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Constitutional Law - Search and Seizure Involving Nonsuspect Third Parties - Legislative Responses

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE INVOLVING NONSUSPECT THIRD PARTIES—LEGISLATIVE RESPONSES. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

On April 11, 1971, the Stanford Daily newspaper published photographs of a violent confrontation between police and demonstrators at the Stanford University Hospital. The day after the Daily's publication, the district attorney's office obtained a warrant to search the newspaper's offices for negatives, film and photographs of the incident.[1] The warrant affidavit contained no allegation that members of the Daily staff were in any way involved in unlawful activity.[2]

The search was conducted by four police officers. They examined the contents of filing cabinets, desks, wastebaskets, and photographic darkrooms. Police found no photographs other than those already published and no material was removed from the Daily's offices. During the search, the officers were in a position to see reporters' notes that contained confidential information from sources who had been promised anonymity.[3] The searching officers denied having read any confidential material, although the testimony of the Daily employees put this in dispute.[4] The Stanford Daily sought declaratory and injunctive relief under 42 USC § 1983 in the District Court for the Northern District of California.[5] The Daily asserted that the search violated its first, fourth, and fourteenth amendment rights.[6]

The district court held that the search was illegal in that a subpoena duces tecum was the proper method for obtaining evidence

1. Zurcher v. Stanford Daily, 436 U.S. 547, 551 (1978).

2. The warrant was issued on a finding of "just, probable and reasonable cause for believing that: Negatives and photographs and film, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with Deadly Weapon, will be located [on the premises of the Daily]." *Id.* at 551.

3. *Id.*

4. *Id.*

5. Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

6. 353 F. Supp. 124 (N.D. Cal. 1972).

from one not suspected of criminal activity.[7] The court construed the fourth amendment to prohibit a search of innocent persons unless the requesting party could establish that a subpoena would be impractical.[8] The court further held that where the innocent target of a search is a newspaper, first amendment interests make a search constitutionally permissible "only in the rare circumstance where there is a clear showing that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order would be futile."[9] The state would thus have to meet a more stringent test with respect to press searches than would be necessary for searches of other individuals. The court of appeals affirmed per curiam, adopting the district court's opinion.[10]

The United States Supreme Court opinion in *Zurcher v. Stanford Daily,*[11] written by Justice White, reversed the lower courts, holding that the state's interest in law enforcement and the recovery of evidence requires that third party searches be permitted.[12] The Court emphasized that the test of a constitutionally-permissible search is not whether the owner of the property is suspected of a crime, but whether there exists probable cause to believe that the evidence sought is located on the property to be searched.[13] The culpability of the owner or possessor of the evidence is therefore immaterial in the context of a fourth amendment search.

Under the Supreme Court opinion, a search of a newspaper office is no different from any other third party search. The Court rejected the district court's first amendment analysis and held that "the preconditions for a warrant . . . should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices"[14] and "no more than this is required."[15] Justice Stewart, joined by Justice Marshall, vigorously

7. *Id.* at 135.

8. *Id.*

9. *Id.*

10. Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), *rev'd,* 436 U.S. 547 (1978).

11. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). The Stanford Daily's petition for rehearing was denied. 439 U.S. 885 (1978).

12. Zurcher v. Stanford Daily, 436 U.S. 547, 560 (1978). A third party search is a search conducted by authorities for the fruits, instrumentalities, or evidence of a crime on property which is owned or occupied by a person who is neither suspected of nor implicated in the crimes. *Id.* at 553.

13. *Id.* at 556.

14. *Id.* at 565. The preconditions set forth by the Court—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—are those which apply to all search warrants generally. *Id.* at 556-57 n.6.

15. *Id.* at 565.

dissented on first amendment grounds.[16] Justice Stevens filed a separate dissent based on the fourth amendment.[17]

This Comment analyzes the Supreme Court's opinion in *Zurcher* and discusses the first and fourth amendment questions raised. Also, the impact of this decision on third party searches and its influence on the right to privacy is examined. In analyzing the first amendment issues in *Zurcher,* the article discusses the Supreme Court's overriding concern for law enforcement needs and whether those needs could be served by means which would not restrict the press' ability to gather and distribute the news. Various legislative responses to *Zurcher* are also reviewed.

THIRD PARTY SEARCHES UNDER THE FOURTH AMENDMENT

Probable Cause and Reasonableness

Prior to *Zurcher* no case had directly stated when a search warrant could be used to obtain criminal evidence from one not suspected of criminal activity.[18] *Zurcher* provided the Supreme Court with an opportunity to consider whether such a high degree of intrusion upon privacy could be justified as a reasonable search under the fourth amendment.

The fourth amendment protects against unreasonable searches and seizures.[19] A determination of the reasonableness of a search depends on the particular evidence and circumstances of each case[20]

16. Justice Stewart did not object to the majority's holding that search warrants may properly be used against nonsuspects. *Id.* at 571 n.1 (Stewart, J., dissenting). He stated, however, that a search of a newspaper office would disrupt newspaper operations, impair editing and lead to needless disclosure of confidential material unrelated to the criminal investigation. *Id.* at 571. Because of first amendment interests, Stewart concluded that a search would be proper only if a magistrate determined that a subpoena would be impractical. *Id.* at 575.

