In the

Supreme Court of the United States

JAMES ZURCHER, et al.,	:	
Petitioners,	:	
--VS--	:	No. 76-1484
THE STANFORD DAILY, et al.,	:	
--and-		
LOUIS P. BERGNA, et al.,	:	
	:	No. 76-1600
--VS--	:	
	:	Consolidated
THE STANFORD DAILY, ET AL.,	:	

Washington, D. C.
January 17, 1978

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Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 76-1484
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v.	:	No. 76-1600
THE STANFORD DAILY, et al	:	Consolidated

Washington, D.C.

Tuesday, January 17, 1978

The above-entitled matter came on for argument at 2:11 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

W. ERIC COLLINS, ESQ., Deputy Attorney General, 6000 State Building, San Francisco, California 94102
For Petitioners Bergna and Brown

ROBERT K. BOOTH, JR., ESQ., City Attorney, City of Palo Alto, 250 Hamilton Avenue, Palo Alto, California 94301
For Petitioners Zurcher, Bonander, Deisinger, Martin and Peardon

APPEARANCES: [Continued]

JEROME B. FALK, JR., ESQ., Howard, Prim, Rice, Nemerovski, Canady & Pollak, A Professional Corporation, 650 California Street, Suite 2900, San Francisco, California 94108
For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-1484, Zurcher against the Stanford Daily et al and the related case.

Mr. Collins, I think you may proceed when you are ready.

ORAL ARGUMENT OF W. ERIC COLLINS, ESQ.,

ON BEHALF OF PETITIONERS BERGNA ET AL

MR. COLLINS: Mr. Chief Justice and may it please the Court:

These consolidated cases come to you on writ of certiorari to the Ninth Circuit, which affirmed a summary judgment affording declaratory relief in a Federal Civil Rights Act case.

The case involves search warrants and attorneys' fees.

I appear on behalf of the District Attorney and his deputy and I shall state the case for you and attempt to argue the search issues and the fees issues insofar as they affect prosecutorial and judicial immunity.

Mr. Robert Booth, Junior, here, will appear on behalf of Chief Zurcher and the Police Petitioners and will argue those fees issues. He will take ten minutes.

I should like, Mr. Chief Justice, to reserve a couple of minutes for rebuttal. Thank you, sir.

On Friday, April the 9th, 1971, the medical director of Stanford University Hospital called upon the Palo Alto police to remove a group of demonstrators who had barricaded themselves in Stanford University Hospital.

Now, the main action and the press and the police was on the west side of the building. There, the demonstrators had barricaded the doors, chained them shut and papered over the glass panels. The police attempted to force the doors and were driven back by a shower of heavy missiles. Several were injured.

Eventually, ropes were brought. One door was dragged partly open. The chains were cut and the police got in.

Now, they tried first, of course, unsuccessfully, to persuade these people to move peacefully but this failed.

Now, that was on the west side. On the east side, there were also doors. These, too, had been barricaded shut and papered over, preventing police identification.

When the police broke in the west side, suddenly the doors on the east side were opened and all the demonstrators erupted out of them.

Now, on the east side there was a squad of eight men. Four were facing to the rear, where there were sympathizers in the hall and four were facing the glass doors. They attempted to hold the baton line and were successful for

four or five seconds but were clubbed to the ground. All nine were injured, three severely. They could not identify their attackers. That was on Friday.

Now, the following Sunday a special edition of the Stanford Daily, the student newspaper, was published. That showed clearly that a photographer or one of them of that newspaper had been in the position where he could have seen and photographed the east side entrance and that is what we are concerned with.

The police went to the District Attorney, District Attorney Brown, asking for a search warrant. Brown had had previous experience with this newspaper. In the 1969 riots, he had subpoenaed the editor and one of the staff. The subpoenaes had been unsuccessful.

The editor testified to the effect that a few of the photographs were available. The others had been misplaced or stolen. The defense had had full access to the photographs and he had done the best he could.

Another staffer had the temerity to testify that the photographs were dangerous to have around and some had been sent to Tokyo for safekeeping.

Now, this was the District Attorney's experience at that time. He decided, with the officer, to apply for a search warrant, a search warrant which, according to California law, specifically authorizes the seizure of evidence from any

person or place, provided, of course, there is probable cause and the rest.

Judge Phelps of the Palo Alto Municipal Court issued the warrant. He authorized a search for film, negatives and photographs. The warrant was executed at 5:30 on Monday afternoon. The officers asked for but did not get cooperation in producing the photographs.

After waiting a few minutes, they searched the photo lab and the main office which was in some considerable disarray. They searched desk tops, unlocked drawers, filing tops and, I add, no materials were ruined. As far as possible, they returned everything to the place it was found.

During the search the officers were subjected to harassing comments and they were photographed many times. No claim of confidentiality was made by any member of the staff at any time to any person.

The search lasted 15 minutes. Nothing was seized.

One month later, in May, 1971, the Stanford Daily filed suit in Federal District Court seeking injunctive and declaratory relief.

Affidavits were filed. Depositions were noted. But before the depositions of the Stanford Daily's witnesses could be taken, their motion for summary judgment was granted and declaratory relief was afforded. This was in 1972.

The District Court laid down two new rules. One,

in all third party searches -- that is to say, searches of persons who are not suspected of crime, in addition to the historical requirements of particularity, specificity and probable cause, the affidavit must also contain probable cause to believe that the materials will be destroyed or removed or that otherwise a subpoena was impractical. That is one.

There was a special rule where First Amendment values are involved. This time, said the Court, there must be a clear showing that first, the materials are important and secondly, that a restraining order would be futile.

In 1973, attorney's fees were awarded by separate opinion on a private attorney's general theory.

In 1974, these fees were set at $27,500.

In 1977, the Ninth Circuit adopted the search opinion but they used the 1976 Civil Rights Fees Awards Act, Attorney's Fees Awards Act, to authorize the granted fees and then confirmed the District Court's calculation of $47,500.

Rehearing and suggestions for hearing en banc were denied and these petitions come before you. Those are the facts of the case and the statement of them.

