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Congressional Response to *Zurcher v. Stanford Daily*

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I. INTRODUCTION

Over thirty years ago, Mr. Justice Jackson said, "the right to be secure against searches and seizures is one of the most difficult to protect."¹ His words have proved to be prophetic. The record of Supreme Court opinions, particularly over the last two decades, is spotted with decisions wrestling with difficult fourth amendment issues.² The advancements in technology and the increasing complexities of society have conspired to pose questions about rightful intrusions of government on a citizen's privacy which have taxed interpreters' abilities to discern the intent of the framers of the fourth amendment³ in the context of the twentieth century. In May of 1978 the Court decided *Zurcher v. Stanford Daily*⁴ which prominent members of the press immediately denounced as "a first step toward a police state."⁵ "This assault stands on its head the history

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¹*Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

²*See, e.g., United States v. United States Dist. Court*, 407 U.S. 297 (1972) (warrantless domestic security wiretapping violates the fourth amendment); *Katz v. United States*, 389 U.S. 347 (1967) (warrantless electronic eavesdropping violates the fourth amendment if it invades an area of an individual's reasonable expectation of privacy); *Berger v. New York*, 388 U.S. 41 (1967) (statute permitting electronic surveillance pursuant to court order struck down on its face as being too broad) (effectively overruled *Olmstead v. United States*, 277 U.S. 438 (1928), where the Court had held that a telephone conversation was not protected by the fourth amendment). For a discussion of the state of fourth amendment law prior to 1960, *see Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CAL. L. REV. 474 (1961).

³U.S. CONST. amend. IV provides,

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.

⁴436 U.S. 547 (1978).

⁵*Boston Globe*, June 1, 1978, at 14, col. 1, *reprinted in* 124 CONG. REC. H5654 (daily ed. June 15, 1978) (remarks of Rep. Drinan).

of both the First and Fourth Amendments";⁶ "The privacy rights of the law-abiding were shabbily treated by the Supreme Court the other day. . . ." ⁷ The majority of the Court held that the fourth amendment does not prevent law enforcement officers from making unannounced searches for evidence in the possession of innocent third parties.⁸ Although the facts of the case were confined to a search of a press room, the decision was broad, extending to all non-suspect third parties, whether doctors, lawyers, businessmen, or ordinary citizens.

The response in Congress was swift. On June 5, 1978, I introduced S. 3164,⁹ the Citizens Privacy Protection Amendment of 1978, which was designed "to assure the rights of citizens under the 4th and 14th Amendments of the Constitution and to protect the freedom of the press under the 1st Amendment" ¹⁰ Similar bills soon followed.¹¹ Counterresponse from law enforcement authorities was also swift. At hearings before the Senate Judiciary Committee, Subcommittee on the Constitution, begun in June, 1978, both the National District Attorneys Association¹² and the Department of Justice¹³ registered their approval of the Court's majority opinion in *Stanford Daily*, and their reservations at legislative attempts to curtail its effects. Mr. Philip Heymann, Special Assistant to the Attorney General, Criminal Division, testifying on behalf of the Department of Justice, expressed the Department's deep concern about any threat to the press, announced the Department's preparation of regulations to safeguard its policy of minimizing searches of press facilities, and reaffirmed the Department's general policy of selecting the least intrusive means of acquiring evidence from all parties. At the same time, Mr. Heymann revealed skepticism about the efficacy of statutory as opposed to administrative restrictions.¹⁴

⁶Washington Post, June 1, 1978, at A22, col. 1.

⁷N.Y. Times, June 6, 1978, at A16, col. 1.

⁸436 U.S. at 560.

⁹S. 3164, 95th Cong., 2d Sess., 124 CONG. REC. S8557 (daily ed. June 5, 1978).

¹⁰*Id.* § 2.

