

RAIDING ISLAM: SEARCHES THAT TARGET RELIGIOUS INSTITUTIONS

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INTRODUCTION

On the morning of March 20, 2002, while television cameras recorded the events for the evening news, dozens of federal agents entered and searched the offices of several Islamic educational and religious organizations in Northern Virginia.¹ The agents were searching, it appears, for evidence that those organizations contributed money to international groups known to have sponsored terrorist acts. By most public accounts, the targeted institutions were regarded as moderate and progressive voices in American Islam.² For that reason, the searches sent shock waves through the American Muslim community. Muslims who had supported the Administration's domestic war on terrorism began to wonder out loud: If religious institutions like these are suspect in the eyes of the government, then what Islamic organization is not? Is this a war on terrorism, or a war on Islam?

In response to protests from a variety of American Muslim organizations, the government was quick to point out that the searches were authorized by warrants issued by a federal magistrate.³ But as months have passed with little indication that the searches produced

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1. This symposium includes first-hand accounts of the searches from some who were present. See pp. 105, *supra*. For news accounts, see Tom Jackman, *N. Va. Sites Raided in Probe of Terrorism; Federal Agencies Seek Information on Funds*, Wash. Post B1 (Mar. 21, 2002); and Judith Miller, *A Nation Challenged: The Money Trail; U.S. Raids Continue, Prompting Protests*, N.Y. Times A13 (Mar. 22, 2002).

2. John Mintz & Tom Jackman, *Finances Prompted Raids on Muslims; U.S. Suspected Terrorism Ties to N. Va. For Years*, Wash. Post A1 (Mar. 24, 2002); and Nancy Dunne, *U.S. Muslims See their American Dreams Die*, Fin. Times (London) 10 (Mar. 28, 2002). ("respected Islamic institutions").

3. The *Washington Post* quoted United States Attorney, Paul McNulty, as saying, "A search warrant is issued only after a magistrate judge ascertains that probable cause exists that a crime was committed. This case followed that procedure." See Brooke A. Masters, *Va. Muslim Groups Want Property Back*, Wash. Post A9 (May 3, 2002).

evidence of any crime, questions about the government's choice of targets and tactics continue to trouble many observers. Why did the government choose the tactic of multiple, coordinated and well publicized searches rather than the simpler, quieter alternative of a subpoena? Before searching religious institutions, did government agents and attorneys consider the harm that would come to reputable religious institutions from the searches? If so, did government officials conclude that other factors—like the risk that subpoenaed records might be destroyed—outweighed the potential harm to religious expression? Or does the government now regard the chilling of religious expression by “suspect” organizations to be a legitimate goal of law enforcement in combating terrorism?

Despite the importance of these questions to the American Muslim community in particular, and to the community of faith-based organizations more generally, solid answers are hard to find.⁴ In this brief essay, I will not attempt to unravel the bits and pieces of publicly available data that might answer these questions as a matter of fact. Instead, I will try to put the searches in legal context by addressing two basic questions. First, how does our law account for the damage that may result from a search warrant where the search by itself may stifle religious expression? Second, does that law make sense in light of the law enforcement tactics used, and the religious interests at stake, in the domestic war against terrorism?

I. OPERATION GREENQUEST AND ITS FALLOUT

A. *The Searches*—On March 20 and 21, 2002, federal agents executed search warrants on sixteen locations in the Northern Virginia suburbs of Washington, D.C. The raids targeted the offices of Islamic charitable and educational institutions, and the homes of individual Muslims who worked in those institutions. Despite the fact that affidavits supporting the search warrants were sealed by court order, government sources quickly informed the press that the searches were part of “Operation Green Quest,” a U.S. Customs Service initiative

4. Aff. (Redacted) in Support of Application for Search Warrant (October 2003), *In the Matter of Searches Involving 555 Grove Street, Herndon, Virginia, and Related Locations*, Misc. No. 02-114-MG (E.D. Va.). The affidavit supporting the search warrants was sealed at the government's request. *See id.* at 8, ¶ 10. After eighteen months, a redacted version was unsealed. Despite its unusual length—almost one hundred pages—the redacted affidavit fails to draw any clear connection between the Northern Virginia institutions and any terrorist organization. Indeed, the affidavit candidly admits that the trail of funds disbursed outside the United States “cannot practically be followed.” *Id.* Instead, much of the affidavit aims to show that the targeted institutions may have violated IRS reporting requirements for tax-exempt charitable institutions.

designed to stop the flow of money to terrorist groups.⁵ Later statements by Customs officials suggest that the Northern Virginia raids were by far the largest initiative undertaken by Operation Green Quest in the year following the September 11 terrorist attacks.⁶

The search warrants were broadly framed. In addition to authorizing seizure of financial records, the warrants called for seizure of all computers as well.⁷ Ranging even further, the warrants authorized seizure of documents, pamphlets, leaflets, booklets, audio and videotapes that related to any “individual or entity designated as a terrorist” under federal law.⁸ In effect, therefore, the warrants authorized seizure of everything from the daily newspaper to religious treatises decrying terrorism. Over the course of two days, the agents seized about five hundred boxes of papers and eighty computers.⁹ Among the documents seized by federal agents were library books, pamphlets on religious education and scholarly manuscripts awaiting publication.¹⁰ In some instances, it appears, documents written in Arabic were seized by agents who could not speak or read the language.¹¹

Whether the Customs agents hit any real targets in their search for terrorist funding remains to be seen. Within days of the searches, Government sources told the press that some of the seized materials had

