Search of the Newsroom: The Battle for a Reporter's Privilege Moves to New Ground

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SEARCH OF THE NEWSROOM: THE BATTLE FOR A REPORTER’S PRIVILEGE MOVES TO NEW GROUND

The resolve of the press to advance claims of constitutional immunity to subpoenas¹ and the presence of shield laws protecting the confidentiality of news sources² have led law enforcement officials to seek new ways of acquiring information from uncooperative journalists.³ One resort has


For a comparative analysis of all but the Oklahoma act, see Comment, Newsman’s Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy, 49 TUL. L. REV. 417 (1975). Congress has enacted no statute giving reporters a testimonial privilege in federal court, but the Department of Justice has issued guidelines regulating employee requests for issuance of subpoenas to members of the news media. All such requests must have the express authorization of the Attorney General. Department of Justice Order 544-73, 28 C.F.R. § 50.10 (1977). However, failure of a department official to obtain authorization is no defense to a subpoena. See In re Horn, 458 F.2d 468, 473 (3d Cir. 1972).

3. California police admittedly used the search technique because they feared that the Daily would be uncooperative, and that a subpoena would give "unnecessary notice" resulting in delayed acquisition of the evidence sought. Brief for Petitioners at 18-20, Zurcher v. Stanford Daily, 453 U.S. 547 (1978). The Reporters Committee for Freedom of the Press claims that California law enforcement officials utilized this method to avoid the state’s shield law. 6 PRESS CENSORSHIP NEWSLETTER 30 (1975).
been to the ex parte search warrant process. This procedure, which permits police to seize now and litigate later, was upheld by the United States Supreme Court against first and fourth amendment challenges in Zurcher v. Stanford Daily.

The case arose in 1971 when four police officers, pursuant to a warrant, searched the premises of a Stanford University student newspaper for photographs of a clash between police and demonstrators. Nine officers had been injured in the fray, and police hoped that pictures taken by a Daily photographer would help identify the assailants. Photographic laboratories, desks, filing cabinets and waste paper baskets were searched, and although locked drawers and rooms were not opened, the officers had the opportunity to read confidential notes and correspondence. They found only photographs which had already been published, and left empty-handed.

The Daily and members of its staff sued for injunctive and declaratory relief under 42 U.S.C. § 1983, alleging that the search had deprived them, under color of state laws, of rights secured by the first, fourth and fourteenth amendments to the United States Constitution. The district court denied the injunction, but granted declaratory relief. It held that where material is sought from a third party—one not suspected of criminal activity—a search is unreasonable per se unless a magistrate has before him an affidavit showing that the material sought is likely to be destroyed, or that a subpoena duces tecum is otherwise "impractical." Furthermore, since first amendment interests in newsgathering, editing and dissemination are involved, the court ruled that a media search should only be permitted in the "rare" situation where there is a clear showing that 1) important materials will be destroyed or removed from the jurisdiction; and 2) a restraining order would be futile." The Court of Appeals for the

4. There have been at least fifteen incidents of search warrants issued against the news media since 1970: thirteen in California, one in Rhode Island and one in Montana. Information on these searches is available from The Reporters Committee for Freedom of the Press, 1750 Pennsylvania Ave., N.W. Washington, D.C. 20006. See generally Wicker, The Knock at The Door, N.Y. Times, June 25, 1978, at E21, col. 1.
6. Id. at 551.
8. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1976).
10. Id. at 132.
11. Id. at 135.
Ninth Circuit affirmed per curiam, adopting the district court opinion.\(^{12}\)

In an opinion by Justice White, the Supreme Court of the United States reversed.\(^{13}\) The Court held that valid warrants may be issued to search any property, whether or not occupied by a third party, when there is probable cause to believe that fruits, instrumentalities or evidence of crime may be found there.\(^{14}\) When first amendment interests are involved, it said that courts need do no more than apply the warrant requirements with "particular exactitude."\(^{15}\)

Justice Powell concurred with the holding of the Court, noting that fourth amendment procedure contemplates a magistrate's taking into account the constitutional guarantee of a free press.\(^{16}\) Three justices dissented. Justice Stewart, joined by Justice Marshall, found the search to be a burden on freedom of the press and thus violative of the first and fourteenth amendments.\(^{17}\) Justice Stevens dissented on the broader ground that the majority's construction of the fourth amendment threatened all innocent third parties.\(^{18}\) Justice Brennan did not participate in the decision of the case.\(^{19}\)

In cutting short growing judicial recognition of a qualified constitutional privilege for reporters,\(^{20}\) the Stanford Daily decision has provoked

14. Id. at 554.
15. Id. at 565.
16. Id. at 568-70. See text accompanying notes 109-11 infra.
17. Id. at 570-77. Justices Stewart and Marshall would have upheld the decision of the lower courts, since a subpoena would have served the "legitimate needs of government . . . without infringing the freedom of the press." Id. at 576. See text accompanying notes 101-02 infra.
18. Id. at 577-83. Justice Stevens dissected the fourth amendment, separating the opening clause of the amendment, which sets forth the scope of its protection, from the warrant clause, which regulates the issuance of warrants. He argued that the probable cause standard historically has required a demonstration that "no less intrusive" method of investigation would succeed, \(i.e.,\) if notice were given the object sought would be concealed or destroyed. Justice Stevens noted that prior to Warden v. Hayden, 387 U.S. 294 (1967), cases interpreting the fourth amendment drew a distinction between "mere evidence" of crime, which could not be seized, and fruits and instrumentalities, which could. In those cases, he said, it was the "probability of criminal culpability" which justified the fear of evidence destruction. In the post-Hayden era then, he reasoned, "the only conceivable justification for an unannounced invasion of a citizen's privacy is a showing of some reasonable basis for a similar fear."
20. In Branzburg v. Hayes, 408 U.S. 665 (1972), the United States Supreme Court held, 5 to 4, that the first amendment does not relieve a journalist from the obligation to respond to a grand jury subpoena and answer questions relevant to a criminal investigation. It has never been clear, however, whether Branzburg completely precludes recognition of a testimonial privilege for reporters under the Constitution. A concurring opinion by Justice Powell, the swing vote, em-
criticism and may lead Congress to attempt a legislative reversal. More is involved in press search and seizure than a simple confrontation between the first amendment and society's need to protect itself from crime. The purpose of this note is to survey the considerations complicating the controversy.

