

CONSTITUTIONAL LAW—FOURTH AMENDMENT—EXPANDING PERMISSIBLE INTRUSION INTO FIRST AMENDMENT FREEDOMS UNDER THE AEGIS OF THE FOURTH AMENDMENT—*Zurcher v. The Stanford Daily*, 98 S. Ct. 1970 (1978).

INTRODUCTION

In *Zurcher v. The Stanford Daily*¹ the United States Supreme Court upheld the constitutionality of a search of a newspaper office conducted by police acting under the authority of a general search warrant. The Court held that neither the first, fourth, nor fourteenth amendments required a prior adversarial hearing before a press facility could be searched, stating that the safeguards inherent in the fourth amendment were adequate to prevent any infringement of the Daily's first amendment rights.

The *Zurcher* decision is consistent with the fourth amendment analysis found in other Supreme Court cases. However, a close examination of the protection offered first amendment rights by fourth amendment safeguards suggests that these safeguards may in fact be insufficient to prevent interference with first amendment interests.

FACTS AND HOLDING

Zurcher involved a search by police officers of a newspaper office for photographs of a violent confrontation between demonstrators and police at the Stanford University Hospital.² The Stanford Daily, the student newspaper, published photographs of the clash between police and demonstrators two days after the incident. The next day the district attorney's office obtained a warrant for the search of the newspaper's offices for negatives, films, and pictures of the events and occurrences at the hospital. The warrant

1. 98 S. Ct. 1970 (1978).

2. *Id.* at 1974. The director of the hospital requested the Palo Alto Police Department and the Santa Clara County Sheriff Department to remove a large group of demonstrators who had, the day before, seized the hospital's administrative suite and occupied it since that time. The police made several futile attempts to persuade the demonstrators to leave peacefully. They then attempted to force their way into the suite to evict the demonstrators. The main body of police attempted to enter through the west doors. While they were so engaged a group of demonstrators, armed with sticks and clubs, emerged from the east doors and attacked the contingent of police stationed there, injuring all nine officers. The officers were able to positively identify only two of their assailants. There were no police photographers at the east end; they and most bystanders and reporters were at the west doors. One of the injured officers, however, did notice that at least one bystander was photographing the incident at the east door. The police had no photographs of the clash. *Id.*

affidavit contained no allegation or indication that members of the Daily were in any way involved in any unlawful acts.³

The search itself was conducted by four police officers in the presence of the Daily's staff members. Desks, wastepaper baskets, filing cabinets, and photographic laboratories were searched. The staff did not advise the officers that the areas they were searching contained confidential materials. Contrary to the claims made by staff members, the officers denied reading any confidential material or exceeding the limits of the search warrant. A month later the Stanford Daily brought an action under 42 U.S.C. § 1983⁴ alleging that the search of the Daily's office had deprived it, under color of state law, of its first, fourth, and fourteenth amendment rights.⁵

The district court held that the fourth amendment forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless two requirements were met. First, the officers desiring the search must present to a magistrate sworn affidavits sufficient to establish probable cause that a subpoena duces tecum would be impractical.⁶ Second, the officers must present evidence that the possessor of the objects sought would disregard a court order not to remove or destroy the objects.⁷ In addition to these general requirements applicable to third-party searches, the district court further held that since the innocent object of the search in this instance was a newspaper, first amendment interests made a search constitutionally permissible "only in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order would be futile."⁸ Since these preconditions had not been met, the district court held that the search of the Stanford Daily's offices was illegal.⁹ The court of appeals affirmed per curiam, adopting the opinion of the district court.¹⁰

On certiorari, the Supreme Court addressed primarily the fourth amendment question and focused on the issue of "how the Fourth Amendment is to be construed and applied to a 'third party' search."¹¹ The Supreme Court noted that the rule an-

3. *Id.*

4. 42 U.S.C. § 1983 (1976).

5. 98 S. Ct. at 1974-75.

6. *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 135 (N.D. Cal. 1972), *rev'd*, 98 S. Ct. 1970 (1978).

7. *Id.* at 133.

8. *Id.* at 135.

9. *Id.*

10. 98 S. Ct. at 1975.

11. *Id.* A third-party search is a search conducted by authorities for the fruits,

nounced by the district court imposed a severe burden on the state which could be satisfied only in unusual situations.¹² Noting that this rule would force the state to obtain a subpoena in order to recover fruits, instrumentalities, or evidence of crime from third parties,¹³ the Court held that there "is no direct authority in this or any other Federal Court for the District Court's sweeping revision of the Fourth Amendment."¹⁴ Rather, the Court stated that if the requirements of probable cause and particularity are met, then the "State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not."¹⁵ In the Court's opinion, the issuance of a warrant may not be forbidden simply because the owner or possessor of the place to be searched is not suspected of a crime.¹⁶

The Court rejected the first amendment element of the district court's analysis by holding that fourth amendment safeguards adequately protect first amendment interests. In the Court's opinion, "the preconditions for a warrant . . . should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices"¹⁷ and "no more than this is required."¹⁸ The Court therefore concluded that neither the fourth nor the first amendments warranted "imposing the regime ordered by the District Court."¹⁹

ANALYSIS

Fourth amendment precedent supports the *Zurcher* Court's conclusion that a search of a third party for the fruits, instrumentalities, or evidence of crime is constitutionally permissible.²⁰ Although the fourth amendment does not mandate a different result,²¹ the Court's treatment of the first amendment issue failed to provide the high degree of protection traditionally accorded first amendment interests.

instrumentalities, or evidence of crime on property which is owned or occupied by a person who is neither suspected of nor implicated in the crime. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1976.

16. *Id.* at 1979.

17. *Id.* at 1982.

18. *Id.*

19. *Id.* at 1981.

20. See *Ker v. California*, 374 U.S. 23, 40-41 (1963).

21. *Zurcher v. The Stanford Daily*, 98 S. Ct. 1970, 1984 n.1 (1978) (Stewart, J., dissenting).

FOURTH AMENDMENT

The *Zurcher* Court concluded that "[u]nder existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found."²² Prior decisions indicate that the critical element in determining the reasonableness of a search under fourth amendment standards is not whether the owner of the property searched is suspected of criminal activity or subject to arrest, but whether there is reasonable cause to believe that the specific objects of the search are located on the property.²³ Indeed a search warrant may be constitutionally valid without naming the persons from whom the articles will be seized.²⁴

Items having solely evidential value have not always been subject to seizure. Until 1967 "mere evidence" could not be legally seized either under the authority of a search warrant or during the course of a search incident to arrest.²⁵ This treatment of evidence

22. 98 S. Ct. at 1975-76. See *United States v. Manufacturers Nat. Bank of Detroit*, 536 F.2d 699, 703 (6th Cir. 1976), *cert. denied sub nom.* *Wingate v. United States*, 429 U.S. 1039 (1977). In *Zurcher* the Court quoted with approval this Sixth Circuit Court of Appeals' opinion which held that "once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of *any* property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime." 98 S. Ct. at 1978 (emphasis added).