5. See Jackman, *supra* n. 1, at B1. Over the months after the raids, the press reported a wide range of details about the investigation, attributing most of them to government sources. According to those reports, the probe had begun in 1996 as an investigation of anti-Israeli activists in Florida. The government had traced contributions from a Northern Virginia group, identified as the SAAR Foundation, to the World and Islam Studies Enterprise (WISE), a now defunct research group led by University of South Florida professor Sami Al-Arian. See Mintz & Jackman, *supra* n. 2, at A1. WISE was closed down when the State Department designated it as a funding organization for militant Palestinian groups, including Hamas. See Jerry Seper, *Revived Probe Eyes 80 Charities' Ties to Terrorism*, The Wash. Times A3 (Apr. 9, 2002). Al Arian was indicted in February 2003 for alleged support of Palestinian terrorists. See Elaine Silvestrini, *Al-Arian Won't Be Set Free on Bail*, Tampa Trib. (Apr. 11, 2003).

6. Shortly after the Northern Virginia raids, Customs officials stated that Operation Green Quest was responsible for twenty-one searches, twelve arrests and four indictments. See Dunne, *supra* n. 2, at 10. The March 14, 2002 searches therefore accounted for about two-thirds of Green Quest search activity as of that time. In October 2002, government officials called the Northern Virginia investigation “one of the highest priorities of Operation Green Quest.” Douglas Farah & John Mintz, *U.S. Trails Va. Muslim Money, Ties*, Wash. Post A1 (Oct. 7, 2002).

7. See Br. Amicus Curiae of the Am. Civ. Liberties Union of Va. Inc., In Support of Mot. for Return of Prop. and to Unseal the Search Warrant Aff. at 3, *In the Matter of the Search of: 750 A Miller Drive, et al.* No. 02-MG-122 (E.D. Va.) [hereinafter *ACLU Brief*].

8. *Id.*

9. See Brooke A. Masters, *U.S. Magistrate Denies Muslim Groups' Request*, Wash. Post A13 (May 4, 2002).

10. *ACLU Brief*, *supra* n. 7, at 3; and Masters, *supra* n. 3, at A9.

11. *ACLU Brief*, *supra* n. 7, at 3.

provided “substantial leads.”¹² But today, approaching two years later, none of the people or institutions searched in March 2002 has been charged with any crime. None of their financial assets has been frozen or seized.

B. Damage in the Wake of the Searches—While the efficacy of the raids is known only to government insiders, the damage resulting from the raids is easier to see. On one level, the damage was very personal, and quite immediate. Elsewhere in this Symposium, several American Muslim women offer their first-hand accounts of the searches. They speak of fear at seeing armed strangers burst into their workplaces, humiliation at being handcuffed and monitored within their own homes, and frustration at the futility of their efforts to learn why it all happened.

For the targeted religious institutions, the most obvious and immediate harm was the disruption of the ongoing business of teaching, learning, writing and publishing. For a period of months, several of the targeted institutions were virtually shut down because the seizure of their computers deprived them of everything from student academic records to payroll information.¹³ Enrollments dropped. Employees were laid off.¹⁴ Publications, presentations and conferences were delayed or cancelled. The long-term effects from the March 2002 searches are harder to calculate, though perhaps even more significant. For the targeted institutions themselves, the well-publicized raids are likely to chill financial support, not to mention future enrollments and participation in public programs.

Ripple effects from the searches likely will extend beyond the specific institutions raided in March 2002, especially because those institutions and their leaders were widely regarded as progressive voices in American Islam. One, the Graduate School of Islamic and Social Sciences, has been the principal trainer of Muslim imams who serve as chaplains in the U.S. military.¹⁵ Another, the Fiqh Council of North America, is a council of moderate Islamic clerics who had been denounced by radicals for issuing a ruling allowing Muslims to fight in the American armed forces in Afghanistan.¹⁶ When the government targets institutions like these for the kind of treatment normally reserved

12. Dunne, *supra* n. 2, at 10.

13. See Masters, *supra* n. 3, at A9.

14. See Paul Bradley, *Muslims Feel Targeted; Raids, Other Actions Cited at Fairfax Meeting*, Richmond Times-Dispatch B5 (Sept. 29, 2002).

15. See Jackman, *supra* n. 1, at B1.

16. See Farah & Mintz, *supra* n. 6, at A1; and Phillip Kurata, *U.S. Islamic Leaders Issue Fatwa on U.S. Muslim Soldiers Fighting Terrorists* (U.S. Dept. St. Info. Programs Oct. 16, 2001) <<http://usinfo.state.gov/topical/pol/terror/01101611.htm>> (accessed Jan. 20, 2004).

for drug dealers and thieves, the not-so-subtle message to the broader community of American Muslims is hard to avoid: Be careful whom you trust with your money, your time, your thoughts and your faith.¹⁷

C. *The Government's Choice of Tactics*—One of the most troubling aspects of the March 2002 searches is that the government chose to use search warrants at all, rather than to employ tactics that would limit collateral damage to religious institutions. In an investigation targeting financial transactions, the government has other means for obtaining the records necessary to trace money and identify its sources. The simplest, of course, is just to ask for the information. Another is to subpoena it. In the vast run of financial investigations, the government obtains most of its information through these means rather than through search warrants.

