courts have rejected the argument that the United States Constitution forbids the media to encroach on a person’s property while the police search it.”⁷³ In contrast, however, it recognized the Second Circuit’s ruling in *Ayeni* that clearly established constitutional law forbids the presence of the media within a private dwelling during law enforcement execution of a search warrant.⁷⁴ Absent these superficial observations, the Eight Circuit failed to rule on the Fourth Amendment issue.

3. *Berger v. Hanlon*

Finally, the Ninth Circuit Court of Appeals addressed the issue of media ride-alongs in *Berger v. Hanlon*.⁷⁵ This case was granted certiorari and consolidated with *Wilson v. Layne* for argument before the United States Supreme Court.⁷⁶

72 In his concurring opinion, District Judge Rosenbaum recognized that the court had failed to determine whether the defendants violated Parker’s Fourth Amendment right to be free from unreasonable searches and seizures. In agreement with the Second Circuit’s decision in *Ayeni*, Judge Rosenbaum found that police executing a search warrant violate a resident’s Fourth Amendment rights when the police allow media to enter the resident’s home without first securing the resident’s express consent. *Id.* at 448.

73 *Id.* at 447. The court cited four cases: *Avenson v. Zegart*, 557 F. Supp. 958 (D.Minn. 1984) (holding no reasonable expectation of privacy because the puppy mill searched was open land); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio 1984) (holding that photographs taken by the media during the execution of a search warrant was not a violation because the Constitution does not guarantee the right to be free from unwanted publicity); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980) (holding that the media’s publishing of photographs taken during a search did not violate § 1983 because there was no “gross abuse.”); and *Prahl v. Brosamle*, 295 N.W.2d 768 (Wisc. Ct. App. 1980) (holding an unauthorized filming of a search did not violate § 1983 because the broadcaster was acting independently and not under color of state law).

74 *Id.*

75 129 F.3d 505 (9th Cir. 1997).

76 *Hanlon v. Berger*, 525 U.S. ____ (1998).

As in the previous cases, the Ninth Circuit held the search of the Bergers' residence violated their Fourth Amendment rights against unreasonable searches and seizures.⁷⁷ In 1993, former employees of the Bergers informed the United States Fish and Wildlife Service ("USFWS") they had witnessed Mr. Berger poison or shoot eagles a few years earlier.⁷⁸ The USFWS began an investigation into the allegations. After learning of the investigation, Cable News Network, Inc. and CNN employee Jack Hamann, together with Turner Broadcasting System, Inc. and TBS employees Robert Rainey and Donald Hooper entered into an agreement with Assistant United States Attorney McLean to film the search for the networks' environmental programs.⁷⁹ In exchange for use of the footage on their environmental shows

⁷⁷ 129 F.3d at 510.

⁷⁸ *Id.* at 508.

⁷⁹ *Id.* The following letter agreement was executed by Assistant U.S. Attorney McLean and Jack Hamann on CNN letterhead:

Dear Mr. McLean:

This confirms our agreement that the United States Attorney's Office for the District of Montana agrees to allow CNN to accompany USFWS Agents as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993. Except as provided below, CNN shall have complete editorial control over any footage it shoots; it shall not be obliged to use the footage; and does not waive any rights or privileges it may have with respect to the footage.

In return, CNN agrees to embargo the telecast of any videotape of the attempt to execute the search warrant until either: (1) a jury has been empaneled and instructed by a judge not to view television reports about the case; or (2) the defendant waives his right to a jury trial and agrees to have his case tried before a judge; or (3) a judge accepts a plea bargain; or (4) the government decides not to bring charges relating to the attempt to execute the search warrant.

Please acknowledge your agreement to the foregoing by executing the signature line below.

Sincerely, Jack Hamann, Correspondent, CNN Environment Unit.

Acknowledged signature of Kris McLean, Assistant United States Attorney for the District of Montana, Helena, Montana.

cc: Jennifer Falk Weiss, CNN Legal Department.

Chet Burgess, CNN Environment Unit.

"Earth Matters" and "Network Earth," the government gained publicity for its efforts to combat environmental crime.⁸⁰

In March of 1993, a magistrate judge issued a search warrant for the Bergers' ranch, and "appurtenant structures, excluding the residence, for evidence indicating the taking of wildlife."⁸¹ According to the testimony of the Bergers and without contention otherwise by the media or U.S. Attorney's Office, the magistrate judge had no knowledge of the planned media participation.⁸²

On the morning of the search, the media members and government team met on a country road to discuss the execution of the warrant before they proceeded to the ranch.⁸³ Mr. Berger met USFWS Special Agent Joel Scrafford, who was wearing a hidden microphone, and the two consentually entered the Berger home.⁸⁴ The Bergers were not informed that Agent Scrafford was wearing a microphone or that the camera present during the search belonged to the media.⁸⁵ The media broadcast portions of the eight hours of video footage and sound recordings made in the Bergers' house.⁸⁶

Mr. Berger was charged with various violations of § 16 of the United States Code and with the use of a registered pesticide in a manner inconsistent with its labeling.⁸⁷ Prior to trial, the magistrate judge denied Mr. Berger's motion to suppress evidence on the grounds that the agents lacked probable cause for the search and that the warrant did not accurately describe the property to be searched.⁸⁸ Mr. Berger was acquitted of all charges, except the misdemeanor charge of using a pesticide contrary to its labeling.⁸⁹

The Ninth Circuit began its discussion on the Fourth Amendment by stating that "[t]his was no ordinary search."⁹⁰ From the outset,

80 *Berger v. Hanlon*, 129 F.3d at 507-508.

81 *Id.* at 508.

82 *Id.* at 508-509.

83 *Id.*

84 *Berger v. Hanlon*, 129 F.3d at 509.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Berger v. Hanlon*, 129 F.3d at 509.

90 *Id.* at 510.

the intended purpose of the media presence was for reasons other than those related to law enforcement.⁹¹ According to the court, and documented by a written contract, the media's purpose was to obtain material for their commercial programming.⁹² Nonetheless, the agents obtained the warrant without disclosing to the magistrate judge the planned presence of the media or its purpose.⁹³

The agents and media claimed that the Bergers' privacy was not invaded because their cameras shot footage only from the open fields of the shed and other outbuildings on the ranch where the Bergers' had no reasonable expectation of privacy.⁹⁴ The court quickly rejected this argument and stated that "[t]he open fields doctrine is not a license for the police to bring trespassers on private property" and certainly "does not immunize the officers from liability for conduct that has no law enforcement purpose."⁹⁵ Furthermore, the court noted that the record indicated that the shed and other buildings were places where the Bergers did have a reasonable expectation of privacy in that "they were located close to the house and guarded by a dog."⁹⁶

The court next addressed the issue of whether the media's conduct amounted to governmental action.⁹⁷ Private parties may be held liable in a *Bivens* action for violation of the Constitution if they are deemed to have acted "under color of law."⁹⁸ Applying the joint action test, the court stated the test is satisfied when "the plaintiff is able to establish an agreement, or conspiracy between the government actor and a private party."⁹⁹

In the present case, the parties not only had a verbal agreement, but a written contractual agreement.¹⁰⁰ Furthermore, it was alleged

91 *Id.*

92 *Id.* See *supra* note 79.

93 *Id.* at 510-11.

94 *Berger v. Hanlon*, 129 F.3d at 512.

95 *Id.*

96 *Id.* at 512-13.

97 *Id.* at 514.

98 *Berger v. Hanlon*, 129 F.3d at 514. Private persons act "under color of law" when engaging in a joint activity with state actors. See *Lugar v. Edmonson Oil Co.* 457 U.S. 922, 941 (1982).