Your Honors, it is our essential position that the District Court and, indeed, now, counsel did not realize the extent of the rule they fashioned.

QUESTION: If, Mr. Collins --

MR. COLLINS: Yes, sir?

QUESTION: If a subpoena duces tecum must be sought first, or these other preliminaries and we decide against you, that would be the end of the case, would it not? Because there was not any subpoena duces tecum sought and there was not any allegation of the kind that the District Court prescribed.

MR. COLLINS: It is certainly true, Your Honor, that in the affidavit presented to Judge Phelps, there was no sworn statement of the impracticality which in fact, attended to this case.

QUESTION: Then would we have to go on to decide whether the public statement of the Stanford Daily made previously that they would not aid any prosecution or preserve any evidence or submit any evidence that would help the so-called "political prosecution" -- we would have to then move on to that question.

MR. COLLINS: Yes, sir. May I remind this Court that it reads as follows: "Negatives which can be used to convict protestors will be destroyed. The Daily feels no obligation to help in the prosecution of students for crimes related to political activity." That was before.

Now, in all fairness to the Daily I must add that afterwards that policy was somewhat amended. Now it apparently is, the standing policy is to destroy all potentially incriminating unpublished photographic material.

I might add that even on this, the Board was split and as to these particular events involving the injuries and the damage caused, the Board split 50-50; 50 percent thought it warranted and 50 unwarranted. Yes, sir?

QUESTION: Mr. Collins, if they destroyed them immediately, then you cannot -- what are you going to do then?

MR. COLLINS: Your Honor, it is our hope that the Stanford Daily will not set a precedent for the remainder of the media. If they do destroy it immediately, we obviously cannot get it. You are quite right.

But if we were to take the disarray of the offices as indicative of the efficiency --

QUESTION: I do not think that has anything to do with this case.

MR. COLLINS: Very well, Your Honor.

QUESTION: I just think that the duces tecum should do it without a search warrant. Should it not? That would be the normal way.

MR. COLLINS: Your Honor, it is true and --

QUESTION: And then there would be a motion to quash and you could have it out. Everybody would have his day in court.

MR. COLLINS: In any event, Your Honor, they are going to have the day in court.

QUESTION: They do not have the day in court if

you get an ex parte search warrant and come in there and search the place.

MR. COLLINS: May I distinguish between two situations, Your Honor?

QUESTION: Well, help yourself.

MR. COLLINS: In the run, it is undoubtedly true, if Your Honor's point is this -- if Your Honor's point is, there is not a prior full adversary hearing to the taking of those photographs, then of course Your Honor is correct but may I add this? It is undoubtedly true there will be an adversary hearing on the return. The question facing --

QUESTION: Then we do not need a warrant any how.

MR. COLLINS: Your Honor, there are in this case, considerations that would indicate a warrant should be used.

First, as the affidavits show, there are staffers who have a flirting relationship, I think is a fair characterization, with the paper.

Now, as to them, whether they are bound by this or not, we do not know. They are the stringers and so on.

Secondly, what I am suggesting is this, that I may say, I will do X but my efficiency in doing so is a matter that may or may not occur. It may or may not.

QUESTION: I do not know of any injunction that can control all of mankind's actions.

MR. COLLINS: I thoroughly agree with Your Honor.

In fact, I would say this, that any attempt by any court in advance to exercise that kind of restraint over the press should be abhored. We could not do it. Of course not.

MR. CHIEF JUSTICE BURGER: If you wish to reserve any time for rebuttal and allow your colleague ten minutes, to speak --

MR. COLLINS: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: This would be the time to think about that.

MR. COLLINS: Your Honor, of course.

MR. CHIEF JUSTICE BURGER: Mr. Booth.

ORAL ARGUMENT OF ROBERT K. BOOTH, JR., ESQ.,

ON BEHALF OF PETITIONERS ZURCHER ET AL

MR. BOOTH: Mr. Chief Justice and may it please the Court:

I represent Chief Zurcher and the four other Police Petitioners in this matter.

Our contention is two-fold; first, that no claim has been stated or proven against these officers under section 1983 and secondly, that whether or not such a claim has been stated or proven, the judicial and prosecutorial immunity should extend to the court's agents in carrying out lawful c ourt orders. At the very least, the special circumstances here make it manifestly unjust and unfair to award attorney's fees against these officers.

First of all, even though the Respondents in this case sought an injunction and were granted declaratory relief, there still is a necessity to prove elements of tort in order to hold them liable. Any duty which these Petitioners owed to the Respondents has been fully met.

Chief Zurcher did not order, did not supervise and was not even aware of the acts complained of in this suit. Neither was District Attorney Bergna.

QUESTION: Would you concede that they are entitled to costs? That the prevailing plaintiffs are entitled to costs in an injunctive action such as this where you say one of your clients was not even aware of it?

MR. BOOTH: Not as against Chief Zurcher, Justice Rehnquist. He is not a proper party to this case. He is not at all.

QUESTION: Well, supposing someone is found to be the proper subject of an injunction because of his participation in an unconstitutional activity or his failure to properly supervise employees, something of that sort so that an injunction issues, although he did not have any knowledge of the act for which he was -- which was on the basis of the injunction. If an injunction issues against him is the Plaintiff entitled to costs?

MR. BOOTH: I think under those circumstances, yes, Justice Rehnquist, but I do not believe under Section

1983 that there is any such theory of respondiat superior.

QUESTION: Well, so then your argument about the impropriety of awarding attorneys' fees is based on your contention that the Plaintiff should not have prevailed on the merits against your client?

MR. BOOTH: No, it is based on a lack of a cause of action against my client and also on what I believe should be an extension under the circumstances here of the judicial and prosecutorial immunity because these officers were acting as agents of the court carrying out the command of the court.

QUESTION: But judicial prosecutorial immunity is an affirmative defense which might not disentitle the Plaintiffs to an injunction or declaratory judgment even though it might disentitle them to damages and if they were under those circumstances entitled to declaratory judgment, would they also be entitled to costs or not? Assuming that they did state a claim under 1983 and should have prevailed on their declaratory judgment action but should not have gotten damages because of the immunity defense.