23. *Carroll v. United States*, 267 U.S. 132 (1924). In *Carroll* the Court stated: "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *Id.* at 158-59.

Commentators have also distinguished between the right to arrest and the right to search. See, e.g., LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, 260-61 [hereinafter cited as *Search and Seizure*]; Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

The position taken in the Model Code of Pre-Arrest Procedure reinforces this distinction: "Searches and seizures, in a technical sense, are independent of, rather than ancillary to, arrest and arraignment." ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 491 (1975).

24. *United States v. Kahn*, 415 U.S. 143, 155 n.15 (1974); *United States v. McClard*, 333 F. Supp. 158, 163 (E.D. Ark. 1971). See *United States v. Manufacturers Nat. Bank of Detroit*, 536 F.2d 699, 702-03 (6th Cir. 1976) *cert. denied sub nom.* *Wingate v. United States*, 429 U.S. 1039 (1977) where the court, without a single reference to persons, authorized the search of *any* property on which the magistrate has probable cause to believe that evidence is concealed. See also *Trupiano v. United States*, 334 U.S. 699, 710 (1948) where the Court expressed concern that a warrant must describe the *place* to be searched and *things* to be seized.

25. *Warden v. Hayden*, 387 U.S. 294, 304-07 (1967); see *Harris v. United States*, 331 U.S. 145, 154 (1946). *Accord*, *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Carroll v. United States*, 267 U.S. 131, 149-50 (1924); *Gouled v. United States*, 255 U.S. 298, 309 (1921); *Weeks v. United States*, 232 U.S. 383, 392-93 (1913); *Boyd v. United States*, 116 U.S. 616, 624 (1886).

as non-seizable can be traced back to 1765 in England²⁶ and was adopted by the United States Supreme Court in 1886 in *Boyd v. United States*.²⁷ The *Boyd* Court held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods"²⁸ is a violation of the fourth and fifth amendments.²⁹

It was against this backdrop that the landmark case of *Gouled v. United States*³⁰ was decided. In *Gouled* the Court held that the seizure of "a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person . . . [was] a violation of the Fourth Amendment."³¹ *Boyd* and *Gouled* long stood for the proposition that items solely evidential in nature were exempt from seizure and consequent use as evi-

26. *Boyd v. United States*, 116 U.S. 616, 625-30 (1886). There, the Supreme Court adopted the English court's opinion in *Entick v. Carrington & Three Other King's Messengers*, 19 How. St. Tr. 1029 (1765). The action was trespass for entering Entick's home, breaking into his desk, drawers, etc., and searching and examining his private papers. The judgment rendered by Lord Camden held that such a search and seizure was illegal for

[t]he great end for which men entered into society was to secure their property. . . . [I]t is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence . . . [but] it is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle.

116 U.S. at 627-29 (citation omitted).

27. 116 U.S. at 630.

28. *Id.*

29. In *Boyd*, the Court stated that both amendments related to the personal security of the citizen and "they throw great light on each other." *Id.* at 633. If the fifth amendment prohibition against compelling a man to be a witness against himself is violated by search and seizure of his private papers, it is an unreasonable search and seizure under the fourth amendment. *Id.*

The *Boyd* Court quoted extensively from Lord Camden's decision in *Entick*, including the observation that:

yet where private papers are removed and carried away . . . [w]here is the written law that gives any magistrate such a power? I can safely answer, there is none [I]t is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence . . . [b]ut our law has provided no paper-search in these cases to help forward the conviction [U]pon the whole we are all of opinion, that the warrant to seize and carry away the party's papers . . . is illegal and void.

Id. at 628-29 (citation omitted).

The *Boyd* Court then noted that the principles enunciated by Lord Camden "affect the very essence of constitutional liberty and security." *Id.* at 630. In the Court's opinion, "any forcible or compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods" might suit the purposes of despotic power but could not be tolerated in an "atmosphere of political liberty and personal freedom." *Id.* at 630, 632.

30. 255 U.S. 298 (1921).

31. *Id.* at 305.

dence.³²

Application of the mere evidence exclusion was marked by uncertainty.³³ Therefore, in *Harris v. United States*³⁴ the Court attempted to differentiate between mere evidence and those items which were properly subject to seizure. The *Harris* Court drew a distinction

between merely evidentiary materials . . . which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and . . . those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of a person arrested might be affected, and property the possession of which is a crime.³⁵

In 1967, however, the Court abandoned the mere evidence rule. In *Warden v. Hayden*,³⁶ the Supreme Court stated that "[n]othing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband."³⁷ The Court rejected the premise that property interests control the right of the government to search and seize, and instead held that the principal object of the fourth amendment was the protection of privacy rather than property.³⁸ The seizure of mere evidence, therefore, was no longer prohibited as a violation of one's property rights.³⁹ Not only may evidence be seized but it is now generally recognized that a search may be conducted solely

32. *Id.* at 309-11; *Boyd v. United States*, 116 U.S. 616, 630 (1886). *Accord*, *Angello v. United States*, 269 U.S. 20, 34, 35 (1925). For a discussion concerning "mere evidence," see Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172 (1964); Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966); Comment, 20 U. CHI. L. REV. 319 (1953).

33. Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593, 606-21 (1966); Comment, 20 U. CHI. L. REV. 319, 320-22 (1953). An example is the differing treatment an address book received. In *Matthews v. Correa*, 135 F.2d 534 (2nd Cir. 1943), an address book was seized and treated as a fruit of the crime of concealing certain property from the trustee in bankruptcy. *Id.* at 535-36. In *United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951), however, it was held that a seized address book was merely evidence of the crime of harboring a fugitive. *Id.* at 768. In *Abel v. United States*, 362 U.S. 217 (1960), in the course of an investigation to gather evidence of espionage, a hollowed out pencil and block of wood were held to have been properly seized. The Court interpreted the nature of these items to be instrumentalities and means of committing crime as opposed to "mere evidence." *Id.* at 240-41.

34. 331 U.S. 145 (1947).

35. *Id.* at 154.

36. 387 U.S. 294 (1967).

37. *Id.* at 301.

38. *Id.* at 304.

