SUPREME COURT OF THE UNITED STATES

No. 98–83

CHARLES H. WILSON, ET UX., ET AL., PETITIONERS *v.* HARRY LAYNE, DEPUTY UNITED STATES MARSHAL, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[May 24, 1999]

JUSTICE STEVENS, concurring in part and dissenting in part.

Like every other federal appellate judge who has addressed the question, I share the Court's opinion that it violates the Fourth Amendment for police to bring members of the media or other third parties into a private dwelling during the execution of a warrant unless the homeowner has consented or the presence of the third parties is in aid of the execution of the warrant. I therefore join Parts I and II of the Court's opinion.

In my view, however, the homeowner's right to protection against this type of trespass was clearly established long before April 16, 1992. My sincere respect for the competence of the typical member of the law enforcement profession precludes my assent to the suggestion that "a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful." *Ante*, at 11. I therefore disagree with the Court's resolution of the conflict in the Circuits on the qualified immunity issue.[1] The clarity of

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[1] It is important to emphasize that there is no split in Circuit authority on the merits of the constitutional issue. Nor, as I explain *infra*, at

the constitutional rule, a federal statute (18 U. S. C. §3105), common-law decisions, and the testimony of the senior law enforcement officer all support my position that it has long been clearly established that officers may not bring third parties into private homes to witness the execution of a warrant. By contrast, the Court's opposing view finds support in the following sources: its bare assertion that the constitutional question "is by no means open and shut," *ante*, at 11; three judicial opinions that did not directly address the constitutional question, *ante*, at 12; and a public relations booklet prepared by someone in the United States Marshals Service that never mentions allowing representatives of the media to enter private property without the owner's consent, *ante*, at 13–14.

I

In its decision today the Court has not announced a new rule of constitutional law. Rather, it has refused to recognize an entirely unprecedented request for an exception to a well-established principle. Police action in the execution of a warrant must be strictly limited to the objectives of the authorized intrusion. That principle, like the broader protection provided by the Fourth Amendment itself, represents the confluence of two important sources: our English forefathers' traditional respect for the sanctity of the private home and the American colonists' hatred of the general warrant.

The contours of the rule are fairly described by the Court, *ante*, at 5–8 of its opinion, and in the cases that it

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6, do I believe that any District Court had reached a conclusion at odds with the Court's Fourth Amendment holding. Any conflict was limited to the qualified immunity issue. Three Circuits rejected the defense whereas the Fourth and the Eighth accepted it. See *Ayeni* v. *Mottola*, 35 F. 3d 680, 686 (CA2 1994); *Bills* v. *Aseltine*, 958 F. 2d 697 (CA6 1992); *Berger* v. *Hanlon*, 129 F. 3d 505 (CA9 1997); 141 F. 3d 111 (CA4 1998) (en banc); *Parker* v. *Boyer*, 93 F. 3d 445 (CA8 1996).

cites on those pages. All of those cases were decided before 1992. None of those cases– nor, indeed, any other of which I am aware– identified any exception to the rule of law that the Court repeats today. In fact, the Court's opinion fails to identify a colorable rationale for any such exception. Respondents' position on the merits consisted entirely of their unpersuasive factual submission that the presence of representatives of the news media served various legitimate– albeit nebulous– law enforcement purposes. The Court's cogent rejection of those *post hoc* rationalizations cannot be characterized as the announcement of a new rule of law.

During my service on the Court, I have heard lawyers argue scores of cases raising Fourth Amendment issues. Generally speaking, the Members of the Court have been sensitive to the needs of the law enforcement community. In virtually all of them at least one Justice thought that the police conduct was reasonable. In fact, in only a handful did the Court unanimously find a Fourth Amendment violation. That the Court today speaks with a single voice on the merits of the constitutional question is unusual and certainly lends support to the notion that the question is indeed "open and shut." *Ante,* at 11.