17. Justice Stevens concluded that the fourth amendment did not permit searches of nonsuspects unless there were a showing of probable cause that evidence would be destroyed or concealed if advance notice were given. *Id.* at 582-83 (Stevens, J., dissenting).

18. "The parties to the case *sub judice* . . . conducted exhaustive research into the issue involving third party searches and informed this court and the courts below of the dearth of available precedent." Amicus Curiae Brief, the National Association of Criminal Defense Lawyers, Inc., In Support of the Position of the Respondents Stanford Daily, at 6, Zurcher v. Stanford Daily, 436 U.S. 547 (1978). Prior to *Zurcher,* the Supreme Court had upheld the use of subpoenas in acquiring evidence from third parties. *See* Fisher v. United States, 425 U.S. 391, 405-14 (1976); Couch v. United States, 409 U.S. 322, 335-36 (1973).

19. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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. Const. amend. IV.

20. United States v. Rabinowitz, 339 U.S. 56, 63 (1950); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931).

and is made by balancing the government's need against the invasion of privacy which the search and seizure entails.[21]

In *Zurcher* the Court emphasized that probable cause to search is the most critical element in determining reasonableness.[22] Because a reasonable search depends on probable cause to search and not on the right to arrest,[23] the Court found no meaningful difference between searching a suspect's possessions and searching the possessions of an innocent third party. Justice White explained:

> The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena duces tecum, whether on the theory that the latter is a less intrusive alternative, or otherwise.[24]

In determining that the state's law enforcement needs outweigh any third party interest, the Court developed two conclusions. First, prior case law had established a less strict standard of probable cause when a search was not intended to secure evidence of criminal conduct against the possessor.[25] Second, law enforcement efforts would be seriously undermined if third party searches were not permitted.[26]

The Court's first conclusion is based primarily upon *Camera v. Municipal Court*.[27] In that case the Supreme Court extended fourth amendment protection to civil cases by requiring a warrant for noncriminal administrative searches.[28] This requirement was upheld even though routine building inspections for building code violations are a less hostile intrusion than a search for criminal evidence.[29] Under the *Camera* holding, the probable cause required for an administrative search was satisfied if reasonable legislative or administrative standards for inspecting a particular dwelling were met.[30]

The Court in *Zurcher* placed no emphasis on the fact that *Camera* involved an inspection for evidence in a civil rather than a criminal

21. United States v. Ortiz, 422 U.S. 891, 900 (1975) (Burger, C. J., concurring); Terry v. Ohio, 392 U.S. 1, 29-30 (1968).

22. Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978). Probable cause to search exists whenever there are reasonable grounds to believe that the specific evidence sought is located on the property to be searched. *Id.*

23. *Id.* at 557 (citing Carroll v. United States, 267 U.S. 132, 158 (1925)).

24. *Id.* at 559.

25. *Id.* at 556.

26. *Id.* at 560.

27. 387 U.S. 523 (1967).

28. *Id.* at 534.

29. *Id.* at 530.

30. *Id.* at 538.

matter. *Camera* stands for the proposition that a less strict standard of probable cause is required in a limited administrative inspection because the degree of intrusion is less than that created by a search for criminal evidence.[31] It is implicit in *Camera* that criminal searches require stricter standards of probable cause. *Camera,* therefore, does not support the broad conclusion that some lesser standard of probable cause is required in criminal searches of third parties.[32]

The Court's second conclusion is that law enforcement efforts would be undermined unless evidence possessed by a third party is subject to a search. It was noted that warrants are often required early in a criminal investigation when the identities of all suspects are not known.[33] The Court feared that third parties may not be innocent or may be sympathetic to the culpable parties; police must therefore be permitted to search for the evidence before it disappears.[34]

While these fears are justified in some circumstances, the Court's holding is overbroad in its presumption that every third party will destroy evidence. Moreover, the Court's fears are questionable when applied to the press because newspapers are neither likely to conceal evidence nor usually implicated in the evidence they hold. Culpable parties generally do not have access to evidence in the possession of newspapers.

Where there is justifiable concern that a third party will destroy evidence, a subpoena would be impractical and a warrant would be necessary to recover such evidence.[35] But where there is no likelihood

31. For a discussion of *Camera,* see Note, *Administrative Search Warrants,* 58 Minn. L. Rev. 607 (1974).

32. The *Zurcher* Court further supported its position by citing Colonade Catering Corp. v. United States, 397 U.S. 72 (1970) and United States v. Biswell, 406 U.S. 311 (1972) for the proposition that some limited searches may be accomplished without a warrant. These cases are simply inapposite to *Zurcher. Colonade* dealt with an administrative search of a liquor establishment. The warrantless search was held reasonable because of the long history of governmental control of such businesses. 397 U.S. at 76. Similarly, *Biswell* involved the warrantless searches of federally licensed dealers in firearms. The Court upheld these searches because the government's regulatory scheme necessitated unannounced inspections and the licencees had limited expectations of privacy in these circumstances. 406 U.S. at 316. Neither case is precedent for a lesser standard of probable cause in third party criminal searches.