MR. BOOTH: It is my recollection that they would be entitled to costs, Justice Rehnquist. However, we are talking about a great difference in degree here. The costs in a suit of the type you described are substantially less and not the type of burden, nor do they carry with it the stigma that an award of attorneys' fees against these clients

would.

QUESTION: Well, that is the problem we had after Edelman against Jordon, isn't it, of the old Fairmount Creameries case and this case where the court said you could award costs against a state, you cannot award damages against a state and the questions are, are attorneys' fees more like costs or are they more like damages?

MR. BOOTH: I think when they reach this type of level in the circumstances under which they arise, I believe that they are more like damages.

I would further point out that one of the additional police officers should not be held liable here, either. He furnished an affidavit which was the truth. No one has contested that. And again later on, he participated in the search yet his acts violated no duty to these Respondents.

QUESTION: Are all of these points litigated, the responsibility of each person you are talking about?

MR. BOOTH: Yes, they were, Your Honor.

QUESTION: And they were held to b e liable?

MR. BOOTH: Yes, they were, Your Honor.

QUESTION: Well, what are you arguing about now?

MR. BOOTH: I am arguing that they were improperly held. They were held --

QUESTION: And you want us to reverse that holding. We have to go all the way back to that holding, do we not?

MR. BOOTH: I believe that is the case and I think you can do that by finding that there was no cause of action stated under Section 1983.

QUESTION: But I do not see how you separate the attorney fees of the finding. I think you have to get rid of both of them. That is all I was saying.

MR. BOOTH: Well, I think, Mr. Justice --

QUESTION: Can I separate them?

MR. BOOTH: Yes, I believe you can do it, Mr. Justice Marshall.

QUESTION: What authority do you have?

MR. BOOTH: I think that regardless of whether a cause of action was stated, I think that the special circumstances of this case would make it unfair to penalize these Petitioners even if they are liable for the search here, with attorneys' fees.

QUESTION: And what statute is the unfair statute? I mean, I cannot do it as being unfair.

MR. BOOTH: It arises out of interpretation of statute, the 1976 Civil Rights Act Amendments.

QUESTION: You want me to use the Chancellor's foot on this?

MR. BOOTH: I am sorry, sir, I did not understand.

QUESTION: Do you want me to use the Chancellor's foot on this?

MR. BOOTH: Yes, sir. Well, in a sense. I think that the --

QUESTION: Or would it be more than that?

MR. BOOTH: Well, I do not believe that under the circumstances here where attorneys' fees were awarded in 1971, five years before the Act was amended and the circumstances of this case with summary judgment and never an opportunity to present defenses like good faith and probable cause, that it would be unjust to apply attorneys' fees regardless of the outcome of the remainder of the case.

We would point out that the Court acts only through its agents. In this case it is police officers and under the circumstances they should be put in the same category here as court clerks, bailiffs and other agents of the court. They did not do anything improper. They got an order of the court. They served it in a proper and appropriate fashion.

You do not have the kind of facts that lead to the aggravated situations in which all of us would be offended. These officers acted in a proper fashion as agents of the court.

In fact, Judge Peckham, in dismissing the municipal court judge from this case found "Nothing but good faith in discharging his judicial responsibilities" in the judge and I would suggest to the Court that that type of finding should be extended in this case to these police officers. They

acted in good faith also, carrying out the command of the court.

QUESTION: Quite apart from any immunity, would not they then have a Wood against Strickland kind of defense?

MR. BOOTH: In part, yes, Your Honor.

QUESTION: Which is, as far as the Court has so far decided, is available to any defendant sued under 1983.

QUESTION: But you take the position that summary judgment prevented that.

MR. BOOTH: Well, I think that is part of it but I think also it was a misinterpretation of the applicability of 1983 and also was completely ignoring the immunities which should be applied in this case. We have cases like Pierson versus Ray and Rhodes versus Houston, a Federal Supplement case, Imbler versus Pachtman, which I think should be applied to the situation here. We have cited all those.

QUESTION: Does this record show how the court arrived at this fee of $47,500? By days, hours of service? I mean, that kind --

MR. BOOTH: Yes, it does, Your Honor. It also --

QUESTION: How many days were they in court in connection with this injunction?

MR. BOOTH: I do not recall directly but there is -- it was based on an hourly rate. There is also a premium involved. In my mind there was a total of about three days

in court, part days.

QUESTION: Three days in court.

MR. BOOTH: Part days, Your Honor. And there is also a premium attached, as I recall.

QUESTION: The premium being punitive? I am not sure what --

MR. BOOTH: Well, the trial judge recognized that perhaps there was value of services in excess of the amount attributable to hourly rate although, as I recall, the attorneys for the Respondent sought even more.

It is sort of a contingent-nature-type fee, of course.

I think I have made the points I wished to make.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Falk.

ORAL ARGUMENT OF JEROME B. FALK, ESQ.,

ON BEHALF OF RESPONDENTS

MR. FALK: Thank you, Mr. Chief Justice.

May it please the Court:

This case is in a somewhat curious posture. When we received Petitioner's opening briefs, it struck us that their quarrel on the merits of this case was with the District Court's opinion and not so much with us.

We had gone to court to obtain protection against

further searches of a newspaper in situations where a subpoena would suffice.

Petitioners, in their brief, barely touch upon this aspect of the case with its First Amendment overtones and aim their cannons at the District Court's opinion which they perceive to create a rather broad per se rule barring third party searches in all cases of all sorts of people.

We dealt with those problems in the practical law enforcement kinds of problems which they perceived to arise from that opinion in our reply brief in which we suggested that the power of the police to search non-press third parties is at least subject to the rule of overall reasonableness and that five factors, which we summarized on page 41 of our brief made this search in this case unreasonable on these facts as demonstrated to the Magistrate.

QUESTION: What should a police officer do in the Ninth Circuit after affirmance of the District Court's opinion?

MR. FALK: Well, I concede that the District Court's opinion, you know, which this Court has before it stated a broader rule than we advocate as governing this case.

