

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A.  
MCLEAN, RICHARD C. BRANZELL, AND ROBERT  
PRIEKSAT, Petitioners v. PAUL W. BERGER, ET UX.;  
and CHARLES H. WILSON, ET UX., ET AL. v. HARRY  
LAYNE, DEPUTY UNITED STATES MARSHAL, ETC.,  
ET AL.

CASE NO: No. 97-1927 c-2  
PLACE: Washington, D.C.  
DATE: Wednesday, March 24, 1999  
PAGES: 1-83

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**Supreme Court U.S.**

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   RODNEY C. HANLON, JOEL                   :

4       SCRAFFORD, KRIS A. McLEAN,       :

5       RICHARD C. BRANZELL, AND         :

6       ROBERT PRIEKSAT,                 :

7                   Petitioners             :

8           v.                               :   No. 97-1927

9   PAUL W. BERGER, ET UX.;               :

10   and                                     :

11   CHARLES H. WILSON, ET UX.,         :

12   ET AL.                                 :

13           v.                               :   No. 98-83

14   HARRY LAYNE, DEPUTY UNITED         :

15   STATES MARSHAL, ETC., ET AL.       :

16   - - - - -X

17   Washington, D.C.

18   Wednesday, March 24, 1999

19                   The above-entitled matter came on for oral  
20   argument before the Supreme Court of the United States at  
21   10:12 a.m.

22   APPEARANCES:

23   RICHARD A. CORDRAY, ESQ., Grove City, Ohio; on behalf of  
24       the Petitioners in No. 97-1927 and the Federal  
25       Respondents in No. 98-83.

1 LAWRENCE P. FLETCHER-HILL, ESQ., Assistant Attorney  
2 General, Baltimore, Maryland; on behalf of the State  
3 Respondents in No. 98-83.

4 HENRY H. ROSSBACHER, ESQ., Los Angeles, California; on  
5 behalf of the Respondents in No. 97-1927.

6 RICHARD K. WILLARD, ESQ., Washington, D.C.; on behalf of  
7 the Petitioners in No. 98-83.

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1 P R O C E E D I N G S

2 (10:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in two cases that have been consolidated for argument:  
5 No. 97-1927, Rodney C. Hanlon, et al. v. Paul W. Berger;  
6 and 98-83, Charles H. Wilson v. Harry Layne.

7 Mr. Cordray.

8 ORAL ARGUMENT OF RICHARD A. CORDRAY  
9 ON BEHALF OF THE PETITIONERS IN NO. 97-1927  
10 AND THE FEDERAL RESPONDENTS IN NO. 98-83

11 MR. CORDRAY: Mr. Chief Justice, and may it  
12 please the Court:

13 I represent the Marshals Service officers in  
14 Wilson and all the officials in Hanlon.

15 There are two issues in these cases: the  
16 constitutional issue itself and the further issue of  
17 whether in any event these officers should be held  
18 personally liable for money damages when, at the time they  
19 acted, the law was not clearly established and it was not  
20 apparent that their conduct violated the Fourth Amendment.

21 We submit that however the Court decides the  
22 constitutional issue is a matter of first impression in  
23 this case. Mitchell v. Forsyth compels the result that  
24 qualified immunity should be upheld for these officers  
25 here.

1           Turning first to the constitutional issue, as  
2 framed by the Court, the issue is whether law enforcement  
3 officials violate the Fourth Amendment when they permit  
4 members of the news media to accompany them in order to  
5 observe and report on their execution of a warrant.

6           We submit that it would be wrong to erect a per  
7 se rule that in all circumstances such conduct is  
8 improper. Certainly to the extent that the search in the  
9 Hanlon case involved open fields or had the arrest of  
10 Dominic Wilson occurred in a public place, it would be  
11 unproblematic that the media accompanied the officers and  
12 observed and reported on their execution of a warrant.

13           As a larger matter, moreover, there are many  
14 instances throughout this country every day in which third  
15 parties accompany officers as they execute warrants, and  
16 this has been true since the inception of bench warrants.  
17 There are many different circumstances. They may be there  
18 to join in performing the search or the seizure in  
19 assistance of the officers. They may assist the officers  
20 in other more tangential ways: provide clerical help,  
21 translating, identifying evidence. They may also help  
22 facilitate the law enforcement objectives that are served  
23 by procuring and implementing the warrant itself.

24           QUESTION: Well, let's -- let's get to the help  
25 that you claim was provided here. What's your argument

1 here?

2 MR. CORDRAY: Your Honor, as reflected in the  
3 Justice Department policy in the U.S. Attorneys' Manual in  
4 effect at the time of the Hanlon search and --

5 QUESTION: It has since been -- that section has  
6 since been repealed. Is that correct?

7 MR. CORDRAY: Since been amended. That's  
8 correct. Yes.

9 QUESTION: Amended out of existence as I recall.

10 MR. CORDRAY: No. Modified. Modified with  
11 respect to the execution of a warrant.

12 QUESTION: How does it read now?

13 MR. CORDRAY: It -- it still is the case -- this  
14 is set forth in the appendix to the blue brief in the --  
15 in the Hanlon case -- that law enforcement officers may  
16 assist the news media in reporting on and observing and  
17 videotaping --

18 QUESTION: Does it say that they may take  
19 members of the media into people's houses, into private  
20 places --

21 MR. CORDRAY: It doesn't speak to that, but it  
22 has now specified that they should not facilitate media  
23 accompaniment in the execution of a warrant, Your Honor.  
24 However, at the time the policy certainly countenanced  
25 such conduct and, in fact, encouraged it.



1                   However, the purposes served are the same ones  
2 that were served as -- as stated in that policy, which are  
3 to promote the aims of law enforcement by deterring  
4 criminal conduct and by enhancing public confidence.

5                   QUESTION: Well, why do you have to take  
6 photographers into someone's house to aid law enforcement  
7 in that respect? I mean, you can have a news conference  
8 when it's over if you want to. I don't see why you -- you  
9 have to take people into private places.

10                  MR. CORDRAY: This Court has held that the  
11 Fourth Amendment doesn't require a least intrusive means  
12 test as long as the conduct is reasonable.

13                  QUESTION: No. I just want to know whether  
14 there's anything substantial to this or whether it's --  
15 whether it's fluff. It sounds like fluff.

16                  MR. CORDRAY: Well certainly, Your Honor, to the  
17 extent that the media are permitted to give a firsthand  
18 objective account of the actual events, that facilitates  
19 accurate reporting on law enforcement functions, and it  
20 may be quite helpful in preventing abuses in instances.

21                  QUESTION: But why just the media, Mr. Cordray?  
22 Do -- do you know of any other area of law in which the -  
23 - the media, quotes, have been given special  
24 constitutional privileges that -- that John Q. Public  
25 wouldn't have?

1 MR. CORDRAY: No, Your Honor, and no one  
2 contends that the media should have special privileges  
3 here.

4 QUESTION: So, they could have brought in maybe  
5 their sister-in-law to -- to watch the thing too as well.  
6 Is that -- is that it?

7 MR. CORDRAY: Many law enforcement departments  
8 around the country do have a public ride-along program  
9 that will permit public to ride along with officers and  
10 observe --

11 QUESTION: Do they drive right into the house?

12 QUESTION: Yes, right into the house or -- or  
13 inside premises on a search warrant or -- or is the  
14 program more one of letting them ride in squad cars and  
15 see whatever occurs on the street?

16 MR. CORDRAY: Well, there are a variety of such  
17 programs, and I'm sure that in various circumstances --

18 QUESTION: Do you know of any that allow private  
19 citizens to accompany officers inside dwellings to execute  
20 a search warrant?

21 MR. CORDRAY: Well, yes, Your Honor. The  
22 Marshals Service policy at issue in the Wilson case in  
23 place at the time clearly countenanced -- page 7 of the  
24 joint appendix --

25 QUESTION: No, but your argument was that there

1 were -- there were -- throughout the country, there was a  
2 practice of ride-along, and our question is do they ride  
3 right into the house.

4 MR. CORDRAY: Yes, Your Honor. We -- we have -  
5 -

6 QUESTION: Do you have specific instances in  
7 which this is going on?

8 MR. CORDRAY: We have -- we have cited to the  
9 Court the Fletcher case from the Florida Supreme Court  
10 which recognized, as a matter of common usage and custom  
11 at the common law as of 1972, that it was common practice  
12 to allow media to accompany police --

13 QUESTION: No.

14 MR. CORDRAY: -- even into private property or  
15 residence --

16 QUESTION: I think the question -- excuse me. I  
17 think the question that we're -- we're pursuing is, are  
18 individuals other than those in the media going into  
19 people's houses for the execution of warrants in a  
20 capacity simply as observers, not performing any law  
21 enforcement function? And I -- I think we got -- several  
22 of us I guess got the suggestion from you that the answer  
23 to that was yes, and we want to know whether that is  
24 specifically correct. Is there a practice out there in  
25 the country, apart from the Marshals Service, of taking

1 members of the public, performing no law enforcement  
2 function, into private places during the execution of a  
3 warrant?

4 MR. CORDRAY: That's where I beg to differ. The  
5 purpose of a public ride-along program, as with the media  
6 ride-along program, is to serve law enforcement purposes.  
7 That's the whole -- it's not merely for someone's  
8 entertainment value or to satisfy someone's curiosity.

9 QUESTION: All right. We'll -- we'll accept  
10 that qualification. Are members of the general public  
11 going into people's houses during the execution of the  
12 warrants? Is this a common practice? We'd just like to  
13 know that.

14 MR. CORDRAY: I -- I can't speak to that one way  
15 or another, Your Honor.

16 QUESTION: Do you have any instances?

17 MR. CORDRAY: I can speak to the fact that it  
18 was recognized at the common law as of 25 years ago, that  
19 it was common practice around the country for the media to  
20 accompany --

21 QUESTION: Mr. Cordray --

22 QUESTION: For media to accompany, but not for  
23 private individuals. As far as you know, it is not and  
24 has never been common practice for police officers to  
25 bring in non-media people to show that -- that everything

1 is open and above board.

2 MR. CORDRAY: I -- I can't speak to that one way  
3 or another, Your Honor.

4 QUESTION: Can you answer my question? As far  
5 as you know, there was no such practice.

6 MR. CORDRAY: I believe that's right, but I  
7 wouldn't want to concede that --

8 QUESTION: Do you know -- do you know of any --  
9 do you know of any such practice?

10 MR. CORDRAY: I know that there are public ride-  
11 along programs. I'm sure they have different components.  
12 I don't know for certain that they contemplate entry into  
13 a home, but they do contemplate the public attending or  
14 accompanying officers.

15 QUESTION: May I -- may I ask you specifically  
16 about the law school program? There are law schools that  
17 do have their students ride along. Indeed, some of them  
18 have had professors who have written books about their  
19 ride-along experiences. Are there controls on that kind  
20 of ride-along to avoid the unnecessary intrusion on  
21 people's privacy?

22 MR. CORDRAY: I'm certain that they are, just as  
23 a matter of common sense practice and to avoid potential  
24 lawsuits and the like. I can't at firsthand speak to law  
25 school programs around the country, but I do believe that

1 they are fairly common.

2 QUESTION: In the -- in the Montana case, there  
3 was no entry into the house by virtue of the warrant.  
4 Isn't that true?

5 MR. CORDRAY: That's correct. There was no  
6 execution of the warrant in the home. The only entry into  
7 the home was accompanying Mr. Berger --

8 QUESTION: By consent?

9 MR. CORDRAY: By consent to explain the  
10 situation to his wife so there wouldn't be a  
11 misunderstanding.

12 QUESTION: But there was an entry into sheds and  
13 outbuildings, as I understand it.

14 MR. CORDRAY: Correct.

15 QUESTION: With regard to those, does the  
16 evidence disclose whether those buildings had open doors  
17 or anything like that or -- or what do we know about those  
18 sheds and outbuildings?