The reasons that financial investigators typically choose subpoenas rather than resorting to search warrants are well known. First, search warrants are more costly and more difficult to obtain than subpoenas. Issuing a subpoena is a simple, clerical task. Obtaining a search warrant, at least in a complex financial investigation in the federal system, typically involves days of preparation by agents and prosecutors, drafting of lengthy affidavits to show probable cause for the search, and the approval of a federal magistrate.¹⁸

Second, search warrants are more difficult to execute. A subpoenaed party does his own searching and hands over the subpoenaed records. To execute a search warrant, agents must assemble a team, enter a premises, and spend hours or days plowing through extensive records to find what they are seeking. Where the records are stored on computers, they must undertake the difficult task of circumventing passwords and other security measures to access the stored data without changing or destroying it in the process. Where many of the documents are in a language unknown to most federal agents—Arabic in this case—translators must read the documents before the agents can know what to seize.

Third, search warrants are dangerous. Even in a financial investigation, the unexpected entry of armed strangers into a home or

17. In protesting the raids, the Council on American-Islamic Relations said that targeting “respected Islamic institutions sends a hostile and chilling message to the American Muslim community and contradicts President Bush’s repeated assertions that the war against terrorism is not a conflict with Islam.” Dunne, *supra* n. 2, at 10.

18. In describing these investigative techniques, I write primarily from personal experience as a federal prosecutor. For a detailed analysis of the roles of federal prosecutors and agents during complex investigations, see Daniel Richman, *Federal Prosecutors and Their Agents, Agents and their Prosecutors*, 103 Colum. L. Rev. 749 (2002).

business is a tricky proposition. By contrast, reports of physical injury in serving a subpoena are rare.

Fourth, in comparison to searches, subpoenas minimize invasion of privacy and disruption of ordinary business. As the March 2002 searches demonstrate, a search for documentary evidence requires agents to review hundreds or thousands of pages in order to identify the ones that are subject to seizure. By comparison, a subpoena directs the recipient to find the relevant documents within its own records. Typically, a subpoenaed party (or its attorneys) can accomplish that process with no disruption to ongoing business and without inviting outsiders to rifle through confidential records.

Finally, a subpoena poses less risk of damage to the reputation of the recipient. Banks, telephone companies, utilities and other businesses receive subpoenas in criminal investigations as a matter of routine. Both by design and by law, the process is secret. By contrast, the execution of a search warrant is a far more dramatic event, and one more likely to stigmatize those who are searched.¹⁹

Of course, there are valid reasons why the government may choose to use search warrants, rather than subpoenas, despite the increased costs, risks, disruption and stigma associated with a warrant. The principal reason is that the recipient of a subpoena has the opportunity to destroy or hide the evidence. In large measure, when prosecutors and investigators rely on subpoenas, they also rely on the good faith of the subpoenaed persons and entities, or their lawyers. In choosing whether to use search warrants or subpoenas, therefore, law enforcement officials typically undertake a cost-benefit analysis. They weigh the many costs and disadvantages of a search warrant against the risks that evidence will be hidden or destroyed. This cost-benefit calculus accounts for the fact that search warrants typically are the tactic of choice in the investigation of drug dealing and violent crime, while subpoenas typically are preferred in financial investigations.²⁰

19. These substantial differences between subpoenas and other more coercive forms of government investigation are accounted for in constitutional law. There is an immense body of law regulating searches and arrests under the Fourth Amendment. By contrast, the Court has held that a subpoena for testimony is not even a "seizure" within the meaning of the Fourth Amendment, *see U.S. v. Dionisio*, 410 U.S. 1, 9-10 (1973), and Fourth Amendment regulation of subpoenas is minimal, *see U.S. v. R Enterprises, Inc.*, 498 U.S. 292, 301 (1991) (holding that subpoena does not violate 4th Amendment where there is any reasonable possibility that subpoenaed materials will be relevant to investigation).

20. This difference may have been more pronounced a decade ago than it is today. While subpoenas remain the tool of choice in financial investigations, prosecutors are employing search warrants with increasing frequency in white-collar investigations. *See* Julie R. O'Sullivan, *Federal White Collar Crime: Cases and Materials* 10 (West Group 2001).

There is another, more problematic reason why the government may choose to use search warrants rather than subpoenas: search warrants send a message. Because search warrants normally are reserved for those about to be charged with crime, a search often sends a public message that the subjects of the search are viewed as criminals by the government.²¹ And that message is amplified when government sources alert the media—as they apparently did in March 2002—to ensure that the televised image of armed agents seizing evidence by force appears on the evening news. In many cases, that kind of public display may be of little consequence, because it is followed in short order by other events open to public scrutiny: arrests, criminal charges, and a public trial. In such cases, the government is put to its proof and the suspect has a chance to defend his reputation. In such cases, the public aspects of searches, arrests and trials may serve the legitimate interest of deterrence. People see justice being done.

The aftermath of the very public March 2002 searches, however, followed a different and more troubling pattern. The factual basis for the searches remained officially secret for over a year, hidden in affidavits that were sealed at the government's request.²² At the same time, unnamed government "sources" made sure that the government's message found its way into the newspapers through selective statements about Operation Green Quest and its aims.²³ As a practical matter, the government has publicly identified the targeted religious organizations as aiders and abettors to terrorism, while avoiding any responsibility for proving the charge.²⁴

21. "The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched." *Zurcher v. Stanford Daily*, 436 U.S. 547, 580 (1978) (Stevens, J., dissenting).