At least four distinguishable interests are involved in searches of the news media: (1) the right of the press, both as individuals and as an in-

phasized that the holding was a limited one which did not abrogate the constitutional rights of newsmen with respect to newsgathering. Instead, Justice Powell said, a claim of privilege should be judged on a case-by-case basis "by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with regard to criminal conduct." Id. at 710. This opinion has proven to be extremely influential in subsequent decisions, to the point of sparking what is perhaps a trend on the part of courts to sustain a qualified reporters' privilege. See, e.g., Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973) (reporter need not identify source where information not essential to plaintiff's case); Gilbert v. Allied Chem. Corp., 411 F. Supp. 505 (E.D. Va. 1976) (reporter's confidential sources privileged except where the information is crucial to the case and not otherwise obtainable); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) (reporter's testimony privileged where enforcement of subpoena would have chilling effect on flow of information to the press); Morgan v. State, 337 So. 2d 951 (Fla. 1976) (reporter need not testify before a grand jury probing non-criminal activity); Opinion of the Justices, 373 A.2d 644 (N.H. 1977) (senate president and council, in proceeding for removal of director of probation, may not order a reporter to disclose news sources); State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974) (newsgatherer may refuse to answer inquiries in a deposition unless there is no other source for the information sought and it is relevant and material to the issue of guilt or innocence); Brown v. Commonwealth, 214 Va. 775, 204 S.E.2d 429, cert. denied, 419 U.S. 966 (1974) (newsmen's privilege of confidentiality should yield only where criminal defendant's need for the information is essential to a fair trial). For a discussion of recent case law in this area, see Comment, Reporter's Privilege and the First Amendment, 23 CATH. L. 41 (1977).


22. See notes 115-23 and accompanying text infra.

23. For a more detailed discussion of the four interests involved in media search and seizure, see Note, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 STAN. L. REV. 957, 971-74 (1976).
stitution, to an expectation of privacy under the fourth amendment;\(^\text{24}\) (2) first amendment freedom to gather, edit and disseminate information;\(^\text{25}\) (3) the government's need for the power of search and seizure to provide for the security of its citizens;\(^\text{26}\) and (4) the need of society's dispute-

\(^{24}\) U.S. CONST. amend. IV. The Supreme Court has indicated that the purpose of the fourth amendment is to protect individual privacy. "[W]herever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." Terry v. Ohio, 392 U.S. 1, 9 (1968), quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The protection of the amendment is not limited to "the right of the people to be secure in their . . . houses" but extends to commercial premises. See, e.g., Mancusi v. DeForte, 392 U.S. 364, 367 (1968); See v. Seattle, 387 U.S. 541, 543 (1967); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). If the press organization is incorporated, the corporation itself has a protected right of privacy. FTC v. American Tobacco Co., 264 U.S. 298, 305-06 (1924). However, "corporations can claim no equality with individuals in the enjoyment of a right to privacy." United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

\(^{25}\) U.S. CONST. amend. I; Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241 (1974) (Florida newspaper right to reply law unconstitutional because of its intrusion into function of editors); Branzburg v. Hayes, 408 U.S. 665 (1972) (dicta recognizing newsgathering as constitutionally protected); New York Times Co. v. United States, 403 U.S. 713 (1971) (refusing to interfere with editorial discretion by enjoining publication of the "Pentagon Papers"); Grosjean v. American Press Co., 297 U.S. 233 (1936) (state license tax upon newspapers selling advertising held an unconstitutional burden on freedom of the press); Wichita Eagle & Beacon Publ. Co. v. NLRB, 480 F.2d 52 (10th Cir. 1973), cert. denied, 416 U.S. 982 (1974) (editorial writer active in formulating, determining and effectuating newspaper's journalistic policies properly excluded from employee collective bargaining unit); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (discussing all three interests in the context of a criminal contempt proceeding for failure to answer questions before a federal grand jury). The guarantees of the first amendment were perhaps stated most eloquently by the late Justice Musmanno of the Pennsylvania Supreme Court:

Freedom of the press is not restricted to the operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure.

Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any of these integral operations is interdicted, freedom of the press becomes a river without water.

\(^{26}\) "The primary societal interest underlying law enforcement is 'security for the person and property of the individual' from 'reprehensible conduct forbidden to all other persons.' . . . To the extent that the police are denied the use of this technique, the prosecution of a given crime may become considerably more difficult or expensive. Clearly the utter denial of access to this evidence when held by the press could impose significant costs on society." Note, Search and Seizure of the Media: 4 Statutory Fourth Amendment and First Amendment Analysis, 28 STAN. L. REV. 957, 973-74 (1976).
resolving forums, the courts, to be furnished with relevant information.\(^{27}\)

The fourth amendment broadly secures the right of "the people" against unreasonable searches and seizures. Although historically the amendment has been primarily concerned with persons suspected of wrongdoing,\(^{28}\) it is clear that its protection extends to innocent and guilty alike\(^{29}\) since the sanctity of a person's privacy is the controlling consideration.\(^{30}\) Few cases discuss the fourth amendment rights of third parties,\(^{31}\) probably because these persons have little motivation to object to searches and seizures when they are not suspected of criminal activity.\(^{32}\) Other reasons for this scarcity perhaps include past reliance of law enforcement officials upon the subpoena duces tecum, rather than the search warrant, to secure desired information,\(^{33}\) and the fact that prior to 1967 the fourth


\(^{28}\) See, e.g., United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) where Judge Learned Hand said: "[T]he only fair observation that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him."