19 MR. CORDRAY: The search in the Hanlon case was  
20 executed in two different places, in open areas on the  
21 ranch, which I think fairly clearly would fall within the  
22 open fields doctrine, although it is private property, and  
23 at the same time in outbuildings. And the record, as --  
24 as far as I can tell, does not disclose for certain one  
25 way or the other whether they were within the curtilage or

1 not. But they may well be. I think there is a  
2 constitutional argument that they are open fields --

3 QUESTION: And that issue wasn't resolved below  
4 because it was a -- pretty much a per se rule applied, I  
5 take it.

6 MR. CORDRAY: I think that's right, both ways,  
7 by the district court in our favor and by the court of  
8 appeals --

9 QUESTION: Well, do you understand the open --

10 QUESTION: You don't really know whether open -  
11 - whether sheds, closed sheds at least, that are outside  
12 the curtilage come within the open fields doctrine. We  
13 haven't -- we haven't held one way or another on that  
14 point, have we?

15 MR. CORDRAY: I don't believe the Court has  
16 specified all the details of that, no.

17 QUESTION: But you don't understand the -- or  
18 maybe you do -- the open fields doctrine to permit a  
19 police officer to stay on an open field if the owner tells  
20 him to leave, do you?

21 MR. CORDRAY: As I understand the open fields  
22 doctrine, it would be because the Court has said that  
23 searches of open fields, even though they may be private  
24 property, do not implicate the Fourth Amendment. And,  
25 therefore, I -- I think that that's correct, although

1 again I don't believe the Court specifically addressed  
2 that.

3 QUESTION: But in the -- in the Oliver case, the  
4 Court was referring to the fact that officers happened to  
5 be in an open area and they were concerned with viewing  
6 something in an open field from a highway. But in -- in  
7 -- in this case, the police and the accompanying news  
8 people demanded, in effect, entrance and had the right to  
9 enter under a warrant --

10 MR. CORDRAY: That's correct.

11 QUESTION: -- and -- and threatened the owner  
12 with -- with imprisonment if -- if he obstructed their  
13 search. So, it seems to me that's quite different. I --  
14 I'm not sure the open fields doctrine would apply if you  
15 told the police officer to leave.

16 MR. CORDRAY: I think it's an open factual issue  
17 in this case, and I think what's germane to the issue that  
18 the Court has framed is that there was no execution of a  
19 warrant in a home in that case. And if this Court is  
20 particularly concerned with execution of a warrant in a  
21 home, that would not be implicated on the facts of the  
22 Hanlon case.

23 QUESTION: Well, supposing there's a policeman  
24 that's standing out on your front lawn, and you tell him,  
25 get off, and he says, no, I want to look in your window.



1 (Laughter.)

2 QUESTION: I mean, is that a trespass violation  
3 or a Fourth Amendment violation or what?

4 MR. CORDRAY: As here, the police are operating  
5 pursuant to a valid warrant, and it's been determined in  
6 both cases that they were properly executing the warrant.  
7 In a -- in a situation where the police are looking  
8 through a window, they may or may not have right to be at  
9 the vantage point they're at --

10 QUESTION: I think that bears on the open --  
11 open fields question.

12 MR. CORDRAY: It may. It may, and again I think  
13 that's an open factual issue in this --

14 QUESTION: Why do you need a warrant under the  
15 open fields doctrine?

16 MR. CORDRAY: I think you would not need a  
17 warrant, although perhaps in an abundance of caution to  
18 avoid any problems that might arise in later litigation or  
19 motion to suppress, certainly the better practice would be  
20 for the police to obtain a warrant, as they did here.

21 But in any event, to return to the --

22 QUESTION: Of course, just because the police  
23 can -- can play around in open fields, it doesn't mean  
24 that they can bring along anybody else they want to play  
25 in the open fields.

1 MR. CORDRAY: No, but certainly --

2 QUESTION: So, I mean, even if you resolve the  
3 open field question, there's still the further question of  
4 whether whatever open fields immunity from the Fourth  
5 Amendment the officers have extends to the -- the officers  
6 bringing along somebody else as well I assume.

7 MR. CORDRAY: I think that's correct, but that's  
8 why I thought it was important to emphasize the Court  
9 should not erect a per se rule against media accompaniment  
10 in all circumstances where a warrant is involved. In many  
11 instances, a warrant would be executed in such a way as to  
12 not even implicate Fourth Amendment interests. It might  
13 be executed in a public place. It might be executed in an  
14 area of open fields. Certainly the nature of the  
15 intrusion is much reduced in that setting, and -- and  
16 across the board, across the spectrum of different  
17 possible settings, each of them somewhat fact-specific,  
18 each of them raising maybe a greater or lesser extent of  
19 intrusion, those are factors that would be relevant in  
20 trying to draw this balance.

21 QUESTION: But as you put it, we shouldn't adopt  
22 a rule regarding media accompaniment.

23 MR. CORDRAY: Correct.

24 QUESTION: So, it is -- it is part of your case  
25 that -- that -- that there's a -- a different rule for

1 media, and that -- and that it's -- it's better to bring  
2 media along than to bring your sister-in-law.

3 MR. CORDRAY: I think it's -- it's more -- more  
4 beneficial in certain respects and it's more of a concern  
5 in certain respects. The Court --

6 QUESTION: Personally I'd rather have your  
7 sister-in-law along than --

8 MR. CORDRAY: Perhaps. The Court framed the  
9 issue in terms of media, but in general the Court -- the  
10 Court has -- has -- has never addressed the issue of any  
11 third parties coming along.

12 We don't contend that the media have a special,  
13 privileged constitutional right of access. They do not  
14 under this Court's case, but they as surrogate for the  
15 public could potentially be -- they should not be  
16 discriminated against. It's not as though the media  
17 should be the one individual not permitted to do what  
18 private individuals might otherwise be permitted to do --  
19

20 QUESTION: It's fairly common, isn't it, Mr.  
21 Cordray, to bring along the claimant to stolen property  
22 with the search so that he -- it's his property presumably  
23 if they're successful, and he should identify it?

24 MR. CORDRAY: Yes, Your Honor. There are a  
25 variety of practices where third parties are permitted to

1 accompany police and have been thought to be without  
2 problematic discussion reasonable under the Fourth  
3 Amendment.

4 QUESTION: But those are to aid in the specific  
5 search, not for some more systemic purpose of criminal  
6 administration.

7 MR. CORDRAY: In many cases, that's true, but  
8 there are also a number of instances in which that really  
9 can't be maintained. For example, in the Hanlon case, the  
10 assistant prosecutor, Kris McLean, accompanied the  
11 officers. It wasn't contended that he was helping to  
12 execute the particular search, but he was there serving  
13 the same objectives for which the officers had sought and  
14 obtained a search warrant in the first place to enforce  
15 the Federal wildlife laws. He was probably going to be  
16 prosecuting any charges that might be brought, and it was  
17 thought it would useful for him to attend and observe the  
18 execution of the warrant.

19 QUESTION: Well, wouldn't there be -- wouldn't  
20 there be some purpose too to take along someone who was a  
21 lawyer in case you run into some uncertain Fourth  
22 Amendment situation? Can you go ahead and break down this  
23 door or should you get a warrant or something like that?

24 MR. CORDRAY: I think that certainly be  
25 reasonable, although it's not contended that that was the

1 case here in this case.

2 But again, I think what's important is under  
3 Michigan v. Summers is that the Court needs to apply a  
4 reasonableness standard. I think that's agreed among the  
5 parties here. The specific requirements of the Fourth  
6 Amendment don't speak directly to this other than the  
7 reasonableness clause, and it's a balance between the  
8 nature of the intrusion on the one hand and the objectives  
9 served by the practice on the other hand.

10 QUESTION: Well, does it then all boil down to  
11 the value that the media provide to law enforcement when  
12 they go into the house. Is -- is that the nub of the  
13 case?

14 MR. CORDRAY: I think that's an important  
15 factor.

16 QUESTION: That's what we have to value against  
17 the privacy intrusion.

18 MR. CORDRAY: I think that -- that is the one  
19 side of the balance in all of these cases. The other side  
20 of the balance may change. It may be of greater concern,  
21 of lesser concern in various circumstances, but I think  
22 that's correct, Your Honor. That would be the balance --

23

24 QUESTION: Do you say here that the value of  
25 having media coverage of this particular execution of a

1 search warrant outweighs the privacy interests of the  
2 ranchers who were searched?

3 MR. CORDRAY: Again, we think --

4 QUESTION: Whose property was searched.

5 MR. CORDRAY: We think in the Hanlon case that's  
6 -- that's correct, in particular because they were merely  
7 searching outbuildings and open areas. They were -- they  
8 were -- there was a search that did not involve criminal  
9 conduct that appeared to involve any --

10 QUESTION: Well, let's -- let's assume for the  
11 moment, since it hasn't been decided, that some of these  
12 outbuildings were within the curtilage and therefore the  
13 same rules would apply as -- as to the home itself. Now,  
14 how do you weigh that balance if it -- if it involves  
15 that? Let's say a search of the home.

16 MR. CORDRAY: I think that there the fact -- the  
17 fact of entering a residence is a -- is obviously an  
18 important consideration. It is -- it is a consideration  
19 that raises the nature of the intrusion and magnifies it.  
20 So, certainly that's a concern. On the other hand --

21 QUESTION: So, how -- how do we weigh the  
22 balance where maybe there is in some broad sense a value  
23 to having public information about it but, on the other  
24 hand, is a very weighty interest on the part of the  
25 homeowner to have privacy within the home?

1 MR. CORDRAY: Yes.

2 QUESTION: We have valued that very highly.

3 MR. CORDRAY: That's correct.

4 QUESTION: So, how do we weigh that balance in  
5 your view?

6 MR. CORDRAY: In our view, we would suggest that  
7 in any case where we're talking about execution of an  
8 arrest warrant, not involving a search that's going to be  
9 into private papers or personal effects, we can pretty  
10 much adopt a general rule --

11 QUESTION: But inside the home.

12 MR. CORDRAY: That's right. That execution of  
13 an arrest warrant is going to be generally reasonable to  
14 allow medic accompaniment because an arrest is a public  
15 event.

16 QUESTION: Well, but I -- I didn't pose arrest  
17 warrant. I posed -- which is involved in the other case  
18 -- a search warrant for items executed in the home or  
19 within the curtilage.

20 MR. CORDRAY: I think that it -- it's fairly  
21 clear that as we proceed along a spectrum here, a search  
22 warrant in the home is more problematic than an arrest  
23 warrant. I think it's more problematic than a search of  
24 outbuildings, certainly more problematic than a search of  
25 open fields. Yes, and that --

1 QUESTION: Mr. Cordray, could -- could I pursue  
2 the value to law enforcement that -- that having the media  
3 along is?

4 MR. CORDRAY: Yes.

5 QUESTION: I -- you say in assistance of law  
6 enforcement. I -- I assume the means that to assure that  
7 everything is open and above board, that they're not being  
8 brutal, that they're not exceeding the limits of their  
9 authority. Is that right?

10 MR. CORDRAY: That's certainly much of it. I  
11 think also there is the --

12 QUESTION: What is it beyond that other than PR  
13 which --

14 MR. CORDRAY: Well, the PR itself is very  
15 important. I mean, it certainly helps to deter criminal  
16 conduct for people around the country to know that the  
17 officers are aggressively pursuing crime. Criminals often  
18 think they're not going to be caught. If they know that  
19 the officers are aggressively pursuing crime, they may  
20 think twice before they --

21 QUESTION: Just photographing them going into  
22 the building saying these officers are, you know, going in  
23 and -- and they're going to do a search. Do you have to  
24 be there while they're opening dresser drawers?

