Unreasonable Searches

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- The Fourth Amendment protects you against unreasonable searches.
- Can a state use a subpoena to bypass the warrant requirements of the Fourth Amendment?
- Do governments use subpoenas to intimidate people to give up their rights?

When a government agency searches without a reason it's called "fishing." When the Attorney General of New Jersey issued a subpoena demanding the names, addresses, and phone numbers of the donors to a pregnancy center, it wasn't just fishing, it was searching for a white whale.

The Fourth Amendment protects us from unreasonable searches. However, that does not stop some law enforcement agencies from abusing their subpoena authority to conduct unreasonable searches. That appears to be what happened to First Choice Women's Resource Center.

Subpoena vs Warrant

Before we get into the case, we should define the difference between subpoenas and warrants.

The criteria for a warrant is defined in the Fourth Amendment.

[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment IV

According to the Free Legal Dictionary, a subpoena is:

A formal document that orders a named individual to appear before a duly authorized body at a fixed time to give testimony.

Subpoena – The Free Legal Dictionary

This distinction is important, because according to The Free Legal Dictionary, a "duly authorized body" can order an individual to appear without any probable cause. There's no need to provide a reasonable suspicion that the person has, is, or about to, commit a crime according to the case Union Pac. R. Co. v. Botsford:

"No right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Union Pac. R. Co. v. Botsford, 141 U. S. 250, 251 (1891)

So where is the clear and unquestionable authority of law for a "duly authorized body" to search without a warrant? Where is the authorization for said body to seize, by demanding attendance, with the authority of a warrant? As we'll see, while it may not have been the focus of much of the argument, this is the cornerstone of the protection of our rights.

ERIN M. HAWLEY, ESQ. On behalf of the Petitioner

As usual, argument starts with the attorney for the petitioner.

1. HAWLEY: Thank you, Mr. Chief Justice, and may it please the Court:

This Court has long safeguarded the right of association by protecting the membership and donor lists of nonprofit organizations like First Choice. Yet the attorney general of New Jersey issued a sweeping subpoena commanding on pain of contempt that First Choice produce donor names, addresses, and phone numbers so his office could contact and question them. That violates the right of association.

First Choice Women's Resource Centers v. New Jersey – Oral Arguments

Ms. Hawley's opening argument may be true, but I still have a problem with it. Yes, if the State of New Jersey can simply demand the information of people who associate with a group, then it violates their right of association. However, the First Amendment does not protect people from such violations by a state, only those done by laws made by Congress.

Congress shall make no law … abridging …the right of the people peaceably to assemble,

U.S. Constitution, Amendment I

The Constitution of the State of New Jersey does protect its citizens.

The people have the right freely to assemble together,

Constitution of New Jersey, Article I, Section 18

Not only is this rather important detail missed by both the attorneys and justices of the Supreme Court, but lower courts had some interesting views as well.

Yet the lower courts held that First Choice must litigate its First Amendment claims in state court. That violates this Court's decision in Knick, contradicts the courts' virtually unflagging obligation to decide cases within their jurisdiction, and runs contrary to Section 1983. Even the attorney general now agrees as much.

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There is a serious constitutional issue with the claims of the lower courts. States court do not have jurisdiction over First Amendment issues, only federal ones.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

U.S. Constitution, Article III, Section 2, Clause 1

So how can a state court litigate a case that the Constitution clearly states is under the judicial power of the United States, i.e., federal courts?

His newest rationale for evading review – questioning First Choice's chilling injury – fails for two reasons. First, First Choice's associational interests were harmed the moment it received a coercive subpoena demanding donor names on pain of contempt. This is true irrespective of whether the subpoena is non-self-executing for even an unenforceable threat may chill First Amendment freedoms.

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There was a fair amount of discussion regarding "chilling injury," that the actions of the New Jersey Attorney General "chilled" the ability of First Choice to acquire and maintain donors. We'll talk about that later.

Second, the attorney general does not dispute that First Choice faces a credible threat of enforcement, and there's no question that First Choice's First Amendment interests are arguably burdened by the subpoena. This Court's cases require no more. The attorney general's proposed subpoena exception

from ordinary Article III rules would mean that the NAACP could have received a hostile subpoena from an attorney general and federal court review would not have been available until a state court ordered production. But then Younger abstention and res judicata would almost certainly slam the federal courthouse doors shut.

First Choice Women's Resource Centers v. New Jersey – Oral Arguments

The other major point of discussion was whether or not there was a credible threat against First Choice?

First choice has a simple ask.

This Court should reverse and hold that this subpoena violates the First Amendment and satisfies Article III.

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I agree that the lower court decision should be reversed and that the case belongs in an Article III court. But I disagree that the subpoena violates the First Amendment, because what it does is violate the Fourth Amendment.

SUNDEEP IYER, ESQ. On behalf of the Respondent

The Attorney General of New Jersey argued their case.

1. IYER: Mr. Chief Justice, and may it please the Court:

Petitioner's factual allegations do not show that the issuance of this subpoena objectively chilled Petitioner's First Amendment rights.