But the more important basis for my opinion is that it should have been perfectly obvious to the officers that their "invitation to the media exceeded the scope of the search authorized by the warrant." *Ibid.* Despite reaffirming that clear rule, the Court nonetheless finds that the mere presence of a warrant rendered the officers' conduct reasonable. The Court fails to cite a single case that even arguably supports the proposition that using official power to enable news photographers and reporters to enter a private home for purposes unrelated to the execution of a warrant could be regarded as a "reasonable" invasion of either property or privacy.

II

The absence of judicial opinions expressly holding that police violate the Fourth Amendment if they bring media representatives into private homes provides scant support for the conclusion that in 1992 a competent officer could reasonably believe that it would be lawful to do so. Prior to our decision in *United States* v. *Lanier*, 520 U. S. 259 (1997), no judicial opinion specifically held that it was unconstitutional for a state judge to use his official power to extort sexual favors from a potential litigant. Yet, we unanimously concluded that the defendant had fair warning that he was violating his victim's constitutional rights. *Id.*, at 271 ("The easiest cases don't even arise" (citations and internal quotation marks omitted)).

Nor am I persuaded that the absence of rulings on the precise Fourth Amendment issue presented in this case can plausibly be explained by the assumption that the police practice was common. I assume that the practice of allowing media personnel to "ride along" with police officers was common, but that does not mean that the officers routinely allowed the media to enter homes without the consent of the owners. As the Florida Supreme Court noted in *Florida Publishing Co.* v. *Fletcher*, 340 So. 2d 914, 918 (1976), there has long been a widespread practice for firefighters to allow photographers to enter disaster areas to take pictures, for example, of the interior of buildings severely damaged by fire. But its conclusion that such media personnel were not trespassers rested on a doctrine of implied consent[2]— a theory wholly inapplica-

[2] The Florida Supreme Court held:

"The trial court properly determined from the record before it that there was no genuine issue of material fact insofar as the entry into respondent's home by petitioner's employees became lawful and non-actionable pursuant to the doctrine of common custom, usage, and practice and since it had been shown that it was common usage, custom

ble to forcible entries in connection with the execution of a warrant.[3]

In addition to this case, the Court points to three lower court opinions– none of which addresses the Fourth Amendment– as the ostensible basis for a reasonable officer's belief that the rule in *Semayne's Case* was ripe for reevalution.[4] See *ante,* at 12. Two of the cases were decided in 1980 and the third in 1984. In view of the clear restatement of the rule in the later opinions of this Court, cited *ante,* at 7, those three earlier decisions could not possibly provide a basis for a claim by the police that they reasonably relied on judicial recognition of an exception to

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and practice for news media to enter private premises and homes *under the circumstances present here.*

. . . . .

"'The fire was a disaster of great public interest . . . . [I]t has been a longstanding custom and practice throughout the country for representatives of the news media to enter upon private property where disaster of great public interest has occurred.'" 340 So. 2d, at 917–918.

The Court's reference to this case, *ante,* at 12, n. 3, misleadingly suggests that the "widespread practice" referred to in the Florida court's opinion was police practice; it was not.

[3] Indeed, the Wisconsin state-court decision, cited by the Court as contrary authority, took pains to distinguish this case:

"We will not imply a consent as a matter of law. It is of course well known that news representatives want to enter a private building after or even during a newsworthy event within the building. That knowledge is no basis for an implied consent by the possessor of the building to the entry . . . . We conclude that custom and usage have not been shown in fact or law to confer an implied consent upon news representatives to enter a building under the circumstances presented by this case." *Prahl* v. *Brosamle,* 98 Wis. 2d 130, 149–150, 295 N. W. 2d 768, 710 (App. 1980).

[4] As the Court notes, the only Federal Court of Appeals authority on the subject, *Bills* v. *Aseltine*, 958 F. 2d 697 (CA6 1992), "anticipate[d] today's holding that police may not bring along third parties during an entry into a private home pursuant to a warrant for purposes unrelated to those justifying the warrant." *Ante,* at 13.

the basic rule that the purposes of the police intrusion strictly limit its scope.