25 MR. CORDRAY: No, not necessarily. And again,



1 that's -- that has to do with the nature of the intrusion.  
2 But standing alone --

3 QUESTION: It seems to me the principal value  
4 you're appealing to is the value of making sure that --  
5 that law enforcement is conducted fairly and properly.  
6 Nobody has a greater interest in that than the person  
7 being searched. So, why don't you just ask the person,  
8 before you bring in the television news crew, you know,  
9 we're going to do you a favor. To make sure that this --

10

11 (Laughter.)

12 QUESTION: -- that this search is going to be  
13 absolutely fair, we have a television crew along. Would  
14 you like them to come in to be sure that this search will  
15 be very fair?

16 MR. CORDRAY: They could do that, and certainly  
17 they could --

18 QUESTION: It seems to me they ought to if  
19 that's the principal value of --

20 MR. CORDRAY: Perhaps, but -- but it's not a  
21 silly -- it's not a silly point. It shouldn't merely  
22 evoke laughter. I mean, it's not as though police know  
23 ahead of time that they're going to commit an abuse or  
24 they're not going to commit an abuse. They -- they deal  
25 with unforeseen circumstances, and having the third party

1 present may well deter abuse.

2 QUESTION: My -- my point is why don't you ask  
3 the homeowner if he wants that protection? Why force it  
4 upon him when he'd rather -- he trusts the police force  
5 and values his privacy more.

6 MR. CORDRAY: They certainly could do that. In  
7 -- in various cases perhaps they should do that. Whether  
8 they are obliged to do that in all cases, I guess is part  
9 of the calculus --

10 QUESTION: Well, I -- I suppose too that some  
11 sort of photographic presence might uphold the validity of  
12 the search against complaints by the -- the person who's  
13 being searched.

14 MR. CORDRAY: In fact, that was true in the  
15 Hanlon case here.

16 QUESTION: Are there no photographers other than  
17 those in the media? Couldn't you bring along -- I thought  
18 there were police photographers.

19 MR. CORDRAY: There are police photographers.  
20 They may or may not be available. It might be within the  
21 discretion of the officer to decide, gee, we have a  
22 photographer here. Gee, this means that might be the best  
23 way to execute it on the spot. Typically those decisions  
24 have been left to the discretion of officials who must  
25 implement these policy --

1 QUESTION: I take it you're not arguing here  
2 that the photographers were brought along because there  
3 was no available police photographer.

4 MR. CORDRAY: We don't know that one way or  
5 another. Again, as a matter of objective reasonableness,  
6 the fact that their photographs or videotape could be  
7 used, as in Hanlon they were used to resolve the consent  
8 issue, may be again a part of the calculus.

9 QUESTION: Mr. Cordray, as I'm listening to your  
10 argument and you keep saying no per se rules and it  
11 depends on what the particular facts and circumstances  
12 are, I have a certain deja vu feeling, and it relates to  
13 the old days when this Court was trying to draw a luggage  
14 line, telling the police they couldn't search the -- the  
15 green suitcase but they could search the paper bag, and  
16 then finally they decided in Ross, no. The police have to  
17 know going in what they can do and what they can't do.  
18 And your argument seems to me to be going back to the time  
19 when, well, we'll decide after the fact and there will be  
20 no rules going in.

21 Isn't there some real importance to being able  
22 to tell the police in advance what's okay and what isn't?

23 MR. CORDRAY: Yes, Your Honor, I think there is.  
24 And as I say, this Court has never addressed this whole  
25 general area who can come with police, and so some

1 guidance will be useful in this case. But to draw bright  
2 lines at the outset in a -- in a reasonableness balancing  
3 area might or might not be prudent.

4 Here I think there are certain bright lines that  
5 could be drawn. Anytime an arrest warrant is being  
6 executed, I think in general it will be objectively  
7 reasonable to permit media to accompany and observe. If a  
8 search warrant is being executed not in a residence, in an  
9 outer area, I think per se that probably will be  
10 acceptable to allow accompaniment. If you have a search  
11 warrant in a home that's going to involve rummaging  
12 through private papers and personal effects, perhaps you  
13 could -- you could determine as a general matter that  
14 might well be unreasonable. I think there are some areas  
15 where clearly it would be unreasonable. Any search  
16 involving physical invasion of the body, body cavity  
17 search or the like, just as the number of officers present  
18 in such a search is always minimized, I think any third  
19 party being present would be per se unreasonable.

20 QUESTION: Now, we also have an issue I guess in  
21 the Hanlon case concerning audiotapes that were made that  
22 -- while the officers and the media were in the house.

23 MR. CORDRAY: Correct. There was an audiotape  
24 made of what discussion occurred as Mr. Berger and the  
25 officer were speaking to Mrs. Berger. That's

1 unproblematic I think --

2 QUESTION: Should we make any distinction  
3 between audiotapes and videotapes?

4 MR. CORDRAY: I don't think so, Your Honor, but  
5 certainly audiotapes have been directly addressed by this  
6 Court in terms of the cases of people wearing a wire,  
7 White v. United States, Lopez, more recently Caceres, in  
8 which the Court has ultimately found there's not a  
9 constitutional problem when an individual is speaking to a  
10 government agent, even if they don't know that person to  
11 be a government agent.

12 Here by extension, they knew full well they were  
13 speaking to Federal agents. I don't think there could be  
14 a reasonable expectation of privacy in those  
15 conversations.

16 As to whether the --

17 QUESTION: Your argument so far lays the  
18 groundwork for you to talk about the second question which  
19 is whether or not these principles were clearly  
20 established. Perhaps you could address that.

21 MR. CORDRAY: Sure. Thank you, Your Honor.

22 The Mitchell v. Forsyth case on qualified  
23 immunity is on all fours with this case. There there was  
24 an allegation that the Fourth Amendment was violated.  
25 It's a wiretapping case. At the time of the actions,

1 there were only two Federal decisions, both unpublished,  
2 which had upheld the legality of such conduct. It was a  
3 fairly common practice, had been occurring episodically  
4 for 25 years.

5 QUESTION: Well, the Fourth Amendment doesn't  
6 talk specifically about wiretapping, but it certainly  
7 talks about houses and personal effects.

8 MR. CORDRAY: That's right. And eventually in  
9 the Keith case, this Court ultimately resolved that such  
10 conduct was unconstitutional, but the decisions that held  
11 that postdated the events in question in the Mitchell  
12 case. All of that is on all fours with this case here.  
13 The only decisions at the time here had indicated that  
14 such conduct was --

15 QUESTION: Well, isn't there a distinction  
16 between going into somebody's home and -- and wiretapping?  
17 I mean, going into people's homes has been something  
18 considered questionable under the common law going -- for  
19 many, many years.

20 MR. CORDRAY: That's correct, Your Honor. There  
21 is -- there is legal precedent that certainly makes that a  
22 harder issue in this case, and depending on how the Court  
23 rules, it may become clear now that -- that this practice  
24 is unacceptable.

25 QUESTION: Do you think we can charge the

1 officers with knowledge of Semayne's Case or the principle  
2 in Semayne's Case?

3 MR. CORDRAY: Yes, although we've -- we've  
4 indicated that Semayne's Case is quite distinguishable in  
5 our brief. In Semayne's Case it was service. That's the  
6 British case involving service of civil process in a home,  
7 and the court itself distinguished between civil process  
8 and criminal process, which it said the public safety  
9 supersedes the private. Blackstone echoed that and that's  
10 generally been this Court's approach, for example, and  
11 Payton recognized that an arrest warrant permits an  
12 intrusion into the home.

13 So, again, I think to extrapolate from older,  
14 especially British cases and early cases general  
15 principles to say that officers must have known how those  
16 apply in these specific instances would be -- would be  
17 harsh, particularly given that the courts that had  
18 attempted to apply such principles had found that this  
19 conduct was -- was constitutional. And the only decisions  
20 that have ever been cited to the contrary postdated these  
21 events.

22 Moreover, if this were an unusual practice, if  
23 it had not been engaged in except very occasionally around  
24 the country, that might explain the lack of this --

25 QUESTION: They might have questioned how

1 frequently it's done. You rely heavily on the Marshals  
2 Service policy.

3 MR. CORDRAY: Not only that, Your Honor.

4 QUESTION: Well, you do rely on that heavily, do  
5 you not?

6 MR. CORDRAY: We do, but the Fletcher case --

7 QUESTION: Well, let me just ask you a question  
8 about the Marshals --

9 MR. CORDRAY: Yes, sir.

10 QUESTION: Can you point to me the part of the  
11 policy that makes it clear they could take people into the  
12 home? I didn't find that in what cited to me.

13 MR. CORDRAY: Page 7 of the joint appendix in  
14 the Wilson case contemplates that there may be occasion.  
15 It says, if the arrest is planned to take place inside a  
16 house or building, agree ahead of time when the camera can  
17 enter and who will get the signal. That isn't an express  
18 authorization in all circumstances to take media into a  
19 home, but it certainly contemplates that a -- a rule that  
20 would say you can never allow the camera and the media --

21  
22 QUESTION: Well, I thought the sheriff, the  
23 Montgomery County Sheriff, in his deposition testified  
24 that permitting civilians to enter a home during the  
25 execution of a warrant wasn't permitted there.



1 MR. CORDRAY: That was -- that was his view and  
2 that may be his policy. There are a variety of policies  
3 around the country. I think it's important --

4 QUESTION: Well, that might have been clearly  
5 established at least in Montgomery County.

6 MR. CORDRAY: Well, I -- I don't think so, given  
7 that -- given that the case law at the time did not  
8 clearly establish it, and judges since have -- have  
9 disagreed, you know. And this was a practice that was  
10 common. We point to the Fletcher case from the Florida  
11 Supreme Court which recognized this as a common practice  
12 at the common law as of 1972, and the Prah case on remand  
13 to trial court in Wisconsin found this to be a common  
14 practice.

15 QUESTION: Well, in Wilson v. Layne, the facts  
16 were -- were pretty extreme in terms of an invasion of  
17 privacy in the home. It occurred in the early hours of  
18 the morning when the couple were asleep and were not, you  
19 know, adequately dressed. I mean, it was an amazing  
20 invasion. And you think on that balance that we would not  
21 be concerned about the privacy interests in that situation  
22 simply because it was an arrest warrant?

23 MR. CORDRAY: I think certainly the Court would  
24 be concerned. I think the fact that it's an arrest  
25 warrant weighs in the balance.

1 QUESTION: But you think we should have a clear  
2 rule that in executing an arrest warrant, you can take  
3 outsiders in who aren't there to help with the execution  
4 of the arrest warrant?

5 MR. CORDRAY: I would tend to suggest a more  
6 fact-specific approach to these cases, but if the desire  
7 is to draw some bright lines, that may be one that could  
8 be.

9 If I could --

10 QUESTION: That might be a very easy clear line  
11 to draw.

12 MR. CORDRAY: It could be.

13 If I could reserve the remainder of my time for  
14 rebuttal.

15 QUESTION: Very well, Mr. Cordray.

16 Mr. Fletcher-Hill, we'll hear from you.

17 ORAL ARGUMENT OF LAWRENCE P. FLETCHER-HILL

18 ON BEHALF OF THE STATE RESPONDENTS IN NO. 98-83

19 MR. FLETCHER-HILL: Thank you, Mr. Chief  
20 Justice, and may it please the Court:

21 There are two fundamental facts that establish  
22 the qualified immunity of the three deputy sheriffs I  
23 represent.

24 The first of those is that the most able lawyer  
25 researching this issue in 1992 would have found no cases

1 from any court condemning the mere presence of media when  
2 a warrant is executed lawfully as a constitutional  
3 violation. The only cases then in existence, in fact,  
4 held to the contrary, that media presence at most was a  
5 tort under common law principles if -- if the media was  
6 brought inside a home.