QUESTION: Well, that was not my question. My question is, what should a police officer do in light of what has happened in the Ninth Circuit?

MR. FALK: Well, he must present, in the light of

what has happened --

QUESTION: In any third party search, he must conform with the District Court's opinion which was affirmed by the Ninth Circuit?

MR. FALK: Well, he must at this time, Your Honor, yes.

QUESTION: How are we to determine or, more appropriately, how is a police officer to determine when it is a third party search and when it is a criminal suspect search? Neither party, as I recall, cites the Hoffa against the United States in its brief but there is language in Hoffa that says that the police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of Fourth Amendment if they guessed wrong.

MR. FALK: I think the question you asked me, Mr. Justice Rehnquist, goes to the difference between the formulation of the District Court which I concede is somewhat broader than ours and our position is set forth in part two of our brief.

What we say is that the subpoena -- and what the Solicitor General's brief calls the "subpoena first rule" -- what we say is that that applies where the evidence submitted by the police to the Magistrate affirmatively shows that the person is a non-suspect.

Let me just give a couple of examples that I think will bring this into focus beyond this case. Plainly, the evidence in this case showed that the evidence submitted to the Magistrate in this case showed that the Stanford Daily had this evidence by virtue of the fact that it was a neutral party gathering --

QUESTION: Those are easy cases. Supposing the affidavit shows that there is reason to believe that there is secreted on the premises of the Stanford Daily 500 pounds of marijuana?

MR. FALK: I think that is an easy case as well and it goes in the other direction because the possession of marijuana itself is a crime. Noone could be a non-suspect, I think, in possession of a quantity of marijuana.

QUESTION: Even though there is nothing in the affidavit that suggests that there is any knowledge on the part of any Daily employee.

MR. FALK: I think so and I think that -- I think further that may not give sufficient evidence for a conviction. It certainly raises the inference that someone in possession and control of those premises has knowledge that a crime is being committed there. I think really that what you indicated is the easy case is the typical case.

The typical case in which evidence is sought from third parties is a case such as this where evidence is in the

hands of somebody. It might be a bank. It might be a lawyer's office. It might be an employer.

QUESTION: Let me give you these. An unnamed co-conspirator. Now, the police have got to figure that one out?

MR. FALK: No, I do not think so, Your Honor. If --

QUESTION: Well, what would he do?

MR. FALK: We say --

QUESTION: What would he do with one?

MR. FALK: I think he would proceed with a search warrant application.

QUESTION: He would go get a real good lawyer and pay him.

MR. FALK: He would get a warrant application.

QUESTION: No, no, he is given the warrant against an unnamed conspirator. Now, is that a third party or not? Is he supposed to determine that?

MR. FALK: I do not think he is supposed to determine that.

QUESTION: Why not?

MR. FALK: We do not contend that he is.

QUESTION: Why not?

MR. FALK: We contend only that where it affirmatively appears from the material known to the Magistrate that the third party is, in fact, not involved in crime --

QUESTION: I am not talking about the Magistrate.

I am talking about the policeman who is handed the piece of paper.

MR. FALK: We do not ask police officers to disobey warrants. I take it that it is their obligation to enforce warrants. That is why no damage is recited in the case.

QUESTION: That is why you want counsel fees against the policemen in this case.

MR. FALK: Your Honor, we want counsel fees against --

QUESTION: Against the policemen.

MR. FALK: -- against the policemen to be paid out of public funds pursuant to an indemnity statute in a case in which the transaction cost of litigating -- not anything relating to the primary conduct, the cost of litigating this matter and having this matter determined was -- has to be borne by someone and Congress has said where it belongs.

QUESTION: I take it that -- I thought you were defending the Ninth Circuit and the District Court's judgments only insofar as they applied to a press -- and the third party is the press.

MR. FALK: I did want to start there because I think that is this case.

QUESTION: Well, do you defend the rest of the -- you say any third -- you just were arguing that you were defending the need for something more than probable cause

where any third party is involved.

MR. FALK: We have said two things in this Court, if I may just summarize them and then I will state them more broadly. We say, with respect to the press, the police must proceed by subpoena absent a reason to believe that there is an impractical situation such as the risk of destruction and secondly we say with respect to non-press searches that there are cases in which a search will be unreasonable, and that depends on an analysis of all of the facts and we have indicated five factors in our brief which made this one unreasonable, even without regard to the special First Amendment considerations.

None of those factors would apply, I take it, where the police are simply in doubt about who the third party is or perhaps have some suspicions that do not rise to probable cause. Our position, our submission on that matter would permit a third party search in that situation.

Now, if I may return to the situation involving the newspaper.

QUESTION: This is not the Ninth Circuit rule, I take it.

MR. FALK: Our first point is -- and our second point is a narrower statement of the case for the Ninth Circuit announced. I make no apology for that. I think that some reflection on the matter has suggested that that is all

that is really presented on this record. One can conjure hypotheticals on other facts that involve problems that I do not think we are prepared to discuss intelligently on a hypothetical basis.

I think the District Court and the Court of Appeals were right ultimately but I do not think I have to convince you of that for this judgment to be sustained.

This case involved a newspaper and the interesting thing about the briefs in this case is that the parties almost pass in the night on that issue. We spend all of our time discussing the facts of this case and the legal consequences that flow therefrom with the First Amendment bite that is required in cases where First Amendment interests hang in the balance.

The Solicitor General on Friday filed a brief -- on Saturday filed a brief to which we filed a response yesterday in which the Government concedes that there are no law enforcement interests that are impaired by a rule requiring the police to proceed by subpoena when seeking material from the press so we can put that issue aside.

No substantial law enforcement issues are presented in any of the briefs in this case as to that part of the case and that is what this case is about.

Now, I would like to stress that we do not question the issue that was raised in Branzburg concerning the

duty of the press to produce evidence when it is sought by law enforcement.

No issue of privilege is presented in this case. The question is not whether evidence may be obtained from a newspaper but how that evidence is to be obtained. It is a question not of substance but of procedure.

That distinction, to my mind, answers the objection in the arguments of Petitioners that we seek some special privilege for the press. We do not.