\(^{30}\) "The basic purpose of [the fourth] amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Ct., 387 U.S. 523, 528 (1967).


\(^{32}\) For a good discussion of the fourth amendment protection afforded third parties, in the course of which this argument is made, see Comment, Search Warrants and Journalists' Confidential Information, 25 AM. U. L. REV. 938 (1976).

amendment was construed to bar searches for "mere evidence," as opposed to "fruits and instrumentalities," of crime. 34

But despite this paucity of discussion, third party searches, and particularly those of newspaper offices, raise serious fourth amendment questions. The principal remedy afforded the victim of an unreasonable search and seizure—the exclusionary rule— is not available to a third party. 35

Neither the individual searched nor the party against whom the seized evidence is introduced at trial has standing to contest the legality of the intrusion. 36 The result is that an innocent, law-abiding citizen has less protection against invasions of his privacy than does a person suspected of criminal behavior. Furthermore, because of their necessarily broad scope, it has been argued that searches of newsrooms and reporters' files violate the fourth amendment's specific prohibition against general searches. 37

37. Only the criminal defendant has standing to challenge the legality of the search, and to have it he must be on the premises at the time of the search, have a proprietary or possessor interest in the premises, and be charged with an offense that includes, as an essential element, possession of the seized evidence. See Rakas v. Illinois, 99 S. Ct. 421, 433-34 (1978); Brown v. United States, 411 U.S. 223, 229 (1973). See generally White & Greenspan, Standing to Object to Search and Seizure, 118 U. PA. L. REV. 335 (1970).
38. The problems connected with a general search arise when police enter premises with a search warrant that fails to describe with particularity the materials sought. As a result, police rummage about, seizing any item which seems relevant to the investigation. The Framers of the Constitution were familiar with the problem of the general search, and it has been said that the case of Entick v. Carrington, 19 How. St. Tr. 1029 (1765), which held that English officers could not break into a citizen's house pursuant to a general arrest warrant and search for evidence of libel, had a tremendous impact on the founding fathers and served as the basis for the fourth amendment. Boyd v. United States, 116 U.S. 616, 626-27 (1886). The Supreme Court, in turn, has sought to limit the power of law enforcement officials to rummage by holding that the scope of a search must be reasonable in light of the circumstances that warrant the initial intrusion. Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Stanford v. Texas, 379 U.S. 476 (1965); Go-Bart Co. v. United States, 282 U.S. 344 (1931); Boyd v. United States, 116 U.S. 616 (1886). For an argument that the fourth amendment was added to the Constitution, in part, as a protection against police searches of colonial printers, and that the Stanford Daily decision flies in the face of precisely what the amendment was intended to prevent, see
Faced with these issues in *Zurcher v. Stanford Daily,* the Supreme Court held that "[n]othing on the face of the Amendment suggests that a third-party search warrant should not normally issue." Arguing that search warrants are not directed at persons, but at "places" and "things," it reasoned that probable cause to believe incriminating evidence will be found on the property to which entry is sought justifies the invasion of privacy. The Court discounted what it perceived to be the premise of the district court holding—that issuance of a warrant is dependent upon a reasonable belief in the culpability of the party to be searched—indicating that, if anything, "a less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor." The Court rejected the argument that additional protection is required to safeguard the constitutional rights of third parties because of the unavailability of the exclusionary rule as a deterrent. It further disagreed that general searches would be a problem "if the requirements of specificity and reasonableness are properly applied, policed and observed."46

The opinion may be a Pandora's box. As pointed out by Justice Stevens in dissent, it exposes "[c]ountless law-abiding citizens" to unannounced searches, and requires no consideration of whether the offensive invasion

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40. Id. at 554.
41. Id. at 555 (citing United States v. Kahn, 415 U.S. 143, 155 n.15 (1974)).
42. "As the Fourth Amendment has been construed and applied by this Court, 'when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue.'" 436 U.S. 547, 554 (1978) (quoting Fisher v. United States, 425 U.S. 391, 400 (1976)).
43. 436 U.S. 547, 555 (1978). "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." Id. at 556 (footnote omitted).
44. Id. at 556 (citing Frank v. Maryland, 359 U.S. 360, 365 (1959)). See also Camara v. Municipal Ct., 387 U.S. 523, 530 (1967).
45. "We reject totally the reasoning of the District Court that additional protections are required to assure that the Fourth Amendment rights of third parties are not violated because of the unavailability of the exclusionary rule as a deterrent to improper searches of premises in the control of nonsuspects." 436 U.S. 547, 562 n.9 (1978).
46. "Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The warrant issued in this case authorized nothing of this sort." Id. at 566.
of privacy is justified by the law enforcement interest it is intended to vindicate. Applied to the press, the principle is particularly reprehensible. Two considerations need be noted. First, police acting pursuant to a valid search warrant may seize evidence of other crime that is inadvertently found. Second, police may enter and search a news office under warrant when reporters and editors are absent.