7 The second point is that --

8 QUESTION: May I ask -- suppose it had been  
9 clearly established that it was a common law tort to bring  
10 the media into a home, but there had been no decision on  
11 interpreting section 1983 or the Fourteenth Amendment.  
12 Would you think under those -- under that assumption there  
13 would be qualified immunity?

14 MR. FLETCHER-HILL: No, Your Honor. I think it  
15 would still be an open question whether -- whether this  
16 Court would eventually incorporate those common law  
17 principles into the Fourth Amendment.

18 QUESTION: Well, assume that -- assume that we  
19 on the first time we -- we decide yes, it's a clear  
20 violation. The only issue we have to face is, should the  
21 officers have been aware that they shouldn't go in if  
22 their only restraint on going in was a well-established  
23 common law rule -- a common law tort rule.

24 MR. FLETCHER-HILL: No, because the -- the  
25 doctrine of qualified immunity would operate only as to

1 the constitutional principles. There may be other  
2 immunities for the officers concerning the common law, and  
3 in fact, one -- one could find the situation where the  
4 common law would -- would suggest to these officers that  
5 they should not do this. But as a matter of Fourth  
6 Amendment jurisprudence and the Bivens or 1983 action  
7 against the officers, I think the law would still not be  
8 clearly established as a matter of constitutional  
9 principle.

10 QUESTION: Don't you think it's a clearly  
11 established constitutional principle that it is  
12 unreasonable to commit a tort in -- in the course of the  
13 search? I mean, once you -- I mean, I think it's an open  
14 question of whether -- whether it was clear that this was  
15 a tort, but if it was a tort, I think the game is up.  
16 Surely you're not authorized to commit a tort in the  
17 course of a search.

18 MR. FLETCHER-HILL: No, Your Honor.

19 QUESTION: Wouldn't that make the search  
20 automatically unreasonable? Do you need a case that says  
21 that?

22 MR. FLETCHER-HILL: Let me give an -- an  
23 illustration. The technical issue of trespass may be such  
24 that in the absence of a warrant, something would clearly  
25 be a trespass. But if the officer is in the position

1 under Fourth Amendment jurisprudence of having authority  
2 to come into the house based on a warrant, then that  
3 potential superior authority of the officer would overcome  
4 the tort violation.

5 QUESTION: Well, supposing you -- you have --  
6 during a search or an arrest an officer commits what's  
7 later decided to have been an assault and battery. You -  
8 - you run up against the person in a way a court says  
9 there wasn't -- that wouldn't make it invalid under the  
10 Fourth Amendment, would it?

11 MR. FLETCHER-HILL: That's correct. You -- you  
12 would still have the issue under the Fourth Amendment, but  
13 whether that use of force, which might admittedly be -- be  
14 a battery at common law, is justified by the need to  
15 control, under Michigan v. Summers, the people who are in  
16 the -- the premises where the warrant is being executed.

17 QUESTION: There occurs to me an even better  
18 answer than that which is that the open fields doctrine  
19 explicitly says that you can commit a tort and not violate  
20 the Fourth Amendment.

21 MR. FLETCHER-HILL: Well, Your Honor, in many  
22 cases the -- the tort issue and the constitutional issue  
23 are going to overlap very closely. But in fact, this  
24 case, the Wilson case, provides a good illustration of  
25 where they don't overlap and where I think there's an

1 important distinction. The common law has arisen in the  
2 area of invasion of privacy to take care of situations of  
3 publication.

4 QUESTION: That's true. But would you take me  
5 through the officer's thinking, the thinking of the  
6 reasonable officer? He knows that the Fourth Amendment  
7 protects the security of a person in his house against an  
8 unreasonable search. He knows that.

9 MR. FLETCHER-HILL: That's correct.

10 QUESTION: He knows a police officer normally  
11 has to get a warrant -- normally -- before he can go into  
12 that house in order to protect that privacy. He has to  
13 have a very good reason to intrude on that privacy.

14 Now, a person knowing that -- why wouldn't he  
15 think, well, obviously you can't bring in a person who  
16 isn't even mentioned in the warrant, which person is going  
17 to broadcast personal things to 10 million people? I  
18 mean, if the lesser is forbidden, why isn't it obvious  
19 that the greater is?

20 And so, what I -- what I want you to do is to  
21 explain what's the thinking of a person who knows the  
22 lesser is forbidden, but nonetheless he thinks it's  
23 reasonable to do the greater.

24 MR. FLETCHER-HILL: Your Honor, the -- the  
25 thinking of the officers in this case is that, of course,

1 it is a serious proposition to enter someone's house  
2 without consent to make an arrest, but these officers had,  
3 matching that issue, valid arrest warrants which they knew  
4 gave them clear authority to enter the house.

5 QUESTION: It couldn't -- it couldn't be more  
6 important to broadcast this than it is to do the search in  
7 the first place. So, why wouldn't you at least have to  
8 have it in the warrant?

9 MR. FLETCHER-HILL: No. The -- Your Honor, I  
10 think the entry into the house is met by the presence of  
11 the warrant. The secondary --

12 QUESTION: Does the warrant refer to the -- they  
13 have a right under the warrant to bring in the press?  
14 Does it say anything about the press?

15 MR. FLETCHER-HILL: No. I think the issue of  
16 the --

17 QUESTION: In fact -- if I may interrupt --  
18 doesn't the warrant say just the contrary? Doesn't the  
19 warrant expressly limit itself to officials, to police  
20 officers of some sort?

21 MR. FLETCHER-HILL: Your Honor, that's correct.  
22 The warrant is directed to peace officers.

23 QUESTION: Okay. So, the terms of the warrant  
24 limit it to peace officers. How could an officer  
25 therefore reasonably believe that under the authority of

1 that warrant he could take in other people regardless of  
2 what the general law might be if the warrant were less  
3 exact in specifying those to -- to whom it gave authority?

4 MR. FLETCHER-HILL: These officers could believe  
5 that because at the time they operated, they were  
6 operating under the direction of the Marshals Service.  
7 The media presence was --

8 QUESTION: Well, but there was a Federal statute  
9 I believe in effect at the time. It may still be in  
10 effect as far as I know in 18 U.S. Code 3105, and it says,  
11 a search warrant may in all cases be served by any of the  
12 officers mentioned in its direction or by an officer  
13 authorized by law to serve such warrant, but by no other  
14 person, except in aid of the officer on his requiring it,  
15 he being present and acting in its execution.

16 Now, how do you read that statute as allowing  
17 private citizens or media ride-alongs?

18 MR. FLETCHER-HILL: If applicable at all, that  
19 statute would be applicable only to the Hanlon case which  
20 was a search warrant and not to the officers here who were  
21 executing an arrest warrant.

22 QUESTION: Well, I suppose it isn't the fact  
23 that the statute limits the number of people who can serve  
24 the warrant, doesn't in so many words say that nobody else  
25 can come along.



1           MR. FLETCHER-HILL: That's correct. And we have  
2 made no claim here that -- that the media are entitled to  
3 help serve the warrant. The officers must stay within the  
4 clear bounds of their authority under the warrant in  
5 serving it. The media there -- are there as mere  
6 observers.

7           QUESTION: Well, if -- if -- if we take the word  
8 serve to mean those who may in fact be present, then I  
9 take it you're -- you're out of luck. There's no basis  
10 for -- for arguing qualified immunity because there's no  
11 basis for -- for arguing any colorable authority.

12          MR. FLETCHER-HILL: Well, Your Honor, I think a  
13 great deal of authority has -- has come down to -- for the  
14 proposition that non-law enforcement personnel may be  
15 present during the service of both search warrants and  
16 arrest warrants without --

17          QUESTION: So, you're arguing that cases from -  
18 - from other States which -- which may have condoned this  
19 in the past override the terms of your warrant in deciding  
20 what it is reasonable for your officers to do. Is that  
21 correct?

22          MR. FLETCHER-HILL: No. The terms of this  
23 warrant only say that a -- a peace officer is to execute  
24 the warrant.

25          QUESTION: Right.

1 MR. FLETCHER-HILL: And peace officers in this  
2 case in fact did execute the warrant. The -- the media  
3 personnel did not do anything to execute the warrant.

4 QUESTION: Well, I -- I -- if -- if we -- if it  
5 is reasonable to read it as excluding others from  
6 participating in the execution of the warrant, then I take  
7 it by its terms your -- your argument would be excluded.

8 MR. FLETCHER-HILL: It would exclude on the  
9 substantive violation, but I don't think it would exclude  
10 the issue of clearly established right because it would  
11 still be the case that these officers armed with those  
12 warrants would be operating under a Marshals Service  
13 policy arranged at the direction of others whom they did  
14 not have a reason to question and regular on its face,  
15 that is, the media participation --

16 QUESTION: Their argument basically is the  
17 Marshals Service told us we could do it?

18 MR. FLETCHER-HILL: No. At the time that these  
19 officers acted, it was -- it was a common law enforcement  
20 practice to have ride-alongs. There was no contrary  
21 authority from any court --

22 QUESTION: Well, but when -- when you say ride-  
23 along, are you saying that it was a common law enforcement  
24 practice to bring the media into the house in the  
25 execution of an arrest warrant?

1 MR. FLETCHER-HILL: I -- I think the existence  
2 of a number of cases where exactly that happened --

3 QUESTION: Well, but in Wilson v. Layne, we know  
4 what the Montgomery County Sheriff said, and he said it  
5 wasn't the policy.

6 MR. FLETCHER-HILL: That's true, and I think if  
7 anything, those statements by Sheriff Kight illustrate the  
8 predicament of these officers because what Sheriff Kight  
9 also said was as to this operation, he understood his own  
10 officers to be operating under Marshals Service guidelines  
11 which did permit this activity, and he himself would not  
12 condemn the conduct of his own officers at -- at this time  
13 in 1992 because they were on loan to the Marshals Service  
14 and not operating under his own office's policies.

15 QUESTION: Well, were they on loan in the sense  
16 that they were required to follow orders from the Marshals  
17 Service? You spoke of their predicament, and I'm not sure  
18 that I know what the predicament is. Were they -- had  
19 they taken some kind of an oath to do what the Marshals  
20 Service told them to?

21 MR. FLETCHER-HILL: In fact, two of them were -  
22 - were deputized for purposes -- as deputy U.S. marshals  
23 for purposes of this operation.

24 QUESTION: So, they were subject to line  
25 authority.

1 MR. FLETCHER-HILL: The -- the authority under  
2 that program was directed from Mr. Layne, from Deputy U.S.  
3 Marshal Layne, as the supervisor in -- in this geographic  
4 area.

5 QUESTION: Thank you, Mr. Fletcher-Hill.

6 MR. FLETCHER-HILL: Thank you, Your Honor.

7 QUESTION: Mr. Rossbacher, we'll hear from you.  
8 Is it Rossbacher or bacher?

9 MR. ROSSBACHER: Rossbacher, Your Honor.

10 QUESTION: Mr. Rossbacher.

11 ORAL ARGUMENT OF HENRY H. ROSSBACHER

12 ON BEHALF OF THE RESPONDENTS IN NO. 97-1927

13 MR. ROSSBACHER: Mr. Chief Justice, and may it  
14 please the Court:

15 The searches and seizures involved in the Berger  
16 case violate the core values and the core holdings of this  
17 Court in relation to the Fourth Amendment in five  
18 important ways.

19 First, the warrant was used as a general  
20 warrant, bringing private persons onto private property to  
21 search and seize for their private purposes. The  
22 Revolution was fought, in part, to prohibit that.

23 Second, the conduct of the law enforcement  
24 officers in bringing the media, the private persons, on  
25 was not authorized by the warrant. Their presence was not

1 authorized. In fact, their presence which had been  
2 guaranteed by an Assistant U.S. Attorney signing a  
3 contract on behalf of the Government a week before the  
4 warrants were obtained was concealed from the magistrate.