22. In a particularly odd twist, a principal "confidential" source for the sealed affidavit may well have thrust herself and her information into the public eye. About a year after the raids, a book was published by an "anonymous" author who claimed to have worked extensively with Green Quest agents to develop probable cause for the warrants. Anonymous, *The Terrorist Hunter* 301-330 (Ecco 2003). The "anonymous" author appeared on the CBS News show, *Sixty Minutes*, on May 4, 2003, without using her name or showing her face. Predictably, her name—Rita Katz—was quickly and widely disclosed. In short order, she was sued for libel by some of those targeted in the March 2002 raids. Just before Katz' appearance on *Sixty Minutes*, the government reversed its position and asked that portions of the affidavit be unsealed.

23. See *supra* nn. 5 & 6.

24. "It's a smearing," commented Washington D.C. attorney Nancy Luque, who represents many of the targeted institutions. Farah & Mintz, *supra* n. 6, at A1.

II. WHEN WORLDS COLLIDE: “LAWFUL” SEARCHES THAT CHILL RELIGIOUS EXPRESSION

From a constitutional perspective, the March 2002 searches present an apparent clash between the Fourth Amendment world of search and seizure and the First Amendment world of religious freedom. On the one hand, the government claims that its tactics were lawful. After all, the searches were authorized by warrants issued by a neutral magistrate who found probable cause to believe that there was evidence of crime in the places that were searched.²⁵ On the other hand, the searches caused substantial damage to religious organizations that have never been charged with a crime. Activities traditionally protected by the First Amendment—religious teaching and publication—have been disrupted. Financial support for religious institutions has been threatened. Even more troubling, that kind of fallout was easily predictable and—at least for some government decision makers—may even have been an intended consequence of the raids.²⁶ In sum, if probable cause is the only standard by which we measure the legality of searches aimed at religious institutions, then the Fourth Amendment can allow searches and seizures that are predictably destructive to the First Amendment interests of those institutions. In a nation committed to religious liberty, that doesn't sound right.

The Supreme Court has never explicitly considered this clash of constitutional doctrines in a case involving the search of religious institutions.²⁷ After all, police seldom search for evidence of crime in churches. To sort out these First and Fourth Amendment concerns, therefore, we must turn to a closely analogous setting: the search of a newspaper office. The Court's opinion in *Zurcher v. Stanford Daily*²⁸

25. See *supra* n. 3, and accompanying text.

26. In the post-9/11 environment, it is simply implausible that the government officials who planned the March 2002 raids failed to recognize in advance that the event would be highly publicized and highly damaging to the business and reputation of the targeted institutions. Indeed, the rapidity and number of statements to the press from “government sources” after the raids suggest a calculated government effort to publicize the alleged connection between those institutions and terrorists. It is hard to escape the conclusion that one purpose of the massive, well-publicized searches was simply to disrupt the operations of the targeted groups. In a moment of—perhaps excessive—candor, one government source told a reporter that, even if the searches did not lead to prosecutions, they would serve the purpose of disrupting the flow of money to terrorists. See Mintz & Jackman, *supra* n. 2, at A1.

27. There are few reported cases from lower federal courts addressing searches of religious institutions. See *e.g. Presbyterian Church v. U.S.*, 870 F.2d 518 (9th Cir. 1989) (discussing standing of a church to raise First and Fourth Amendment claims). The government's investigation of the “church” of Scientology produced a few. See *e.g. U.S. v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981).

28. 436 U.S. 547 (1978).

may offer the best frame of reference for considering the constitutional issues at stake in the March 2002 searches.

In April 1971, at the height of protests against the Vietnam War, a large group of students occupied the offices of Stanford University Hospital.²⁹ When police arrived, violence broke out and nine police officers were injured. Two days later, the *Stanford Daily* student newspaper carried accounts of the incident, along with photographs. The news story and published photos indicated that the photographer had been in position to take other photographs that might identify those who assaulted the police.³⁰ The District Attorney obtained search warrants authorizing police to enter and search the newspaper offices for negatives and photographs depicting the assaults. The searches uncovered nothing other than the already-published photos. Weeks later, the *Stanford Daily* filed a civil suit, alleging that police violated the newspaper's First and Fourth Amendment rights.³¹

There was no question that the warrants had been issued by a neutral magistrate, and were based upon probable cause to believe that the newspaper offices might contain photographic evidence of the assaults. But the *Daily* argued that the searches were nonetheless unlawful, for three reasons.

(1) *Searches Directed at "Innocent" Parties*—The *Daily* was not suspected of any crime. It was an innocent third party that happened to possess evidence of a crime committed by someone else. Under those circumstances, the newspaper argued, it should not have to endure the inconvenience, disruption and invasion of privacy that come from an unannounced search.³²

The Court rejected the argument. As a general rule, the Court found, the Fourth Amendment requires no special showing in order to justify the search of property occupied by an innocent party. The Fourth Amendment prohibits "unreasonable searches," and provides that "no warrants shall issue, but upon probable cause."³³ Reading those two clauses together, the *Zurcher* Court wrote

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

29. *See id.* at 550.

30. *See id.* at 551.

31. *See id.* at 552.

32. *See id.* at 553-554.

33. U.S. Const. amend. IV.

seized are located on the property to which entry is sought.³⁴

“Search warrants,” the Court noted, “are not directed at persons; they authorize the search of ‘place[s]’ and the seizure of ‘things.’”³⁵ As a constitutional matter, therefore, it is irrelevant whether the owner or occupant of the place to be searched is himself suspected of any crime.