Journalists must rely at times on confidential sources for information. During the production of a story notes and correspondence are filed in their offices. No matter how specifically a warrant describes the material sought, a search through all the journalist's papers until the documents sought are found will often be necessary. During the course of such a

47. Id. at 579. The American Psychiatric Association has requested from Congress corrective legislation because of "the significant implications of the Supreme Court's decision in Zurcher v. Stanford Daily upon the confidentiality of medical records, particularly those of psychiatrists." See Citizens' Privacy Protection Act: Hearing on S.3164 Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary, 95th Cong., 2d Sess. (1978) (statement of Dr. Jerome S. Beigler) (unpublished record). An interesting editorial argument has been made that in the wake of the Stanford Daily decision adequate legal representation and absolute candor require the attorney to advise his clients that their "secrets can be discovered by the police if and when a prosecutor or police officer convinces a magistrate or judge that I might possess evidence of a crime committed by you or any other of my clients." Conger, Will lawyers be giving Stanford warnings?, 64 A.B.A. J. 1211 (1978).


49. See, e.g., United States v. Gervato, 474 F.2d 40 (3d Cir. 1973), cert. denied, 414 U.S. 864 (1973) (search of apartment pursuant to a valid warrant made while the occupant was absent held not unreasonable).

50. The Watergate informer "Deep Throat" is, perhaps, the most famous example. C. Bernstein & B. Woodward, All the President's Men (1974). The authors, two Washington Post reporters who were largely responsible for uncovering the White House connection to the now infamous break-in at the offices of the Democratic National Committee, dedicate their book thus:

To the President's other men and women—in the White House and elsewhere—who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the Washington Post.

Id. at 7.

51. For example, in Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), the search was quite thorough. The district judge who wrote the memorandum and order explained the overall situation in this way:

[N]ewspaper offices are much more disorganized than, say, the average law office; a search for particular photographs or notes will mean rummaging through virtually all the drawers and cabinets in the office. The 'indiscriminate nature' of such a search renders vulnerable all confidential materials, whether or not identified in the warrant, and the concomitant threat to the gathering of news, which frequently depends on confidential relationship—is staggering.
search, perusal of confidential information is likely.\textsuperscript{52} If evidence of crime is uncovered—whether or not related to the subject of the search—it may be seized.\textsuperscript{53} Moreover, since police need not make the search in the reporter’s presence, the journalist may not have the opportunity to provide his sources with even limited protection by cooperating with law enforcement officials and delivering relevant materials to them. The practical effect is that the press is left remediless. Post-seizure access to the courts for return of the materials is essentially futile—the confidential cat is out of the bag.

For this reason, searches of news media offices interfere with the first amendment right of the press to gather, edit and disseminate information.\textsuperscript{54} A source who had wished to remain anonymous and whose identity was disclosed as the result of a police search is going to be reluctant to give information in the future. Other potential sources who learn of the disclosure will be reluctant to come forward as well. Furthermore, premature disclosure, even when not damaging to the source, could damage the developing story by putting targets on guard.\textsuperscript{55} A pragmatic publisher might well decide to kill a number of important, but relatively minor, investigative stories in order to avoid the chance of a police search that could expose the subject matter of a major story currently under production. And, especially among smaller newspapers and broadcast stations operating on limited budgets, editors might discourage investigative work by their reporters in order to avoid the expenses of litigation and disruption to the news facility so often associated with searches and seizures. The net result, of course, would be a diminution in the flow of information to the public.

Because of the importance of freedom of expression, the Supreme Court has ruled that the first amendment modifies the fourth amendment to require additional protections when both are involved in the same case.\textsuperscript{56} It has found constitutional violations where government regula-

\textit{Id.} at 134-35 (footnotes omitted). In another case, police searched Los Angeles radio station KPFK for more than eight hours in an unsuccessful attempt to find a tape recording. \textit{See} note 86 \textit{infra}.

52. “It is irrelevant that the police are instructed not to 'read' or 'look closely' at photographs or notes not mentioned on the warrant because a) it is difficult to imagine how a policeman searching for a photograph or set of notes will not 'read' or 'look closely' at items not mentioned in the warrant and b) the major harm to the press comes with the public knowledge that the police will be in a position to see confidential material.” Stanford Daily v. Zurcher, 353 F. Supp. 124, 135 n.12 (1972).

53. \textit{See} cases cited note 48 \textit{supra}.

54. \textit{See} cases cited note 25 \textit{supra}.


56. \textit{See Roaden v. Kentucky}, 413 U.S. 496 (1973) (seizure of film unreasonable because prior restraint of expression calls for a higher hurdle in the
tion was that where the state has a variety of effective means to achieve a legitimate end, it must choose the alternative which least interferes with first amendment freedoms. 58

The district court found the first amendment infringements involved in news media searches to be serious. 59 It relied on the above doctrines, and the Supreme Court's analysis in Branzburg v. Hayes, 60 to reach its conclusion that "third party searches of a newspaper office are impermissible in

evaluation of reasonableness); Lee Art Theatre v. Virginia, 392 U.S. 636 (1968) (search warrant for films issued on affidavit of police officer without judicial inquiry fell short of constitutional requirements demanding sensitivity to freedom of expression); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) (warrant procedures for the seizure of books constitutionally insufficient because they did not adequately safeguard against seizure of non-obscene books); Marcus v. Search Warrant, 367 U.S. 717 (1961) (procedure for issuance of warrant without judicial determination of obscenity lacked safeguards to insure due process protection to non-obscene material); Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1970), vacated and remanded on other grounds, 401 U.S. 990 (1971) (ex parte issuance of search warrant for allegedly obscene films violated first amendment); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), cert. denied, 397 U.S. 920 (1970) (first amendment held to require hearing before seizure of allegedly obscene films). See also NAACP v. Alabama, 357 U.S. 449 (1958) (order requiring association to produce names and addresses of all members held to entail the likelihood of a substantial restraint upon exercise of the right to freedom of association).