5 QUESTION: Is it your position that if the  
6 warrant does not specifically authorize people other than  
7 peace officers to serve it that no such person can be  
8 brought along?

9 MR. ROSSBACHER: That is in part our position,  
10 Your Honor.

11 QUESTION: Even if it were, for instance, a  
12 search warrant in connection with a -- a theft ring and  
13 the owner of the property was brought along to identify  
14 the goods or some expert in fingerprinting was brought  
15 along or something like that?

16 MR. ROSSBACHER: We are not --

17 QUESTION: You say absolutely not.

18 MR. ROSSBACHER: No, Your Honor. We think that  
19 3105 -- I hadn't finished my answer. I beg my -- I beg  
20 your pardon. We believe 3105 -- as Sir Matthew Hale's  
21 Pleas to the Court in 1600 said, you can bring a private  
22 person along as long as he is under the authority of the  
23 law enforcement officer and is there solely to execute the  
24 warrant and for that function.

25 Here it is undisputed that that did not occur.

1 In fact, the media --

2 QUESTION: Well, but --

3 MR. ROSSBACHER: -- had signed a contract --

4 QUESTION: Just a minute, Mr. --

5 MR. ROSSBACHER: Yes, Your Honor.

6 QUESTION: In -- in answer to my question, you  
7 say that a person such as Justice O'Connor described could  
8 be brought along.

9 MR. ROSSBACHER: Yes, Your Honor.

10 QUESTION: And that it's not -- not necessary to  
11 authorize it in the warrant.

12 MR. ROSSBACHER: The warrant authorizes, as we  
13 understand it under section 3105 and the Fourth Amendment,  
14 law enforcement to bring along pursuant to that explicit  
15 authorization, which we believe is a constitutional  
16 authorization, people who are necessary.

17 QUESTION: Well, the warrant doesn't say  
18 anything about -- typically it doesn't. It authorizes  
19 certain police officers to -- to execute the warrant. And  
20 we're interested in exploring whether under your view  
21 other people brought in by the officers to help them  
22 identify goods, to take fingerprints, whatever it might  
23 be, to take photographs for them, for the police -- now,  
24 is that all right even though they are not explicitly  
25 named in the warrant and although the warrant doesn't talk

1 about such people?

2 MR. ROSSBACHER: Yes, Your Honor, because the  
3 warrant is issued in the context of section 3105 being --

4  
5 QUESTION: How about the attorney in the Hanlon  
6 case who went along?

7 MR. ROSSBACHER: We do not believe the attorney  
8 was authorized. The testimony below and in the record is  
9 unequivocal that he performed no role in the search, and  
10 in fact, the evidence obtained from CNN --

11 QUESTION: You say authorize, Mr. Rossbacher.  
12 What do you mean by the word authorize? Do you mean  
13 permitted under the Fourth Amendment or specifically  
14 authorized in some other way?

15 MR. ROSSBACHER: Either. Both, Your Honor. In  
16 fact, he was a stranger to the performance of the warrant.  
17 He was there to give a press conference, according to the  
18 materials we obtained from CNN, for making a TV show. He  
19 was not there to perform any law enforcement function  
20 related to the service and execution of the warrant.

21 QUESTION: But if he had been there to perform a  
22 law enforcement function, it would have been all right?

23 MR. ROSSBACHER: If he had been designated as  
24 necessary by the executing agent under 3105 --

25 QUESTION: Well, now, where -- where does all

1 that come from? You say designated. That's all under  
2 3105?

3 MR. ROSSBACHER: Yes, Your Honor. And under the  
4 unanimous cases that we've cited in our brief construing  
5 section 3105 from the circuits, Schwimmer, Clouston, all  
6 of these, the 3105 authorizes the executing agent to bring  
7 along a private person who is necessary, provided they are  
8 necessary and provided their activities are confined to  
9 execution of the warrant.

10 QUESTION: What about the law students in -- in  
11 the clinic, in the law school clinic, as part of their  
12 educational program are riding along with the police,  
13 going in with the police wherever they go?

14 MR. ROSSBACHER: I'm not aware, Your Honor, that  
15 they do go in with police wherever they go. We do not  
16 believe that people who are there just to observe and not  
17 performing an essential task --

18 QUESTION: Well, what -- what can in your -- in  
19 your view, consistent with the Fourth Amendment, what can  
20 the academic, the student, do in the way of a ride-along?  
21 What would -- what would the limits be?

22 MR. ROSSBACHER: They cannot enter pursuant to a  
23 search warrant or an arrest warrant into private property  
24 where the warrant is necessary. The authority of the  
25 warrant -- or the specific police power of the law



1 enforcement officer is necessary to enter the property.

2 QUESTION: I'm giving you an example of a person  
3 who isn't there to identify anything. He's not to aid the  
4 police. He's there to be educated, to observe, and to  
5 advance his own education.

6 MR. ROSSBACHER: We believe that's --

7 QUESTION: And so, I'd like to know -- he's in  
8 the squad car, such a person. Can he ever leave the car,  
9 or he's just waiting for the police as they go in and out  
10 to search, to seize?

11 MR. ROSSBACHER: Presumably he can leave the  
12 car. He cannot enter private property pursuant to the  
13 authority given to the police by the warrant.

14 QUESTION: Just a slight variation on Justice  
15 Ginsburg's hypothetical. Suppose -- just assume this is  
16 right, but the -- the optimum number of police for a  
17 search is -- of a house is five. But they bring along two  
18 police trainees, and they say, now, you just watch. Is  
19 that permitted?

20 MR. ROSSBACHER: Not if they're just watching,  
21 Your Honor. If they are there to execute the warrant and  
22 it --

23 QUESTION: No, they're not there -- they're  
24 there just for training purposes.

25 MR. ROSSBACHER: Then it is our view --

1 QUESTION: So, the police have no way to train  
2 their -- train their new recruits, their -- their rookies.

3 MR. ROSSBACHER: Not on private property, Your  
4 Honor, not in violation of the privacy rights and the core  
5 values protected by the Fourth Amendment.

6 QUESTION: Now, you say private property. How  
7 about the entry onto the ranch lands in Hanlon?

8 MR. ROSSBACHER: Your Honor, there was no --

9 QUESTION: Armed with a warrant. Now, is there  
10 any violation of the Fourth Amendment by virtue of  
11 strangers to the execution of the warrant accompanying the  
12 officers on the open lands in -- in Hanlon?

13 MR. ROSSBACHER: We believe so, Your Honor.

14 QUESTION: And what do you rely on for that?  
15 Because there -- we have cases dealing with a so-called  
16 open fields exception.

17 MR. ROSSBACHER: I know you do, Your Honor. I  
18 don't think that that -- when you're in the open fields it  
19 is -- it is clearly established as to what can be done  
20 there. But what is clearly established is that no  
21 authority of the warrant can be used to justify private  
22 parties. What's happening here -- and I would like to  
23 correct a misstatement that I'll get to as to what was  
24 done with this warrant.

25 The warrant was represented to cover everything,

1 including the house. The press was brought along solely  
2 -- and they have said this -- solely on the authority of  
3 law enforcement officers to enter and, in essence, be  
4 immune from their -- the consequences of their conduct  
5 under the open fields doctrine. As a result, we believe  
6 that that's improper, and that does violate the Fourth  
7 Amendment.

8 QUESTION: Well, I think the balance may well be  
9 different within a home or within closed structures in the  
10 curtilage than it is in open areas where presumably  
11 anyone, the mailman or anybody else, can drive up to the  
12 ranch house but can't enter the house.

13 MR. ROSSBACHER: Your Honor, there is a problem  
14 with that and that is that in this case, CNN asserts that  
15 it has an absolute defense to charges against trespass,  
16 charges against any kind of tortious conduct because of  
17 the permission given by law enforcement to enter. Their  
18 -- their position is not that the First Amendment allowed  
19 them to do this.

20 QUESTION: But we don't have that question  
21 before us.

22 MR. ROSSBACHER: No, but it -- it is  
23 problematical in that what law enforcement is doing here  
24 is, in fact, facilitating a tort explicitly. They're  
25 attempting to immunize a tort. And we think that that's

1 inappropriate and improper and violates the Fourth  
2 Amendment.

3 In addition, it's not possible to argue that  
4 this was not clearly established. Section 3105 and the  
5 cases that interpret it have said clearly for years that  
6 in fact law enforcement officers are not free to bring  
7 strangers to the warrant on private property except for  
8 the purposes of 3105.

9 QUESTION: The -- the problem with that in your  
10 case is the open fields doctrine might mean that the rules  
11 here are not so well established.

12 MR. ROSSBACHER: Your Honor, let us look --

13 QUESTION: It's a murky doctrine.

14 MR. ROSSBACHER: But let us look at what  
15 happened here. First, they entered the house pursuant to  
16 the claim that the warrant covered the house. That was  
17 what triggered the entry. There was no consent. The  
18 officers have testified there was no consent.

19 QUESTION: The Ninth Circuit --

20 QUESTION: Well, the lower courts have decide -  
21 - the Ninth Circuit said there was. And we're not going  
22 to --

23 QUESTION: We -- we don't reevaluate those  
24 things here.

25 MR. ROSSBACHER: There was no factual finding of

1 consent. It was not litigated below in the district --

2 QUESTION: The court of appeals said there was  
3 consent. So, take it -- take it from us --

4 MR. ROSSBACHER: I understand.

5 QUESTION: -- we're not interested.

6 MR. ROSSBACHER: Even if there was consent, the  
7 position is that they could not bring in the press with a  
8 microphone to seize conversations protected by Silverman  
9 and these cases and Katz in the house, which is what was  
10 done. It was done on 9 or 10 separate occasions. They  
11 taped solely -- law enforcement did not tape. The tapes  
12 were not made available to law enforcement. They were not  
13 in their possession, either video or oral tapes. They  
14 were, in fact, refused to be produced in the criminal  
15 trial, and the Government in fact even refused to admit  
16 there was a contract here.

17 QUESTION: Do you agree, Mr. Rossbacher, that  
18 the agents did not search when they were in -- when they  
19 were in the home?

20 MR. ROSSBACHER: No. They -- they entered the  
21 house under a claim that they had a right to search the  
22 house, and they in fact went through the house, and they  
23 recorded in the house. And we believe that is a search  
24 and a seizure.

25 QUESTION: Well, apart from -- apart from the

1 recording, is it your --

2 MR. ROSSBACHER: We believe that there --

3 QUESTION: -- contention that they -- that they  
4 conducted a search of the house?

5 MR. ROSSBACHER: Your Honor, they entered the  
6 house and observed what was there.

7 QUESTION: Well, I mean, I -- I have a lot of  
8 people come into my house. I don't think everybody who  
9 comes into my house is searching my house.

10 MR. ROSSBACHER: Your Honor, when they say that  
11 they're entering pursuant to a search warrant and they  
12 assert their absolute right to do that, when they enter -  
13 -

14 QUESTION: That -- that's out of the case as the  
15 Chief Justice has said. We assume --

16 MR. ROSSBACHER: I understand.

17 QUESTION: -- that they entered pursuant to  
18 consent. Having entered pursuant to consent, did they  
19 search?

20 MR. ROSSBACHER: We believe so, Your Honor, yes.

21 QUESTION: In -- in any respect other than  
22 making the recording?

23 MR. ROSSBACHER: They went through the rooms,  
24 yes.

25 QUESTION: I didn't ask whether they went

1 through the rooms. People who come into my house go  
2 through the rooms.

3 MR. ROSSBACHER: They did not tear the place  
4 apart, Your Honor. They went through the rooms --

5 QUESTION: They didn't search.

6 MR. ROSSBACHER: I don't believe, Your Honor,  
7 it's fair to say that when a law enforcement officer  
8 enters your house pursuant to a search warrant and a claim  
9 of right, that in fact he's not searching when he observes  
10 what he observes there and was free to testify about it.

