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Limiting Search Warrants

WHEN THE Supreme Court announced its decision last spring broadening the use of search warrants in criminal cases, we anticipated a sharp debate over the wisdom of its ruling. No such debate has yet materialized. Instead, the discussions and studies under way on Capitol Hill and inside the administration are aimed at deciding how sharply Congress should curtail the effects of what the court has done. There seem to be few politicians or federal administrators who are prepared to defend a decision that makes it possible for law-enforcement officers to search the private papers and files of all individuals, whether or not they have been implicated in criminal activity.

That decision came in the case of a California newspaper whose files were searched by police seeking (without success) pictures of a particular crime. The court said warrants for searches of that kind can be issued without advance notification to the newspaper or without a prior request that it provide the material voluntarily, so long as there is probable cause to believe it has the evidence the police want.

Most newspapers quickly denounced the decision and called for legislation to overturn it. While that united front may well have something to do with the cold shoulder the decision has received in Congress—no politician wants to alienate the local press in an election year—the effort to change the decision developed much wider support once the realization sank in that it applies to the files of lawyers, doctors, clergymen and ordinary citizens as well as newspapers. A dozen bills, with more than 50 sponsors, have been introduced. Three congressional committees have held hearings (more are scheduled) and the House Committee on Government Operations has recommended, without dissent from any of its 43 members, that Congress take action.

The problem is that there is no agreement about what that action should be. Some of the bills would bar judges from authorizing such searches of offices without first attempting to get the evidence in other ways. Others would include the files and papers of lawyers, doctors and clergymen in the ban. Still others would prevent all such searches. Some of the bills would limit only federal officials; others attempt to limit state officials as well.

Our view is that Congress should go as far as it constitutionally can in overturning the court's decision. A surprise search of anyone's papers and files—ours or yours—could expose to the police confidential material beyond what they might be entitled to see, and could also be highly disruptive and embarrassing. As Assistant Attorney General Philip B. Heymann said last summer, "Any decent government should attempt to use the least force possible in dealing with its citizens." Searches ought not to take place if requests or subpoenas will produce the evidence—from newspapers, lawyers, doctors, clergymen or ordinary citizens. Searches of those not implicated in crime can be justified only if the police have reason to believe the evidence will be destroyed or hidden if a request for it is made.

Congress should not hesitate in applying those principles to searches by federal officers. Whether it can apply them to searches by state officers as well is unclear. Some constitutional experts say it can through its power under the 14th Amendment; others say it can, at least as far as the news media are concerned, under the commerce clause; others say it can't. We expect the question to be more fully aired later this month when Attorney General Griffin Bell presents the administration's proposals. Once he does, the last reason for delay on the subject will be gone, and Congress should legislate as quickly as possible.