57. See, e.g., Baird v. State Bar of Arizona, 401 U.S. 1 (1971) (applicant to state bar need not answer question relating to Communist Party membership); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (state provision making seditious words grounds for removal of school teachers held unconstitutionally vague); Lamont v. Postmaster General, 381 U.S. 301 (1965) (law requiring addressee to return a reply card in order to receive communist propaganda held unconstitutional); Baggett v. Bullitt, 377 U.S. 360 (1964) (statute requiring state employees to take loyalty oath held vague and inhibitive of free speech). Note, however, that allegations of a subjective chill on the exercise of constitutional rights are not enough, there must be a showing of specific present objective harm, or an immediate threat of specific future objective harm. See Laird v. Tatum, 408 U.S. 1 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940).

58. The Court has used what is commonly known as the "less drastic means" or "least drastic alternative" doctrine to invalidate governmental measures which impinge upon constitutional rights. See, e.g., United States v. Robel, 389 U.S. 258 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Shelton v. Tucker, 364 U.S. 479 (1960); Dean Milk v. City of Madison, 340 U.S. 349 (1951). The Court has not, however, suggested what the alternative should have been in each of those cases. See also Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968). An analysis of the less drastic means doctrine in first amendment cases can be found in Note, Less Drastic Means and The First Amendment, 78 YALE L.J. 464 (1969). See generally Struve, The Less-Restrictive Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).


60. 408 U.S. 665 (1972).
all but a very few situations." For six years Branzburg had been the prevailing opinion on the testimonial privilege of the press, and its logic seemed to fit well the search and seizure situation. In departing from it the Court has established unpropitious precedent.

Branzburg v. Hayes and its companion cases, In re Pappas and United States v. Caldwell, dealt with the refusal of reporters to appear and testify before state and federal grand juries. The holding—that the first amendment does not give journalists a privilege to refuse to respond to grand jury subpoenas and answer questions relevant to a criminal investigation—was a narrow one. It appeared to afford press newsgathering some protection, but reasoned that the investigatory needs of the grand jury ordinarily establish a compelling state interest sufficient to overcome first amendment concerns. Indeed, Justice Powell, whose vote was necessary to the Court's judgment, emphasized in his concurrence that "[t]he court does not hold that newsmen, subpoenaed to testify before a grand jury, are

61. Because a search presents an overwhelming threat to the press's ability to gather and disseminate the news, and because "less drastic means" exist to obtain the same information, third party searches of a newspaper office are impermissible in all but a very few situations. A search warrant should be permitted only in the rare circumstance where there is a clear showing that 1) important materials will be destroyed or removed from the jurisdiction; and 2) a restraining order would be futile. To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society.

353 F. Supp. at 135 (emphasis in original).

62. Branzburg involved Supreme Court review of three cases: Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970); Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970); In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971). Paul Branzburg was a reporter for the Louisville Courier-Journal who wrote two stories on illegal drug abuse which he had witnessed in his role as a journalist. He described in detail both the unlawful use of drugs and the synthesis of marijuana into hashish. 408 U.S. at 667-71. Paul Pappas was a Providence, R.I., television reporter who was permitted by Black Panther leaders to view activities inside their New Bedford, Mass., headquarters during civil disorders there. Id. at 672-75. Earl Caldwell, a reporter for the New York Times, was assigned to cover the Black Panther Party and other black militant groups. He was present on several occasions when persons advocated violent revolution and the assassination of President Nixon. Id. at 675-79. The Supreme Court upheld the orders of the Kentucky and Massachusetts Supreme Courts compelling Branzburg and Pappas to testify, and reversed the Ninth Circuit, which had refused to order Caldwell to testify.

63. 408 U.S. at 708-09.

64. If the test is that the government "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," . . . it is quite apparent (1) that the State has the necessary interest . . . and (2) that, . . . the grand jury called these reporters . . . because it was likely that they could supply information to help the government determine whether illegal conduct had oc-
without constitutional rights with respect to the gathering of news or in safeguarding their sources.\textsuperscript{65} Justice Powell said that a reporter, like all other witnesses, would have to appear,\textsuperscript{66} but indicated that he might refuse to answer certain questions. If the grand jury pursued the inquiry by seeking an order, the court would be required to balance press interests against societal need on a case-by-case basis.\textsuperscript{67} Generally, it is this balancing approach that has since been followed by lower federal courts in newsmen's privilege cases.\textsuperscript{68}

The "limited nature"\textsuperscript{69} of the \textit{Branzburg} holding is highlighted by the facts of the cases involved.\textsuperscript{70} Each of the reporters had actually witnessed criminal activity rather than simply being informed of it. Their refusal to even appear before the grand jury was a more sweeping claim of exemption than would have been a refusal to answer selected questions. The cases involved infringement upon only one of several press functions—newsgathering; and they did not present as grave a threat to fourth amendment interests in privacy as did the third party search in \textit{Stanford Daily}.

The government has a responsibility to provide for the safety of its citizens and to provide its adjudicatory bodies with evidence. It was the

\textsuperscript{65} \textit{Id.} at 709.

\textsuperscript{66} "The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him." \textit{Id.} at 710 n.1.

\textsuperscript{67} [N]o harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

\textit{Id.} at 709-10.