99 *Id.* (citations omitted).

100 *Id.* at 515. See *supra* note 79.

that the government shared confidential information with the media.¹⁰¹ The court noted that the agents engaged in "conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators."¹⁰² In finding the existence of a joint action, the court concluded "the government officers planned and executed the search in a manner designed to enhance its entertainment value rather than to further their investigation."¹⁰³

The court next addressed the qualified immunity issue. Government agents are entitled to qualified immunity "if they could have reasonably believed that their conduct violated no clearly established federal statutory or constitutional right."¹⁰⁴ In its analysis, the Ninth Circuit reviewed prior Fourth Amendment jurisprudence to determine if the government agents could have reasonably believed their conduct was lawful.¹⁰⁵ The court, citing *Ayeni*, held the agents were not entitled to qualified immunity.¹⁰⁶ In *Ayeni*, the Second Circuit held that although there was no reported decision expressly forbidding the government from allowing a media ride-along during the execution of a warrant, no reasonable officer could have thought it permissible in light of 18 U.S.C. § 3105.¹⁰⁷ Thus, based on the reasoning of *Ayeni*, the Ninth Circuit held that the agents were not entitled to qualified immunity.¹⁰⁸

In summary, the Ninth Circuit found the search of the Bergers' ranch unreasonable.¹⁰⁹ It concluded that the search was a joint operation between the government and media intended to serve a

101 *Id.*

102 *Id.*

103 *Berger v. Hanlon*, 129 F.3d at 514.

104 *Id.* at 511 (citations omitted).

105 *Id.* at 511-12.

106 *Id.* at 512.

107 *Id.* (citing *Ayeni v. Mottola*, 35 F.3d 680). 18 U.S.C. § 3105 (1994) states: "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

108 *Berger v. Hanlon*, 129 F.3d at 512.

109 *Id.* at 510.

major purpose other than law enforcement.¹¹⁰ Furthermore, the court held the government agents were not entitled to qualified immunity because a reasonable officer should have determined that media presence during an execution was unlawful.¹¹¹ Thus, the Ninth Circuit concluded that the government and media violated the Bergers' Fourth Amendment right to be free from unreasonable searches and seizures.¹¹² On March 24, 1999, the United States Supreme Court heard oral arguments on this case.¹¹³

II. SUBJECT OPINION: *WILSON V. LAYNE*

A. Facts

On April 16, 1992, federal and state law enforcement agents engaged in a joint effort to apprehend a fugitive for probation violations.¹¹⁴ Dominic Wilson was identified as a dangerous fugitive and a target of "Operation Gunsmoke."¹¹⁵ According to this special national fugitive apprehension program, Wilson had violated his probation on three previous felony charges.¹¹⁶

The Circuit Court for Montgomery County, Maryland issued three arrest warrants, one for each of Dominic Wilson's probation violations.¹¹⁷ The warrants were addressed to "any duly authorized peace officer."¹¹⁸ They made no mention of media presence during the arrest.¹¹⁹

¹¹⁰ *Id.*

¹¹¹ *Id.* at 512.

¹¹² *Id.* at 510.

¹¹³ *Hanlon v. Berger* consolidate for oral arguments with *Wilson v. Layne*, Nos. 97-1927, 98-83, 1999 WL 187365 (U.S. March 24, 1999).

¹¹⁴ *Wilson v. Layne*, No. 98-83, 1999 WL 187365, at *3.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Wilson v. Layne*, No. 98-83, 1999 WL 187365, at *3. In all relevant respects, the warrants were identical. By way of example, the Court cited the following:

The State of Maryland, to any duly authorized peace officer, greeting: you are hereby commanded to take Dominic Jerome Wilson, if he/she shall be found in your bailiwick, and have him immediately before the Circuit Court for Montgomery County, now in session, at the Judicial Center, in Rockville, to

At around 6:45 a.m., Deputy United States Marshals and Montgomery County Police officers, joined by a Washington Post reporter and a photographer as part of a Marshall's Service ride-along policy, entered the suspected home of Dominic Wilson.¹²⁰ Dominic Wilson's parents, Charles and Geraldine, were asleep in bed when they heard the officers enter the home.¹²¹ Charles Wilson, dressed only in briefs, ran into the living room to investigate the disturbance and found at least five men dressed in street clothes with their guns drawn.¹²² The officers did not identify themselves as law enforcement officials.¹²³ Mr. Wilson angrily demanded that the men state their business and repeatedly cursed the officers.¹²⁴ The officers subdued Mr. Wilson on the floor.¹²⁵ Geraldine Wilson, dressed in a sheer nightgown, entered the living room to investigate.¹²⁶ The officers questioned the Wilsons about their son's whereabouts.¹²⁷ Mr. Wilson told the officers that he was not Dominic, that his son did not live there, and he had not seen Dominic for over two weeks.¹²⁸ Mrs. Wilson identified Charles as her husband and confirmed his statement that his son was not present at the residence.¹²⁹ After completing their protective sweep of the house, the officers realized that the subject of the warrant, Dominic Wilson, was not in the home.¹³⁰

answer an indictment, or information, or criminal appeals unto the State of Maryland, of and concerning a certain charge of Robbery [Violation of Probation] by him committed, as hath been presented, and so forth. Hereof fail not at your peril, and you then and there this writ. Witness. (citation omitted).

120 *Id.*

121 *Id.*

122 *Id.*

123 Brief For Petitioners at 4, *Wilson v. Layne*, 1998 WL 901778 (U.S.) (No. 98-83).

124 *Id.*

125 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *3.

126 *Id.*

127 Brief For Petitioners at 4, *Wilson v. Layne*, 1998 WL 901778 (U.S.) (No. 98-83).

128 *Id.*

129 *Id.*

130 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *3.

During the course of the event, the Washington Post reporters observed and photographed what transpired.¹³¹ The print reporter observed the confrontation in the living room between the police and Charles Wilson, and the photographer took pictures of Mr. Wilson while he was forcibly detained on the floor with a knee in his back and a gun to his head.¹³² The Wilsons were not permitted to cover themselves during the incident.¹³³ The Washington Post reporters performed their newsgathering duties but, "[a]t no time, however, were [they] involved in the execution of the arrest warrant."¹³⁴ The photographs taken by the Washington Post reporter were never published.¹³⁵

B. Procedural History

Charles and Geraldine brought a *Bivens* action in the District Court of Maryland alleging the officer's action in bringing members of the media into their home during the attempted execution of the arrest warrant violated their Fourth Amendment right against unreasonable searches and seizures.¹³⁶ The government moved for summary judgment on qualified immunity grounds, but it was denied by the district court.¹³⁷

On interlocutory appeal a divided Fifth Circuit reversed the district court decision and found the law enforcement officers entitled to qualified immunity.¹³⁸ The Wilsons filed for a rehearing

131 *Id.*

132 Brief For Petitioners at 5, *Wilson v. Layne*, 1998 WL 901778 (U.S.) (No. 98-83).

133 *Id.*

134 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *3.

135 *Id.*

136 *Id.* at *4. In addition to the *Bivens* actions, the Wilsons also asserted claims under 42 U.S.C. § 1983. Those claims were dismissed by the district court. The district court also granted summary judgment on the Wilsons' *Biven* claims that the law enforcement officials lacked probable cause to enter the home and, when doing so, used excessive force. The Wilsons moved for entry of final judgment on those claims. The court denied the motion. See Brief For Petitioners at 6, *Wilson v. Layne*, 1998 WL 901778 (U.S.) (No. 98-83).