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Funny that Mr. Iyer claims that a subpoena threatening contempt if First Choice doesn't comply, does not chill their

rights. I agree it doesn't chill their First Amendment rights, but it does chill their liberty to retain donors when they find out their personal identifying information has been collected by the State of New Jersey simply for donating to a particular non-profit organization.

To some of the colloquies this morning about state law, New Jersey state law establishes that subpoenas do not require anyone to produce documents, and a party faces no penalties for non-production. Any legal duty to produce documents and, in this case, any disclosure of donor identities is instead wholly contingent on a future state court order requiring production.

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Interesting. If the laws of the State of New Jersey do not require complying with the subpoena, you would think the Attorney General's office would know that. Yet still, they included this language in the subpoena.

Failure to comply with this Subpoena may render you liable for contempt of Court and such other penalties as are provided by law. … You have an obligation to retain, and continue to maintain the requested Documents. Failure to comply with this Subpoena may render you liable for contempt of court and such other penalties as are provided by law.

First Choice Women's Resource Centers v. New Jersey – Petition for a writ of certiorari

Yes, the subpoena says First Choice "may" be liable for contempt of Court, but the threat is there: Comply or else. Not to mention the legal costs to First Choice to attempt to quash the subpoena.

This case is a perfect illustration. The state court has repeatedly declined to order production over two years of

litigation. That helps explain why Petitioner never alleged below that anyone actually has been or is objectively likely to be chilled by this subpoena. Instead, at most, the complaint alleges that the subpoena itself "may cause" donors to stop contributing. But that contingent language has never been enough for Article III.

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For two years, First Choice has had to defend themselves in court against what I will later show to be an unreasonable, and therefore unconstitutional, search of their records.

As for Article III standing, as I've already pointed out, since this is a case arising under the Constitution of the United States, Article III courts are the only ones with jurisdiction.

The federal government's alternative credible threat of enforcement theory of standing is even worse. State and local governments issue tens of thousands of subpoenas every year. But the federal government's theory would risk turning many of these ordinary subpoena disputes into federal cases even without a First Amendment claim. That would be a remarkable break from history and tradition.

[First Choice Women's Resource Centers v. New Jersey – Oral Arguments]

Perhaps the tens of thousands of subpoenas issued every year by state and local governments, not to mention by federal agencies, should be reviewed. Where do these governments get the legal authority to compel attendance, and in some cases the production of evidence, without a warrant? That is a violation of the Fourth Amendment's Reasonableness Clause. It may even be a violation of the Fifth Amendment's Self Witness clause.

No court has accepted that theory, and this Court should not be the first, particularly in a case where the question presented was itself limited to chill.

First Choice Women's Resource Centers v. New Jersey – Oral Arguments

While no court may have accepted the theory that a state subpoena violates the First Amendment, there's always a first. As I've said, I believe the court should be the first to consider whether or not subpoenas, specifically the language to compel attendance, violate the Fourth Amendment.

Command or Request

During questioning, several interesting arguments were looked at. Let's start with whether or not a subpoena is a command or merely a request.

JUSTICE THOMAS: Your argument seems to be based on the mere reception of the subpoena, so what did that cause you to do?

1. HAWLEY: Sure. So, under Article III, we can have both a present and a future imminent harm, Your Honor –

JUSTICE THOMAS: But what is – what did you have to do upon reception of the subpoena?

1. HAWLEY: So the subpoena commands First Choice to do several things. It commands it to produce 28 different categories of documents, including every solicitation e-mail and text message it sent to its donors. It commands it produce donor names, addresses, phone numbers, as well as places of employment. It imposes a litigation hold, Your Honor. And it also chilled First Choice and its donors' First Amendment rights.

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As I pointed out, this subpoena cannot violate the First Amendment since it is not based on a law made by Congress. However, by compelling that First Choice do something, the Attorney General deprived them of the liberty to privately communicate with their donors. That violates the Fourteenth Amendment's due process clause.

nor shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment XIV

Remember, under the Fourth Amendment, any search must be reasonable. While there are circumstances where a search can be reasonable without a warrant, there has to be some basis for reasonableness.

JUSTICE THOMAS: Were there complaints against – were there complaints against you that stimulated the subpoena?

1. HAWLEY: No, Your Honor. The attorney general has never identified a single complaint against First Choice.

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If there is no complaint, what is the reasonable articulable suspicion that a crime has been committed? There isn't one, so what makes the search of documents that subpoena is demanding reasonable?

But is a subpoena nothing more than a request?

JUSTICE THOMAS: Did you view this as a request? The briefs of the attorney general seem to suggest that this is – I've never heard the term "subpoena request." But did you view this as a request?

1. HAWLEY: Absolutely not, Your Honor. This is not in the record, but First Choice immediately convened an

emergency board meeting to discuss the subpoena. The very Latin term for subpoena means under penalty. If you look at the face of the subpoena, it twice commands First Choice to produce on pain of contempt, and it twice threatens that the failure to comply with the subpoena, not a later state court order but with the subpoena, shall render First Choice liable for contempt and other penalties at law. Some of those other penalties at law are business dissolution. That is a death knell for nonprofits like First Choice.