39. *Id.* at 303-07.

for evidence.⁴⁰

Although the *Hayden* Court held that evidence could constitutionally be seized, it stated that "[t]his case . . . does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."⁴¹ Seven months later, in *Katz v. United States*,⁴² the Court made it clear that the fourth amendment protects a citizen's reasonable expectation of privacy against certain types of governmental intrusions.⁴³ State intrusion on privacy may be justified, however, "when the State's reason to believe incriminating evidence will be found becomes sufficiently great."⁴⁴

The practical effect of the pre-*Hayden* rule prohibiting seizure of mere evidence was to limit not only the category of objects subject to seizure, but also the category of persons and the character of the privacy interests protected by the fourth amendment.⁴⁵ The post-*Hayden* doctrine, allowing searches and seizure for items with merely evidential value, has expanded the scope of constitutionally permissible searches and seizures. After the abandonment of the mere evidence rule only the fourth amendment safeguards of probable cause and reasonableness were left to protect citizens from the excesses of governmental intrusions on privacy.⁴⁶

40. *Fisher v. United States*, 425 U.S. 391, 407 (1976); *Warden v. Hayden*, 387 U.S. 294, 306-07 (1967).

41. 387 U.S. at 303. For example, personal diaries, private letters, or recordings made for personal use or communication may not be subject to seizure. Seizure of such objects, unless they bear a substantial relationship to some criminal enterprise, is a serious invasion of personal privacy and the minimal public interest in such an invasion (since normally such items will be of only evidential value anyway) might lead the Court to treat such actions as unwarranted. This is the position taken in ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 1.03(2) (Tent. Draft No. 4, 1971).

In *Silverman v. United States*, 365 U.S. 505 (1961), the Court held that the fourth amendment extends to the recording of oral statements overheard without any "technical trespass under . . . local property law." *Id.* at 511. In *United States v. Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied sub nom. Jessup v. United States*, 396 U.S. 852 (1969), it was implied that the reasonableness of the seizure of a personal diary must take into account the seriousness of the invasion of privacy involved in permitting an inspection of the diary in search of a particular passage which would make the diary seizable. The inability to predict where in a personal diary seizable information will be found might mean that no search of the diary may be conducted therefore. *See generally id.* at 897.

42. 389 U.S. 347 (1967).

43. *Id.* at 350. In *Jones v. United States*, 362 U.S. 257 (1960), the Court stated that the constitutional "restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy." *Id.* at 261.

44. *Fisher v. United States*, 425 U.S. 391, 400 (1976).

45. *Zurcher v. The Stanford Daily*, 98 S. Ct. 1970, 1988-89 (1978) (Stevens, J., dissenting).

46. *See id.* at 1988-90 (Stevens, J., dissenting). Mr. Justice Stevens' opinion

Probable cause requires proof of sufficient facts to warrant a person of reasonable caution in the belief that the article sought both evidences criminal activity and is in fact located at the place named in the warrant.⁴⁷ If the government satisfies this burden of proof, the magistrate will issue the warrant.⁴⁸ Thus, no warrant shall issue unless there are reasonable grounds to believe that a search will uncover evidence of criminal activity. The existence of "probable cause" or "reasonable grounds" is established by proof of factual and practical considerations on which reasonable men, not legal technicians, act.⁴⁹ Even if probable cause exists, a search may violate the fourth amendment standard of reasonableness if the execution of the search is unreasonable in light of the facts establishing probable cause.⁵⁰ In other words, a search conducted pursuant to probable cause may be unconstitutional by virtue of its unreasonable intensity or scope.⁵¹

The determination of the reasonableness of a search depends on the particular evidence and circumstances of each case⁵² and is made by balancing the government's need against the invasion of privacy which the search or seizure entails.⁵³

In *Zurcher* the authorities knew that the Stanford Daily had in its possession photographs of the assault.⁵⁴ Thus there was no

echoes Mr. Justice Stewart's concern in *Berger v. New York*, 388 U.S. 41 (1967) that "[t]he standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion." *Id.* at 69 (Stewart, J., concurring).

Even before the *Hayden* decision was handed down commentators noted that such a change in the scope of the prosecutor's search authority would require a fresh examination of the probable cause requirement. See T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 66 (1969).

47. See *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949); *Kwong How v. United States*, 71 F.2d 71, 73-74 (9th Cir. 1934). See also *Aguilar v. Texas*, 378 U.S. 108, 113-14 (1964); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Supreme Court indicated that in applying the probable cause standard "a particular decision to search is tested against the constitutional mandate of reasonableness." *Id.* at 534.

48. See *Dumbra v. United States*, 268 U.S. 435 (1925). "[I]f the apparent facts set out in an affidavit [for a search warrant] are such that a reasonably discreet and prudent man would . . . believe there was a commission of the offense . . . there is probable cause justifying the issuance of a [search] warrant." *Id.* at 441.

49. *Draper v. United States*, 358 U.S. 307, 313 (1959); *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

50. *Terry v. Ohio*, 392 U.S. 1, 18-20 (1968).

51. *Id.* See generally *Kremen v. United States*, 353 U.S. 346 (1957); *Harris v. United States*, 331 U.S. 145, 152-53 (1947); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356-58 (1931).

52. *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950); *Harris v. United States*, 331 U.S. 145, 152 (1947); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931).

53. See *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968).

54. *Zurcher v. The Stanford Daily*, 98 S. Ct. 1970, 1974 (1978).

doubt that incriminating evidence might be found in a search of the Daily. Based on this information the magistrate issued a warrant finding that "just, probable and reasonable cause for believing that . . . evidence material and relevant to the identification of the perpetrators of felonies" would be located on the premises of the Daily.⁵⁵

The search conducted in *Zurcher* took place in the presence of members of the Daily's staff.⁵⁶ The search consisted of examining photo labs, filing cabinets, desks, and wastepaper baskets.⁵⁷ Locked drawers and rooms were not searched.⁵⁸ Given the nature of the objects sought and the importance attached to them by the government, the manner and mode of the search were reasonable.⁵⁹ The intrusion authorized by the warrant, and the consequent search, satisfied the reasonableness test and there was no justification under the circumstances to insist that the search be conducted by any less intrusive means.⁶⁰ Likewise the fact that the target of the search was a third party did not hinder issuance of a valid search warrant.⁶¹ Under these circumstances and facts the decision in *Zurcher* is indeed based on solid fourth amendment precedent.

FIRST AMENDMENT

Press searches lie at the crossroads of the first and fourth amendments. Any search of the media is likely to have certain detrimental effects on press interests protected by the first amendment.⁶² In *Zurcher* the Court held that these first amendment in-

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See generally* Johnson v. United States, 293 F.2d 539 (D.C. Cir. 1961). A commentator noted that "[i]n *Johnson* and the other cases in accord, the search was lawful; the warrant in each case was issued on probable cause and did particularly describe the place and things, and in each case the executing officers limited their search to the place named and looked only where the named articles might be found." *Search and Seizure, supra* note 23, at 276-77.