\textsuperscript{69} 408 U.S. at 709 (Powell, J., concurring). For a discussion of the narrowness of the Court's holding, see Comment, \textit{Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis}, 28 STAN. L. REV. 957, 976-78 (1976).

\textsuperscript{70} Subsequent cases have recognized the importance of taking such considerations into account. See, e.g., \textit{Baker v. United States}, 466 F.2d 1059 (9th Cir. 1972).
grand jury’s “important role in fair and effective law enforcement” combined with its “essential” reliance on the subpoena process that tipped the scales in \textit{Branzburg}.\footnote{71} Had the Court applied \textit{Branzburg’s} grand jury/subpoena analysis to the police investigation/search warrant situation, the press would have emerged in a wholly different legal position with respect to its rights to resist government evidence gathering efforts.

The grand jury is an integral part of the American legal system.\footnote{72} The fifth amendment mandates indictment for serious federal offenses. Although this requirement is not applied to the states through the fourteenth amendment,\footnote{73} many states provide that certain criminal prosecutions may only be initiated by indictment.\footnote{74} The subpoena is essential to the fulfillment of the grand jury’s function. Without it the grand jury would have no authoritative means of acquiring testimony or commanding the production of evidence.\footnote{75}

Judicial supervision and procedural safeguards prevent the subpoena from requiring the press indiscriminately to disclose its sources.\footnote{76} For example, a subpoena must be “reasonable.”\footnote{77} It may require only the pro-

\textbf{Footnotes:}

71. 408 U.S. at 685-96. \textit{See} Comment, \textit{Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis}, 28 STAN. L. REV. 957, 978 n.123 (1976) for the view that Justice White’s opinion “should be viewed as a monument to the importance of unfettered grand jury investigation into crime, not as a gravestone over the rights of the press.” The note, written before the Supreme Court’s decision in the \textit{Stanford Daily} case, goes on to argue for application of the \textit{Branzburg} analysis to the press search situation.


76. \textit{Id.} at 682.


\textit{FED. R. CRIM. P. 17(c)} provides: “A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify
duction of documents that are relevant to the investigation, it must specifically describe the materials sought, and it may only order records covering a reasonable period of time. A subpoena is subject to prior challenge. If a reporter believes that the information being sought bears only a remote and tenuous relationship to the investigation, or would expose confidential sources without a legitimate need of law enforcement, he has access to the court on a motion to quash. If appropriate, a protective order may be issued. Finally, "the characteristic secrecy of grand jury proceedings is a further protection against the undue invasion" of first amendment rights.

Contrast this with the search warrant procedure. In at least four ways it more seriously infringes first amendment interests than the subpoena

the subpoena if compliance would be unreasonable or oppressive . . ." (emphasis added).

For a general discussion of the reasonableness requirement see Comment, Search Warrants and Journalists' Confidential Information, 25 AM. U. L. REV. 938, 962-63 (1976).


83. Id. at 700. Justice White stressed all of the press protective characteristics of the subpoena process—judicial supervision, prior challenge and the secrecy of grand jury proceedings—in concluding that the subpoena's limited harmful effects on the press were outweighed by its societal value. Id. at 700, 707.

84. The four ways in which a search warrant more seriously impinges upon press interests than does the subpoena procedure contested in Branzburg is discussed in more detail in Comment, Search and Seizure of the Media: A Statutorily Fourth Amendment and First Amendment Analysis, 28 STAN. L. REV. 957, 989-91 (1976).
process contested in *Branzburg*, and it fails to serve as compelling a state interest.

First, a search is a more serious invasion of the citizen's right to privacy than the subpoena. Police are not bound to secrecy, and in executing a warrant they may break, enter and even ransack if necessary.  

Second, the inhibiting effect of searches on the willingness of informants to make disclosures to newsmen, and the concomitant burden on newsgathering, is far greater than that which Justice White found "consequential, but uncertain" in *Branzburg*.  

A search renders a journalist's pledge of confidentiality impotent. If he tries to block the search, he may be lawfully forced aside.  

Since the search need not be made in his presence, he may be unable to limit its scope by voluntarily surrendering the materials. While the warrant must describe with reasonable specificity the place to be searched and the things to be seized, this limitation allows significant access if the item is small and capable of concealment. Officers may rummage through files, scrutinize their contents, and seize evidence of unrelated criminality inadvertently found. In addition, officers are normally bound only by the constitutional prohibition against unreasonable searches and seizures. Pennington v. State, 302 P.2d 170 (Okla. Crim. 1956). Moreover, in determining the reasonableness of an officer's actions courts will recognize that often police must act on a quick appraisal of facts without the benefit of the hindsight afforded those reviewing the situation. State v. Johnson, 102 R.I. 344, 230 A.2d 831 (1967).

408 U.S. at 690. At least two media searches have involved prolonged scrutiny of news offices and police seizures of documents that were apparently unrelated to the investigation. On October 10, 1975, Los Angeles police conducted a no-notice search of radio station KPDK and, for over eight hours, looked through all the station's files and facilities for a communique from a radical organization that related to a bombing of a Los Angeles hotel. Station officials gave police a copy but refused to turn over the original citing the first amendment and the California shield law. Although the police did not find the original communique, they rifled files and seized other documents belonging to the station.

On October 17th of the same year police using search warrants issued under a criminal libel complaint seized the printing plates and layout sheets of the complained of edition of the Los Angeles Star, a weekly tabloid. Later that night police also seized twelve manila folders containing artwork, photographs, editorial copy and address books from the Star editorial offices. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, 7 PRESS CENSORSHIP NEWSLETTER 30, 30-31 (1975).