11 QUESTION: If it was a search, does your  
12 position imply that -- suppose they had found something in  
13 the house -- that that evidence would have to be  
14 suppressed?

15 MR. ROSSBACHER: Absolutely, Your Honor, that in  
16 fact, under Bumpers and under Schneckloth, in fact, having  
17 asserted on the --

18 QUESTION: My assumption is that it would have  
19 been all warranted because they did have a warrant.

20 MR. ROSSBACHER: The warrant excluded --

21 QUESTION: Were it not for the media -- so, in  
22 other words, I'm giving you a situation where the police  
23 had just gone in on their own, executed the warrant, they  
24 would have -- they would have done everything according to  
25 law. That bringing the media along you say makes it

1 unlawful. And my question is, to what extent do you go -  
2 - does the media presence so taint the operation that what  
3 would otherwise have been lawfully seized becomes  
4 unlawfully seized?

5 MR. ROSSBACHER: If the media seized it, as they  
6 did with the recordings, we believe it is like the extra  
7 mikes installed in the house.

8 QUESTION: Not the media. The police -- the  
9 police did --

10 MR. ROSSBACHER: The police seized --

11 QUESTION: -- but they did it in the presence of  
12 the photographers who got it all live for CNN.

13 MR. ROSSBACHER: We think it makes the search  
14 unreasonable, but we're not sure that it triggers the  
15 exclusionary rule because in fact what would be found  
16 would be found properly by the officers. You're really  
17 talking more I believe with respect about the operation of  
18 the exclusionary rule.

19 QUESTION: So, you're -- so, you're now giving  
20 me a different answer than the one you gave me initially.  
21 You say --

22 MR. ROSSBACHER: I hope not, Your Honor.

23 QUESTION: Well, you told me I thought initially  
24 -- or maybe I didn't phrase the question so that you were  
25 able to answer it precisely. I asked you would the



1 exclusionary rule apply to evidence seized under a warrant  
2 but in the presence of the press and captured on -- on the  
3 press camera.

4 MR. ROSSBACHER: Captured on the press camera,  
5 the press tape we believe would be -- would be suppressed.  
6 And officer's testimony as to him finding the evidence or  
7 the evidence itself would not be because that would not be  
8 in excess of the warrant, as you phrased your question to  
9 me, as I understand it. But the seizure by the press,  
10 just as if the press wandered off by themselves into a  
11 shed and found evidence and seized it, would clearly be -  
12 -

13 QUESTION: But the evidence found by the police  
14 might fall within the inevitable discovery exception. I  
15 mean, they're going to go in with a warrant and find what  
16 they find, wouldn't it?

17 MR. ROSSBACHER: It might well, Your Honor. It  
18 might be a hard argument to make if in fact the press goes  
19 off and -- and films things and the police doesn't bother  
20 to look there and then later the tape shows it. I mean,  
21 that would be a situation --

22 QUESTION: Well, no. The assumption we were  
23 talking about was officers with a warrant finding the  
24 evidence and nonetheless having the presence of the media.

25 MR. ROSSBACHER: We don't think that that per se

1 triggers the exclusionary rule, but we think that it is a  
2 general warrant. We think it violates the Fourth  
3 Amendment, and we think that the private electronic --  
4 private electronic surveillance that took place here by  
5 the CNN is a separate search by a private party for their  
6 private purposes, the proceeds of which is not properly  
7 seized by the Government.

8 The cases of this Court involving the extent of  
9 a search, for example, Arizona v. Hicks and Andresen, we  
10 believe should inform the Court's consideration of what  
11 happened here. The Court has been eternally vigilant and  
12 jealous of confining law enforcement officers to what is  
13 explicitly authorized. For example, you can't turn over a  
14 \*Bang and Olafson box. In Andresen, very clear in note 11  
15 that the officers are required to minimize their conduct  
16 and minimize their intrusion.

17 Here, bringing the press, is absolutely designed  
18 to maximize the intrusion. It is contemplated and was  
19 contemplated here that the intrusion into privacy would be  
20 broadcast nationally and internationally. There could be  
21 no greater affront toward the right to privacy found by  
22 Winston and Soldal by this Court under the Fourth  
23 Amendment than to authorize worldwide broadcasts.

24 I would like to get to the argument of our  
25 opponents that in fact there were cases authorizing this

1 and this was somehow widespread. I would -- I would  
2 submit to you there is no record. The practice of  
3 bringing press people, or private persons for that matter,  
4 for private purposes into private homes was widespread.

5 QUESTION: Counsel, do you know whether there  
6 are instances in which warrants have expressly permitted  
7 the inclusion of media in --

8 MR. ROSSBACHER: I know of none, Your Honor.

9 QUESTION: -- in a search warrant?

10 MR. ROSSBACHER: And I think that -- that to  
11 bring in -- to expressly authorize private persons for  
12 their -- for their private purposes, even as has been held  
13 by the Bills I court in the circuit to be inappropriate  
14 and constitutionally questionable; in addition, in the  
15 Sanusi case, by Judge Weinstein.

16 But there is a whole line of cases, Clouston and  
17 Schwimmer under 3105, and another line of cases which says  
18 that merely because law enforcement can enter for an  
19 appropriate purpose, for example, the Warren case, Coast  
20 Guard can enter to inspect your ship, but they can't bring  
21 a drug agent to search for drugs. That's what happened  
22 here. Law enforcement entered to search for poisons.  
23 They brought along the press to search for -- for TV  
24 footage or film whatever they wanted. There's no --  
25 there's no limitation of the press coverage here to what

1 the officers were doing. It's -- it's a ex post facto  
2 rationale.

3 QUESTION: Your complaint is that they didn't  
4 actually concentrate on the -- what the officers were  
5 doing, but simply conducted their own search?

6 MR. ROSSBACHER: That is one of our complaints.  
7 And they were free to do so. In fact, some of the tapes  
8 show that they're out filming something and Mr. Berger  
9 says, what are you doing? This is when Mr. Berger gets  
10 threatened with going to jail. And Mr. Berger is directed  
11 away, is threatened with going to jail, and the press is  
12 out filming what they want within Mr. Berger's buildings.  
13 So, there was no confining of the press to some limited  
14 role of even covering law enforcement. This --

15 QUESTION: Well, you wouldn't -- you wouldn't  
16 say that would be okay either, would you?

17 MR. ROSSBACHER: No, I would not. But I don't  
18 want the impression to be given that this is somehow some  
19 kind of very controlled, restricted, disciplined operation  
20 going on.

21 QUESTION: But even if it were, your argument is  
22 exactly the same.

23 MR. ROSSBACHER: That's correct.

24 And our argument is the circuit court opinions  
25 which look at minimization, all of this Court's cases that

1 look with -- at minimization of the intrusion and  
2 confining to the purpose of the warrant itself, not  
3 general law enforcement purposes, mandate and were clearly  
4 established at the time all of this took place. The  
5 Second Circuit, the Fourth Circuit in Buonocore, and the  
6 Ninth Circuit all found that this was clearly established,  
7 and they also found that 3105 prohibited this conduct.  
8 3105 has been on the books a long time.

9 QUESTION: I'm not sure 3105 really speaks to  
10 the issue because it talks about search warrants and it  
11 tells who's authorized to serve the search warrant. It  
12 doesn't say anything about who may go along.

13 MR. ROSSBACHER: But the cases in Schwimmer --  
14 the -- the circuit court decisions in Schwimmer and  
15 Clouston and the other cases that interpret it that are  
16 present in our brief do talk about the fact that the only  
17 justification for being along is because you're complying  
18 with 3105.

19 QUESTION: Those cases aren't binding on us.

20 MR. ROSSBACHER: No, Your Honor, but they --

21 QUESTION: You can argue as to the clearly  
22 established point.

23 MR. ROSSBACHER: Well, that's what I am arguing  
24 and I also think the statute clearly established it  
25 itself. Under Harlow you say that, in fact, it's not just

1 constitutional rights but statutory rights. 3105 we  
2 believe is the constitutional rule, but it also created a  
3 clear rule not to be searched by strangers to the warrant.  
4 And so --

5 QUESTION: Well, not to be searched. But there  
6 -- you know, if you're saying that the media did their own  
7 search, you have a stronger case under 3105 than if the  
8 media simply accompanied.

9 MR. ROSSBACHER: Your Honor, if you look at the  
10 Wilson v. Layne facts, where the media takes photographs  
11 of these people, which it was free to publish, isn't that  
12 a search? Isn't that a seizure both of the images and a  
13 search? Because the only way --

14 QUESTION: Your time -- your time is expired,  
15 Mr. Rossbacher.

16 MR. ROSSBACHER: Thank you, Your Honor.

17 QUESTION: Thank you.

18 Mr. Willard, we'll hear from you.

19 ORAL ARGUMENT OF RICHARD K. WILLARD

20 ON BEHALF OF THE PETITIONERS IN NO. 98-83

21 MR. WILLARD: Mr. Chief Justice, and may it  
22 please the Court:

23 The constitutional issue in this case does not  
24 involve a balancing test. It involves a bright line rule  
25 drawn at the front door of the home. Our position is that

1 any trespass into the home by the Government is per se a  
2 violation of the Fourth Amendment. This authority, going  
3 back to the common law as old as Semayne's Case, makes it  
4 clear that when the police enter a home, they have the  
5 authority only to execute criminal process. They cannot  
6 enter the home in order to execute civil process, even  
7 though civil process may serve many important public  
8 purposes. It may be useful to have civil cases resolved  
9 and to have evidence, and yet, since Semayne's Case, it  
10 has been clear that the only authority the police have to  
11 enter the home is the authority to enter to execute  
12 criminal process.

13 QUESTION: Well, they say that's what they were  
14 there to do. They had a warrant and that's why they were  
15 there.

16 MR. WILLARD: That's correct.

17 QUESTION: That's the argument.

18 MR. WILLARD: That's correct, Your Honor. They  
19 had an arrest warrant. That arrest warrant gave them the  
20 implicit authority --

21 QUESTION: -- Wilson.

22 MR. WILLARD: Yes, Your Honor. I represent the  
23 plaintiffs in the Wilson case.

24 They had an arrest warrant which gave them the  
25 implicit authority to enter the home where they believed

1 that Dominic Wilson lived, for one purpose, and that was  
2 to effectuate his arrest.

3 Entry of the media was entirely ultra vires of  
4 the warrant. The warrant did not implicitly -- it  
5 certainly didn't explicitly -- didn't even implicitly  
6 authorize bringing along the media on a news gathering  
7 expedition. In this case, it's very clear because the  
8 defendants have conceded that news media were not there in  
9 order to assist in execution of the warrant.

10 There may be some difficult, gray-area cases  
11 involving, say, trainees or prosecutors where there's some  
12 argument that they're there to assist in execution of the  
13 warrant. I think --

14 QUESTION: Well, wouldn't it be true that the  
15 media would never be there to assist in execution of the  
16 warrant. It's hard to see how they could be of  
17 assistance.

18 MR. WILLARD: That's correct, Your Honor. The  
19 media, as far as we're concerned, is like the sister-in-  
20 law. They're not there under any colorable reason to  
21 assist in execution of the warrant. They're there for a  
22 different purpose.

23 QUESTION: The trainee hypothetical was designed  
24 to probe whether or not there are any systemic interests  
25 that the law enforcement has extending beyond the specific



1 search, and that would -- that was why --

2 MR. WILLARD: I -- I understand, Your Honor.  
3 And I think there may be situations where trainees would  
4 be authorized to assist in the event that they were needed  
5 in execution of a warrant. If the violence erupted, they  
6 might be there in order to help out. Similarly,  
7 prosecutors might be able to provide legal advice.

8 QUESTION: I mean, for trainees, don't they  
9 build, you know, facilities to train trainees? I know  
10 they do it for firearms. They don't take them along to  
11 just, you know, on the job training. They --

12 (Laughter.)