33. 436 U.S. at 561.

34. *Id.*

35. The Stanford Daily had announced a policy of destroying any evidence that might aid in the prosecution of protestors. However, this policy was not presented to the magistrate who issued the search warrant. 353 F. Supp. 124, 135 n.16 (1972). Had this policy been presented to the magistrate, the district court most likely would have upheld the validity of the search because the subpoena would have been impractical. Although the Daily's policy was never an issue in the case, it obviously had some influence on the Supreme Court's decision. 436 U.S. 547, 568-69 n.1 (1978) (Powell, J., concurring).

that evidence will be destroyed, a subpoena would adequately serve the state's needs while protecting the privacy interests of innocent parties. The *Zurcher* Court noted that "if the evidence sought by warrant is sufficiently connected with the crime to satisfy the probable cause requirement, it will very likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash."[36] The Court assumes that the probable cause requirement for a search warrant offers the same constitutional protection as the requirements for a subpoena. Such an assumption is unreasonable because the warrant process lacks the procedural safeguards provided by the subpoena. Without these safeguards the possibility of governmental abuse remains a constant threat.

Procedural Safeguards and the Right to Privacy

Under the majority opinion, a showing of probable cause to search justifies issuing a search warrant against either a suspect or an innocent third party, regardless of any difference in their expectations of privacy. The Court recognized that the state has the same interest in recovering evidence whether the third party is culpable or not.[37] The Court refused, however, to acknowledge that an innocent third party has a higher expectation of privacy than one who is implicated in a crime. In striking the balance in favor of the state, the Court seriously harmed the privacy interests of innocent parties. The broad language of the *Zurcher* holding has given rise to searches for evidence of a crime in not only newsrooms, but also lawyers' and doctors' record rooms,[38] credit bureaus, academic enclaves[39] and private homes everywhere.

36. 436 U.S. at 567.

37. *Id.* at 555.

38. In 1973 a young man complained to the Palo Alto, California police that he had been the victim of a homosexual rape. Because he was so distraught, police took him to the Psychiatric Clinic at Stanford University Medical Center. There he was seen by Dr. Marguerite Lederberg, the psychiatric resident on duty. After only two meetings, the victim/patient discontinued treatment. Later, the alleged rapist was apprehended, and the Santa Clara County District Attorney decided he ought to have the victim's psychiatric records to see if the complainant had given Dr. Lederberg the same details of the rape that he had provided the prosecutor. Instead of requesting the records or using the subpoena, the D.A. went to a magistrate and obtained a search warrant covering not only the clinic but also the car and home of Dr. Lederberg. *See* Respondent's Petition for Rehearing, Zurcher v. Stanford Daily, 439 U.S. 885 (1978). This incident was discussed in greater detail during Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (Aug. 22, 1978) (testimony of Dr. Maurice Grossman, Clinical Professor Emeritus, Stanford University School of Medicine). *See also* Hentoff, *The Master Search Warrant: No Waiting/Fits Every Citizen,* Village Voice, Feb. 12, 1979, at 38.

Lead counsel in *Zurcher* on behalf of the Stanford Daily, Jerome Falk of San Francisco, also testified before the Senate Subcommittee on the Constitution. The following refers to a search which took place after the *Zurcher* decision was handed down.

In San Diego, a criminal defendant's father had found an incriminating docu-

Because no hearing is required for the issuance of a search warrant, the *Zurcher* decision denies a judicial forum to third parties desiring to challenge the production of evidence. Prior to *Zurcher* the subpoena was the device traditionally used to acquire information in the custody of third parties.[40] A subpoena can always be challenged by a motion to quash filed with the court before the sought-after materials are produced. If a search warrant is used, the innocent third party has no opportunity to challenge it prior to the intrusion. Such third party privileges as attorney-client or doctor-patient cannot be judicially enforced during a search. Thus a search warrant may now be used to circumvent many constitutional and statutory rights and privileges which would defeat a request for production by subpoena.

The Supreme Court has also stranded innocent third parties without adequate remedies in the event of an illegal search. A third party victim of an illegal search cannot move to suppress evidence under the exclusionary rule.[41] Similarly, an action for damages brought by a third party victim against the magistrate or the police would fail because "good faith" and "pursuant to official duty" defenses provide complete immunity.[42] The innocent victim's third party status may even prevent the recovery of attorneys' fees incurred as a result

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> ment and delivered it to the defendant's lawyer. The prosecutor asked the lawyer to produce it voluntarily, which the lawyer declined to do. A subpoena . . . would have provided all parties an opportunity to obtain a judicial determination of whether the document was privileged (as the lawyer for the defendant claimed). Instead the police secured a warrant and searched the entire law office from top to bottom. They found the letter, but in the process examined files pertaining to other clients and involving confidential and privileged information wholly irrelevant to the investigation.