(2) *Search Warrants where Subpoenas May Suffice*—Second, the newspaper argued that the search was not necessary. Before authorizing the search of property occupied by an innocent party, the *Stanford Daily* asserted, a magistrate must find probable cause to believe that police cannot obtain the evidence simply by requesting it or by subpoenaing it.³⁶ In other words, a search directed at an innocent third party is “unreasonable” under the Fourth Amendment where there is a less intrusive means to get at the evidence.

The *Zurcher* majority rejected this claim as well, for two reasons. First, the Court found that it would be impractical to require law enforcement to prove the necessity for choosing a search warrant rather than a subpoena. Searches often occur at early stages of investigations before all suspects are identified. The majority wrote,

The seemingly blameless third party in possession of . . . evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends³⁷

Second, the Court believed that the practicalities of investigating crime would lead prosecutors and police to avoid using search warrants unless they were necessary. “[S]earch warrants are more difficult to obtain than subpoenas,” the Court noted.

Where, in the real world, subpoenas would suffice, it can be expected that they will be employed by the rational prosecutor. On the other hand, when . . . the prosecutor chooses to use the search warrant, it is unlikely that he has needlessly selected the more difficult course.³⁸

In effect, the Court left the choice of tactics—search warrant vs. subpoena—to the discretion of the prosecutor, trusting in the practicalities of the “real world” to limit abuses.

34. *Zurcher*, 436 U.S. at 556.

35. *Id.* at 555.

36. *See id.* at 560-561.

37. *Id.* at 561.

38. *Id.* at 563.

(3) *Searches Directed at the Press*—The *Stanford Daily*'s third contention went directly to the First Amendment interests at stake when police are allowed to raid a newspaper office.³⁹ The search of a newspaper office can disrupt or delay the publication of news. Seizure of information that has not yet been published can amount to a “prior restraint” on constitutionally protected speech. Search of a news organization can threaten the confidentiality of news sources and thereby limit access of reporters to critical information. And—as the American colonists saw in their struggles with George III⁴⁰—searches directed at the press can chill a news organization's willingness to gather and report news unfavorable to the same government that chooses where to search and whom to arrest. For all of these reasons, the *Daily* argued, whatever the Fourth Amendment might allow as “reasonable” under ordinary circumstances, the rules should be different where a search threatens to chill First Amendment interests. Search of a news media office should be allowed only in those rare circumstances where the police can demonstrate that important evidence will be removed or destroyed if law enforcement tries to obtain it by subpoena.⁴¹ In other words, the *Daily* sought a *per se* rule that magistrates should not issue warrants to search newspapers without first finding that the search was the only means for obtaining the evidence.

The *Zurcher* majority was unwilling to impose that *per se* rule of necessity. Instead, the Court suggested, magistrates could protect First Amendment interests through their application of traditional Fourth Amendment standards:

Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.⁴²

III. BEYOND PROBABLE CAUSE: ACCOUNTING FOR FIRST AMENDMENT VALUES IN SEARCHES TARGETING RELIGIOUS INSTITUTIONS

The *Zurcher* opinion stirred controversy as soon as it was issued. In short order, Congress took the unusual step of passing legislation to

39. *See id.* at 563-564.

40. In *Marcus v. Search Warrants*, 367 U.S. 717, 724-728 (1961), the Supreme Court detailed the historical genesis of the Fourth Amendment in struggles between the press and the British crown.

41. *Zurcher*, 436 U.S. at 563-564.

42. *Id.* at 565.

limit its reach.⁴³ Nevertheless, as a matter of constitutional law, *Zurcher* remains the standard for evaluating search warrants that implicate First Amendment interests.

In several respects, *Zurcher* seems to validate the government's tactics in the March 2002 searches. Just like the police in *Zurcher*, the Operation Green Quest agents acted under the authority of a search warrant issued by a magistrate who found probable cause to believe there was evidence of crime in the offices to be searched. Under *Zurcher*, it does not matter that the people and institutions searched were not charged, or perhaps even suspected, of criminal acts themselves. Likewise under *Zurcher*, it seems not to matter whether an unannounced search was necessary or whether a subpoena may have sufficed to get the government what it needed. Finally, under *Zurcher*, the fact that the searches targeted religious institutions does not fundamentally alter the traditional Fourth Amendment approach to search and seizure. As a general rule, the government satisfies its constitutional obligations when it obtains a search warrant and acts within the authority of the warrant.

Still, searching a church, or temple, or mosque is different than searching a suspected drug dealer's apartment. The privacy of innocent believers and the potential for chilling religious expression make it different. *Zurcher* does not say that probable cause alone is sufficient to permit any search of any institution without regard to the First Amendment interests at stake. Even as it denied relief to the *Stanford Daily*, the *Zurcher* Court acknowledged the historical link between First Amendment interests and the warrant requirement of the Fourth Amendment:

It is true that the struggle from which the Fourth Amendment emerged "is largely a history of conflict between the Crown and the press," and that in issuing warrants and determining the reasonableness of a search, . . . magistrates should be aware that "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."⁴⁴

Accordingly, the Court continued, First Amendment concerns play a key role in limiting the government's power to search: "Where the materials sought to be seized may be protected by the First Amendment, the

43. In 1980, Congress passed the Privacy Protection Act, 42 U.S.C. § 2000aa, in response to *Zurcher*. The Senate Judiciary Committee Report states, "The Committee believes that the search warrant procedure in itself does not sufficiently protect the press and other innocent third parties . . ." Sen. Judiciary Comm. Rep. No. 874, 96th Cong., 2d Sess. 1980, at 3951.