137 *Id.*

138 *Id.*

and oral arguments were heard *en banc* September 30, 1997.¹³⁹ Subsequently, one of the judges died and the case was argued again *en banc* March 3, 1998.¹⁴⁰ A divided court again upheld the finding of qualified immunity.¹⁴¹ It reasoned that, at the time the search occurred, no court had held that media presence during the execution of a warrant in a private home violated the Fourth Amendment, thus "the right allegedly violated by the petitioners was not 'clearly established' and ... qualified immunity was proper."¹⁴² The Court of Appeals, however, declined to decide the Fourth Amendment issue.¹⁴³

Five judges dissented arguing the officer's action constituted a Fourth Amendment violation.¹⁴⁴ Furthermore, "[t]he dissenters concluded that since no reasonable officer could have believed that allowing reporters into the home or allowing them to take pictures was either authorized by the arrest warrant or reasonably necessary to accomplish a legitimate law enforcement objective, [the officers] were not entitled to qualified immunity."¹⁴⁵

On November 9, 1998, the United States Supreme Court granted the Wilsons' writ of certiorari limited to the issues of: 1) whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant and 2) whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to the defense of qualified immunity.¹⁴⁶ *Wilson v. Layne* was consolidate with *Berger v. Hanlon* for oral arguments.¹⁴⁷

139 Brief For Petitioners at 7, *Wilson v. Layne*, 1998 WL 901778 (U.S.) (No. 98-83).

140 *Id.*

141 *Id.* The final vote was 6 to 5 to reverse the district court's ruling.

142 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *4 (quoting *Wilson*, 141 F.3d 111).

143 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *4.

144 *Id.*

145 Brief For Petitioners at 9, *Wilson v. Layne*, 1998 WL 901778 (U.S.) (No. 98-83).

146 *Wilson v. Layne*, 119 S.Ct. 443 (mem.).

147 *Id.*

C. Supreme Court Review

1. Majority Opinion

The Supreme Court began its analysis by discussing the requirements for qualified immunity.¹⁴⁸ The Wilsons sued the Deputy United States Marshals under *Bivens* and the Montgomery County Police officers under § 1983.¹⁴⁹ Under both actions, the qualified immunity analysis is identical.¹⁵⁰ To determine if officials are entitled to qualified immunity, a court must "first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation."¹⁵¹ Thus, in order to answer the qualified immunity question, the Court first addressed the Fourth Amendment issue.

Chief Justice Rehnquist, writing for the majority, began by stating the Fourth Amendment embodies the "centuries-old principle of respect for the privacy of the home."¹⁵² Citing the 1604 English case *Semayne v. Gresham*,¹⁵³ the Court observed that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."

These basic Fourth Amendment principles have been applied in cases similar to *Wilson*.¹⁵⁴ In *Payton v. New York*,¹⁵⁵ for example, police entered a private home to execute an arrest warrant. There, the Court was "persuaded that the 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic' meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest."¹⁵⁶

The Court reasoned that although the officers in *Wilson* were entitled to enter the home and attempt to execute the arrest warrant,

148 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *4.

149 *Id.*

150 *Id.* (citations omitted).

151 *Id.* (quoting *Conn v. Gabbert*, 526 U.S. ---, --- (1999) (slip op., at 4)).

152 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *5.

153 *Id.* (quoting 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.) (1604)).

154 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *5.

155 *Id.* (citing 445 U.S. at 602).

156 *Id.* (quoting 445 U.S. at 602).

"it does not necessarily follow that they were entitled to bring a newspaper reporter and photographer with them."¹⁵⁷ If the scope of a search exceeds that expressly or impliedly permitted by the warrant, the subsequent seizures are unconstitutional.¹⁵⁸ In other words, the actions of the participants must be related to the objectives of the intrusion.

The Court stated the presence of Washington Post reporters inside the Wilsons' home was not related to the objectives of the intrusion.¹⁵⁹ Since the reporters were in the Wilsons' home for their own purposes and not to aid in the apprehension of Dominic Wilson, "they were not present for any reason related to the justification for police entry into the home."¹⁶⁰ Thus, the reporters were not assisting the law enforcement officers in the execution of the warrant.¹⁶¹

There are situations, however, where third parties are present to aid in the execution of warrant.¹⁶² In such cases, their presence is lawful.¹⁶³ For example, the Court noted that third parties may accompany law enforcement officers on a search to recover stolen goods if the third party is there to identify the stolen property.¹⁶⁴

The government argued the reporters were present to aid legitimate law enforcement purposes and, therefore, they were assisting in the search.¹⁶⁵ First, it stated that officers should be entitled to a reasonable amount of discretion in determining when media presence furthers their law enforcement mission.¹⁶⁶ The Court dismissed this argument as ignoring the core purpose of the Fourth Amendment - the right of residential privacy.¹⁶⁷ The Court reasoned that Fourth Amendment protections would be

157 *Id.* at *5.

158 *Id.* (citation omitted).

159 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *6.

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *6 (citation omitted).

165 *Id.*

166 *Id.*

167 *Id.*

"significantly watered down" if such generalized law enforcement objectives themselves were sufficient to trump the Amendment.¹⁶⁸

Next, the government argued that media presence aids in informing the public of law enforcement efforts to combat crime.¹⁶⁹

Although recognizing the importance of the media's First Amendment rights and their role in informing the public of law enforcement activities, the Court stated "the Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged."¹⁷⁰ The desire for good public relations and accurate reporting on police issues does not justify intrusion into a private home.¹⁷¹

Finally, the government argued that the media's presence aided in the reduction of police abuses and protected both the officers and suspects from potential harm.¹⁷² Recognizing that in some cases the presence of third parties may be constitutionally permissible, the Court found that the media members in this case were acting for private purposes.¹⁷³ "They were not there for the purpose of protecting the officers, much less the Wilsons ... evidenced in part by the fact that the newspaper and not the police retained the photographs."¹⁷⁴

The Supreme Court held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."¹⁷⁵

The Court then turned to the qualified immunity issue. Citing *Anderson v. Creighton*,¹⁷⁶ the Court stated that "whether an official protected by qualified immunity may be held personally liable for

168 *Id.*

169 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *6.

170 *Id.*

171 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *7.

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *7. (quoting 483 U.S. 635, 639 (1987)).

an allegedly unlawful official action turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." Thus, the issue in this case is "whether a reasonable officer could have believed bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed."¹⁷⁷

The Wilsons and the dissenting opinion in the Court of Appeals argued that any violation of the Fourth Amendment is "clearly established" because police actions are clearly restricted by Fourth Amendment protections.¹⁷⁸ The Court rejected this notion stating that before a court can determine if a right was clearly established, the right allegedly violated must be defined at the "appropriate level of specificity."¹⁷⁹ It concluded that in April 1992 the violation in question had not been sufficiently defined to render it clearly established. Thus, the Court held that "it was not unreasonable for a police officer to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful."¹⁸⁰

First, although deciding that it was a Fourth Amendment violation for police to bring third parties into a home during the execution of a warrant when the third parties were not aiding in the execution of the warrant, the Court said the issue was "by no means open and shut."¹⁸¹ The question in this case was not whether a valid warrant existed, rather whether the invitation extended to the media exceeded the scope of the warrant.¹⁸² The Court stated that, in light of the importance of media coverage of police activities, "it is not obvious from the general principles of the Fourth Amendment that the conduct of the officers in this case violated the Amendment."¹⁸³

177 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *8.

178 *Id.*

179 *Id.* (citing *Anderson*, 483 U.S. at 123).

180 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *8.