"One need only ask what would happen if the addressee of a warrant refused to allow the search to be conducted to appreciate the magnitude of compulsion produced by a search warrant. Without the slightest hesitation his doors would be broken down, he would be placed under arrest, and the desired material would be seized . . . ." VonderAHE v. Howland, 508 F.2d 364, 373 (9th Cir. 1974) (Ely, J., concurring and dissenting).

See, e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971) (if initial instruction bringing police into plain view of incriminating evidence is legitimate, searches permissible); Warden v. Hayden, 387 U.S. 294 (1967) (search may be made for "mere evidence" as well as for fruits and instrumentalities of crime).
confidential information might be on record may justifiably fear exposure. Third, searches affect not only newsgathering, but the media’s editing and disseminating functions as well. A search may disrupt a newsroom for several hours, impede timely broadcast or publication, and impose extra costs in the form of salaries paid to employees made idle or required to put things back in order. As a result, the mere threat of a search may chill newsgathering and editorial policy.

Finally, search warrants lack the judicial supervision and procedural safeguards relied upon by the Court in striking the Branzburg balance against the press. Although there is judicial administration to the extent that only a “neutral and detached magistrate” may authorize a search, upon examination the apparent protectiveness of this requirement fades. Magistrates who are approached for search warrants often have a symbiotic rather than a supervisory relationship with the police. In some jurisdictions they need not even be attorneys. The probable cause standard, while in theory more protective than the reasonableness requirement of the subpoena, is in practice somewhat less protective. While a grand jury must show a legitimate need for the information sought in order to withstand a motion to quash, a mere showing that an item is relevant

89. Branzburg dealt only with the “consequential, but uncertain burden on news gathering” resulting from requiring reporters to respond to grand jury subpoenas. 408 U.S. at 690.

90. See note 86 supra. Factors such as these, not present in Branzburg, have been held to constitute unconstitutional burdens in other cases. See, e.g., Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241 (1974) (Florida newspaper right-to-reply law found unconstitutional because it interfered with editorial discretion and imposed extra costs in printing and composing time and in materials). The potentially high cost of libel actions has also been viewed as a threat to freedom of the press warranting judicial restrictions. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public official must show “actual malice” to recover for defamatory falsehood relating to his official conduct.). See generally note 25 and accompanying text supra.

91. See text accompanying notes 54-55 supra.


Published by University of Missouri School of Law Scholarship Repository, 1979.
to a criminal investigation will justify seizure under a search warrant. But most importantly, search warrants are issued in ex parte proceedings lacking the adversarial engagement that assures consideration of competing interests in the subpoena process. When confronted with a search warrant, the journalist is left with only the insufficient post facto remedy of seeking return of the materials seized.

On the other hand, there are societal needs which only the search warrant can serve that must be balanced against its more severe infringement of first amendment interests. While police have myriad alternative means of obtaining information, when swift action is necessary to acquire crucial evidence and the possessor will not cooperate, a search may be imperative. It is, however, only in this limited situation where police fear imminent destruction or loss of vital evidence that the search becomes as essential to the police as is the subpoena to the grand jury.

Justice Stewart argued in dissent that the concurring opinion of Justice Powell in Branzburg properly interpreted the first amendment to require a careful balancing of "vital constitutional and societal interests." Since a


97. There must be a nexus between the item sought and criminal activity. In the case of fruits or instrumentalities of crime the nature of the item itself provides the requisite nexus. In the case of mere evidence of crime probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction, and consideration of police purposes is required. Warden v. Hayden, 387 U.S. 294, 307 (1967). Probable cause exists where there are sufficient facts to warrant a person of reasonable caution to believe that the item sought is connected with criminal activity, and is presently located in the place named in the warrant. See, e.g., Berger v. New York, 388 U.S. 41 (1967); Aguilar v. Texas, 378 U.S. 108 (1964). Note, however, that factual allegations in the affidavit accompanying the warrant request may be based on the observations of informants—even those of questionable reliability—if there is a basis for crediting the hearsay. See Jones v. United States, 362 U.S. 257 (1960).

98. See text accompanying notes 35-37 supra. The Supreme Court has ruled that an action for damages will lie against a federal officer responsible for an unlawful search or seizure. Bivens v. Six Unkown Named Agents, 403 U.S. 388 (1971). However, common law judicial immunity may insulate a magistrate from liability for authorizing an unreasonable search, and the standard of "good faith" may operate as a defense for a police officer. See Pierson v. Ray, 386 U.S. 547 (1967); cf. Wood v. Strickland, 420 U.S. 308 (1975) (public school officials not immune from liability if they knew or reasonably should have known action would violate constitutional rights).

99. For example, observation, surveillance, tips, informers, access to public records, and interrogations of victims, third parties and suspects. See Comment, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 STAN. L. REV. 957, 991-92 (1976).


subpoena would normally serve the "legitimate needs of government... without infringing freedom of the press," Justice Stewart would have required a showing of probable cause to believe a subpoena "impractical" before permitting a warrant to issue.\textsuperscript{102}

The majority, however, refused to engage in a new balancing of interests. In the words of Justice White:

The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena \textit{duces tecum}, whether on the theory that the latter is a less intrusive alternative, or otherwise.\textsuperscript{103}

Noting that the Framers of the Bill of Rights did not forbid warrants where the press was involved, the Court said that prior cases "do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search."\textsuperscript{104} It held that so long as they are properly administered, the warrant requirements themselves "should afford sufficient protection against the harms that are assertedly threatened" by searches of newsrooms.\textsuperscript{105}

The Court was unconvinced that confidential sources would disappear or that the press would suppress news because of fear of warranted searches,\textsuperscript{106} and argued that a warrant to search newspaper offices for criminal evidence involves no "realistic threat of prior restraint" since even "presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial."\textsuperscript{107} Finally, the Court said it could see no reason for requiring a prior adversary hearing because "if the evidence is sufficiently connected with the crime to satisfy the probable

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\textsuperscript{102} Id. at 575, 576.