Those cases such as Pell and Saxby on which Petitioners rely for the proposition that the court has declined to give special privileges to the press involve claims of substantive rights or claims of substantive exemptions from duties that any citizens have.

All this case involves is a question of process. By what process shall evidence be obtained from the press when it is sought?

QUESTION: Let me see if I have it clear. Do you think the process should be any different for the San Francisco Chronicle or the First National Bank of San Francisco?

MR. FALK: Well, I -- as I indicated, we would regard for the reasons set forth in part two of our brief a search of the First National Bank as unreasonable if the factors set forth in our brief were present. That is, if

there were no reason to believe that the First National Bank were involved in any crime.

QUESTION: In regard to that, is there any difference between a newspaper and anyone else on earth in this respect?

MR. FALK: There is one difference. It is engaged in a First Amendment activity and this Court has said --

QUESTION: Well, does not everyone have First Amendment activity rights?

MR. FALK: Everyone has First Amendment rights but not everyone is engaging in them as their business activity. A bank has some First Amendment rights, to be sure, but the business of banking is not a First Amendment activity and no First Amendment interests of a bank are impaired when --

QUESTION: Then your theory is that if you are using the First Amendment right more often, more frequently, then do you have some greater right than a person who uses it less frequently?

MR. FALK: Our theory is that if the entry into your premises will impair the exercise of your First Amendment rights and there is another way to go about the same objective to accomplish the same interests of government, the other way, the less-burdensome means, ought to be pursued.

QUESTION: I still do not know whether you think

a bank or the San Francisco Chronicle has a different kind of a First Amendment right.

MR. FALK: My bottom line is that they both have the same right to be free of entry in this kind of a situation but the analysis has to be different because the First Amendment requires a stricter scrutiny of the process than would be applicable to an ordinary business, which a bank is.

So my answer is that there are different analyses that are applicable.

QUESTION: What if an individual had simply gone out and taken pictures that the Stanford Daily took and an effort was made to get a warrant to get his negatives because of the thought that he would probably burn them, too. Would he be subject to the same protections that you say the Stanford Daily is by virtue of the freedom of the press?

MR. FALK: I think it would depend on knowing some more facts than that. Certainly, the kinds of First Amendment injuries are less in that situation because in that situation the individual is unlikely to have around other materials like a newspaper --

QUESTION: What if he were a scholar working on a criticism of the present administration?

MR. FALK: I think if all of those facts were before the Magistrate, I think the answer would have to be yes, that it would be. I think it is important to understand the

kinds of injuries that this sort of a search --

QUESTION: And if he were a clergyman wanting the pictures for the preparation of a sermon the next Sunday in connection with First Amendment rights?

MR. FALK: Well, I would have great difficulty with that search for the reasons set forth in our Fourth Amendment reasonableness analysis and I think that it would be unreasonable to do it if that were all the facts that there were.

QUESTION: This is a clergyman, engaged in First Amendment business, at least every Sunday?

MR. FALK: Surely he is. I think that the difference may be in the other kinds of First Amendment injuries.

If I could just turn to what sorts of injuries we identify here, I think perhaps I could make the point more clearly.

When the police enter into a newsroom in execution of a search warrant, several things happen. One, they cut off, as Mr. Justice Marshall indicated earlier, they cut off absolutely the right to address a court on the question of whether the police have a right to get those particular documents that they are seeking, whether the arguments against production would arise from whatever rights are provided by Branzburg or under a state shield law, the right to be heard on that is cut off.

Secondly, the files and records of the newspaper and whatever confidences, whatever unpublished stories, whatever drafts of editorials may be in the premises, all of these are laid bare to inspection of police and that does distinguish this kind of search from some of the hypotheticals that we have been discussing in the last few minutes.

That kind of injury, that kind of exposure -- and a needless one at that -- causes a special injury in the context of the newspaper search.

Thirdly, the entire newsroom is disrupted. The precise amount of time that this search is somewhat in dispute, but it took at least 15 minutes and may have taken as long as 45 minutes.

QUESTION: Well, that is no different than a bank's operations being disrupted, is it? I mean, the First Amendment does not guarantee newspaper operations fiscally in the sense that they will be subject to less burden of law enforcement in that sense, so long as there is no censorship connotation.

MR. FALK: I take it that the bank would be disrupted and I daresay that the business of banking would be as devastated as can be if the police were executing search warrants on a regular basis in the bank. I have no doubt that that is true and I think that under most circumstances, execution of a search warrant in a bank for this kind of

purpose would be unconstitutional as an unreasonable search under the Fourth Amendment.

QUESTION: If you hold up the international wires in any big bank in the country for 15 minutes, it is chaos plus.

MR. FALK: Yes. I think that is right. Now --

QUESTION: Let us go back to Justice Blackmun's clergy for the moment in relation to your last point. If the subpoena or the search took place in the Parsonage, the files of the Minister, including confidential memoranda about the emotional and marital troubles of his parishioners and a great many confidential things might be equally there. Would that not be true?

MR. FALK: I think it is true and I think that such a search would have to be --

QUESTION: A clergyman is entitled to no less protection than the San Francisco Chronicle or whatever.

MR. FALK: I fear that I may have created the impression that I think it would be proper to search the clergyman. I only mean to say that in the case where someone is in a -- is engaged in a First Amendment activity and I think the clergyman is -- where First Amendment interests are at stake and are impaired by a search, the case for unreasonableness is stronger but certainly there are other situations.

Take the search of the psychiatric clinic at

Stanford which occurred in this case and was performed by some of the same Petitioners -- and it is in the record.

They searched the Stanford Psychiatric Clinic files because they had subpoenaed the medical records of a patient and were impatient to get them. There was some concern that the doctor was going to make a motion to quash before the subpoena became due and before a motion to quash could be brought on for hearing. They marched in, armed with a search warrant and --

QUESTION: Is that search before us now?

MR. FALK: That is in the record as -- and it got into the record because we moved for an injunction on the basis of fact that the Petitioners had done it again and the facts of that are in the record. And it is an example of the kind of danger that exists here. They marched right through and they looked at the files of other patients.