60. *See* note 88 *infra*, which describes a "reasonable" search much more intrusive than the one in *Zurcher*.

61. *See* notes 22-24 and accompanying text *supra*. The Court stated that the critical element was not whether the victim of the search was a third party, but whether there was reasonable belief that the objects were actually located on the property to which entry was sought. 98 S. Ct. at 1977.

62. The Court has held that freedom to print is a right basic to the existence of a democratic society. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Media functions that have been constitutionally recognized include: the gathering, *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); the publication, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); the editing, *see generally* *Wichita Eagle & Beacon Publishing Co. v. NLRB*,

terests can be adequately protected by application of the fourth amendment's procedural safeguards: "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."⁶³ The *Zurcher* Court's finding that fourth amendment warrant requirements alone provide sufficient protection for these special rights conflicts with the traditional treatment and protection afforded first amendment interests.⁶⁴ The problems inherent in the application of these safeguards make them inappropriate and ineffective protectors of first amendment rights.

The *Zurcher* Court attached considerable significance to the fact that a "neutral magistrate carrying out his responsibilities under the Fourth Amendment"⁶⁵ would provide the requisite amount of judicial input into the search warrant procedure to protect first amendment rights.⁶⁶ A neutral magistrate's review of the grounds for the search and its proposed scope lies at the heart of the fourth amendment.⁶⁷ The rationale for the magistrate requirement is that "the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests."⁶⁸

480 F.2d 52 (10th Cir. 1973); and the distribution, *March v. Alabama*, 326 U.S. 501, 509 (1946); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), of information. For a general discussion of the deleterious effects which are caused by governmental intrusion upon the exercise of these interests, see Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957 (1976) [hereinafter cited as *Search and Seizure of the Media*]; Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970) [hereinafter cited as *Reporters and Their Sources*].

63. 98 S. Ct. at 1982.

64. See generally Notes 93-108 and accompanying text *infra*.

The dissenting opinions in *Zurcher* voice this concern. For example, Mr. Justice Stewart noted that "unnannounced police searches of newspaper offices will significantly burden the constitutionally protected function of the press." 98 S. Ct. at 1986 (Stewart, J., dissenting). Allowing police officers to "make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public." *Id.* (Stewart, J., dissenting).

65. *Id.* at 1982.

66. *Id.* "There is no reason to believe . . . that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper." *Id.*

67. *United States v. United States Dist. Court for Eastern Dist. of Michigan Southern Division*, 407 U.S. 297, 316 (1972); *Sibron v. New York*, 392 U.S. 40, 59 (1968).

68. *Aguilar v. Texas*, 378 U.S. 108, 110-11 (1964) (quoting *United States v. Lefko*

However, upon closer examination the apparent protection afforded by such judicial input may be insufficient to protect first amendment rights. Because of the very nature of their work the magistrates who issue search warrants are in close continuous contact with police. This close contact is likely to create a symbiotic rather than a supervisory relationship with the authorities.⁶⁹ Thus, the danger exists that the magistrate will not perform his neutral and detached function and will serve merely as a rubber stamp for the police.⁷⁰

In addition, Supreme Court decisions have minimized the role of the neutral magistrate in issuing administrative search warrants.⁷¹ The amount of magisterial input has been restricted as a result of a more relaxed probable cause standard necessary to support such a search warrant.⁷² Although recognizing that certain administrative searches must be conducted pursuant to a warrant, the Court has held that an administrative authority's burden of proving probable cause would be less onerous than in other settings.⁷³

These diminished probable cause requirements for administrative searches have prompted concern that "boxcar" or "paper" warrants issued with little judicial input may become prevalent.⁷⁴

witz, 285 U.S. 452, 464 (1932)). See *Giordenello v. United States*, 357 U.S. 480, 486 (1958).

69. *Search and Seizure of the Media*, *supra* note 62, at 986.

70. See *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

71. See *Camara v. Municipal Court*, 387 U.S. 523, 534-39 (1967); See *v. City of Seattle*, 387 U.S. 541, 545-46 (1967).

72. *Marshall v. Barlow's Inc.*, 98 S. Ct. 1816, 1824 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

73. *Marshall v. Barlow's Inc.*, 98 S. Ct. 1816, 1822-25 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967); Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607, 612-14 (1974).

In *Marshall*, the Supreme Court recently upheld *Camara* and *See* insofar as requiring a warrant for OSHA inspections of regulated areas. The Court also noted that in obtaining such a warrant "[p]robable cause in the criminal law sense is not required." 98 S. Ct. at 1824. Instead of requiring specific evidence of an existing violation the Court stated that "a warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights." *Id.* at 1825.

74. See *v. City of Seattle*, 387 U.S. 541, 547-48, 554 (1967) (Clark, J., dissenting). Mr. Justice Clark dissented in *Camara* and *See*, stating that the Court was imposing a new probable cause standard for administrative searches. He disagreed with the majority because under the Court's reasoning probable cause would exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. These standards will vary . . . according to the code program and the condition of the area with reference thereto rather than the condition of a particular dwelling. . . . These boxcar warrants will be identical as to every dwelling in the

Such warrants would authorize several distinctly separate searches in any given area based upon a single finding of probable cause.⁷⁵

Even without the dilution of magisterial input which has followed the administrative search cases, the probable cause requirement would not seem sufficient to protect first amendment interests. Probable cause requires proof of sufficient facts which create a reasonable belief that the articles sought indicate criminal activity, and proof that the articles are currently located in the place named in the warrant.⁷⁶ The question of the quantity and quality of information necessary is thus dependent upon a case by case determination.⁷⁷ That practice has led to confusion over the application of the probable cause standards.⁷⁸

There are other flaws in the fourth amendment safeguards, besides the restricted role of the magistrate and the vagaries of probable cause, which the *Zurcher* court failed to address. The Court did not examine closely the ex parte nature of the warrant procedure. In a warrant hearing there is no adversarial input or argument; the finding of probable cause is instead based on papers and affidavits "normally drafted by nonlawyers in the haste of criminal

area, save the street number itself . . . and issued by magistrates in broadcast fashion as a matter of course.

Id. at 554 (Clark, J., dissenting).

75. *Id.* at 553-54 (Clark, J., dissenting). Furthermore, Mr. Justice Powell's concurring opinion in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) implies that several distinctly separate searches may be made under the authority of a single warrant. He argued in *Almeida-Sanchez* that the Border Patrol could establish probable cause to search cars and trucks traveling on certain highways which the patrol could show were used by illegal aliens. Such warrants would permit roving searches of any vehicle traveling on particular roads for a reasonable period of time. *Id.* at 283-84 (Powell, J., concurring).