181 *Id.*

182 *Id.*

183 *Id.*

Furthermore, in 1992 there were no published federal judicial opinions holding that media presence was unlawful during the execution of a warrant in a private home.¹⁸⁴ The only published decision directly on point was a state intermediate court decision finding such conduct was not unreasonable.¹⁸⁵ There existed two unpublished federal District Court decisions addressing the issue, but both of these courts applied an "unorthodox non-Fourth Amendment right of privacy" theory.¹⁸⁶ The Court concluded that these cases were not enough to "clearly establish" a Fourth Amendment violation.¹⁸⁷

The Wilsons also pointed to the Sixth Circuit decision in *Bills v. Aseeltine*.¹⁸⁸ Due to the existence of general issues of material fact, the Court of Appeals found summary judgment improper on the question of whether law enforcement officers exceeded the scope of a search warrant by allowing a private security guard to accompany them on a search to identify stolen property other than that described in the warrant.¹⁸⁹ Although the case was decided five weeks prior to the search of the Wilson residence, the Supreme Court stated that it "cannot say even in light of *Bills*, the law on third-party entry into homes was clearly established in April 1992."¹⁹⁰ Due to the Wilsons failure to cite controlling authority in their jurisdiction or a consensus of persuasive authority which clearly established such actions as a Fourth Amendment violation, the Court refused to deny the officers qualified immunity on this basis.¹⁹¹

184 *Id.* The Court noted, however, that apparently media ride-alongs had become common practice according to Florida Supreme Court's decision in *Florida Publishing Co. v. Fletcher*, 340 So.2d 914, 918 (1976).

185 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *8. (citing *Prahl*, 295 N.W.2d at 782).

186 *Id.* at *8 (citing *Moncrief*, 10 Media L. Rptr. 1620; *Higbee*, 5 Media L. Rptr. 2372).

187 *Id.* at *8.

188 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *9 (citing *Bills v. Aseeltine*, 958 F.2d 697 (6th Cir. 1992)).

189 *Id.* at *9 (citing *Bills*, 958 F.2d at 709).

190 *Id.* at *9.

191 *Id.*

Finally, the Court found the Marshals reliance on a Marshal Service ride-along policy significant. It stated that "important to our conclusion was the reliance by the United States marshals in this case on a Marshal's Service ride-along policy...."¹⁹² The policy "explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests."¹⁹³ Since the body of case law in the area was undeveloped, the Court held it was not unreasonable for the officers to rely on their formal ride-along policy.¹⁹⁴

In conclusion, the Court stated that due to the lack of development in this area of Fourth Amendment jurisprudence, "the officers in this case cannot have been 'expected to predict the future course of constitutional law.'"¹⁹⁵ To support its holding, the Court noted that since the search in *Wilson* a split developed among the Federal Circuits regarding the issue of qualified immunity.¹⁹⁶ "If judges thus disagree on the constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."¹⁹⁷ The Supreme Court affirmed the holding of the Fourth Circuit.¹⁹⁸

2. Dissenting Opinion

Justice Stevens concurred with the majority's holding that it is a Fourth Amendment violation for law enforcement officers to permit third parties to enter a private residence during the execution of a warrant, but dissented on the question of qualified

192 *Id.*

193 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *9.

194 *Id.*

195 *Id.* (quoting *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)).

196 *Id.* (citations omitted).

197 *Id.*

198 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *10. As noted, the Supreme Court consolidated *Wilson* with *Hanlon v. Berger*. Regarding *Berger*, the Supreme Court held that the police violated the Bergers Fourth Amendment rights. However, since "the parties have not called our attention to any decisions which would have made the state of law any clearer a year later," the Court found the agents were entitled to qualified immunity. Thus, the Supreme Court vacated the judgment of the Court of Appeals for the Ninth Circuit and remanded the case for further proceedings. *Hanlon v. Berger*, No. 97-1927, 1999 WL 320818 (U.S. 1999).

immunity.¹⁹⁹ Justice Stevens argues that, "[t]he clarity of the constitutional rule, a federal statute (18 U.S.C. § 3105), common-law decisions, and the testimony of the senior law enforcement officer" all support the position that the officers violated a clearly established right.²⁰⁰

According to Justice Stevens, the majority's opinion did not announce new constitutional law, rather the Court "has refused to recognize an entirely unprecedented request for an exception to a well-established principle. Police action in the execution of a warrant must be strictly limited to the objectives of the authorized intrusion."²⁰¹ Justice Stevens further stated that the officers' argument that media presence serves a legitimate law enforcement purpose is merely a post hoc rationalization.²⁰² The Court's rejection of such arguments cannot be characterized as a new rule of law.²⁰³

More importantly, Justice Stevens believed it should have been obvious to the officers that permitting the media to ride-along on a search of a private residence exceeded the scope of the warrant.²⁰⁴ "Despite reaffirming that clear rule, the Court nonetheless finds that the mere presence of a warrant rendered the officers' conduct reasonable."²⁰⁵ Although the Court found the officers' actions reasonable, it failed to provide a single case to support such a proposition.²⁰⁶

Next, Justice Stevens addressed the argument that prior to 1992 no judicial opinion held that officers violated the Fourth Amendment by allowing members of the media to accompany them on a search of a private home.²⁰⁷ He found such reasoning "scant."²⁰⁸ The majority cited three cases each holding police

199 *Id.* (Stevens, J., concurring in part and dissenting in part).

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *11.

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

conduct similar to that in *Wilson* was not unreasonable.²⁰⁹ The two federal cases were not reported and, furthermore, were decided on "unorthodox non-Fourth Amendment right of privacy theories."²¹⁰ The state case addressed an illegal trespass and it "surely does not provide any support for an officer's assumption that a similar trespass would be lawful."²¹¹ Justice Stevens concluded that these decisions "could not possibly provide a basis for a claim by the police that they reasonably relied on judicial recognition of an exception to the basic rule that the purposes of the police intrusion strictly limited its scope."²¹²

Finally, Justice Stevens found the majority's reliance on United States Marshal Service's ride-along policy "[t]he most disturbing aspect of the Court's ruling."²¹³ This document was obviously not prepared by an attorney, but by someone "concerned with developing the proper public image of the Service, with a special interest in creating a favorable impression with Congress."²¹⁴ The Justice points out that the document contains no discussion of what conditions must be present before the media is permitted to enter a private residence.²¹⁵ Although it states the media should not be allowed to enter until a "signal" is given, it fails to provide the marshal any indication of when and under what circumstances such signal should be given.²¹⁶ The notion that a trained law enforcement officer would rely on such a document for guidance "it is too far fetched to merit serious consideration."²¹⁷

In conclusion, Justice Stevens, in agreement with the majority, found that the conduct in this case clearly violated the Fourth Amendments core purpose - protection of the home.²¹⁸ In his view,

209 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *12.

210 *Id.* (citing *Moncrief*, 10 Media L. Rptr. 1620; *Higbee*, 5 Media L. Rptr. 2372).

211 *Id.* (citing *Prahl*, 295 N.W.2d 768).

212 *Id.* at *12.

213 *Id.*

214 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *12.

215 *Id.*

216 *Id.*

217 *Id.*

218 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *13.

however, it had been clearly established that officers may not bring third parties into private homes during the execution of a warrant.²¹⁹ To this end, he states that "[i]n shielding this conduct as if it implicated only the unsettled margins of our jurisprudence, the Court today authorizes one free violation of the well-established rule it reaffirms."²²⁰

III. ANALYSIS

The Supreme Court decided the Fourth Amendment issue in *Wilson v. Layne* correctly because the presence of the reporters inside the Wilsons' home was not related to the objectives of the authorized intrusion. However, this decision is not without its shortcomings. First, although the officers violated the Fourth Amendment by permitting the media ride-along, the Court failed to address whether the reporters too infringed on the Wilsons' right of privacy. Furthermore, the Court's oversight of the clear purpose of the Fourth Amendment, reinforced by 18 U.S.C. § 3105, lead to an erroneous conclusion on the issue of qualified immunity.