44. *Zurcher*, 436 U.S. at 564 (quoting *Stanford v. Texas*, 379 U.S. 476, 482 (1965) and *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961)).

requirements of the Fourth Amendment must be applied with scrupulous exactitude.”⁴⁵ Those words should apply to the search of the Fiqh Council or the Graduate School of Islamic and Social Sciences no less than to a search at a student newspaper.

The basic Fourth Amendment requirements are (1) probable cause and particularity, and (2) in the words of the *Zurcher* Court, “overall reasonableness.” The hard part, of course, is deciding what it means to be “scrupulous” and “exacting” in applying those requirements in a search targeting religious institutions.

A. Probable Cause and Particularity in Searches for Evidence of
“Material Support”

The Fourth Amendment provides that “no warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized.”⁴⁶ Those words found their way into the Bill of Rights in large measure because of conflicts between the press and the Crown in England and Colonial America. Officers armed with “general” warrants could enter press offices and search for anything they might consider “seditious” or “scandalous.”⁴⁷ Searching, even without arrest or prosecution, was an effective way to identify political dissidents and to chill their desire to write or speak out against the king. And an effective way to silence a printing press was to seize what it printed, not to mention the press itself.

The Fourth Amendment requirements of probable cause and particularity work hand-in-hand to prohibit that kind of general search. Before police can search, they must show probable cause that a premises holds evidence of a crime. And—to satisfy the particularity requirement—they must articulate specifically what that evidence is. In addition, the particularity clause limits what police can do after they get the warrant. They can search only in the particular place, and for the particular thing, that the warrant identifies.⁴⁸ They cannot look for a stolen twenty-seven inch television in a six by ten inch glove compartment. And when they find what is listed in the warrant, they must stop searching.

45. *Id.* at 564 (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

46. U.S. Const. amend. IV.

47. See *Marcus v. Search Warrant*, 367 U.S. 717, 726 (1961).

48. For cases detailing the limits imposed on police searches by the “particularity” requirement, see generally *Thirty-First Annual Review of Criminal Procedure*, 90 Geo. L.J. 1117-1124 (2002) [hereinafter *Criminal Procedure Project*].

The particularity requirement plays an especially critical role in protecting First Amendment interests.⁴⁹ As the March 2002 searches demonstrate, the more broadly agents are allowed to search, the more likely they are to disrupt teaching, speaking, writing and publication. The more drafts, notes, emails and private papers they are allowed to see and to seize, the more the drafters, note-takers, emailers and paper-writers will stop writing and communicating in the future. A limited search, in a particular place for a particular piece of evidence, is less likely to chill protected religious expression.

Particularity is not a difficult concept to grasp in a search for a stolen twenty-seven inch television. But it is immensely complicated when it comes to seeking evidence of “material support” for terrorist organizations.⁵⁰ A search within a religious or educational institution for evidence of “material support” can stretch the concept of particularity to an astonishing breadth for several reasons.

First, a search for “material support” aims at documents. By their nature, search warrants for documents lead to broad, highly intrusive searches, because they allow agents to look everywhere the relevant documents may be found. Often, that means every file in an office—including computer files. And, because an agent cannot know what a document says until she reads it, even an agent searching for a specific document may be required to read through dozens or thousands of private papers before finding what she seeks.⁵¹ Moreover, unlike the search for a stolen television, which is over when the television is seized, most document searches have no logical stopping point. A search for “all documents referring to terrorists” allows agents to keep looking until they review all documents, regardless of how many they may seize along the way.

Second, the crime of “material support” brings into play an almost limitless range of potential “evidence” subject to review and seizure.

49. See *Stanford v. Texas*, 379 U.S. 476, 485-486 (1965); and see *Criminal Procedure Project*, *supra* n. 48, at 1120-1121.

50. A federal statute makes it a felony “knowingly” to provide “material support or resources to a foreign terrorist organization.” 18 U.S.C. § 2339B(a)(1) (2000). “Material support” includes any form of financial support as well as personnel or equipment. *Id.* § 2339A(b). The definition of “material support” was expanded by the U.S.A. PATRIOT Act, Pub. L. No. 107-156, § 805(a)(2), 115 Stat. 272, 377 (Oct. 26, 2001), to include intangibles such as “expert advice or assistance” along with the “training” that was already considered “material support” in 18 U.S.C. § 2339A(b). Significantly, the statute explicitly excludes “religious materials” as a form of material support. *Id.*

51. “[I]n order to find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it may be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one.” *Zurcher v. Stanford Daily*, 436 U.S. at 573 n. 7 (Stewart, J., dissenting).

Evidence of material support includes a great deal more than just financial records. The statute prohibits “knowingly” providing support to a terrorist organization.⁵² Documents that might show “knowledge” of the sources and uses of charitable donations therefore become potential evidence of crime. But this may be only the beginning of the particularity explosion. A thorough investigator would tell us that evidence of motive could be critical to proof of any crime. And why might a suspect person or institution support terrorism? To answer that question, a searching agent might say, she needs to know more about the suspect’s knowledge of terrorists and their aims; she may even need to understand the suspect’s political and religious views. An agent concerned with material support to Hamas, for example, may need to probe a suspect’s writings about Palestine, or the suspect’s readings about martyrdom. All of these writings may be evidence of a motive to provide material support to terrorism.