76. See note 47 and accompanying text *supra*; *Search and Seizure of the Media*, *supra* note 62, at 986 n.171.

77. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). "The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief that a felony has been committed . . . must be measured by the facts of the particular case.'" *Id.*

78. As one commentator has noted:

Apart from the warrant requirement, the requirement of probable cause for arrest (which has been carried over to a few other areas such as moving vehicle searches), and the pint-sized version of probable cause required for stop-and-frisk, the Supreme Court has never found—nor, so far as I can tell, has it ever been asked to find—any legal mechanisms for controlling police activities Lurking beneath the difficulty, in turn, is the monstrous abyss of a graduated fourth amendment . . . splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforcibility, and general oozi-ness.

Amsterdam, *Perspective on the Fourth Amendment*, 58 MINN. L. REV. 349, 414-15 (1974).

investigation."⁷⁹ The magistrate's finding of probable cause may be based only on the information presented to him by the requesting officer under oath or affirmation.⁸⁰ Such a procedure lends itself to the presentation of evidence which only supports the issuance of a warrant; indeed the requesting officer may base the factual allegations in the affidavit supporting probable cause upon information obtained from informants, even those of uncertain reliability.⁸¹

Furthermore, court review of the magistrate's determination of probable cause on appeal adds little to this supposed protection of first amendment interests. The reviewing court may consider only that evidence which was presented to the magistrate⁸² and must give great deference to the magistrate's determination of probable cause.⁸³ Even if the warrant is later determined to be insufficient and the search illegal, great damage will have been done to the press facility and its news gathering functions for which there may be no adequate remedy.⁸⁴

The *Zurcher* Court did, however, consider the particularity requirement of the fourth amendment.⁸⁵ A warrant must specify the place to be searched and the item to be seized in order to be constitutionally valid.⁸⁶ This requirement, in the Court's opinion, offered sufficient protection against the harms "assertedly threatened by warrants for searching newspaper offices."⁸⁷

Despite the Court's reliance upon this fourth amendment safe-

79. *United States v. Ventresca*, 380 U.S. 102, 108 (1965). The Court authorized magistrates to issue warrants without recourse to "technical requirements of elaborate specificity once exacted under common law." *Id.*

80. *Nathanson v. United States*, 290 U.S.41, 47 (1933). See *Aguilar v. Texas*, 378 U.S. 108, 112-14 (1964); *Giordenello v. United States*, 357 U.S. 480, 484-87 (1958).

81. *Search and Seizure of the Media*, *supra* note 62, at 986-87.

82. *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964).

83. *Spinelli v. United States*, 393 U.S. 410, 419 (1969).

84. *Search and Seizure of the Media*, *supra* note 62, at 993. If a person were to choose to resist official execution of a warrant "without hesitation his doors would be broken down, he would be placed under arrest, and the desired material seized." *VonderAhe v. Howland*, 508 F.2d 364, 373 (9th Cir. 1974) (Ely, J., concurring in part and dissenting in part).

It is of little solace to be informed, after the search has been made and the damage done, that the search was illegal. Most remedies, being post facto, are inadequate to recompense the victims of an illegal search. An action against the magistrate who issued the warrant would fail since "pursuant to official duty" and/or "good faith" defenses completely immunize the magistrate. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The same defenses provide the police officers executing the warrant virtually the same protection. See *id.*; *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1343 (2d Cir. 1972).

85. 98 S. Ct. at 1981-82.

86. U.S. CONST. amend. IV.

87. 98 S. Ct. at 1982.

guard, it too has flaws which make it an inappropriate protector of first amendment interests. Although a search warrant must describe with particularity the item to be seized, the scope of the search for that item may cover any portion of the described premises upon which the item might reasonably be found.⁸⁸ In the course of an authorized search the executing officers may seize other items which are inadvertently discovered in the course of the search.⁸⁹ Therefore, police executing a search warrant in a newspaper office could hunt through confidential files and seize those items which may be relevant to the criminal proceeding pursuant to which the warrant was issued even though such information was not described in the search warrant.⁹⁰

Because these requirements often fail to restrict the scope of a general search, the protection offered by the fourth amendment safeguards is uncertain in the press context.⁹¹ The general search which accompanies the execution of a search warrant almost invariably overflows the requisite bounds of precision and specificity prescribed by the fourth amendment.⁹²

88. *Id.* at 1985 n.7 (Stewart, J., Dissenting). Mr. Justice Stewart noted that "in order to find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one." *Id.* (Stewart, J., dissenting). Thus, while the requirement legally limits the search to the items specified, it in effect allows access to the entire premises if the item is small or easily concealed. For example, on October 10, 1974, police acting pursuant to a warrant subjected KPFFK-FM in Los Angeles to an intensive eight-hour search—combing files, listening to tapes, and reading reporters' notes—in search of a communique delivered to the station by a radical group. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, PRESS CENSORSHIP NEWSLETTER 11-12 (1975); PRESS CENSORSHIP NEWSLETTER 30 (1975).

89. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). Such a seizure would be permissible under the plain view doctrine. When a police officer has a legitimate justification for conducting a search, "[t]he doctrine serves to supplement the prior justification . . . and permits the warrantless seizure." *Id.* Justifying this policy it was stated that

[a]s against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.

Id. at 467-68.

90. See note 88 and accompanying text *supra*.

91. In *Roaden v. Kentucky*, 413 U.S. 496 (1973), the Court found that "a higher hurdle in the evaluation of reasonableness" of searches is due when first amendment interests are present. *Id.* at 504.

92. In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), police officers appeared with a search warrant authorizing them to seize all "obscene" publications in appellants' possession. *Id.* at 722. The officers seized 11,000 copies of 280 different publications. *Id.* at 723. Two months after the seizure the trial court found that 180 of the seized publications were not, in fact, obscene. *Id.* at 724.

The problems with the fourth amendment make its safeguards insufficient protectors of first amendment interests. First amendment rights have traditionally occupied a "preferred position" in American constitutional jurisprudence.⁹³

This position is reflected by a stringent specificity requirement when such interests must be regulated. The Supreme Court has recognized that first amendment rights are not absolute and may be regulated in some instances.⁹⁴ When such regulation is permissible the Court has traditionally imposed high standards of precision and specificity.⁹⁵ If first amendment interests must suffer such regulation, the procedure used must "be tailored as precisely as possible to the exact needs of the case."⁹⁶ Because of the overflow problem⁹⁷ and the inherent vagueness of probable cause,⁹⁸ the fourth amendment safeguards do not meet the specificity requirements of the first amendment. Therefore, the precision and specificity required in any infringement of first amendment interests cannot be attained solely by reliance upon the fourth amendment safeguards.