They did not -- I do not think that there is any evidence that they read them. But they had access to them and the other patients have no assurance now of confidentiality about their own files.

Certainly the fact that the other patients' names are there, the fact that they were being treated at the Psychiatric Clinic is now exposed to --

QUESTION: Mr. Falk, can I ask you a question or two about that? The District Court's opinion was on

October 5, 1972. Is that the declaratory judgment that is appealed? Or what is the judgment that is being appealed?

MR. FALK: There are three opinions of the District Court. The one you identify is the only one on the merits.

QUESTION: Did he ever enter a declaratory judgment or is the opinion a declaratory judgment?

MR. FALK: No, there is a judgment. For some reason, when the Petitioners caused the brief to be prepared, it was not included -- I am sorry, the Appendix to be prepared, it was not printed but it is in the Clerk's transcript.

There was a judgment entered in about 1974.

QUESTION: Is that in the record somewhere?

MR. FALK: Yes, it is and then perhaps before -- I will advise the Clerk.

QUESTION: The only thing I have found is the judgment of September, '73 in which they deny your motion for an injunction.

MR. FALK: Yes, there is a judgment --

QUESTION: It sounds like you might have lost and I wonder if they applied for a fee.

QUESTION: On page 73 of your petition there is a judgment filed July 23rd, 1974 that looks like it might be what you are referring to.

MR. FALK: That is not -- that is the Petitioner's

petition, I think. That must be the judgment. It is an exhibit to one of the petitions and it was in 1974.

QUESTION: Mr. Falk, may I ask you, who made the motion for summary judgment? I do not recall.

MR. FALK: We did, Your Honor.

QUESTION: Was that motion opposed?

MR. FALK: Yes, it was and there were extensive briefs prepared and argument.

I do want to respond very briefly to the suggestion that there is anything in this record that would support an inference that the Stanford Daily would have destroyed evidence following receipt of a subpoena. That is an unfortunate slur that has no support in the record.

The first thing that ought to be said about it is that there was absolutely nothing before the Magistrate. absolutely nothing at all to support such a contention in the way of competent evidence. As a matter of fact, two editorials, about which I will have more to say in just a moment, were not before the Magistrate. There is no evidence to show that they were.

The evidence that is in the record consists of the uncontradicted statements, sworn statements of some of Respondents who said that the policy of the Daily was not to destroy any evidence that was covered by a subpoena. That has never been refuted. There is the Brown affidavit to which

counsel refers which contains some hearsay statements that are conclusory with lack of proper foundation which the District Court properly refused to consider but they were never even before the Magistrate and that really leaves the --

QUESTION: What about the burden of proof on this question if it was a summary judgment?

MR. FALK: Well, I think that the answer to that question, Mr. Justice Rehnquist, is that it would have had to have been shown to the Magistrate and that all of this really is not properly considered at this stage of the proceedings.

QUESTION: So that the District Court should not have entertained or looked at any of these affidavits at all?

MR. FALK: Well, it did say that they were irrelevant. The District Court, of course, cannot control what parties submit in the way of affidavits so that my answer is two-fold.

One, it is irrelevant and two, to the extent you wish to consider it, because it informs the atmosphere of this case, the record is uncontradicted that the Daily was law-abiding and would not --

QUESTION: Well, but if the Daily had the burden of proof on a motion for summary judgment, the defending parties in a lawsuit are not bound by the affidavits of interested parties.

MR. FALK: Well, they were -- they had an

opportunity to submit affidavits of their own but I want to -- but there was something else. There were the editorials and I think that they, far from proving the point that Petitioners would make of them, prove exactly the opposite and I think Justice Marshall's question highlighted it.

The editorials of which counsel read you an excerpt which very much distorts their meaning, if read in full -- and they are in the record and I would like the Court to read them. They are not long but I would like the Court to read them. They are at pages 117 to 120 of the record -- are a careful statement with which the Court may or may not personally agree but it is a measured and reasoned statement written prior to Branzburg at a time when questions of journalists privilege were very much uncertain and actually, the law of the Ninth Circuit was the other way from Branzburg and the editorials said, in effect, in an effort to discourage police subpoenas, we are not going to retain photographs once they have been used.

My wife has suggested to me that this is exactly like the stickers which are put in cabs and buses on a routine basis saying the driver only carries five dollars in change -- there is not much point in holding me up. And that is what these editorials, both before and after the search said and that is all they said.

There is absolutely no evidence in this record

and there is not --

QUESTION: Mr. Falk, on the question of evidence, what evidence was there that linked the chief to this?

MR. FALK: I am sorry, I could not hear you.

QUESTION: Was not the chief one of the defendants, the chief of police?

MR. FALK: Yes.

QUESTION: Well, what evidence was before the court that linked him to this?

MR. FALK: The chief was a defendant because he is in charge of the police department and we alleged that he had ratified the search and was prepared to do it again if the circumstances arose. That was never disputed.

The way this issue came up, Mr. Justice Marshall, is that after summary judgment --

QUESTION: I mean, he is now stuck for $40,000-some.

MR. FALK: There is indemnity statute. He is not stuck personally. This award is rendered against him in his official capacity which under the California law will be payable out of public funds.

QUESTION: Well, why do you not make California a party?

MR. FALK: I do not think we can do that, under --

QUESTION: Well, they are going to pay the bill.

MR. FALK: They were not proper parties, of course, but that --

QUESTION: But they are proper to pay the bill.

MR. FALK: They will pay -- actually, it is the county that --

QUESTION: You will pay it too, on your tax bill.

MR. FALK: I appreciate that.

QUESTION: May I ask a question?

MR. FALK: Yes, of course.

QUESTION: About the policy of the Stanford Daily. The complaint alleges that the staff would consider itself free in the absence of service of a subpoena or other proper judicial process, to destroy any materials in its possession.

In light of the answer you gave Mr. Justice Rehnquist earlier, I take it you would not destroy -- I think the question included heroin. You would not destroy --

I will ask you this: Would you destroy evidence of a crime as distinguished from heroin which, the possession of which itself may be a crime?