That the two federal decisions were not officially reported makes such theoretical reliance especially anomalous.[5] Moreover, as the Court acknowledges, the claim rejected in each of those cases was predicated on the media's alleged violation of the plaintiffs' "unorthodox non-Fourth Amendment right to privacy theories," *ante*, at 12, rather than a claim that the officers violated the Fourth Amendment by allowing the press to observe the execution of the warrant. *Moncrief* v. *Hanton*, 10 Media L. Rptr. 1620 (ND Ohio 1984); *Higbee* v. *Times-Advocate*, 5 Media L. Rptr. 2372 (SD Cal. 1980). As for the other case, *Prahl* v. *Brosamle*, 98 Wis. 2d 130, 295 N. W. 2d 768 (App. 1980)– cited by the Court, *ante*, at 12, for the proposition that the officer's conduct was "not unreasonable"– it actually held that the defendants' motion to dismiss should have been denied because the allegations supported the conclusion that the officer committed a trespass when he allowed a third party to enter the plaintiff's property.[6] Since that conclusion was fully consistent with

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[5] In the Fourth Circuit, unreported opinions may not be considered in the course of determining qualified immunity. *Hogan* v. *Carter*, 85 F. 3d 1113, 1118 (1996).

[6] *Prahl* v. *Bronsamle*, 98 Wis. 2d, at 154–155, 295, 295 N. W. 2d, at 782 ("A new trial must be had with respect to the plaintiffs' claims for trespass against Lieutenant Kuenning and Dane Country .... Lieutenant Kuenning had no authority to extend a consent to [the press] to enter the land of another. Although entry by Lieutenant Kuenning was privileged, he committed a trespass by participating in the trespass by [the press]").

The Court is correct that the Wisconsin Court of Appeals upheld dismissal of the plaintiff's 42 U. S. C. §1983 claim *against the newscaster* because he was not acting under color of state law. As the basis for rejecting the §1983 action "for invasion of privacy based on disclosure of the incident," the court further held that "[w]e are unwilling to

a number of common-law cases holding that similar conduct constituted a trespass,[7] it surely does not provide any support for an officer's assumption that a similar trespass would be lawful.

Far better evidence of an officer's reasonable understanding of the relevant law is provided by the testimony of the Sheriff of Montgomery County, the commanding officer of three of the respondents: "'We would never let a civilian into a home. . . . That's just not allowed.'" Brief for Petitioner 41.

III

The most disturbing aspect of the Court's ruling on the qualified immunity issue is its reliance on a document discussing "ride-alongs" apparently prepared by an employee in the public relations office of the United States Marshals Service. The text of the document, portions of which are set out in an appendix, makes it quite clear that its author was not a lawyer, but rather a person concerned with developing the proper public image of the Service,

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accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness." 98 Wis. 2d, at 138, 295 N. W. 2d, at 774. Important to its conclusion was its observation that, unlike the unnecessary male participation in body searches of schoolgirls in *Doe* v. *Duter*, 407 F. Supp. 922 (WD Wis. 1976), "[n]either the search of Dr. Prahl and his premises nor the film or its broadcast has been shown to include intimate, offensive or vulgar aspects." *Ibid*. The reporter in question was stationed in the entryway of the building and was able to film into the plaintiff's office during the police interview.