The preference given first amendment interests is also re-

93. *Baker v. F. & F. Inv.*, 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). *Cf. Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (dealing primarily with freedom of speech). The "preferred freedoms" rationale was succinctly stated in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Because freedom of speech and freedom of the press have been viewed as basic to a democratic government, *Thomas v. Collins*, 323 U.S. 516, 530 (1945), the preferred freedoms doctrine was formulated in terms of first amendment rights and served to emphasize the importance the Supreme Court attaches to first amendment freedoms. Note, *Toward a Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77, 81 n.20 (1970).

94. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Schaefer v. United States*, 251 U.S. 466, 474 (1920).

95. *United States v. Robel*, 389 U.S. 258, 264-65 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Stromberg v. California*, 283 U.S. 359, 369 (1931). See generally Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). In *Stromberg*, a statute so indefinite in its language as to be capable of interpretation in such a way as to proscribe activities within the protection of the first amendment was held void on its face. 283 U.S. at 369. In *Robel*, it was noted that "the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights is at stake." 389 U.S. at 275 (Brennan, J., concurring). The Court in *Keyishian* stated that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms, for standards of permissible statutory vagueness are strict in the area of free expression." 385 U.S. at 603-04.

96. *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 184 (1968). In *Carroll*, the Court stated that "[a]n order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted." *Id.* at 183.

97. See notes 88-92 and accompanying text *supra*.

98. See notes 76-78 and accompanying text *supra*.

flected by the fact that the first amendment may have a body of procedural safeguards, a "due process," all its own.⁹⁹ In *Smith v. California*,¹⁰⁰ the Court noted that some devices and doctrines that are consistent with the Constitution in most applications have not passed constitutional muster because "they have the collateral effect of inhibiting the freedom of expression."¹⁰¹ The *ex parte* nature of the search warrant procedure is not consistent with first amendment due process. In a case involving first amendment due process the Court stated that "the value of a judicial proceeding . . . is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment; an adversary proceeding in which both parties may participate."¹⁰² In addition, the Court has held that "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate."¹⁰³ Likewise, in *A Quantity of Copies of Books v. Kansas*,¹⁰⁴ the Court held constitutionally insufficient a Kansas statute authorizing a seizure of certain books on the basis of *ex parte* scrutiny by a judge.¹⁰⁵ The statute was condemned for "not first affording [the seller of the books] an adversary hearing."¹⁰⁶

In summary, the presence of a "neutral" magistrate may be arguably outweighed by the potential bias and sparseness of the evidence upon which he is required to make his decision, and the inadequacy of the appeal process to protect preferred first amendment freedoms.¹⁰⁷ When these factors are coupled with the

99. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 518-19 (1970). First amendment "due process" generally requires that the court decide whether the interests affected by the governmental procedure are protected under the first amendment. *Heller v. New York*, 413 U.S. 483, 489 (1973); *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 243-44 n.6 (1968) (Harlan, J., concurring). This determination should be made before, or as soon after as possible, the infringement of those interests. 413 U.S. at 490; 393 U.S. at 243-44 n.6. If the interests are found to be protected, the infringement may not proceed but must cease immediately. See *Heller v. New York*, 413 U.S. 483 (1973); *Oestereich v. Selective Serv. Local Bd. No. 11*, 393 U.S. 233, 243-44 n.6 (1968) (Harlan, J., concurring).

100. 361 U.S. 147 (1959).

101. *Id.* at 151.

102. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). The Court refused to allow an injunction which restrained petitioners' exercise of freedom of speech without notice or without providing an opportunity to be heard. *Id.* at 185.

103. *Id.* at 180.

104. 378 U.S. 205 (1964).

105. *Id.* at 208.

106. *Id.* at 210-11.

107. See notes 68-75 and 82-84 and accompanying text *supra*.

problems of overbreadth and the warrant's ex parte procedure, the effect is not only potentially damaging to the freedom of the press but is also contrary to established first amendment principles.¹⁰⁸

In cases involving first amendment considerations the undeniably severe impact upon press interests by a search based on a warrant could be mitigated by use of the subpoena process.¹⁰⁹ It should be noted that reliance on the subpoena process is not the complete solution, however.¹¹⁰ In actuality, use of the subpoena process also chills the exercise of first amendment rights. The existence of this detrimental effect leads to the conclusion that authorization of the even more intrusive search warrant will result in an even greater chill on the exercise of first amendment rights.

Like a search warrant a subpoena duces tecum must specify the object sought with particularity¹¹¹ and must also adhere to the fourth amendment prohibition against unreasonable searches and

108. Numerous cases have held that the first amendment modifies the fourth amendment to the extent that extra protections may be required when first amendment interests are involved. Comment, *Search Warrants and Journalists' Confidential Information*, 25 AM. U.L. REV. 938, 954 (1976). See, e.g., *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210-11 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 729-33 (1961); *Demich, Inc. v. Ferdon*, 426 F.2d 643, 645-46 (9th Cir. 1970), *vacated and remanded on other grounds*, 401 U.S. 990 (1971); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410, 411-12 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

109. *Search and Seizure of the Media*, *supra* note 62, at 990-91. The author states that although press searches by warrant and the compulsion of information by subpoena are intrusive, the subpoena is a less serious invasion of privacy. *Id.* This is because the subpoena is subject to judicial challenge prior to production of the item sought. Comment, 19 WAYNE L. REV. 1653, 1654-55 (1973). The chilling effect of an indiscriminate search on the newspaper's right to gather information is much more serious than the procedural burden of requiring the state to secure a subpoena duces tecum. *Search and Seizure of the Media*, *supra* note 62, at 989-91. See generally D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969).

For a general discussion of the advantages of a subpoena duces tecum in the press context, see *Search Warrants and Journalists' Confidential Information*, 25 AM. U.L. REV. 938, 962-66 (1976).

110. A subpoena does have certain procedural drawbacks. In certain instances swift action may be necessary to obtain evidence. To effect such seizure the police resort to the search warrant. If instead they were to be forced to pursue the more time consuming subpoena process, they would run the risk of destruction of crucial evidence. *Search and Seizure of the Media*, *supra* note 62, at 992.

Likewise, in criminal cases where the defendant's liberty is at issue, the question arises as to whether one should be allowed to impede the search for truth by forcing utilization of the subpoena rather than the search warrant.