A. Fourth Amendment Issue

In *Wilson*, the Supreme Court failed to address the issue of whether the reporters entry into the Wilsons' home and subsequent photographing of the events that occurred violated the Fourth Amendment. The reporters were permitted to enter the private dwelling by virtue of the authority bestowed upon the officers via the issuance of the warrant. Since the reporters were acting "under color of law," their actions likewise constitute a Fourth Amendment violation.

For a Fourth Amendment violation to occur the government must conduct a search that violates a citizen's reasonable expectation of privacy.²²¹ A reasonable expectation exists when a person demonstrates both a subjective and objective expectation of privacy.²²² The subjective expectation of privacy requirement is met when "the individual has shown that 'he seeks to preserve

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

²²² *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979).

[something] as private.”²²³ For an objective expectation of privacy to exist, society must recognize the subjective expectation as “reasonable.”²²⁴ Both the subjective and objective expectation of privacy requirements must be met before proceeding to the governmental action prong of the analysis.

The second prong of the analysis mandates the conduct be governmental.²²⁵ In other words, the Fourth Amendment applies only to action by the government, not to private conduct. However, actions of private citizens may be considered governmental when the citizens are willful participants in the governmental activity, referred to as “under the color of law.” Private citizens act under color of law when they engage in a joint action with state officials and thus they are held to the same constitutional constraints as a traditional governmental actor.²²⁶

When applying the two-prong test to media ride-alongs, the presence of the media violates the Fourth Amendment if the resident is able to demonstrate a subjective expectation of privacy that society is willing to recognize as reasonable.²²⁷ Furthermore, the resident must show that the media are governmental actors participating in the execution of the warrant.²²⁸ When this two-prong test is met, Fourth Amendment protections apply to the search of a citizen's home. If the Fourth Amendment is applicable

223 *Id.* at 740 (quoting *Katz*, 389 U.S. at 351).

224 *Katz*, 389 U.S. at 361 (Harlan, J., concurring) The second requirement is met when the individual's expectation is objectively “justifiable” under the circumstances. *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 353). Furthermore, the importance of the term “reasonableness” can not be overlooked. “The bottom line in analyzing the constitutionality of any search is its reasonableness.” *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990).

225 U.S. CONST. amend. IV.

226 *See Lugar*, 457 U.S. at 941 (stating private persons act under color of law when engaging in a joint activity with state actors).

227 *Id.* The test, as articulated by the Court is whether “a person [has] exhibited an actual (subjective) expectation of privacy ... that society is prepared to recognize as ‘reasonable.’”

228 *Johnston*, *supra* note 18, at 1507 (citing BLOOM & BRODIN, at 20).

to the search, one must demonstrate that the search was reasonable to prevent an invasion of privacy.²²⁹

Reasonable Expectation of Privacy Prong

The home has always received special protection under Fourth Amendment analysis.²³⁰ "The home has properly been regarded as among the most highly protected zones of privacy,"²³¹ and "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection."²³² The very purpose of the Amendment was to secure a person's right to "retreat into his home and there be free from unreasonable governmental searches."²³³ Therefore, there is little to no debate as to whether citizens have a subjective expectation of privacy in their homes.

Furthermore, the Supreme Court has held that an objective expectation of privacy, an expectation that society is prepared to recognize as reasonable, exists in the home.²³⁴ To determine if a subjective expectation exists, the Court "examines the beliefs and norms of contemporary society."²³⁵ The home is considered a place where an objective expectation of privacy exists, since the search in *Wilson* occurred in a private home, there clearly existed a reasonable expectation of privacy.²³⁶

229 U.S. CONST. amend. IV. The text of the Fourth Amendment makes it clear that all searches must be reasonable. *Ayeni*, 35 F.3d at 684.

230 *Maryland v. Garrison*, 107 S.Ct. 1013 (1987) (Blackmun, J., dissenting); *See also, Payton*, 445 U.S. 573 ("[T]he 'physical entry of the home is the chief evil which the wording of the Fourth Amendment is directed,'" (quoting *United States v. United States District Court*, 407 U.S. 297 (1972))). Justice Ginsburg has called the home "the most essential bastion of privacy recognized by law." *Minnesota v. Carter*, -- U.S. --, 119 S.Ct. 469, 481 (1998) (Ginsburg, J., dissenting).

231 *Ayeni*, 35 F.3d at 685. (citing *Winston*, 470 U.S. at 761-62; *Payton*, 445 U.S. at 585, 589-90)).

232 *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Reed*, 572 F.2d 412, 422 (2d Cir.) *cert. denied*, 439 U.S. 913 (1978)).

233 *Silverman v. United States*, 365 U.S. 505 (1961).

234 *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

235 *Johnston*, *supra* note 18, at 1508 (citing 1 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE, § 2:7, at 60-61 (2nd ed. 1993)).

236 *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

Government Action Prong

The second prong of the test requires government action.²³⁷ Thus, if the individuals participating in the search are local, state, or federal government officials, the conduct is easily deemed governmental.²³⁸ In *Wilson*, although the law enforcement officers were government officials, the reporters were private citizens. Traditionally, when the participants are private persons, acting independently of government authority, direction or acquiescence, Fourth Amendment protections do not apply.²³⁹ A search conducted by or participated in by a private person may, however, be deemed governmental if the private actors were "acting as an agent of the Government or with the participation or knowledge of any governmental official."²⁴⁰ Thus, in order for a private search to become a governmental action, the private citizen must have acted as an "instrument" or agent of the state.²⁴¹

A private citizen acts "under color of law" if they exercise a right "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."²⁴² The injury, in this case the invasion of privacy, must have been caused by the exercise of a right created by the state, by a rule of conduct imposed by the state or by a person for whom the state is responsible.²⁴³ A private person is acting under color of law if they are willful participants in a joint activity with the government or its

237 *Burdeau v. McDowell*, 256 U.S. at 475 (stating that the Fourth Amendment "was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies").

238 Johnston, *supra* note 18, at 1509 (citing BLOOM & BRODIN, at 20).

239 *Id.*

240 *United States v. Jacobson*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

241 *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

242 *Classic*, 313 U.S. 299, 326.

243 *See Lugar*, 457 U.S. at 937 (stating that private persons' acts may be considered under color of law if such are joint actions between private and state actors). The elements of a *Bivens* claim are similar except that the party acted under color of federal law. *See Butz v. Economou*, 438 U.S. 478 (1978).

agents.²⁴⁴ The question thus becomes whether the reporters were governmental actors, acting under color of law, when they accompanied the law enforcement officials on the execution of a search warrant? Under this analysis, the media members are private citizens acting under color of law because they are willful and joint participants in government action.²⁴⁵

First, without the government's action, the execution of the search warrant, the media coverage of the search would not have occurred. Without the warrant, the media would require the Wilsons' consent to gain access to the interior of the home. It was the show of authority by the officers under color of law that allowed the media access to the residence. Furthermore, the Washington Post reporters were "invited by the Marshals to accompany them on their mission."²⁴⁶ Without the assistance of the law enforcement officials, the media would not have known a search was to occur. It was only through the willful and voluntary cooperation between the government officials and the media that the reporters were able to document the search. "It is the government's execution of a search warrant that serves as the necessary prerequisite to the media's coverage."²⁴⁷ Thus, the media acted under color of law when they accompanied law enforcement officials during the execution of a search of the private residence.²⁴⁸

In contrast, others legal scholars argue the media was not acting under color of law because, "[a]t most, [the media]'s acts were

244 See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (stating a private party can be held liable under § 1983 if they are involved in a conspiracy with a state actor). See also *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989) (holding the scope of immunity available to a private party in a *Bivens* action mirrors that available to a private party in a § 1983 action).