\textsuperscript{103} Id. at 559. As in \textit{Branzburg}, the Court failed to discuss the less drastic means doctrine as a method of protecting first amendment rights, apparently considering it to be irrelevant in light of its opinion that the first amendment does not modify the fourth amendment when press interests are involved.

\textsuperscript{104} Id. at 565.

\textsuperscript{105} Id.

\textsuperscript{106} "Nor are we convinced, anymore than we were in \textit{Branzburg} v. Hayes that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment." \textit{Id.} at 566 (citations omitted).

cause requirement it will very likely be sufficiently relevant to justify a sub-
poena and withstand a motion to quash."108

Perhaps Justice Powell's concurring opinion limits the holding somewhat. As in Branzburg, Powell's was the swing vote, and his concurrence sets out factors that a magistrate should take into account in determining whether to authorize a third party search. Powell said the magnitude of the proposed search, together with the nature and significance of the material sought are "properly considered" as bearing upon the reasonableness and particularity requirements of the warrant process.109 Furthermore, Justice Powell said, "there is no reason why police officers executing a warrant should not seek the cooperation of the subject party in order to prevent needless disruption."110 While he agreed that there is no justification for the establishment of a separate fourth amendment procedure for the press, the justice did say that a magistrate asked to authorize a news media search "should take cognizance of the independent values protected by the First Amendment."111

Before closing, the Court noted that "the Fourth Amendment does not prevent or advise against legislative or judicial efforts to establish non-
constitutional protections against possible abuses of the search warrant procedure."112 The statement has been received as a virtual call to action at both the state and federal level. California has already enacted an amendment to its shield law dealing with the search situation.113 Similar protective legislation is pending in other states.114 Eighteen bills restricting the issuance of search warrants were introduced in the second session of the Ninety-Fifth Congress,115 and the House of Representatives Committee on

108. Id. at 567. The Court further noted that "Fifth Amendment and state shield objections that might be asserted in opposition to compliance with a sub-
poena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment." Id.
109. Id. at 570 n.2.
110. Id.
111. Id. at 570.
112. Id. at 567.
Government Operations has issued a report recommending that legislation be enacted "to curtail the effects of the decision in Zurcher v. Stanford Daily." The President of the United States, after requesting the Justice Department to review all proposed legislation for the purpose of constructing procedures to safeguard first amendment rights, announced his own proposal for remedying what the White House termed "a serious threat to the ability of the press to gather information and to protect confidential sources."

However, there are difficulties in drafting appropriate legislation. One is trying to determine what parties should be protected. Should federal law protect all persons not suspected of involvement in the crime under investigation? If so, would it be encouraging criminals to conceal evidence in the "sanctuaries" of third parties? Should it protect only the press? If so, how should "the press" be defined? Should professional journalists have special legal protections or should the same rights extend to authors, academicians, freelance writers and pamphleteers? Another difficulty is trying to determine what jurisdictions should be covered. While Congress could restrict the use of search warrants by federal law enforcement agencies, such legislation would affect only a small percentage of warrants issued throughout the country. It is an open constitutional question whether the federal government can impose limitations on the activities of states and municipalities where there is arguably no commerce clause relationship. Since civil rights are involved, the fourteenth amendment may imbue Congress with some authority in this area.

President Carter's proposal sidesteps a few of these problems by prohibiting, with limited exceptions, searches and seizures of materials pro-


duced in connection with any form of public communication "in or affecting interstate commerce."122 The legislation would afford protection to newspaper reporters, broadcasters, authors of books, and academicians—in effect, anyone preparing information for dissemination to the public. As for other third parties, because of the "complexities" involved, the administration believes "that further study is necessary."123

While the Zurcher v. Stanford Daily holding may be an unfortunate one, it should be remembered that often the federal Constitution, as interpreted by the United States Supreme Court, is not the only applicable standard.124 Free speech and search warrant provisions in state constitutions may give broader protection, and could provide the advocate with a valuable tool in this area.125

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122. The President's proposal has two major provisions. The first would prohibit a search and seizure of the notes, photographs, or other "work product" of a person possessing such materials in connection with a form of public communication "in or affecting interstate commerce." The second would require police to exhaust the subpoena process before searching for or seizing "non-work product" materials. Non-work product materials are defined as those which are not created by or for the press, such as an extortion note or a film of a bank robbery taken by a hidden camera. Each provision has limited exceptions.

A search and seizure of work product would be permissible if (1) the person possessing the material has committed or is committing the crime under investigation, or if (2) immediate search and seizure is necessary to protect human life.

The same two exceptions apply to non-work product material. In addition, search and seizure of non-work product would be permissible if giving notice pursuant to a subpoena duces tecum would lead to destruction or loss of the materials, or if a delay in obtaining them caused by review proceedings after an initial court order to deliver the documents would threaten the "interests of justice." Under the fourth exception the possessor of the materials would be given notice and an opportunity to submit an affidavit setting forth the factual basis underlying any contention that the materials sought are not properly subject to seizure. Carter Administration Stanford Daily Announcement, White House Press Office, December 13, 1978, at 3, col. 1.

123. Id. at 5, col. 2.


125. See MO. CONST. art. I, § 8 (protecting freedom of speech); MO. CONST. art. I, § 15 (prohibiting unreasonable searches and seizures).