13 QUESTION: Why can't they do the same thing for  
14 searches? I assume they could --

15 MR. WILLARD: I think they can, Your Honor, but  
16 the fact that someone may be designated a trainee, if  
17 they're authorized to assist in execution of the warrant,  
18 even though they may be there primarily to observe, we  
19 don't think that would trigger this -- this bright line  
20 rule.

21 QUESTION: Could they -- the -- I'll assume with  
22 -- I assume you're right. Assume for the sake of  
23 argument. Assume too that it's odd that the Fourth  
24 Amendment, which puts all these protections around a  
25 smaller invasion of privacy, wouldn't fairly clearly

1 prohibit a much bigger one with less purpose. Now, still  
2 -- I'm assuming that. Still, a policeman might have read  
3 some cases and thought I could bring along -- you know,  
4 assuming he knows all the statutes and cases -- I can  
5 bring someone along to help me. All right? In aid of.  
6 And now he thinks, well, this is in aid of because of the  
7 publicity, because of the law enforcement need for public  
8 relations, et cetera, et cetera.

9 Now, wrong though he may be, is that enough to  
10 grant him qualified immunity in the absence of cases going  
11 the other way? I'd like you to focus right on that  
12 because I find that difficult.

13 MR. WILLARD: I understand, Your Honor. If --  
14 if the factual circumstances showed that he legitimately  
15 believed the people being brought in were there in aid of  
16 execution of the warrant --

17 QUESTION: What he thinks is what we know he  
18 thinks. He thinks I have a policy here. The policy is  
19 further a U.S. Marshals Service policy. It's a general  
20 help. It helps build support for law enforcement in the  
21 community, all the things you've heard. And he says, I -  
22 - I think this word in aid of, which I've seen in the --  
23 which he hasn't, but -- but the words in aid of deserve a  
24 -- constitutionally a broad interpretation. Now, so he's  
25 thinking that. Is -- is -- now, what's -- is he -- that's

1 what I want you to focus on. Why isn't that enough to get  
2 him over the -- the hurdle --

3 MR. WILLARD: Well --

4 QUESTION: -- of the need for clear  
5 establishment of the principle?

6 MR. WILLARD: Your Honor, well, in the first  
7 place, factually here the officers testified that's not  
8 why they brought the police along. They testified they  
9 were not there to aid in any particular law enforcement  
10 mission. All of this is a post hoc rationalization of  
11 counsel, and so as a factual matter, the predicate is not  
12 supported in the record here.

13 Even if it were, we would not concede that that  
14 would be a -- a reasonable interpretation of the law.  
15 There is no court that had held explicitly that it was  
16 okay to bring in the media and that this was -- satisfied  
17 the Fourth Amendment's requirements. The only cases that  
18 have been cited here -- there were only three cited. Two  
19 of them, unpublished district court cases, were decided on  
20 the basis to the right to privacy. They cited cases like  
21 abortion in -- in terms of whether there was an invasion  
22 of privacy. They didn't analyze the Fourth Amendment.

23 QUESTION: Is that the Moncrief and Higbee  
24 cases?

25 MR. WILLARD: Yes, Your Honor. That was the

1 Moncrief and Higbee --

2 QUESTION: Does the fact that they didn't even  
3 mention the Fourth Amendment help you or hurt you?

4 MR. WILLARD: Well, it may be a -- it may be a  
5 criticism of the lawyers in those cases for not raising  
6 it, but it doesn't show that the court squarely considered  
7 and decided the issue against us.

8 QUESTION: Do you want to add anything in  
9 respect to the common sense bit? I mean, I'm willing to  
10 assume there's no case that says anything explicitly one  
11 way or the other here. It's -- without any cases at all,  
12 I'll say a person ought to know you don't have a greater  
13 intrusion of -- but that same person, since we're going on  
14 common sense, might think he could bring a long a person  
15 in aid of. So, I'm -- I'm focusing you on what I call the  
16 common sense of the situation rather than --

17 QUESTION: And add to the mix the existence of a  
18 U.S. Marshals Service policy that says it's okay. So, add  
19 to that mix and then what is the --

20 MR. WILLARD: Well, Your Honor, I guess we don't  
21 agree the U.S. Marshals Service policy says it's okay.  
22 Our position is -- the Court can read the policy. It's in  
23 the joint appendix -- is that it's agnostic on that  
24 question, whereas the Montgomery County Sheriff's policy  
25 was quite clear that it wasn't allowed. So, the policies

1 here: one was agnostic; the other one said don't do it.  
2 So, in this case the officers had policies that tilted  
3 against doing it, not in favor of it.

4 Even if they did, though, our position is this  
5 nebulous assistance to the law enforcement mission of  
6 deterring crime is not the kind of assistance that the  
7 Constitution permits implicit to a warrant.

8 QUESTION: Mr. Willard, what about the law  
9 professor and her students?

10 MR. WILLARD: I understand, Your Honor. I was  
11 hoping to get a chance to answer that. I think if the law  
12 students have been authorized to provide legal advice to  
13 the police or to assist in prosecuting --

14 QUESTION: They're going along simply as a  
15 learning experience. They're observing.

16 MR. WILLARD: If that's all, then they wouldn't  
17 be allowed to do it. But I know there are many programs  
18 where law students serve as prosecutors under special  
19 provisions or as -- or might be able to provide legal  
20 advice on constitutional law to the police. In that case  
21 it would be like a regular prosecutor who in our view  
22 normally would be allowed to go in, the theory that they  
23 could advise the police on legal issues that would come  
24 up, and that would relate to the purpose of actually  
25 executing the warrant. But our position is if it's this

1 broad, nebulous purpose of educating the public, that that  
2 is not permitted.

3 And that pretty clearly would not have been  
4 permitted in 1603. In other words, this is not a new  
5 doctrine we're advocating. It would have been clear --

6 QUESTION: They didn't have any law students in  
7 1603.

8 (Laughter.)

9 MR. WILLARD: I understand, Your Honor, but it  
10 would have been -- it would have been repugnant to the  
11 common law in 1603 and to the Framers at the time the  
12 Fourth Amendment was adopted.

13 QUESTION: Yes, but it's hardly hypothetical as  
14 of the 1970's, 1980's, and 1990's. Law schools do have  
15 these programs.

16 MR. WILLARD: That's correct, Your Honor, and  
17 our position would be unless they're -- they're  
18 authorized, as they might be, to provide legal advice and  
19 assistance to the police officers, they wouldn't be  
20 allowed to go into private homes without the consent of  
21 the residents.

22 QUESTION: What Justice Breyer and Justice  
23 O'Connor are asking is also what -- what concerns me.  
24 We're concerned that there might have been an  
25 understanding in the law enforcement community that these

1 ride-alongs were okay. That might be wrong. But does --  
2 doesn't that indicate that the right is not clearly  
3 established?

4 MR. WILLARD: Your Honor, the record -- the  
5 record in this case does not establish that it was clearly  
6 understood in the law enforcement community it was okay.  
7 We cited some model guidelines of law enforcement adopted  
8 in 1974 in our brief which said that the media should not  
9 be permitted to go into private homes.

10 QUESTION: Well, but you're putting the burden  
11 on the wrong side. It doesn't have to be clearly  
12 established that it was okay. It's your burden to show  
13 that it was clearly established that it was not okay. And  
14 so, the so-called agnostic Justice Department guidelines  
15 cut against you. They are not neutral. It seems to me  
16 it's your burden to show that it was a clearly defined --  
17 it was understood to be a violation of the Constitution.

18 MR. WILLARD: Your Honor, I don't agree. In  
19 this case where there is an entry into the home without  
20 legal authority, the burden is on the Government to show  
21 the authority to enter the home, and that was a clearly  
22 established principle. And, therefore, if the police  
23 officers didn't know whether it was okay or not to bring  
24 the media into a private home, they violated clearly  
25 established law in doing so.

1           This is not an area that reasonable lawyers or  
2 judges could disagree about. This is an area where any  
3 reasonable judge, any reasonable lawyer would conclude  
4 that when there is no legal authority, entry into the home  
5 is one of the clearest violations of the Fourth Amendment  
6 that can possibly be imagined.

7           QUESTION: But the -- I think the difficulty I  
8 have with your argument is that I think you will concede  
9 -- I'm going to ask you in a second, but I think you will  
10 concede that there is -- that there was at no time  
11 relevant here a clearly established line that no one but  
12 law -- law enforcement authority in the strict, deputized,  
13 sworn sense of the word could come in to exercise -- in  
14 the exercise of the warrant.

15           And I'm going to ask you, don't you concede that  
16 had there been a reasonable need for a translator outside  
17 the department, a translator could be brought in? Do you  
18 concede that the owner of property could be brought in if  
19 it might be property that would be -- be difficult to  
20 identify? Would -- would you agree that those people who  
21 are not sworn law enforcement officers could come in in -  
22 - at least in aid of the execution of the warrant?

23           MR. WILLARD: Yes, Your Honor, and there were  
24 cases establishing that that was appropriate.

25           QUESTION: So, we -- we can't start then, even



1 if we accept your view of how the -- the privilege -- the  
2 burden on who has to establish what clearly -- even if we  
3 accept your view on that, we can't start with the simple  
4 bright line that there was a clearly established principle  
5 that nobody but sworn law -- law enforcement officers  
6 could go in. We've got a -- we've to a murkier line to  
7 begin with, haven't we?

8 MR. WILLARD: Well, Your Honor, I guess I don't  
9 agree that it's a murky line. The line is spelled out  
10 clearly in section 3105 with regard to search warrants,  
11 and it says officers or those in aid of the officers. In  
12 our view that's the clear line. Officers or those who are  
13 aiding the law -- the officers in executing the warrant.  
14 And here the -- the defendants have conceded quite clearly  
15 and repeatedly that the media were not there to assist in  
16 any way in execution of the warrant.

17 QUESTION: But the --

18 MR. WILLARD: They're not like the translator.  
19 They're not like the locksmith.

20 QUESTION: That -- that depends very much on an  
21 interpretation of section 35 which is -- 05 which is  
22 perfectly permissible, but by no means the only one, that  
23 when it says how such a warrant should be served, that  
24 defines the number of -- that defines the maximum number  
25 of people who may accompany the officer. And certainly

1 that isn't clear on the face of the statute to me.

2 MR. WILLARD: Well, Your Honor, but that's not  
3 all we rely upon. We also rely upon the common law which  
4 establishes quite clearly that when the media went into  
5 the Wilson's home, they were committing a trespass.

6 QUESTION: Well, they were committing a trespass  
7 unless they fall within this concept of being in aid. And  
8 your view of what is in aid is that, you know, a  
9 relatively specific level of generality. It's got to be  
10 in aid of -- in -- in relation to the specific details of  
11 the search, identifying the -- the stolen goods, being  
12 able to communicate with the people in the house, and so  
13 on.

14 But the -- the police's argument is that, well,  
15 it's still in aid, but at a somewhat higher level of  
16 generality. It's in aid because we live in a political  
17 world and we've got to show that we're doing our job in to  
18 -- for the voters to -- to give us an appropriation or for  
19 Congress to think it's getting its money's worth.

20 And -- and isn't that what creates the murk?  
21 The murk is involved in deciding just what is sufficiently  
22 in aid, how specific that aid must be. And isn't that the  
23 nub of the -- the problem on qualified immunity?

24 MR. WILLARD: Yes, Your Honor, that is the nub  
25 of the problem. We contend that it's a fairly bright

1 line, that is, in aid of execution of the warrant or not  
2 in aid of execution of the warrant. And if it's in aid of  
3 something other than executing a warrant, in aid of  
4 educating the public, in aid of promoting confidence in  
5 law enforcement or whatever, that that is not authorized.  
6 And I think the Framers of the Fourth Amendment would roll  
7 over in their graves if they thought that the media could  
8 be brought into private homes by the police, not to assist  
9 the police in executing a warrant, but to help broadcast  
10 to the public at large what they saw inside a private  
11 home.