See Respondent's Petition for Rehearing, Zurcher v. Stanford Daily, 439 U.S. 885 (1978).

39. Mere evidence may be contained in an author's confidential source material. Samuel Popkin, at Harvard in 1972, refused to turn over confidential notes he had acquired during research in Vietnam. The government wanted the information in its attempt to find out how the Pentagon Papers had been leaked. Popkin was jailed for his refusal to reveal his confidential notes pursuant to a subpoena. *See* Hentoff, *Everyone's Running For Cover,* Village Voice, Feb. 19, 1979, at 34. Now, after *Zurcher,* the academician's file could be subject to immediate search. Similarly, if the proper warrant procedure had been observed with respect to Daniel Ellsberg's psychiatric records, and *Zurcher* reasoning had applied at that time, there could have been no charge of an illegal break-in. Senator Charles Mathias (R-Md.) questions whether "Deep Throat," the anonymous Watergate informant, would have provided his information if the police officials had had the authority to search the offices of The Washington Post at the time. *See* Mathias, *Zurcher: Judicial Dangers and Legislative Action,* Trial, Jan. 1979, at 40.

40. *See* Fisher v. United States, 425 U.S. 391, 405-14 (1976); Couch v. United States, 409 U.S. 322, 335-36 (1973).

41. "No rights of the victim of an illegal search are at stake when the evidence is offered against some other party." Alderman v. United States, 394 U.S. 165, 174 (1969). The *Zurcher* Court reaffirmed the restricted standing requirements of *Alderman.* 436 U.S. 547, 562 n.9 (1978).

42. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967); Bivins v. Six Unknown Named Agents, 456 F.2d 1339, 1343, 1347 (2d Cir. 1972).

of the search.[43] An after-the-fact determination of illegality cannot repair the harm incurred during the search, and, given the standing requirements of the exclusionary rule, such a determination will lack adequate judicial sanctions. As a result of *Zurcher,* law enforcement agencies can now regularly search individuals and businesses that have information related to potential defendants and suspects. Such invasions of privacy may presently occur as a matter of routine police procedure.

NEWSPAPER SEARCHES AND THE FIRST AMENDMENT

In *Zurcher* the Supreme Court classified the Stanford Daily as a simple third party nonsuspect.[44] However, in addition to the problems of searching third parties without a prior judicial hearing, searches involving newspapers present a special threat to constitutionally-protected speech.[45] Press searches require balancing society's need for effective law enforcement against society's need for a free press.[46]

First amendment values have prompted the Supreme Court to protect the press' ability to gather,[47] edit, publish,[48] and distribute the news.[49] In carrying out these tasks the press has always resisted any attempts to force it to serve as an investigative arm of law enforcement agencies.[50] The Supreme Court has long recognized the need for an independent press and has therefore provided the press an additional first amendment protection from searches.[51] In *Zurcher,* however, the Court denied any special protection to the news media and held that "prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First

43. The court of appeals had approved the award of attorney's fees to the Stanford Daily under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). However, the Supreme Court declined to rule on the question of whether attorney's fees may be awarded to third parties. 436 U.S. 547, 553 n.3 (1978).

44. The Court phrased the issue in *Zurcher* as "how the Fourth Amendment is to be construed and applied to the 'third party' search." 436 U.S. at 553.

45. *See* United States v. United States District Court, 407 U.S. 297, 313 (1972).

46. Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

47. *Id.* at 681.

48. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

49. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

50. The American Newspaper Guild has adopted the following as part of its code of ethics: "[N]ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies . . . ." Bird & Mervin, The Newspaper & Society 567 (1942).

51. In Roaden v. Kentucky, 413 U.S. 496, 504 (1973), the Court found that "a higher hurdle in the evaluation of reasonableness" of searches is necessary when first amendment interests are present. *See also* Heller v. New York, 413 U.S. 483, 489 (1973); Stanford v. Texas, 379 U.S. 476, 485 (1965); A Quantity of Books v. Kansas, 378 U.S. 205, 208 (1964).

Amendment interests would be endangered by the search."[52] First amendment interests are therefore left to be protected in searches through a warrant issued by a magistrate exercising "particular exactitude." The Court offered no further guidelines. A closer analysis of the arguments advanced by the press is necessary to determine whether first amendment interests were truly outweighed by the needs of law enforcement in *Zurcher*.

Impact on the News Media

The press argued in *Zurcher* that searches would disrupt news operations, discourage confidential sources from coming forward, and have a chilling effect on editorial decisions.[53] Citing *Branzburg v. Hayes*,[54] the Court affirmed its position that newsroom searches would cause neither confidential sources to disappear nor news reporting to be suppressed. It further stated that any "incremental" difference between the *Branzburg* subpoena and the *Zurcher* search warrant had no constitutional significance.[55] In fact, this "incremental" difference is of greater significance than the Court would acknowledge.