245 See Johnston, *supra* note 18, at 1524.

246 *Wilson v. Layne*, Nos. 98-83, 1999 WL 187365, at *3.

247 Johnston, *supra* note 18, at 1524.

248 *Id.* The author also argues that even if the media are considered independent actors conducting an independent search, the Fourth Amendment can still be violated. *Id.* This issue hinges on "the consideration of the actual participation by the government agent in the total enterprise of securing evidence by other than appropriate means." *Id.* at 1525 (quoting 1 HALL, *supra* note 235, at § 12:4, at 557). He argues that the police involvement is sufficient to subject the media's action to Fourth Amendment analysis. *Id.*

committed parallel to and contemporaneous with" the government actions.²⁴⁹ Although the government agents and the camera crew had an interest in the search, they would argue that the parties' motives were different. The agents' motives were to collect evidence, while the camera crew's motive was to obtain a story. "A coincidence of interest does not transform a search into the type of concerted involvement that would 'transform [the reporters' actions] from a private venture [in]to action taken under color of law."²⁵⁰ The reporters must be allowed to enter the house with the common interest of depriving the person of his Fourth Amendment rights.²⁵¹ If this common interest does not exist, there is merely a coincidence of interests and the claim must fail.²⁵²

This argument flies in the face of the Supreme Court's holding in *Lugar v. Edmondson Oil Company*.²⁵³ There the Court held the Fourth Circuit erred in finding that joint participation required "something more than invoking the aid of state officials to take advantage of state-created attachment procedures."²⁵⁴ In *Wilson*, the reporters invoked the aid of the law enforcement officials to take advantage of the warrant allowing access to the interior of the home. The joint efforts of the media and law enforcement officials deprived the Wilsons' of their Fourth Amendment right to privacy. Thus, regardless of the parties' motives, the reporters were private citizens acting under color of law because they were willful and joint participants in government action.

249 See Levy, *supra* note 38, at 1189 (quoting *Parker v. Clarke*, 905 F. Supp. at 642). In addition, the author notes that the Eighth Circuit's majority opinion in *Parker* affirmed this finding. See *Id.* n. 265.

250 *Id.* *supra* note 38, at 1188 (quoting *Jones v. Tabibbi*, 508 F. Supp. 1069, 1973 (D. Mass. 1981)). The author does note, however, that there is an inherent tension between *Taibbi* and *Adickes*. See *id.* at n. 261. Although the author believes the *Taibbi* approach is correct, he admits that *Adickes* only requires "willful participation in joint activity." See *id.* (citing *Adickes*, 398 U.S. at 152). He argues that *Taibbi* is correct because, "mere joint activity without a common plan does not add up to a conspiracy." Levy, *supra* note 38, at n. 261.

251 *Id.* at 1189.

252 *Id.*

253 457 U.S. at 942.

254 *Id.*

The above analysis demonstrates that the threshold requirements of the Fourth Amendment were fulfilled by the reporters' presence during the execution of the warrant. First, a reasonable expectation of privacy existed during the search of the Wilsons' home. Furthermore, the media members who accompanied the law enforcement officials on the search were acting as government agents because they were willful participants in a joint activity with the government. Therefore, Fourth Amendment protections apply and a reasonableness test must be conducted to determine if a violation of the citizen's constitutional rights have occurred.

Reasonableness Requirement

The Fourth Amendment clearly states that all searches must be reasonable.²⁵⁵ This requirement not only prevents government actors from conducting searches based on unreasonable grounds, but "to ensure reasonableness in the manner and scope of searches and seizures that are carried out."²⁵⁶ Fourth Amendment analysis requires a determination of whether the media's presence during the execution of a search warrant is reasonable.

Commentator Brad Johnston finds the media's entrance into a private citizen's home during the execution of a search warrant a *per se* violation of the Fourth Amendment because: 1) the media's presence exceeds the actions permitted by the search warrant; 2) the media's presence creates an additional invasion that is unnecessary; and 3) the media's presence causes an additional harm.²⁵⁷

A compelling argument to support the notion that the media's presence is a *per se* violation of the Fourth Amendment is that the media's presence is outside of the warrant's scope.²⁵⁸ Courts have

255 U.S. CONST. amend. IV.

256 *Ayeni*, 35 F.3d at 684 (citing *Graham v. Conner*, 490 U.S. 386, 395 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)).

257 See Johnston, *supra* note 18, at 1526. The author notes that this list is not exhaustive, but explain why a *per se* rule that the media's presence is unreasonable is needed. See *id.* at n.123.

258 This was the argument used by the Second Circuit in *Ayeni*. There, the court stated that "the unreasonableness of [the officer's] conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking justification based on the legitimate needs of law enforcement, but it was

consistently held the conduct of law enforcement officials executing a search warrant is limited to actions expressly authorized by the warrant, or actions impliedly authorized because they are reasonably related to accomplishing the authorized search or accomplishing additional legitimate law enforcement objectives.²⁵⁹ The media's presence is thus outside the scope of the search warrant, because it is not expressly authorized to participate by the search warrant, nor is it impliedly authorized because it does not serve a legitimate law enforcement objective.²⁶⁰

In *Wilson*, the warrant permitted "any duly authorized peace officer" to aid in the apprehension of Dominic Wilson.²⁶¹ The Court acknowledged that the reporters did not assist the police in achieving their task.²⁶² It stated the reporters "were not present for any reason related to the justification for policy entry into the home - the apprehension of Dominic Wilson."²⁶³ Therefore, since the media are government actors and are unauthorized to be present during the search the home, their accompaniment of law enforcement agents during the execution of a warrant violates the Fourth Amendment.²⁶⁴

Johnston also argues that the media's presence creates an additional and unnecessary invasion of the home.²⁶⁵ The Fourth Amendment tries to minimize the invasion of a private home during the execution of a search warrant by requiring the search to

calculated to inflict injury on the very value that the Fourth Amendment seeks to protect - the right of privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right of privacy." *Ayeni*, 35 F.3d at 686.

259 See *supra* notes 46-47, 158.

260 See Johnston, *supra* note 18, at 1527-28. The author states that "the media's presence is nothing more than state-supported trespass." *Id.* at n. 126. Since the media cannot enter an individual's home without consent, it is trespassing when it accompanies the police during the search of a private home.

261 No. 98-83, 1999 WL 320817, at *3.

262 *Id.* at *6.