[7] See, *e.g.*, *Daingerfield* v. *Thompson*, 74 Va. 136, 151 (1880) ("There seems, indeed, to be no principle of law better settled, and for which numerous authorities may be cited if necessary, than this: that all persons who wrongfully contribute in any manner to the commission of a trespass, are responsible as principals, and each one is liable to the extent of the injury done"); see also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §13, p. 72 (5th ed. 1984).

with a special interest in creating a favorable impression with the Congress. Although the document occupies 14 pages in the joint appendix and suggests handing out free Marshals Service T-Shirts and caps to "grease the skids," it contains no discussion of the conditions which must be satisfied before a newsperson may be authorized to enter private property during the execution of a warrant. App. 12. There are guidelines about how officers should act and speak in front of the camera, and the document does indicate that "the camera" should not enter a private home until a "signal" is given. *Id.*, at 7. It does not, however, purport to give any guidance to the marshals regarding when such a signal should be given, whether it should ever be given without the consent of the homeowner, or indeed on how to carry out any part of their law enforcement mission. The notion that any member of that well-trained cadre of professionals would rely on such a document for guidance in the performance of dangerous law enforcement assignments is too farfetched to merit serious consideration.

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The defense of qualified immunity exists to protect reasonable officers from personal liability for official actions later found to be in violation of constitutional rights that were not clearly established. The conduct in this case, as the Court itself reminds us, contravened the Fourth Amendment's core protection of the home. In shielding this conduct as if it implicated only the unsettled margins of our jurisprudence, the Court today authorizes one free violation of the well-established rule it reaffirms.

I respectfully dissent.

APPENDIX TO OPINION OF STEVENS, J.

"MEDIA RIDE-ALONGS

"The U. S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public when it accomplishes its designated duties. Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.

"Media 'ride-alongs' are one effective method to promote an accurate picture of Deputy Marshals at work. Ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens. The result is usually a very graphic and dynamic look at the operational activities of the Marshals Service, which is subsequently aired on TV or printed in a newspaper, magazine, or book.

"However, successful ride-alongs don't just 'happen' in a spontaneous fashion. They require careful planning and attention to detail to ensure that all goes smoothly and that the media receive an accurate picture of how the Marshals Service operates. This booklet describes considerations that are important in nearly every ride-along." App. 4.

"Establish Ground Rules

"Another good idea— actually, it's an essential one— is to establish ground rules at the start and convey them to the reporter and camera person. Address such things as what can be covered with cameras and when, any privacy restrictions that may be encountered, and interview guidelines.

"Emphasize the need for safety considerations and explain any dangers that might be involved. Make the ground

rules realistic but balanced— remember, the media will want good action footage, not just a mop-up scene. If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal." *Id.*, at 7.

"The very best planning won't result in a good ride-along if the Marshals Service personnel involved do not do their part. It's a case of actions speaking as loudly as words, and both are important in getting the best media exposure possible." *Id.*, at 9.

"'Waving the Flag'

"One action of special consequence is 'waving the flag' of the Marshals Service. This is accomplished when Deputies can easily be recognized as USMS Deputies because they are wearing raid jackets, prominently displaying their badges, or exhibiting other easily identifiable marks of the Service. We want the public to know who you are and what kind of job you do. That is one of the goals of the ride-along. So having Deputy Marshals easily identified as such on camera is not just a whim— it's important to the overall success of the ride-along.

"Of course, how the Deputies act and what they say is also crucial. During the ride-along virtually any statement made by Deputies just might end up as a quote, attributed to the person who made it. Sometimes that could prove embarrassing. A Deputy must try to visualize what his or her words will look like in a newspaper or sound like on TV. Being pleasant and professional at all times is key, and that includes not being drawn into statements of personal opinion or inappropriate comments. Using common sense is the rule." *Id.*, at 9–10.

"You also need to find out when the coverage will air or end up in print. Ask the reporter if he or she can keep you informed on that matter. You might 'grease the skids' for this by offering the reporter, camera person, or other

media representatives involved a memento of the Marshals Service. Marshals Service caps, mugs, T-shirts, and the like can help establish a rapport with a reporter that can benefit you in the future." *Id.*, at 12.

"Getting to the final Product

"Naturally, it's important to see the final product of the ride-along when it airs on TV or appears in the newspaper. You should arrange to videotape any TV news coverage or clip the resulting newspaper stories and send a copy of the videotape or news clipping to the Office of Congressional and Public Affairs." *Id.*, at 13.