In *Branzburg* the Court held that a reporter must appear before a grand jury in response to a subpoena, and that the first amendment did not accord that person the privilege of refusing to answer questions concerning the identity of a source of information.[56] Justice Powell, in his concurring opinion, emphasized that the reporter's ability to oppose the subpoena through a motion to quash provided adequate first amendment safeguards.[57]

The *Zurcher* decision has greater potential than *Branzburg* for allowing infringement of first amendment rights. Unlike a subpoena, a search warrant involves a physical invasion of a newspaper office where material totally unrelated to the warrant is exposed to police scrutiny. During a search police officers may uncover and examine unrelated memos, files, photographs, and other documents before the information sought is located.[58] Although a search warrant must describe with particularity the item to be seized, the per-

52. 436 U.S. at 565.
53. *Id.* at 563-64.
54. 408 U.S. 665 (1972), *cited in* Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978). *Branzburg* had two parallel cases: Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970); *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971).
55. 436 U.S. at 566.
56. 408 U.S. at 682-91.
57. *Id.* at 709-10 (Powell, J., concurring).
58. 436 U.S. at 573 (Stewart, J., dissenting).

missible scope of an authorized search is easily exceeded.[59] The potential for physical disruption of newspaper operations cannot be discounted. In 1974 police conducted an intensive eight-hour search of a Los Angeles radio station.[60] In a radio station with hourly news broadcasts even a short intrusion could prevent regular reporting. During another media search in Helena, Montana, police announced that they might have to break into locked desks and seize every cassette they could find in an attempt to locate a recorded telephone conversation between a reporter and a murder suspect.[61] Such procedures are not only disruptive but also increase the risk of exposing unrelated confidential material to the review of the government agents.

The Court in *Zurcher* was unconvinced that searches would discourage confidential sources from giving information to reporters.[62] Following the *Branzburg* decision, however, the press reported that confidential sources were increasingly reluctant to pass information and, as a result, the press has been unable to perform its news-gathering function.[63] Since the *Zurcher* decision presents a greater risk to confidential sources than does *Branzburg,* the chilling effect on the gathering and processing of news will undoubtedly increase. Consequently, newspapers may become hesitant to publish news items that have a high risk of provoking a subsequent search by law enforcement officials. In addition, newspapers may be forced to publish all of their material in a single issue rather than in a series of

59. In Marcus v. Search Warrant, 367 U.S. 717, 722-24 (1961), police officers seized 280 different "obscene" publications pursuant to a search warrant. Two months later the trial court found that 180 of the seized publications were not obscene.

60. The Reporters Committee for Freedom of the Press, 6 Press Censorship Newsletter 30 (1975), *cited in* Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis,* 28 Stan. L. Rev. 957, 958 n.7 (1976), *cited in* Zurcher v. Stanford Daily, 436 U.S. at 571 n.2 (Stewart, J., dissenting).

61. The Reporters Committee For Freedom Of The Press, The News Media And The Law 3 (1978).

62. 436 U.S. at 566.

63. The Reporters Committee for Freedom of the Press, 1 Press Censorship Newsletter 5-6 (1973), *cited in* Comment, *Newsmen's Privilege Two Years After* Branzburg v. Hayes: *The First Amendment in Jeopardy,* 49 Tul. L. Rev. 417, 421 n.41 (1975), reported the following:

> CBS News had arranged an interview with a woman who said she would disclose how she cheated on welfare if CBS would promise not to reveal her identity. CBS could not honor the promise and the interview was cancelled.
>
> ABC News lost an opportunity to conduct filmed interviews of the Black Panthers because the network was unable to promise confidentiality.
>
> The *Boston Globe* was unable to pursue investigation of official corruption because informants told reporters they were afraid of being identified.
>
> The *Courier-Journal* (Louisville) cancelled a series of stories about drug abuse because of the *Branzburg* subpoena.

stories due to the risk of seizure of the material remaining after the first few installments.[64]

The Court summarily dismissed the first amendment arguments advanced by the press in *Zurcher* just as it had in *Branzburg*.[65] The majority failed to consider the possibility of increased first amendment infringement presented by the search scenario. By its failure to appreciate the significance of the prior adversary hearing provided in the *Branzburg* subpoena procedure, the Court has allowed the constitutional protection for the media to recede.

The Need for Safeguards

In *Zurcher* the Court found no constitutional mandate requiring an adversary hearing prior to a newsroom search. Instead it held that a "neutral magistrate carrying out his responsibilities under the Fourth Amendment" would provide the requisite amount of judicial input for the search warrant process to protect first amendment rights.[66] Prior case law had consistently held that a judicial hearing was required when a seizure of presumptively-protected material was sought.[67] *Zurcher* therefore represents a change in the Court's perception of situations involving first and fourth amendment claims.