¹¹S. 3222, 95th Cong., 2d Sess., 124 CONG. REC. S9452 (daily ed. June 22, 1978); S. 3225, 95th Cong., 2d Sess., 124 CONG. REC. S9456 (daily ed. June 22, 1978); S. 3258, 95th Cong., 2d Sess., 124 CONG. REC. S10,052 (daily ed. June 28, 1978); S. 3261, 95th Cong., 2d Sess., 124 CONG. REC. S10,054 (daily ed. June 28, 1978).

¹²*Citizens Privacy Protection Act: Hearings on S. 3162 and S. 3164 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 317 (1978) (prepared statement of Mr. Paul Perito) [hereinafter cited as 1978 Hearings].*

¹³*Id.* at 55 (prepared statement of Mr. Philip Heymann).

¹⁴*Id.* at 60. The Department of Justice had filed an amicus brief in *Stanford Daily*, arguing strongly on one hand against a constitutional restriction on searches of third parties and the press, and on the other, in support of the need of law enforcement

The District Attorneys Association was more unequivocal in its opposition to legislation. Although paying tribute to the need for prosecutorial restraint, Mr. Paul Perito, representing the Association, stated at the outset, "It is the belief of NDAA that the enactment of this legislation will substantially and adversely affect the investigation and prosecution of criminal activities."¹⁵

The fundamental issue left by *Stanford Daily* was not whether government could obtain evidence, but how it might obtain it. Legislation has been proposed to supply some limits on how documentary evidence might be obtained. The lines between the government's desire for search and seizure procedures unhampered by legislative restraints, and the desire of some of us to guarantee by statute the least intrusive means of obtaining evidence, were drawn within a month of the Court's decision and they have remained intact during the intervening two years. The issue is only now being resolved in the Congress.¹⁶

authorities for the unrestricted ability to search for and seize evidentiary materials from third parties. See Brief for United States as Amicus Curiae, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

¹⁵1978 Hearings, *supra* note 12, at 297 (statement by Mr. Paul Perito).

¹⁶The second significant issue presented by the legislation which will undoubtedly affect its final form is whether the Constitution allows the Congress to impose restrictions upon state and local police officers. Because the Supreme Court in the *Stanford Daily* decision found that searches of innocent third party premises were, in fact, constitutional, state and local police who conduct such searches are operating within their constitutional prerogatives. The House of Representatives thus far has chosen to resolve this question by limiting the scope of the section of the bill providing protection to third parties from unannounced searches to federal law enforcement officers only. The course of the Senate is unknown.

There are two main constitutional theories under which Congress might have the authority to regulate state and local police searches of innocent third party premises. Under article I, section eight of the Constitution, Congress is given the power to regulate commerce among the states. Because the press is engaged in activities which directly affect commerce and because the *Stanford Daily* decision has the potential of greatly disrupting the press, Congress would seem to have the power to regulate at least this aspect of state police power as a method of protecting the free flow of information.

In attempting to regulate state police functions beyond commerce clause situations, the other viable constitutional alternative is section five of the 14th amendment. Under the 14th amendment the states are forbidden to abridge the privileges of citizens of the United States or to deprive any person of life, liberty, or property without due process of law. While this section of the amendment is self-executing in the sense that state action that does any of the things forbidden will be held unconstitutional by the courts, section five seems to go further and authorize Congress to enforce the provisions of the amendment by appropriate legislation.

The question of whether section five confers on Congress affirmative powers to declare state activities to be in violation of the 14th amendment has never been fully answered. In *Stanford Daily* the Court held searches of nonsuspect third parties to be constitutional. The question then becomes whether Congress, in light of the Court's

II. HISTORY OF LEGISLATIVE RESPONSE

A. Introduction

Beginning on June 22, 1978, the Senate Judiciary Committee, Subcommittee on the Constitution, which I chair, held four days of hearings on the problems associated with the *Stanford Daily* decision and possible legislative answers to it.¹⁷ No committee action was taken in the 95th Congress, however. In April of the 1st session of the 96th Congress, I introduced a bill on behalf of the Administration to provide the protection of the subpoena-first rule to those engaged in first amendment activities when evidentiary material is sought by federal, state or local law enforcement authorities. This proposal, S. 855,¹⁸ was later incorporated in S. 1790¹⁹ as Titles I and IV of the legislation. Title II was added in September of 1979 to afford protection against unannounced searches to those in possession of documentary materials which would be privileged in the jurisdiction in which they are to be found, and Title III was designed to extend protection to all innocent third parties holding documentary evidence.