The statement contains no limitation.

MR. FALK: No.

QUESTION: It says you will destroy any evidence.

MR. FALK: And the statement has to be understood in the context in which it was addressed. The reference was to materials gathered in the course of preparing a

newspaper.

QUESTION: May I ask you this question --

MR. FALK: Of course they would not destroy evidence of that nature.

QUESTION: Let us assume you had a picture of the commission of a crime. For example, in banks they take pictures regularly of, not only of robbery but of murder committed in a bank and there have been pictures taken of the actual pulling of the trigger or the pointing of the gun and pulling of the trigger. There is a very famous one related to the assassination of President Kennedy.

What would the policy of the Stanford Daily be with respect to that? Would it feel free to destroy it at any time before a subpoena had been served?

MR. FALK: The -- literally read, the policy of the Daily requires me to give an affirmative answer. I find it hard to believe that in an example such as that, that the policy would have been carried out. It was not addressed to a picture of that kind or in that context.

QUESTION: Well, I am sure you were right. I was just getting to the scope of your theory.

MR. FALK: Our --

QUESTION: What is the difference between the pictures Justice Powell just described and the pictures they were thought to have?

MR. FALK: Well, it simply is a distiction that --

QUESTION: Attacking police officers instead of the President. That is the only difference.

MR. FALK: Well, it is a somewhat more serious crime but -- but -- but the proposition to which this or the concern to which this editorial statement was addressed was the concern that their files would be routinely taken advantage of by many people, including but not limited to the police. Others have been known to -- other private litigants have also subpoenaed the press. It was an attempt to head that off.

I think the relevant point of this editorial for the purposes of this case of course is not whether it is a wise editorial policy -- which I understand many papers have but that is not the point.

The point is, that it was not an announcement that they would destroy evidence in the face of a subpoena. It was quite the opposite. It was an announcement that you should not subpoena us because we do not intend to keep these materials long enough for a subpoena to be useful, so do not subpoena us.

QUESTION: Suppose the chief of police -- bearing in mind that we are talking about not 1978 but 1972, 1971 -- having read, having had that editorial come to his attention, issued an order to his staff or the prosecutor with respect to

these people who wrote that editorial, "Do not wait for a subpoena duces tecum, get a search warrant."

MR. FALK: I do not understand --

QUESTION: Do you think that that editorial would lead a reasonable man to believe that maybe a search warrant, a summary procedure was essential to get the evidence?

MR. FALK: Well, I understand that both subpoenas and search warrants are summary procedures in the sense that both can be obtained very quickly. Both are obtained ex parte. Both take effect the moment that they are served.

Now, I do not think that there is any time advantage as to a subpoena.

QUESTION: But you can quash one and you cannot quash the other.

QUESTION: There is quite a difference between the time --

MR. FALK: That is the relevant difference and that is why one hurts like the devil and the other is one that the press can live with.

QUESTION: Well, a subpoena duces tecum does not require the recipient to turn the material over to the police officer who serves it, does it?

MR. FALK: No, it requires them to bring it in --

QUESTION: Sometime a week or two weeks later.

MR. FALK: It may be a day, Mr. Chief Justice.

QUESTION: Or a day. But sometime, though.

MR. FALK: But the policy of the Daily was to honor a subpoena and if one were to --

QUESTION: Where do we find that out?

MR. FALK: It is in the record.

QUESTION: In relation to that editorial?

MR. FALK: Yes. I am sorry, not in the editorial.

QUESTION: No.

MR. FALK: I admit that the editorial does not say that but the only evidence on the subject in the record was in the form of affidavits submitted after the search. Of course, the editorial was not before the Magistrate, either.

I think that is the point. This Magistrate issued this search warrant without any reason -- I think counsel has conceded this -- without any reason to be concerned that the Daily might destroy evidence. That had nothing to do with what was before the Magistrate.

All the Magistrate was told was, here is some evidence and we want to go get it and there is probable cause to believe it is there and it will be useful.

QUESTION: And until Judge Peckham wrote his opinion, that was a perfectly good grounds for issuing a warrant.

MR. FALK: Yes, I do not say that the Magistrate was in bad faith or anything of that nature.

QUESTION: Judge Peckham said he was in good faith, did he not?

MR. FALK: He did. He said he was in good faith and we have never contended otherwise but the point is that on this record, that is all that was before the Magistrate and I think that that is all that there could ever have been before the Magistrate in almost any newspaper search that one can imagine. If there ever is a case in which there is reason to believe that the newspaper would destroy the evidence, the rule of the court below would permit a search warrant to issue and we have no quarrel with that.

I want to stress that although the conceptual issues that have been discussed this afternoon are fascinating, at the core of this case are law enforcement problems that do not exist. They do not exist.

There are problems -- I concede that there are problems --

QUESTION: There are real problems that exist in the procedure you suggest. Someone subjected to a subpoena duces tecum has several, usually several days to respond. He can argue whether he had custody of the stuff that was subpoenaed. If the court rules that he has to produce it, he can get a writ of mandamus to the Court of Appeals. You can delay by as much as a year or two years if you go by the subpoena route as compared to the search warrant process.

MR. FALK: I think there are two answers to that. At least in California, subpoenaes can be made returnable on extraordinarily short notice, the next day, if that is appropriate.

Secondly, if there is a motion of some kind to quash the subpoena, there really are only two possibilities, it seems to me. One is that the motion is not well-taken and surely courts are able to deal with that situation by summarily denying them if there is a situation of urgency.

If the motion is well-taken and there is something to be adjudicated, that is a very poor excuse for getting a search warrant and overriding the opportunity to have that heard in an orderly way.

QUESTION: Look how long it took the Dionesio cases to proceed from the District Court in Illinois through the Seventh Circuit to this Court and that really was all an argument about whether a particular thing was subject to a subpoena or not.

MR. FALK: I grant that, Mr. Justice Rehnquist, but I would respectfully say that if that -- if there is that kind of a case, which ultimately this Court found it appropriate to review, it would be inappropriate to render that moot by allowing a search warrant.