There are several problems with the Court's reliance on magistrates to protect first amendment rights. First, the ex parte nature of the search warrant process denies the press any opportunity to present its case, thereby reducing the amount of information made available to the magistrate. Because the magistrate's finding of probable cause may be based solely upon the information presented by the requesting officer,[68] the procedure lends itself to bias. It would be unreasonable to expect the police to present or explain the newspaper's constitutional objections to the magistrate. Second, the Court expects an issuing magistrate to balance first and fourth

64. The *New York Times* planned a ten-part series of six pages a day for the Pentagon Papers. Had the *Times* been faced with a potential search and seizure by law enforcement agencies, it would have had to decide whether to hasten publication by expanding the first installments. The newspaper could not have combined all the installments into one sixty page story without excluding all other news. *See* Ungar, The Papers And The Papers ch. 1 (1972).

65. Zurcher v. Stanford Daily, 436 U.S. at 566.

66. *Id.* at 567.

67. Heller v. New York, 413 U.S. 483, 490 (1973); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961). In addition, *Branzburg* had mandated a prior judicial hearing before a newsman could be compelled to divulge confidential information under a subpoena.

68. *See* Aguilar v. Texas, 378 U.S. 108, 112-14 (1964).

amendment interests with no guidelines except that the requirements of specificity and reasonableness be strictly followed. In many jurisdictions this problem is compounded because many magistrates are not lawyers.[69] Requiring nonlawyer magistrates to balance delicate constitutional questions, without specific guidelines and in the absence of one of the parties involved, offers little protection of constitutional rights. Further, magistrates work closely with police and may develop a relationship that is symbiotic rather than supervisory.[70] Where this has become the working pattern, it is difficult for the magistrate to assume a neutral and detached perspective. Where a warrant is denied, it is often still possible for the requesting officer to "judge shop" and attempt to find a more sympathetic magistrate to issue the warrant.

Zurcher and *Branzburg* both illustrate the difficulty in balancing first and fourth amendment values. Indeed, the Court itself is far from unanimous in deciding where to strike the balance.[71] Despite this, the majority has chosen to entrust this demanding task to local magistrates. Both the ex parte nature of the search warrant process and the lack of judicial guidelines raise serious doubts about the ability of a "neutral" magistrate to safeguard constitutional freedoms. Whether the American people will accept this interpretation of the Bill of Rights has been and will continue to be answered by reactions in the Congress and in state legislatures throughout the country.

LEGISLATIVE AND JUDICIAL REACTION

The *Zurcher* decision makes clear that the press cannot presently look to the Constitution to shield it from government searches. As it did after *Branzburg,*[72] the press has turned to Congress to advance its interests. Justice White noted in his opinion that "the Fourth Amendment does not prevent or advise against the legislative or executive efforts to establish nonconstitutional protections against

69. An estimated 8,800 of 14,900 judges and comparable officials in the United States are not lawyers. *See* House Comm. on Government Operations, Search Warrants and the Effects of the Stanford Daily Decision, H.R. Rep. No. 1521, 93d Cong., 2d Sess. 4 n.8 (1978).

70. Note, *Search and Seizure, supra* note 60, at 986.

71. In *Zurcher* the vote was five to three with Justices Stewart, Marshall and Stevens dissenting. Justice Brennan took no part in the decision. In *Branzburg* the vote was five to four with Justices Brennan, Marshall, Stewart and Douglas dissenting.

72. After *Branzburg,* 55 bills were introduced during the 93d Congress to provide reporters with testimonial privilege during grand jury investigations. Comment, *Search Warrants and Journalists' Confidential Information,* 25 Am. U.L. Rev. 938, 938 n.5 (1976). Even after this onslaught there is still no federal shield statute. However, 26 states offer some form of protection to newsmen.

possible abuse of the search warrant procedure."[73] This invitation was not wasted. The 95th Congress quickly responded with thirteen bills designed to control the effects of *Zurcher*.[74] On June 14, 1978, President Carter ordered the Justice Department to fashion some legislation to rescue the threatened first and fourth amendment rights.[75]

The federal bills fall into two basic categories. The first, which applies only to the press, would permit issuance of a warrant only upon a showing of probable cause that the person to be searched has committed a crime or is likely to destroy or conceal the evidence.[76] These bills would provide penalties for abuse of the warrant process ranging from general and punitive civil damages to fines and imprisonment for malicious violation. The second category provides similar protection for all third party nonsuspects.[77] The majority of these bills would apply to both federal and state officials. The 95th Congress did not, however, enact any of the bills into law.

Congressional, media, and special interest support has now

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73. 436 U.S. at 567.

74. H.R. 12952, H.R. 13169, H.R. 13319, S. 3258, S. 3225, S. 3164, S. 3222, S. 3261, H.R. 13017, H.R. 13113, H.R. 13168, H.R. 13227, H.R. 13710, 95th Cong., 2d Sess. (1978).