[First Choice Women's Resource Centers v. New Jersey – Oral Arguments]

Having received a federal subpoena, I can tell you there is nothing about that process that leads to you believe it is a request. Now that I know that subpoena is Latin for "under penalty" I'm sure it's not a request. During questioning of the respondents attorney, Justice Thomas asked the same question.

JUSTICE THOMAS: What is the difference between this subpoena and a request?

1. IYER: Your Honor, this subpoena is a predicate under state law for the state executive branch to be able to go to a court to seek a court order requiring production. We couldn't do that if we had just sent a letter request. But, in other critical respects, there's really not a difference in terms of the legal obligations that are actually imposed upon a recipient of a subpoena.

[First Choice Women's Resource Centers v. New Jersey – Oral Arguments]

Funny, when a District Attorney seeks a court order to compel attendance, I don't think they issue a subpoena first. Does law enforcement, part of the executive branch, seek a subpoena

before seeking a warrant? Mr. Iyer went on.

Typically, when we think about subpoenas, we're thinking about grand jury subpoenas or subpoenas that are issued by a court during civil litigation. I think an administrative subpoena is very different, and courts, as a matter of state law, have held across the country that these subpoenas themselves don't impose any obligation to produce documents from the moment of – of the issuance of the subpoena.

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So a document literally titled "under penalty" does not impose an obligation to produce documents, under some penalty? Does that sound reasonable to you? If there is no obligation, they why does the subpoena use the term "compel"?

Justice Gorsuch also asked about the power of subpoenas.

And just looking at the statute, it says the AG's subpoenas have the force of law, and if a person fails to obey the subpoena, the AG may apply to the Superior Court and obtain an order adjudging such person in contempt of court.

Now I don't know how to read that other than it's pretty self-executing to me, counsel. Now I – maybe that's anomalous. Maybe that's wrong. Maybe the New Jersey Supreme Court's read it differently. But that's not the materials I have before me, so help me out.

1. IYER: Absolutely. So we think there are a number of reasons why these subpoenas need to be understood as non-self-executing.

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The State of New Jersey claims that a subpoena is non self-executing, meaning someone cannot be held for violating it.

But state law says a subpoena from the Attorney General's office has the force of law. So which is it?

JUSTICE BARRETT: Ms. Hawley, I'm sympathetic to the argument that this subpoena on its face looked like it carried penalties based on everything that you said, but I think we have to accept for purposes of this case that it's non-self-executing and so that it did not, in fact, at the moment of receipt demand that you reply on pain of contempt.

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Except, under New Jersey law, the subpoena has the force of law and is therefore "self-executing."

Justice Barrett went on:

Would a letter have been sufficient then for ripeness under your theory? What if he had just sent a letter saying: I intend to send you a subpoena that will demand all of these documents? Or just a letter requesting them that wasn't a subpoena? Please turn over to me all of these documents.

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Think about that for a second. A letter, stating you're going to be sent a subpoena to demand documents that aren't really a demand? Because the subpoena is not "self-executing" and requires a court order to be legally enforceable?

Besides, the AG didn't send a letter, they sent a subpoena. A subpoena that stated:

You are hereby commanded to produce to the New Jersey Division of Consumer Affairs, Office of Consumer Protection ("Division") through Chanel Van Dyke, Deputy Attorney General, at 124 Halsey Street, 5th Floor, Newark, New Jersey 07101, on or before December 15, 2023, at 10:00 a.m., the following:

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Does that sound like a non-self-executing request that needs a court order to be enforced? No, it sounds like a demand to produce documentation to be searched without a warrant, exigent circumstances, or even a claim of reasonable cause. That, ladies and gentlemen, is an obvious and blatant violation of the Fourth Amendment.

First or Fourth Amendment?

As I've already pointed out, this cannot be a First Amendment violation, but a Fourth. Justice Barrett opened that door in her questioning.

JUSTICE BARRETT: And are we only talking about First Amendment cases? Are we talking about other constitutional challenges?

1. IYER: I don't see a way to limit the United States' proposed rule just to First Amendment challenges. I think it would encompass Fourth Amendment challenges, to Justice Sotomayor's examples earlier, due process challenges, extraterritoriality challenges.

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Yes, Fourth Amendment due process in both the Fifth and Fourteenth Amendment, with lots and lots of challenges. But is the purpose of the court to make the government's life easier or to seek justice under the law? It seems to me there are far more constitutional issues with the use of subpoenas, especially the way the New Jersey Attorney General has, than questions of association.

Conclusion

I hope you see why I decided to dive into this case. It's bad enough that the attorneys brought such a poorly formed case,

but the fact no one pointed out the blatant Fourth Amendment violation is truly disturbing.

Having received a subpoena, I know the impact of the words compelling you to attend or provide evidence. In my case, it was a command to testify in a case, in First Choice's case it was to provide confidential information about their donors. Yes, this would certainly give donors pause, chilling their association with First Choice, but to me the greater harm is the loss of protection, for both First Choice and all Americans, of our right to be secure from unreasonable searches and seizures.

I doubt the court will publish their decision before June. I can only hope that the justices will see beyond the focus on First Choice's attorney on the First Amendment and see the true danger to our right to be secure from unreasonable searches and seizures.

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