Thus, the major drawback of the subpoena is its ineffectiveness when swift action is necessary. In order to procure issuance of a subpoena application must be made to the grand jury or prosecutor. FED. R. CRIM. PRO. 17(c). Once the subpoena is issued it must be served and then perhaps litigated before the evidence actually appears. *Id.*; Comment, 19 WAYNE L. REV. 1653, 1655 (1973).

111. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946); *Brown v. United States*, 276 U.S. 134, 142-43 (1928); *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906).

seizures.¹¹² In addition the subpoenaed individual is granted an adversarial hearing and a chance to litigate the final decision regarding the issuance of the subpoena before the actual seizure of material.¹¹³ In contrast the propriety of a general search can be challenged only after the warrant has been executed and the search has been completed.¹¹⁴ Moreover, the victim of an unlawful search may be precluded from disputing the legality of the search because of standing problems.¹¹⁵

There is also a distinction between the degree of intrusion authorized by a search warrant and that authorized by a subpoena.¹¹⁶ The subpoena process prevents police from rummaging through other irrelevant materials since the served individual is responsible for presenting the materials.¹¹⁷ Likewise the supervision and enforcement of the subpoena is at all times under the control of the court.¹¹⁸ The adversarial input inherent in the subpoena process assures consideration of the public, statutory, and even constitutional issues which are at stake. But despite the obvious benefits of the subpoena procedure even this less intrusive means of interference in the exercise of first amendment rights has a chilling effect on first amendment interests. To allow governmental interference with a newspaper's exercise of freedom of the press through either the search warrant or subpoena procedure raises the danger of self-censorship by the press to avoid such interference.¹¹⁹

112. *United States v. Dionisio*, 410 U.S. 1, 11-12 (1973); *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906). The subpoena can therefore be quashed on the grounds of unreasonableness. 410 U.S. at 12. See 201 U.S. at 76-77.

113. Comment, 19 WAYNE L. REV. 1653, 1655 (1973); *Search and Seizure of the Media*, *supra* note 62, at 994.

When the individual challenges the subpoena the burden of justifying production rests on the government, and a court order enforcing the process cannot be obtained until the government shows necessity or reasonableness. *Grand Jury Proceedings*, 507 F.2d 963, 966 (3d Cir. 1975); *In re Grand Jury Proceedings*, 486 F.2d 85, 93 (3d Cir. 1973).

114. *Search and Seizure of the Media*, *supra* note 62, at 987-88.

115. See *Brown v. United States*, 411 U.S. 223, 229 (1973); *Alderman v. United States*, 394 U.S. 165, 174 (1969); *Jones v. United States*, 362 U.S. 257, 261 (1960).

116. *Search and Seizure of the Media*, *supra* note 62, at 989-91.

117. See *In re Nwamu*, 421 F. Supp. 1361, 1364 (S.D.N.Y. 1976); *United States v. Re*, 313 F. Supp. 442, 448 (S.D.N.Y. 1970).

118. *United States v. Doe*, 457 F.2d 895, 898 (2d Cir. 1972).

119. Comment, *Newsmen's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417, 421 (1975) [hereinafter cited as *Newsmen's Privilege*]. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court held that a newsman had to appear before a grand jury in response to a subpoena, and that the first amendment did not accord him a privilege of refusing to answer questions about the identity of his source of information. Mr. Justice Douglas noted that "[f]orcing a reporter before a grand jury will have two retarding effects upon the ear and pen of the press. Fear of exposure will cause dissidents to

The mere possibility of self-censorship of activity protected by the first amendment, motivated by fear of government sanction, has been sufficient in the past to cause the Court to intervene.¹²⁰ In *Smith v. California*,¹²¹ the Court held unconstitutional an ordinance which made the operator of a bookstore strictly liable for the contents of any book or newspaper sold, stating that

[b]y dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature The bookseller's limitation . . . thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.¹²²

The Court held that if a bookseller were to be strictly liable for the contents of any and all of the books he stocked his only recourse, to avoid liability, would be to stock and sell only those books which he read and/or knew were not obscene.¹²³ The practical effect of this would be a severe limitation in what he sold, in effect a self-censoring process by the bookseller to avoid liability. The Court recognized this, and the effect of this self-censorship, by stating

communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restricted pens." *Id.* at 721 (Douglas, J., dissenting). See Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 336 (1970).

One commentator discusses the effects upon the proper functioning of a press facility by a search, and the general disruption and suppression of activity caused thereby. *Search and Seizure of the Media*, *supra* note 62, at 989-90. For a discussion of the chilling effect that subpoenas have on the ability of the press to carry on its activities, see Comment, *Constitutional Protection for the Newsman's Work Product*, 6 HARV. C.R.-C.L. L. REV. 119, 126 (1970); *Newsmen's Privilege*, *supra* note 119, at 421.

120. *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *Near v. Minnesota*, 283 U.S. 697, 716-17 (1931). In *Thornhill*, the Court stated that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." 310 U.S. at 101-02. Statutes which create the mere prospect of self-censorship have been held unconstitutional on grounds of vagueness, even though the exact extent of such censorship may be empirically uncertain. See, e.g., *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

121. 361 U.S. 147 (1959).

122. *Id.* at 153-54.

123. *Id.*

that "[t]he bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public."¹²⁴

In the face of judicial approval for general searches of press facilities, the press would likely seek to avoid a search by reporting only that which would not elicit governmental inquiry.¹²⁵ In *Branzburg v. Hayes*,¹²⁶ the Court required a reporter to testify before a grand jury even though it meant violating a promised confidence. Mr. Justice White, speaking for the Court, stated that subpoenas issued by a grand jury to a reporter do not "require the press . . . indiscriminately to disclose" its sources.¹²⁷ Searches, however, open every file and drawer in the area searched and could result in the exposure and disclosure of information which the subpoena process might have protected.

In view of the Court's stance against governmental interference with the exercise of first amendment rights, it is interesting to note the impact of the *Branzburg* decision.¹²⁸ Mr. Justice White's assertion that first amendment interests would not suffer¹²⁹ is belied by the furor it caused in the press community and in Congress.¹³⁰ Once the *Branzburg* decision was rendered, newspapers were subjected to numerous subpoenas by courts, grand juries, and legislatures.¹³¹

124. *Id.* at 154.

125. See note 119 and accompanying text *supra* and note 132 and accompanying text *infra*.

126. 408 U.S. 665 (1972).

127. *Id.* at 682.

128. The decision immediately provoked comment. See, e.g., Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233 (1974); Murasky, *The Journalists' Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829 (1974); Comment, *Search Warrants and Journalists' Confidential Information*, 25 AM. U.L. REV. 938 (1976); Note, 27 OKLA. L. REV. 480 (1974); *Search and Seizure of the Media*, *supra* note 62; *Newsmen's Privilege*, *supra* note 119.