If this concept of “particularity” sounds farfetched, one need only look at the March 2002 search warrants to see how real it is. Among many other things, those warrants authorized agents to search for and seize “any and all information referencing in any way . . . any . . . individual or entity designated as a terrorist by the President.”⁵³ At an Islamic University or religious council, that description would include virtually any book, sermon, scholarly treatise or private letter expressing religious or political views on the most important issues of the day for many American Muslims, including publications that condemn terrorist acts.

A warrant of such breadth raises two, related concerns. One, of course, is that the agents will do what they apparently did when they seized five hundred boxes of paper in March 2002. They will seize everything that falls within the warrant’s description. Never mind that such a description includes—literally—every issue of the *Washington Post* published since September 11, 2001. The “seize everything” approach is what shuts down an institution. The March 2002 searchers didn’t take copies of data files. They took all of the computers.⁵⁴

A second, but equally serious concern is that a warrant like those issued in March 2002 is so broad that agents will have to narrow it themselves as they choose what to seize. In searching through all information “referencing any entity designated as a terrorist,” for example, a selective agent might seize only those papers and books that,

52. 18 U.S.C. § 2339B(a)(1).

53. See *ACLU Brief*, *supra* n. 7, at 3.

54. See *Masters*, *supra* n. 9, at A13.

in her view, showed sympathy for terrorists. But that kind of approach may be even more troubling. We may as well ask federal agents to look inside a religious institution and see whose views they find most troubling.

Granted, it may be impossible for investigators, at the time they apply for a warrant, to identify each of the particular documents they expect to seize as evidence of material support for terrorism. The nature and potential scope of that kind of crime is simply too complex. Granted, where such material support is real and such documents exist, the need for law enforcement to find them is substantial. But neither the “seize everything” approach, nor the “I’ll know it when I see it” approach, adequately protects the First Amendment interests at stake in a search of religious institutions. Even the *Zurcher* Court recognized that the threat to First Amendment values is greatest where government agents are allowed to rummage through and make their own judgments about the incriminating nature of books and papers. Invoking an earlier decision that had invalidated a warrant authorizing a search for materials “relating to the Communist Party,” the *Zurcher* Court concluded, “Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.”⁵⁵

There is precedent for a more “exacting” approach to probable cause and particularity when constitutionally protected materials are subject to search. In obscenity cases, the Court has required “rigorous procedural safeguards” beyond the normal Fourth Amendment requirements.⁵⁶ Where large-scale seizures threaten to keep materials out of publication, the Court has required adversary hearings before or immediately after seizure to determine what is and what isn’t “obscene.”⁵⁷ Even where seizures do not threaten a prior restraint on publication of allegedly obscene materials, the Court has urged magistrates to “focus searchingly on the question of obscenity” in determining probable cause.⁵⁸

No doubt a procedure requiring judicial review at or near the time of search would prove difficult and time consuming in major cases. But there are practical ways to administer such a process.⁵⁹ And the very

55. *Zurcher*, 436 U.S. at 564.

56. *Ft. Wayne Books, Inc. v. Ind.*, 489 U.S. 46, 62 (1989); and see *Lo-Ji Sales, Inc. v. N.Y.*, 442 U.S. 319, 326 n.5 (1979) (noting that First Amendment imposes special constraints on searches and seizures directed at materials intended for publication).

57. See *A Quantity of Copies of Books v. Kan.*, 378 U.S. 205 (1964).

58. *Id.* at 210 (quoting *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961)).

59. Courts administer discovery disputes in major civil cases on a daily basis. Much the same

prospect of quick and exacting judicial review would deter the kind of large-scale seizures witnessed in March 2002. If our Constitution gives that kind of protection to allegedly obscene books and videos, then surely it must accord at least the equivalent to religious texts.

B. Assessing “Reasonableness” when the Government’s Aim is to Disrupt

The Fourth Amendment prohibits “unreasonable” searches and seizures. One might argue that it is unreasonable to seek evidence from a religious institution under a search warrant when the same evidence might be obtained more easily, and with less disruption to religious expression, by serving a subpoena or simply asking for the evidence. But, as we have seen, the *Zurcher* Court dismissed that argument, in part because the Court believed the practicalities of the “real world” would take care of the problem.⁶⁰ In the Court’s view, rational and practical-minded prosecutors would not choose the tactic of a search warrant where they really believed that other, less disruptive means would suffice.⁶¹ Who would do it the hard way, the Court assumed, when they could do it an easier way?

Unfortunately, the post-September 11 world has turned that rationale on its head. The present, publicly-articulated focus of federal law enforcement is on prevention of future terrorist acts and disruption of terrorist networks.⁶² Prosecution of past crimes, though not ignored by any means, is now a secondary priority. This change of focus has brought with it a significant change in tactics. Increasingly, the government has come to regard the traditional tactics of criminal investigation—searches, arrests, temporary detention of suspects—as goals in themselves rather than as means toward the end of successful prosecution.⁶³ The March 2002 searches may be an example of that

kind of process would be involved in separating genuinely useful evidence from protected expressive materials with little or no value to an investigation.

60. See *supra*, text accompanying nn. 37-38.

61. *Zurcher*, 436 U.S. at 562-563.