12 QUESTION: I'm still wondering about your answer  
13 to Justice Scalia. As -- as I understand your -- your  
14 construct, you have to show that there's a general rule  
15 that you cannot enter the house. Given, and -- and we'll  
16 -- we'll assume that that's easy to establish.

17 Second, you say that it's up to the police to  
18 establish that there is an exception. Why isn't it up to  
19 you to establish that there is no exception?

20 MR. WILLARD: Well, Your Honor, going all the  
21 way back to the Entick case, which we cite in our brief,  
22 where Lord Camden explained that when you're entering into  
23 the home because of the high degree of protection even at  
24 the common law the home had, that it's not enough to have  
25 the silence of the books. His position there is the

1 silence of the books speaks against the authority of the  
2 intrusion; that is, that those who would intrude into the  
3 home at the common law, as well as today, have to show  
4 legal authority to go in, not the burden on the homeowner  
5 to show legal authority to keep them out.

6 QUESTION: Is the answer to this question no?  
7 You have some cases that show that there are certain  
8 people you could bring in, the translator, the property  
9 identifier. And now if I say were there any cases that  
10 you found anywhere about people you couldn't bring in aid,  
11 you couldn't find any. Is that right?

12 MR. WILLARD: As a matter of fact we could. We  
13 found a number of cases, which we cited in our brief,  
14 including one of them that held there wasn't an invasion  
15 of privacy in a constitutional sense, but all of which  
16 held that it was a trespass.

17 QUESTION: No, no. But we didn't -- we don't  
18 have any case up there that says, and by the way, it  
19 violates the Fourth Amendment to bring along this kind of  
20 person, an ice cream vendor or something. No such case.

21 MR. WILLARD: No, Your Honor, we don't. But we  
22 contend that it was clearly established and has been  
23 clearly established that for the Government to sponsor a  
24 trespass into the home is itself a violation of the Fourth  
25 Amendment, and a reasonable officer would not think

1 otherwise.

2 If we're thinking in terms now of the -- the  
3 officer trying to decide what's right and what's wrong, if  
4 he's read cases that say it's a trespass, it's unlawful  
5 for the media to come into a home, we would say it's not  
6 reasonable for him then to bring them in even though the  
7 cases only held it was unlawful and not a violation of the  
8 Fourth Amendment.

9 QUESTION: Although -- although he also knows  
10 that he can trespass in the open fields without violating  
11 the First Amendment I suppose.

12 MR. WILLARD: That's correct, Your Honor,  
13 because the Fourth Amendment has been held by this Court  
14 to protect houses and not open fields. And in this case  
15 it's fairly clear the plain language of the Fourth  
16 Amendment speaks of houses, and that's what we're talking  
17 about, an intrusion into a house.

18 QUESTION: Can I ask you about your  
19 interpretation of section 3105? It's on page 46 of the  
20 red brief in -- in -- in the Hanlon case. It says, a  
21 search warrant may in all cases be served by any of the  
22 officers mentioned in its direction or by an officer  
23 authorized by law to serve such warrant.

24 Now, it has to be your position that serve there  
25 really means execute. Right? Is that your position?

1 Which I suppose you say is supported by -- by the latter  
2 part of it because it goes on, but by no other person,  
3 except in aid of the officer on his requiring it, he being  
4 present and acting in its execution.

5 MR. WILLARD: Yes, Your Honor.

6 QUESTION: And it's your position that the  
7 mention of execution towards the end of that provision  
8 indicates that when they're talking about serving a  
9 warrant, they mean serving and executing.

10 MR. WILLARD: Yes, Your Honor. It's our  
11 position that this statute codifies the common law  
12 understanding that the execution of a warrant should be  
13 accomplished by law enforcement officers or those -- those  
14 assisting, and that the -- and that that's all that the  
15 warrant conveys authority to do.

16 QUESTION: It wouldn't do too much if it just  
17 specified who can deliver the warrant to the -- or, I  
18 mean, you know. You could have a messenger do that I  
19 suppose. It doesn't really make a whole lot of -- there's  
20 not a whole lot of importance to the merely delivering the  
21 paper.

22 MR. WILLARD: That -- that -- that's correct,  
23 Your Honor. And there is similar language in rule 4 of  
24 the Federal Rules of Criminal Procedure, which we also  
25 cite in our brief at page 39.

1           QUESTION: Mr. Willard, what -- what if the  
2 warrant says, so A, B, C, D, and E, F shall serve the  
3 warrant and accompany, and then a fourth law enforcement  
4 officer they decide to take along at the last minute  
5 because they hear there's some sort of a rumble out at the  
6 place where they're going to serve. Now, is -- is that  
7 bad?

8           MR. WILLARD: I think the law has established  
9 that would be implicitly authorized by the warrant even  
10 though he's not named by name if he's there to assist them  
11 to deal with possible violence or something like that.

12           Now, if a law enforcement officer who is  
13 visiting -- you know, the sister-in-law is visiting and is  
14 there just for fun and not to provide any assistance, then  
15 that might create a different issue.

16           But here again, we're not talking -- I mean,  
17 we've had some very interesting and difficult hypothetical  
18 questions about exactly where the line is drawn among  
19 prosecutors or trainees or people like that. That's not  
20 this case. This case involves bringing in people who  
21 could not possibly have been thought to be there in order  
22 to assist in execution of the warrant. They were there  
23 for a totally different, a private purpose which, going  
24 all the way back to Semayne's Case, has been prohibited in  
25 terms of an entry into the home.

1 QUESTION: But a private purpose that -- that  
2 helped the police or the police thought helped the police.

3 MR. WILLARD: Well, but only in this most  
4 nebulous sense. I mean, this argument, if we credit it,  
5 would open the doors to anything. It would open the doors  
6 to the high school civics class going in, the sister-in-  
7 law, or whatever.

8 QUESTION: But especially if we're in doubt,  
9 it's very close. Does the First Amendment get some weight  
10 which would be weighed against you?

11 MR. WILLARD: No, Your Honor.

12 QUESTION: Can we distinguish this from the  
13 other?

14 MR. WILLARD: No, Your Honor, because what we're  
15 talking about here is media access at the sufferance of  
16 the police. The police claim here a discretionary right  
17 to bring in media at their choosing to witness. This is  
18 not much of a safeguard to the public.

19 QUESTION: -- only thinking of --

20 MR. WILLARD: Thank you, Your Honor.

21 QUESTION: Thank you, Mr. Willard.

22 Mr. Cordray, you have 3 minutes remaining.

23 REBUTTAL ARGUMENT OF RICHARD A. CORDRAY

24 ON BEHALF OF THE PETITIONERS IN NO. 97-1927

25 AND THE FEDERAL RESPONDENTS IN NO. 98-83



1 MR. CORDRAY: First, Your Honors, on the  
2 qualified immunity issue, the fact that there's a regular  
3 practice that's occurred frequently around the country,  
4 the silence of the books there has to weigh in favor of  
5 qualified immunity. This practice has not been  
6 discredited, but it's engaged in frequently. How could it  
7 possibly be that officers on the line who are merely  
8 obeying instructions to allow the media to come along with  
9 them -- they don't have the policies in mind, Justice  
10 Breyer, nor do they have the case law in mind. They had  
11 an instruction. It came down from headquarters. Those  
12 people knew the policy. Those people had scrutinized the  
13 case law.

14 QUESTION: How do we know that -- that not just  
15 ride-alongs but entering with the execution of a warrant  
16 was engaged in frequently? What -- what is your evidence  
17 for that?

18 MR. CORDRAY: We speak to that. It was taken  
19 judicial notice upon much -- many submissions and much  
20 study: in the Fletcher case where the Florida Supreme  
21 Court decided in 1977 on practices engaged in in 1972; the  
22 Prah case, the Wisconsin trial court found again that  
23 this was common custom and usage around the country for  
24 media to accompany police inside a residence when there  
25 was an issue of crime or other matter of great public

1 interest that had occurred.

2 QUESTION: What did they base it on? Was there  
3 evidence to that effect in the case?

4 MR. CORDRAY: There was. There were voluminous  
5 submissions and affidavits of this.

6 QUESTION: But I'm not sure of the relevance of  
7 that because there have been instances of police who have  
8 been doing things that -- pursuant to clear policy where  
9 the policy was clearly unconstitutional.

10 MR. CORDRAY: That's true.

11 QUESTION: So -- so, are we supposed to give any  
12 weight to the fact that -- that there's some book in which  
13 somebody has an interpretation --

14 MR. CORDRAY: No, but when the --

15 QUESTION: -- or even practice?

16 MR. CORDRAY: When the practice is fairly widely  
17 engaged in, which is what was found in those cases, and it  
18 has not been ruled unconstitutional, it's very difficult  
19 to say officers should have known. And --

20 QUESTION: Can we say --

21 MR. CORDRAY: -- the Moncrief case was a Fourth  
22 Amendment case specifically.

23 QUESTION: Can we say it is widely engaged in in  
24 execution of warrants as distinct from visiting crime  
25 scenes? Because if there's a crime scene, robbery, body

1 lying on the floor or something, nobody normally is -- is  
2 worried about warrants. I know they come to crime scenes.  
3 Does the -- does the case evidence take us beyond crime  
4 scenes to warrant execution?

5 MR. CORDRAY: As demonstrated by the Marshals  
6 Service and Justice Department policies in place at the  
7 time.

8 QUESTION: No. I'm talking about cases. I'm  
9 talking about cases. You -- you referred to two cases in  
10 particular.

11 MR. CORDRAY: Yes.

12 QUESTION: Do they go beyond crime scenes to  
13 execution of warrants?

14 MR. CORDRAY: They talk generally about a  
15 variety of circumstances where there had been a crime  
16 committed. I mean, here there certainly was a crime  
17 committed by Dominic Wilson --

18 QUESTION: No, no, no. But crime scenes versus  
19 warrants. Apparently they don't discuss that  
20 distinction --

21 MR. CORDRAY: They don't -- they don't address  
22 that specific -- I would think a warrantless situation  
23 might be more problematic. Here at least you have the  
24 comfort that a court has looked at this and authorized an  
25 intrusion by the police. The media are merely an

1 additional or marginal extra intrusion there.

2 QUESTION: Well, you -- you make that argument  
3 and you say it's a marginal intrusion. I don't see why  
4 the case would be different, for example, if there were 3  
5 police officers and 17 reporters. I -- I don't know why  
6 that should make any difference. It's still a violation  
7 of privacy.

8 MR. CORDRAY: It would be factors that would  
9 weigh in balancing the reasonableness is all, Your Honor.

10 On the 3105 issue, the case law that's cited,  
11 the Schwimmer, the Clouston, those are all expansive  
12 cases, who can --

13 QUESTION: All?

14 MR. CORDRAY: All expansive cases, who can be  
15 brought along pursuant to 3105. None of them are limiting  
16 cases. None of them disapproved the practice of people  
17 being along to observe, whether trainees, whether  
18 students, or the like.

19 Moreover, the Fourth Amendment does not only  
20 preserve privacy. It is designed to prevent abuses of  
21 Government power, and that is again the purpose of having  
22 media able to oversee this function in a home or  
23 elsewhere.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
25 Cordray.

1                   The case is submitted.

2                   (Whereupon, at 11:32 a.m., the case in the  
3 above-entitled matter was submitted.)

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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, AND ROBERT PRIEKSAT, Petitioners v. PAUL W. BERGER, ET UX.; and CHARLES H. WILSON, ET UX., ET AL. v. HARRY LAYNE, DEPUTY UNITED STATES MARSHAL, ETC., ET AL.

CASE NO: 97-1927

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: *Diana M. May*  
(REPORTER)