75. Assistant Attorney General Philip Heymann introduced the Justice Department proposal before the Subcommittee on the Constitution of the U.S. Senate Judiciary Committee. The plan would prevent federal, state or local officers from engaging in surprise searches and seizures of the "work product" of those who gather information that will eventually appear in print, on film, or on radio and television. This class will also include freelance writers, academicians and anyone else preparing to communicate with the public. Exceptions are provided when the owner of the "work product" is suspected of having committed the crime for which the evidence is being sought or if the immediate search and seizure is necessary to prevent death or serious bodily injury to a human being. Ironically, an amicus brief filed by the Justice Department encouraged the Supreme Court decision in *Zurcher*. *See Carter Administration Enters Zurcher Debate,* Trial, Mar. 1979, at 8. *See also* Hentoff, *Realpolitik in the Department of Justice,* Village Voice, Feb. 26, 1979, at 28.

76. *See* S. 3258, S. 3225, H.R. 12952, H.R. 13319, 95th Cong., 2d Sess. (1978).

77. Among news organizations, the tendency at first was to lobby for bills that would protect only the press. The American Civil Liberties Union also initially focused on saving only reporters from the effects of *Zurcher*. Their reasoning went to the supposed ease of passage through Congress by a bill so narrowly drawn. Their subsequent attitude agrees with that of Senators Birch Bayh (D-Ind.) and Charles Mathias (R-Md), that an anti-*Zurcher* bill ought to protect all innocent third parties from instant searches. *See* Mathias, Zurcher, *Judicial Dangers and Legislative Action,* Trial, Jan. 1979, at 40.

In testimony before the Senate Subcommittee on the Constitution, John Shattuck, director of the ACLU's Washington office, noted that, because of the post-*Hayden* police power to search any place that might have evidence of a crime, possible targets could include membership lists. "Prospective contributors to and members of controversial organizations will think twice before participating if they cannot be sure that their lawful activities will not be investigated by governmental agents rummaging through organizational records." This necessarily raises the question if *Hayden-Zurcher* will impact on the first amendment guarantee of freedom of association. Hentoff, *Everyone's Running For Cover,* Village Voice, Feb. 19, 1979, at 34.

coalesced behind the Privacy Protection Act of 1979. The Act was drafted after the Senate Subcommittee on the Constitution had received testimony from a variety of academic, legal, medical, and news media sources.[78] The subcommittee hearings were held during the spring and summer of the 1st Session of the 96th Congress, and the proposal was formally introduced September 21, 1979, by Senator Birch Bayh.[79]

Title I of the Privacy Protection Act provides protection for members of the news media if there is no suspicion of criminal involvement on the part of the possessor of the work product material that is sought.[80] Exceptions, which apply to all searches addressed by the Act, were drafted in anticipation of potential problems. A search may be carried out, first, where immediate seizure is considered necessary to prevent bodily injury; second, where alteration or destruction of the materials is reasonably feared; and third, if the materials have not been produced in compliance with the subpoena, and all appellate remedies have been exhausted, or the delay in the investigation would threaten interests of justice.[81]

Title II extends the "subpoena first" rule to professionals such as doctors and lawyers who hold privileged documents under the laws of respective jurisdictions.[82] Title III of the Act provides protection to all persons who become the subject of a police investigation because they possess incriminating materials.[83]

The remedies provided for in Title IV of the Act include a civil cause of action for damages by a person aggrieved by a search or seizure in violation of the Act.[84] The civil action may be brought against the United States, any state which waives sovereign immunity with regard to the Act, or any other governmental unit. Liability is predicated on the actions of government agents acting within the scope or under color of their office or employment. Punitive

78. 125 Cong. Rec. S13193 (daily ed. Sept. 21, 1979).

79. *Id.* After the subcommittee's hearings and coordination with the Justice Department, Senator Bayh introduced the First Amendment Privacy Protection Act, S. 855, on April 2, 1979, to the 96th Congress. S. 1790, the Privacy Protection Act of 1979, extends the protection to all innocent third parties.

80. *Congressional Record,* S. 1790, 96th Cong., 1st Sess., 125 Cong. Rec. S13194 (1979). For the text of the bill, along with analysis of its provisions, see *Congressional Record,* S. 1790, 96th Cong., 1st Sess., 125 Cong. Rec. S131194-S131198 (1979).

81. *Id.* at S13194. Where a search would be requested pursuant to this broad language, the person possessing the materials would be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

82. *Id.*

83. *Id.*

84. *Id.* at S13195.

damages may be granted where warranted, along with attorneys' fees and the costs of bringing the action.[85]

At the state level, Connecticut,[86] Oklahoma, [87] and California[88] have passed laws to protect newsrooms from searches. In addition, California has also curbed the warrant power with respect to searches of the offices of lawyers, psychotherapists, and clergymen.[89] The California statute, like the Privacy Protection Act now pending in Congress, seeks to accommodate both the privacy of nonsuspects and the recognized interests of law enforcement. Under the statute, the State Bar of California is to select special masters who would serve warrants issued for documents held in offices of persons in the named professions.[90] Upon service, the recipient may either comply or assert a privilege. Where a privilege is claimed, the master would seal the material in dispute and deliver it to the court for a hearing similar to the procedure to quash a subpoena. A search by the police would be conducted only where a special master is unavailable and is likely to remain so for a reasonable period of time.[91] The masters would actually conduct the search only if they suspected that the professional was not complying with the terms of the warrant or if the professional could not be located.[92] The state legislature has also placed a proposed constitutional amendment on California's 1980 ballot which would incorporate shield protections into the state constitution.[93]