263 *Id.*

264 See Johnston, *supra* note 18, at 1528.

265 *Id.* at 1529.

be reasonably conducted in both intensity and duration.²⁶⁶ The presence of the media "unnecessarily causes a more intense invasion of the home,"²⁶⁷ and is thus unreasonable.²⁶⁸

Finally, Johnston argues that the most compelling reason for concluding that the media's presence is unreasonable is the additional harm caused by the actual invasion of personal privacy suffered by the citizen as a result of the media's documentation and publication of the search.²⁶⁹ The media, after being allowed to accompany the officers on the search, now have video footage, or in this case photographs, of the investigation. These pictures will headline the evening news and or published in the paper, and the residents of the home are embarrassed and labeled by the community.²⁷⁰ Most shocking is the fact that the residents have no immediate recourse to prevent the media from broadcasting the taped search.²⁷¹ Unlike filing a motion to suppress evidence obtained by police officers during a search, residents have no equivalent to keep the media from using the video it has obtained.²⁷² The author argues that this additional harm will exist even if the charges are dropped or the resident is acquitted.²⁷³ Therefore, because of the additional harm created by the presence of a camera crew during the execution of a search warrant, a harm

266 *Id.* (citing 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 4.10(d), at 670 (3rd Ed. 1996) "The permissible intensity of the search within the described premises is determined by the description of the things to be seized" *Id.* at n. 30 (quoting LAFAVE, at 670. "[G]iven the longstanding requirements that the officers remain on the premises only so long as is reasonably necessary to conduct the search and that they avoid unnecessary damage to the premises, it would appear that the police are not completely free to pursue the search in any manner they choose.")). *Id.* (quoting LAFAVE, at 673-74).

267 *Id.*

268 *Id.* at 1530.

269 *Id.*

270 *Id.* Although the pictures in *Wilson* were never published, the potential for such to occur in this or others cases certainly exists.

271 *Id.* at 1532.

272 *Id.*

273 *Id.* The author adds that, unlike when police illegally seize evidence, "there is nothing equivalent to the exclusionary rule for private actors like the media." *Id.* at 1531.

over which the residents have no control but is preventable by the police, media presence violates the Fourth Amendment reasonableness standard.²⁷⁴

In contrast, the media and proponents of allowing the press to accompany law enforcement officials during the execution of a search warrant argue that media presence is reasonable under its First Amendment right of public access.²⁷⁵ They argue that "commentary and reporting on the criminal justice system is at the core of First Amendment values."²⁷⁶ Such reporting serves many important functions. For example, an objective served by allowing the media to accompany officers and film the search is to "facilitate accurate reporting on law-enforcement activities."²⁷⁷ In doing so, the public's "intense need" and "deserved right" to know about the administration of justice will be fulfilled.²⁷⁸ Furthermore, the media serves an oversight function that minimizes police abuses,²⁷⁹ promotes officer safety,²⁸⁰ protects suspects,²⁸¹ and preserves

274 *Id.* at 1533.

275 Brief For Petitioners at 22, *Hanlon v. Berger*, -- U.S. -- (U.S.) (No. 97-1927); Brief For Respondents Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann in Support of Petitioners at 24, *Hanlon v. Berger*, -- U.S. -- (1998) (Nos. 97-1927); Brief Amici Curiae of ABC, Inc., et. al. In Support of Petitioners in No. 97-1927 and Respondents in No. 98-83 at 3, *Hanlon v. Berger*, -- U.S. -- (1998) (Nos. 97-1927, 98-83). *See generally* Levy, *supra* note 111, at 1190 (stating that the media has at least a limited right of access to cover activities of police officers).

276 Brief For Respondents Cable News Network, Inc. et. al. In Support of Petitioners at 25, *Hanlon*, (Nos. 97-1927) (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)).

277 Brief For Petitioners at 24, *Hanlon*, (Nos. 97-1927) (quoting *Wilson v. Layne*, 141 F.3d 111, 118 (4th Cir. 1998)).

278 Brief For Respondents Cable News Network, Inc. et. al. In Support of Petitioners at 25, *Hanlon*, (Nos. 97-1927) (quoting *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring)).

279 Brief For Respondents Cable News Network, Inc. et. al. In Support of Petitioners at 32, *Hanlon*, (Nos. 97-1927); Brief For Petitioners at 24, *Hanlon*, (Nos. 97-1927).

280 Brief For Respondents Cable News Network, Inc. et. al. In Support of Petitioners at 32, *Hanlon*, (Nos. 97-1927); Brief For Petitioners at 23, *Hanlon*, (Nos. 97-1927).

281 Brief For Petitioners at 23, *Hanlon*, (Nos. 97-1927).

evidence.²⁸² Finally, supporters of media documentation and broadcasting of searches argue that this is a "legitimate law enforcement objective, for publicizing the fight against crime is itself a valuable weapon in helping to deter crime."²⁸³

While there is little doubt the above goals are important, "the media has no special privilege to conduct illegal activity, such as trespass or invasion of privacy, under the protective shield of the First Amendment."²⁸⁴ An invasion of privacy does not become reasonable merely because some benefit is gained from its videotaping. As the Second Circuit stated, "A private home is not a soundstage for law enforcement theatricals."²⁸⁵

Likewise, the Supreme Court in *Wilson*, although acknowledging the importance of the media's role in informing the public about the workings of the justice system, found these arguments to "fall short of justifying the presence of the media inside a home."²⁸⁶ Justice Stevens' dismissed such arguments as "post hoc rationalizations."²⁸⁷

Thus, the presence of the media during a search of a private residence, unless authorized through consent or by warrant, is a violation of the Fourth Amendment. The Fourth Amendment applies to the search of a private residence because individuals hold both a subjective and objective expectation of privacy in their home. Furthermore, though the media is not on the government payroll, they are transformed into government actors, acting under color of law, when they willfully join law enforcement agents during the execution of a warrant. Without the assistance of law

282 Brief For Petitioners at 24, *Hanlon*, (Nos. 97-1927).

283 Brief For Petitioners at 23, *Hanlon*, (Nos. 97-1927). See also Brief For Respondents Cable News Network, Inc. et. al. In Support of Petitioners at 29, *Hanlon*, (Nos. 97-1927).

284 Kevin E. Lunday, Note, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and A Framework For Analysis*, 65 G.W.L.R. 278, 303 (1997) (citing *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.")).

285 *Ayeni*, 35 F.3d at 686.

286 No. 98-83, 1999 WL 320817, at *7.

287 *Id.* at *10 (Stevens, J., concurring in part and dissenting in part).

enforcement officers, the media would not be permitted to enter a home without the consent of its inhabitants. Finally, the media's presence and photographing of the search is unreasonable, regardless of any benefits, because its conduct exceeds the limitations of the warrant and creates additional harm to the residences. Therefore, had the Court addressed the issue, the media also violated the Wilsons' Fourth Amendment rights.

B. Qualified Immunity Issue

Turning to the qualified immunity issue, the Supreme Court erred in holding that it was not unreasonable for a police officer in April 1992 to have believed that allowing the media to accompany them on a search was lawful. The test for immunity, in practice, is:

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken.²⁸⁸

Considering the long history of the Fourth Amendment and the lack of caselaw holding such action permissible, the officers should have known that allowing media to accompany them into a private home was unconstitutional.

The majority rests its argument on the notion that this area of law is undeveloped, and officers cannot be expected to predict the future course of constitutional law.²⁸⁹ Although, admittedly, the law is undeveloped in the area of ride-alongs, the Fourth Amendment has been one of the most highly litigated areas of constitutional law over the last two hundred years.²⁹⁰ From this litigation, it has long been established that:

²⁸⁸ *Wilson*, No. 98-83, 1999 WL 320817, at *7 (quoting *Anderson*, 483 U.S. 635, 639 (citation omitted)).

²⁸⁹ *Id.* at *9. (citations omitted).

²⁹⁰ See BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURIS PRUDENTIAL HISTORY 1 (1986).

[T]he objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.²⁹¹

In *Wilson*, the warrant was addressed to "any duly authorized peace officer."²⁹² Thus, as Justice Rehnquist stated, the question before the Court was "whether the invitation to the media exceeded the scope of the search authorized by the warrant."²⁹³

The warrants made no mention of the Washington Post reporters presence or assistance,²⁹⁴ therefore, the media's admittance into the home was not an express term of the warrant. Furthermore, the police's actions were not reasonably related to the execution of the warrant. As the majority stated, "[c]ertainly the presence of reporters inside the home was not related to the objectives of the authorized intrusion."²⁹⁵ Thus, the officers clearly exceeded well established principles, regardless of the lack of precedent on the specific issue.