62. Soon after September 11, Attorney General John Ashcroft asserted that he would employ all lawful means to target and detain suspected terrorists in order to prevent another attack. See John Ashcroft, *Prepared Remarks for the U.S. Mayors Conference* (Oct. 25, 2001), available at <http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm> (accessed Jan. 5, 2004) (cited in David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. Civ. Rights-Civ. Libs. L. Rev. 1, 24 n. 98 (2003)); and see *Worldwide Threats to Intelligence Community: Hearings Before the Senate Select Committee on Intelligence*, Feb. 11, 2003, at 1 (statement of Robert S. Mueller, Director of the F.B.I.) [hereinafter *Mueller Statement*] (“The prevention of another terrorist attack remains the FBI’s top priority.”).

63. The impact of that change of tactics on American Muslims has been pronounced.

change in tactical choices. Only two days after the searches, the *Washington Post* reported, “Government officials said that even if no crimes are proven, it might serve the counter terrorist cause to simply disrupt the flow of money.”⁶⁴ This post-9/11 “real world” is obviously different than the one the Court saw in *Zurcher*. In the *Zurcher* world, a rational prosecutor would not choose a disruptive tactic like a well-publicized search warrant where a quieter, less intrusive approach would work. In today’s world, the highest officials in our government may prefer the use of a search warrant precisely because it stands the best chance for disrupting a suspect institution.⁶⁵

The *Zurcher* Court found no need for a magistrate to consider the necessity for a warrant, because the normal priorities of prosecutors would prevent abuses. But now, those priorities have changed. And the level of judicial supervision should change as well. Where a search seems likely to disrupt the work of a religious institution—indeed, where it may be intended to do exactly that—it is not too much to ask investigators to convince a magistrate that the search is necessary. It is not too much to ask investigators to demonstrate to a magistrate—before they get the warrant—the steps they intend to take to minimize its disruptive impact on protected religious expression. We require that kind of showing in other contexts—in the issuance of Title III wiretap authorizations, for example.⁶⁶ There is no practical reason why we cannot require it for a search warrant.

Moreover, as the March 2002 searches demonstrate, the government’s tactics in the war on terror call for increased judicial supervision after the warrant is issued. When ongoing religious teaching, speaking and writing are disrupted, courts should demand that

Muslims are by far the most typical targets of “preventive” detentions and searches. For critiques of those tactics and further discussion of their impact on American Muslims, see generally David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L. J. 1003 (2002); Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. Va. L. Rev. 571 (2002); and Scott Alexander, *Inalienable Rights Question: Muslims in the U.S. Since September 11th*, 7 J. Islamic L. & Culture 103 (2002).

64. Mintz & Jackman, *supra* n. 2, at A1; and cf. *Mueller Statement*, *supra* n. 63, at 2 (“Our investigations have also made it more difficult for suspicious NGOs to raise money and continue their operations.”).

65. The March 2002 searches obviously had approvals from the highest levels of federal law enforcement. They involved the coordination of numerous federal agencies and the participation of 150 federal agents. See Dunne, *supra* n. 2, at 10.

66. Before issuing an order authorizing a Title III wiretap, a federal judge must find that other investigative measures have been tried and have failed or that such measures appear unlikely to succeed. 18 U.S.C. § 2518(1)(c) (2000). In executing a Title III order, agents must demonstrate reasonable efforts to minimize intrusion on conversations not germane to the investigation. 18 U.S.C. § 2518(5) (2000).

the government at least minimize the period of disruption. One way to accomplish that, as we have already seen, is to apply the particularity requirement in a more exacting fashion. It takes less time to go through one hundred boxes than five hundred. Another way is to demand more accountability in the process of reviewing seized items. In the case of some of the targeted institutions, for example, computers were seized and held for weeks, even though the copying of computer files could have been done in a few days.⁶⁷

Courts can, and should, play a role in minimizing other kinds of damage. The March 2002 searches dealt severe blows to the reputations of the targeted institutions, blows that had both short and long-term effects on enrollment and public support. In part, that kind of ripple effect is inevitable from a search by law enforcement. But it can be minimized by the kinds of public statements made, or not made, by the government. In the March 2002 searches, government tactics seemed calculated to maximize, rather than to avoid, damage to the reputations of the targeted institutions. While officially claiming secrecy for its investigation, the government's media contacts made certain that the papers trumpeted Operation Green Quest and its accomplishments in disrupting terror. The implied public warning was clear, as the government apparently intended it to be.

In other contexts involving the execution of search warrants, courts have condemned government use of news media where it unnecessarily intrudes on privacy or causes damage to reputation.⁶⁸ Those same courts need not become tools of a one-sided public relations campaign that allows the government to publicly condemn religious institutions as supporters of terrorism while simultaneously telling us that its reasons are too secret for the public to know. Sealed search warrants and selective government news leaks are incompatible.

CONCLUSION

The March 2002 searches caused significant, and predictable, damage to religious institutions. It is not enough to say that the searches were based on warrants supported by probable cause. The concept of "material support" for terrorism is so broad that the traditional protections of probable cause and particularity are severely watered

67. See Bradley, *supra* n. 14, at B5.

68. See *Wilson v. Layne*, 526 U.S. 603, 604 (1999) (finding that officers violate the Fourth Amendment by inviting members of news media to accompany them as they execute warrants in a private home).

down when evidence of material support is the object of a search. Moreover, when the government chooses to use a well-publicized search for the purpose of disrupting the operations of a religious institution rather than purely as a tool of criminal investigation, then the potential for abuse of the warrant process is immense. The Supreme Court has called upon federal magistrates to supervise government searches with “scrupulous exactitude”⁶⁹ when freedom of expression is at stake. In a nation founded on respect for religious liberty, we should expect nothing less.

69. *Zurcher*, 436 U.S. at 564 (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).