The Minnesota Supreme Court, the first high court in any state to rule on the issue, unanimously held that a warrant authorizing a

85. *Id.*

86. 1979 Conn. Pub. Act 79-14 (1979). The use of a search warrant is prohibited to search for or effect the seizure of anything in the possession, custody or control of any news organization unless the warrant is issued upon probable cause that such person or organization has committed the offense related to the property or the property is contraband or an instrumentality of a crime.

87. 47 U.S.L.W. 2228 (1978). The Oklahoma shield law provides that reporters shall not be required to divulge either the source of any unpublished information or the information itself, unless the court finds that the party seeking the information or identity has established by clear and convincing evidence that such information or identity is relevant to a significant issue in the action and could not with due diligence be obtained by alternate means.

88. Cal. Penal Code § 1524(c) (Supp. 1979).

89. *Lawscope: Criminal Justice*, 65 A.B.A. J. 1777 (1979).

90. *Id.*

91. *Id.*

92. *Id.*

93. 47 U.S.L.W. 2228 (1978); The Society of Professional Journalists/Sigma Delta Chi, *Report of the Advancement of Freedom of Information Committee* 7-8 (1978). Shield protections refer to guarantees of protection against the forced production of information or evidence.

search of a lawyer's office was unreasonable and invalid when the lawyer was not suspected of criminal involvement and there was no threat that the documents would be destroyed.[94] The case arose after police obtained a warrant to seize an attorney's business records and work papers. The lawyer was willing to turn over the business records but sued the issuing county judge to eliminate the work product from the order. While noting that the decision to uphold the attorney's position might limit police investigations, the court said that the measure was necessary to protect society's overriding interest in preserving the attorney-client privilege, client confidentiality, the work product doctrine, and the constitutional right to counsel.[95] Similarly, in Oregon, a county district court invalidated a police search of a local attorney's office.[96] In an oral ruling on October 17, 1979, the warrant and supporting affidavit were found to be facially invalid because they did not meet the heightened test of particularity found necessary when a law office is targeted.[97]

Four days later the United States District Court in Hawaii issued a preliminary injunction against the enforcement of a state statute[98] which authorized administrative searches of the offices and records of Medicaid providers.[99] Even though the state was found to have a compelling interest in ensuring that the Medicaid program was not defrauded, the court found no showing that the statute achieved the state's interest by the least restrictive means. The court indicated that some individualized suspicion should exist before a warrant may issue to search a psychiatrist's confidential files.[100]

CONCLUSION

In the absence of clear precedent before *Zurcher,* law enforcement agencies generally relied on a subpoena duces tecum to obtain evidence where the person in possession of documentary evidence was not suspected of wrongdoing.[101] Now, however, police departments depend on the *Zurcher* decision to uphold searches by warrant in newsrooms as well as in medical and legal offices.[102] These

94. O'Connor v. Johnson, No. 79-49232 (Minn. Nov. 9, 1979).

95. Judge Wahl distinguished the case in that no threat to destroy documents was considered by the court, as had been a factor, but not a formal issue, in *Zurcher.*

96. 125 Cong. Rec. S14975 (daily ed. Oct. 23, 1979).

97. *Id.*

98. 1978 Hawaii Session Laws 105 § 8.

99. Hawaii Psych. Soc'y v. Ariyoshi, No. 79-0113 (D. Hawaii Oct. 22, 1979).

100. *Accord,* Division of Medical Quality v. Gheradini, 93 Cal. App. 3d 674, 156 Cal. Rptr. 55 (1979). *But see* State v. Latta, 48 U.S.L.W. 2313 (1979).

101. 125 Cong. Rec. S13194 (daily ed. Sept. 21, 1979).

102. *Id.*

searches involve both criminal suspects and those who merely possess evidence of a crime. The Privacy Protection Act now awaiting approval by Congress strikes a sensible balance between the desire of innocent citizens to be free from unwarranted intrusions into private materials and the legitimate need of law enforcement agencies to pursue all possible leads in an attempt to identify culpable parties. The exigent circumstances provisions in the Act allow the warrant to be resorted to when absolutely necessary. The interests of society are safeguarded, and, at the same time, neither the necessity of privacy for innocent persons in their own homes and offices nor the value of retaining an unfettered press is ignored.

The Supreme Court recognized that Congress could act in response to the *Zurcher* holding. While individual states should not hesitate to enact legislation to overcome the undesirable effects of *Zurcher* in their jurisdictions, the most desirable response is one that will affect the nation as a whole. Without it, one's home will be one's castle at the convenience of the government with the drawbridge controls being operated from the nearest district court.

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