Nonetheless, the majority grasped at straws and cited three cases which held such conduct was not unreasonable.²⁹⁶ Of these three cases, two were unpublished lower court cases and none of them addressed the Fourth Amendment.²⁹⁷ Justice Stevens dismissed them as "not possibly" providing a basis for a claim that the police relied on them as judicial recognition of an exception to the rule

291 *Ayeni*, 35 F.3d at 686.

292 No. 98-83, 1999 WL 320817, at *3.

293 *Id.* at *8.

294 No. 98-83, 1999 WL 320817, at *6.

295 *Id.* at *6.

296 *Id.* at *8.

297 *Id.* at *12 (citations ommitted).

that a search is limited to the scope of the warrant.²⁹⁸ Furthermore, the majority failed to cite a single case that supports the proposition that such activity could be regarded as a "reasonable" invasion.²⁹⁹

This position is further supported by § 3105 of the United States Code.³⁰⁰ The section reads:

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer mentioned by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.³⁰¹

Although this statute addresses who may serve a warrant, "it has been construed to determine who can execute a warrant."³⁰² In *United States v. Clouston*,³⁰³ for example, the Sixth Circuit held

298 *Id.* at *12.

299 *Id.* at *11.

300 18 U.S.C. § 3105.

301 *Id.*

302 *Ayeni*, 35 F.3d at 687 (*see United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980); *United States v. Gervato*, 474 F.2d 40, 45 (3d Cir. 1973)). Furthermore, the court supports its conclusion that those not authorized by the warrant may not be present during its execution by citing: *Clouston*, 623 F.2d at 486-87; *United States v. Gambino*, 734 F. Supp 1084, 1091 (S.D.N.Y. 1990); *In re Southeastern Equipment Co. Search Warrant*, 746 F. Supp. 1563, 1577 (S.D. Ga. 1990); *United States v. Schwimmer*, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988). Although § 3105 identifies who may "serve" a warrant, the court cites the following cases to demonstrate that this section has been construed to determine who may "execute" a warrant: *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980); *United States v. Gervato*, 474 F.2d 40, 45 (3d Cir. 1973). *Id.* Furthermore, the court supports its conclusion that those not authorized by the warrant may not be present during its execution by citing: *Clouston*, 623 F.2d at 486-87; *United States v. Gambino*, 734 F. Supp 1084, 1091 (S.D.N.Y. 1990); *In re Southeastern Equipment Co. Search Warrant*, 746 F. Supp. 1563, 1577 (S.D. Ga. 1990); *United States v. Schwimmer*, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988).

303 623 F.2d at 486-87.

that a telephone company employee's presence during a search was reasonable based on § 3105 because he was there assisting officers in identifying property. In *Wilson*, the media had only a self-serving purpose.³⁰⁴

Thus, based on the history of the Fourth Amendment and the lack of caselaw supporting the reasonableness of media presence, the Supreme Court erred in finding the officers entitled to qualified immunity. As stated by Justice Stevens, the Court permitted "one free violation of the well-established rule that it reaffirmed."

IV. IMPACT

The obvious holding in *Wilson* is that police violate the Fourth Amendment when they permit members of the media or other third parties to accompany them into a home during the execution of a warrant when the presence of the third parties was not in aid of the execution of the warrant.³⁰⁵ The Court's decision, however, leaves many questions still unanswered. This section will address the impact of the Court's holding, not only on the media, but on other third parties as well.

First, the decision is likely to limit, if not end, the media's participation in the execution of a warrant in a private home. Unless the media obtains consent from the private citizen or can show that its presence furthers the objective of the warrant, their participation in the execution of a warrant will be found unconstitutional. "Cops" Executive Producer John Langley however, stated that he expects the reality-based show to go unchanged because they "obtain releases from everyone involved in [their] program."³⁰⁶ Although on its face such a practice appears to constitute an obstruction of justice, the Court suggested it was aware of the possibility during oral arguments.³⁰⁷

304 No. 98-83, 1999 WL 320817, at *7.

305 *Id.* at *6.

306 See Greg Braxton, *Producers Say Ruling Won't Effect Shows Television: 'Cops' and others claim privacy issues are already addressed*, L.A. Times, May 26, 1999 at F4.

307 United States Supreme Court Official Transcript at 23, *Wilson v. Layne*, 1998 WL 187365 (U.S.) (No. 98-83).

As the Marshals Service argued that the media's presence is a means of protecting citizens from potential police abuse, the Court suggested that officers just ask the homeowner before bringing the news crew into the home if the residents desire such means of protection.³⁰⁸ Although difficult to tell if such a resolution was seriously suggested, the possibility of this situation arising remains. If it did, however, there would be no Fourth Amendment question because the resident consented to the media's presence.

Moreover, the Court dismissed generalized notions that the media's presence served legitimate law enforcement purposes.³⁰⁹ Although the media's presence may serve such purposes in a general sense, "that is not the same as furthering the purposes of the search."³¹⁰ Unless, in the future, the media can show that its presence aids in the execution in a more specific nature, it will not be allowed to accompany law enforcement officers during the execution of a warrant.

A significant question arising from the Court's holding is in what situations is the presence of third parties directly aiding in the execution of a warrant. In *Wilson*, the majority recognized that in certain situations third parties do aid in the execution of a warrant.³¹¹ For example, a third party is permitted to accompany law enforcement officials for the purpose of identifying stolen goods.³¹² In oral arguments, the Court posed the question of whether law enforcement trainees were permitted to enter a home.³¹³ In a hypothetical, the Court stated that the optimum number of officers for this particular hypothetical search was five, but the officers brought along two police trainees who were present just to watch.³¹⁴ Would their presence, notwithstanding the fact that they were officers, constitute a Fourth Amendment violation? What if the individual to be arrested became violent and the

308 *Id.*

309 No. 98-83, 1999 WL 320817, at *6.

310 *Id.*

311 *Id.*

312 *Id.* (citing *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765)).

313 United States Supreme Court Official Transcript at 47, *Wilson v. Layne*, 1998 WL 187365 (U.S.) (No. 98-83).

314 *Id.*

trainees were needed to subdue the suspect? Would their presence then constitute an invasion of privacy? These questions exemplify the gray area in the Court's holding.

Finally, after announcing it was unconstitutional for the police to allow the media to accompany them on a search, in a footnote the Court stated that "the violation of the Fourth Amendment is the presence of the media and not the presence of the police in the home." However, the Court stated it had "no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives." Had the Court decided the issue of whether the media violated the Fourth Amendment as posited above, the answer to this question would be clear.

V. CONCLUSION

The Supreme Court decided the Fourth Amendment issue in *Wilson v. Layne* correctly because the presence of the reporters inside the Wilsons' home was not related to the objectives of the authorized intrusion. The Court, however, erred in finding the officers entitled to qualified immunity by failing to acknowledge the clearly established rule that searches must be conducted within the parameters authorized by the warrant. The reporters' presence in the Wilsons' home was self-serving and clearly exceeded the warrant's scope. In conclusion, it is too early to tell how great an impact the Court's holding will have on "reality" television or ride-alongs in general. If nothing more, the *Wilson* decision will make it more difficult for the media and other third parties to obtain access to a private dwelling and, in turn, continue to uphold the sanctity of our homes.

Ronald B. Kowalczyk