But I may say this, that if there is a case in which the procedural hurdles are too great and the need for

speed is genuine, then I take it that a search warrant will be indicated because in that situation, a subpoena will be shown to have been in practice.

I see that my time is up, Mr. Chief Justice.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Collins. You have about six minutes remaining.

REBUTTAL ARGUMENT OF W. ERIC COLLINS, ESQ.

MR. COLLINS: Thank you, Your Honor.

I should refer to the matter brought up by counsel which is, of course, the filing of the late briefs. As the Court knows, the United States filed a brief late Saturday. We received it sometime around 6:00 o'clock on Sunday and then Mr. Falk, with a remarkable diligence, filed a brief last night, I believe. We received it about 6:00 o'clock last night.

MR. CHIEF JUSTICE BURGER: You may have, if you have that in mind, the opportunity to submit a response and comment.

MR. COLLINS: Thank you, Your Honor. That was my request.

Your Honor, to make some of these points, we are faced with an opinion. The opinion contains two rules. We say you must reverse that opinion.

That is our position. That is what the police

face. That is what we face. That is what law enforcement faces. That is what the courts face, not what Mr. Falk writes now.

On that score alone, these opinions must be reversed.

Now, let me go further. The subpoena is not a summons --

QUESTION: He defends the judgments below with respect to the press completely, does he not?

MR. COLLINS: No, Your Honor, no, no.

QUESTION: He does not?

MR. COLLINS: Umm umm.

QUESTION: How is that?

MR. COLLINS: Well, he retreats on several grounds. First, the judgment below contains no distinction between evidence -- or may I use the discredited term, "mere evidence"? Mere evidence --

QUESTION: Whatever you say in California is all right with me.

MR. COLLINS: Thank you, Your Honor. Mere evidence, then, my authority is Warden v. Hayden and contraband, fruits or instrumentalities.

Now we retreat from the rule below and say it shall not apply to instrumentalities, fruits or contraband. That is one retreat.

Second, the clear showing aspect and the important material, that we retreat from. That is no longer required.

QUESTION: That drops out, too.

MR. COLLINS: That drops out, too. Your Honor, I do agree with you. It is difficult to discover who is on first in this case.

We have now a suggestion that it is the one to solve, should it happen, it shall demonstrate that there is no connection and that these are indeed clergymen engaged in preparing sermons for Sunday morning use only, then and only then does this rule apply.

QUESTION: We have to decide whether a judgment stands up or not.

MR. COLLINS: Precisely.

QUESTION: He certainly defends the judgment.

MR. COLLINS: Well, Your Honor, you are the best judge for that.

QUESTION: Well, he certainly does not suggest that the judgment be reversed.

MR. COLLINS: Not in so many words.

QUESTION: He does not in any kind of words that I can see say that he thinks the judgment should be affirmed.

MR. COLLINS: Your Honor, I have only six minutes. I will gladly agree with you.

MR. CHIEF JUSTICE BURGER: You have only three and

a half.

MR. COLLINS: Pardon, Your Honor?

MR. CHIEF JUSTICE BURGER: Three and a half.

MR. COLLINS: Three and a half. Thank you.

QUESTION: Mr. Collins, just one question, if I may?

MR. COLLINS: Yes.

QUESTION: Do we have any case or controversy before us that involves anybody except the newspapers?

MR. COLLINS: From the beginning, Your Honor, we have had severe doubts whether there is a case or controversy and the case cited by the United States in their brief of Ashcraft 431 U.S., we have much difficulty in --

QUESTION: Well, at the very most, we have a case involving a newspaper. We have nothing else.

MR. COLLINS: At the most, you have a case involving a student newspaper, yes.

QUESTION: And a case involving mere evidence. We do not have a case involving contraband or anything like that.

MR. COLLINS: Absolutely true.

QUESTION: We do not have a damage claim. We do not have injunction. We do not have much of anything.

MR. COLLINS: You do not have a damage and you do not have an injunction.

QUESTION: One other question about the attorneys'

fees. Does their fee award include -- there are two opinions on the issue of these, ore, will they get them and secondly, how much?

MR. COLLINS: Yes.

QUESTION: Does the fee award include payment for the time spent in getting the fees award?

MR. COLLINS: My answer is yes. It includes that plus what was referred to as the contingent nature of the services rendered for which an extra $10,000 was added on.

QUESTION: And, of course, it probably includes compensation for the argument about all the non-newspaper aspects of the case, too.

MR. COLLINS: Of course, Your Honor. In fact, I think that equity and not only the Chancellor's foot would demand that we get attorneys' fees for knocking down this third-party rule as stated by the court.

Your Honor, I am told things about California law which, frankly, appall me. I am told it is a summary procedure, I can get a warrant. That is not so.

A warrant does not issue to a district attorney under 1539 of the California Penal Code unless that is a pending proceeding with a date set.

It is true that the grand jury can get a warrant but not the district attorney.

QUESTION: You mean a subpoena, do you not?

MR. COLLINS: A subpoena. I beg your pardon. Thank you.

QUESTION: Yes.

MR. COLLINS: A subpoena. They cannot be obtained. Now, that is a fact on which I can assure you I am correct.

The grand jury does not sit as do the federal's and I noticed the United States in their briefs do not concede this point. They bring to your attention the fact it will hurt them. Their grand juries, even, do not sit but once every sixty days in the Middle West or the Rockies or wherever it was they cited. I cannot remember.

Ours cover 3.8 percent of the total cases in our state.

Your Honors, this rule was ill-conceived from the beginning. Counsels' frantic efforts to salvage something out of the mess, I say are ridiculous.

It will put a burden upon us. We will have to show all these factors. We will have to go through this measured, contemplated -- one might even say meditative procedure of the law before we can get out hands -- this very hospital search, counsel does not tell you that the patient said, "You can have them," but the doctor thought he would assert a privilege.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Collins.

MR. COLLINS: Your Honors, thank you for permission to file.

MR. CHIEF JUSTICE BURGER: The case is submitted.

Thank you, gentlemen.

[Whereupon, at 3:13 o'clock p.m., the case was submitted.]