129. 408 U.S. at 682.

130. Approximately 55 bills designed to provide the press with a testimonial privilege were introduced into the 93d Congress: S.J. Res. 8, S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128, 93d Cong., 1st Sess. (1973); H.R. 717, H.R. 1735, H.R. 1794, H.R. 1813, H.R. 1818, H.R. 1819, H.R. 1985, H.R. 2002, H.R. 2015, H.R. 2101, H.R. 2187, H.R. 2200, H.R. 2230, H.R. 2231, H.R. 2232, H.R. 2234, H.R. 2433, H.R. 2563, H.R. 2584, H.R. 2651, H.R. 3143, H.R. 3181, H.R. 3369, H.R. 3460, H.R. 3482, H.R. 3520, H.R. 3595, H.R. 3725, H.R. 3741, H.R. 3811, H.R. 3964, H.R. 3975, H.R. 4020, H.R. 4035, H.R. 4275, H.R. 4383, H.R. 4423, H.R. 4456, H.R. 4749, H.R. 5167, H.R. 5194, H.R. 5198, H.R. 5227, H.R. 5317, 93d Cong., 1st Sess. (1973). These bills varied in the protection afforded newsmen, ranging from an absolute privilege to a qualified privilege. Comment, *Search Warrants and Journalists' Confidential Information*, 25 AM. U.L. REV. 938 (1976). Even after this onslaught there is still no federal shield statute, although over half the states offer some form of protection to newsmen. The actual protection granted varies among states. In fact, the reporter subpoenaed in *Branzburg* thought he was protected by KY. REV. STAT. § 421.100 (1962). *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972). He wasn't. *Id.* at 690.

131. CBS News Legal Correspondent Fred Graham reported that in two years

It now appears that subjecting the press even to the much less intrusive subpoena of process as a means of obtaining information has chilled the gathering, processing, and dissemination of information.¹³² The threat of governmental interference by the subpoena process has led to an inhibition by the press in seeking out information which might arouse official interest. This was recognized in *Caldwell v. United States*¹³³ when the Ninth Circuit Court of Appeals stated that "it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interroga-

following *Branzburg* 98 subpoenas were issued to individuals and news organizations. The Christian Science Monitor, Aug. 20, 1974, at 5, col. 1, cited in *Newsman's Privilege*, *supra* note 119, at 420 n.33.

132. There are also several documented instances where the press has been unable to follow through its news-gathering function due to the fact that the reporter could not guarantee confidentiality. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, PRESS CENSORSHIP NEWSLETTER 5, 6 (Mar./Apr. 1973) included the following cases:

—CBS NEWS had arranged an interview with a woman who said she would disclose how she cheated on welfare if her identity could be masked during the interview and CBS would promise not to reveal her identity. CBS declined to make the promise and the interview was cancelled.

—ABC NEWS declined an opportunity to conduct filmed interviews of the Black Panthers in their Oakland, California, headquarters because the network reportedly believed it was unable to make a firm promise of confidentiality.

—The *Courier-Journal* (Louisville) cancelled further stories about drug abuse because of the *Branzburg* subpoena.

—The *Boston Globe* was unable to pursue investigation of official corruption because sources told the newspaper's investigative news team that they were afraid of being identified.

—The *State-Times* (Baton Rouge) was unable to pursue a public official corruption story after a key informant told it he was afraid that his reporter-contact would be subpoenaed.

Newsman's Privilege, *supra* note 119, at 421 n.41.

Walter Conkrite, in an affidavit filed in support of a newsman subpoenaed by a grand jury, stated:

Particularly disturbing to me has been a marked increase, recently, in the reticence of my confidential sources in government itself. These sources, some of whom have in the past been instrumental in exposing instances of governmental abuse or corruption, now tell me that, because of the increasingly widespread use of subpoenas to obtain names and other confidential information from reporters, they are fearful of reprisals and loss of jobs if they are identified by their superiors as sources of information for newsmen.

Brief for Appellant, Record, Vol. 2, at 156, *In re Caldwell*, 434 F.2d 1081 (9th Cir. 1970), cited in Comment, *Constitutional Protection for a Newsmen's Work Product*, 6 HARV. C.R.-C.L. L. REV. 119, 126-27 n.35 (1970).

The Supreme Court has recognized the importance of guarantees of anonymity to assure free expression. In *Talley v. California*, 362 U.S. 60 (1960), a statute prohibiting distribution of anonymous handbills was held void on its face. *Id.* at 65. The Court reasoned that an "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.*

133. 434 F.2d 1081 (9th Cir. 1970).

tion."¹³⁴ This is a recognition of the fact that newspapers may engage in self-censorship rather than submit to governmental intrusion, a course of action which the Court has in the past sought to avoid.¹³⁵

When one considers the fact that this is the effect resulting from a process which allows a prior adversarial hearing, remains under court supervision at all times, and is more compatible with the traditional protection accorded first amendment rights, it seem's reasonable to expect subjecting media facilities to the issuance of warrants authorizing their search will result in an even greater chill in the exercise of such rights. To analyze the constitutionality of media searches solely on the basis of fourth amendment strictures without providing any additional first amendment protection could lead to a serious inhibition of freedom of the press.

CONCLUSION

The reliance of the Court in *Zurcher* on fourth amendment safeguards to protect against excessive governmental intrusion on the exercise of first amendment freedoms is misplaced. Fourth amendment safeguards alone do not afford the protection traditionally given these preferred freedoms.

The presence of an arguably neutral magistrate and the particularity requirement in the search warrant procedure provide merely illusory protection, for they do not guard against the excesses of the actual execution of the search. Likewise the fourth amendment requirements of probable cause and reasonableness are too vague, unclear, and uncertain for consistent application in cases involving first amendment interests; cases in which the court has traditionally mandated precision and specificity. In addition, the search warrant procedure is an *ex parte* process and cannot be challenged until after the search has been made. Fourth amendment safeguards do not, therefore, curb the potential overbreadth of a search which may be tolerated by the fourth amendment but which, in a first amendment context, is intolerable.

Although the subpoena process is imperfect, it more closely follows the requirements of traditional first amendment doctrine. However, the effect of subjecting the press to this more limited intrusion has a chilling effect on the exercise of protected first amendment rights. This chilling effect of the less intrusive subpoena illustrates the damaging impact likely to result from the

134. *Id.* at 1086.

135. *See* notes 119-124 and accompanying text *supra*.

state's use of the search warrant. This impact is inconsistent with the protection traditionally accorded first amendment rights.

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