The first congressional action was taken on January 31, 1980, when the Senate Subcommittee on the Constitution began consideration of Titles I and IV of S. 1790, which provided for press protection from unannounced searches.²⁰ The subcommittee also requested a hearing before the full committee on the whole range of relevant legislation. That hearing was held on March 28.²¹

ruling, can declare such searches void under the 14th amendment. Three major cases bear on this issue. The Court had held that a voting qualification of literacy in English was constitutional and that a state could exclude from voting those persons who could not pass such tests. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). Seven years later, though, the Court held that the Voting Rights Act, in limiting a state's power to use literacy tests, was also constitutional. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The Court wrote that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. Four years later, however, the Court splintered badly when the question arose whether Congress could lower all voting ages to 18 through legislation. In a five to four decision, the Court held that Congress had no such power through the 14th or 15th amendment. *Oregon v. Mitchell*, 400 U.S. 112 (1970). Essentially, therefore, the question of congressional power under the 14th amendment is an unsettled one. For a full discussion of these issues, see *1978 Hearings, supra* note 12, at 365, 375 (testimony of Mr. Paul Bender and Mr. William Cohen).

¹⁷See *1978 Hearings, supra* note 12.

¹⁸S. 855, 96th Cong., 1st Sess., 125 CONG. REC. S3791 (daily ed. April 2, 1979).

¹⁹S. 1790, 96th Cong., 1st Sess., 125 CONG. REC. S13,194 (daily ed. Sept. 21, 1979).

²⁰126 CONG. REC. D67 (daily ed. Jan. 31, 1980).

²¹See *Privacy Protection Act: Hearing on S. 115, S. 1790 and S. 1816 Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *1980 Hearing*].

In February, the House Judiciary Subcommittee on Courts, Civil Liberties, and Administration of Justice approved H.R. 3486, the Administration's press protection bill, which they amended to extend protection to all innocent third parties for federal, not state, law enforcement purposes.²² That action was repeated by the full House Judiciary Committee on April 17 following some acrimonious debate on the third party provisions of the legislation. An additional amendment was adopted, providing that remedies would be in accordance with the Federal Tort Claims Act.²³ S. 1790 is presently undergoing Judiciary Committee consideration.

B. Legislative Analysis of S. 1790

1. *Title I.*—The Administration's proposal, Title I of S. 1790, would prohibit a search for, or seizure of, the notes, photographs, or other "work product" materials in the possession of a person whose purpose was to disseminate to the public a newspaper, book, broadcast or other similar form of public communication in or affecting interstate or foreign commerce.

Work product would consist of any documentary materials created by an individual in connection with his or her plans for disseminating information to the public. It includes notes, photographs, tapes, outtakes, video tapes, negatives, films, interview files, and drafts. Work product does not include materials which constitute contraband or the fruits or instrumentalities of a crime.

There are only two exceptions to the rule prohibiting searches for work product. A search or seizure of work product is permissible if: (1) The person possessing the material has committed or is committing the criminal offense for which the evidence is sought; or if (2) immediate search and seizure is necessary to prevent death or serious bodily injury to a human being. Documents containing information relating to national security are also more accessible to the government.

Documents which are held for publication but are not work product would receive the protection of a "subpoena-first" rule. Non-work product documents are materials which were not created by or for the press, or which are contraband or fruits or instrumentalities of a crime. Non-work product documents would include such items as an extortion note or film of a bank robbery taken by a hidden bank camera. With limited exceptions, in all cases where non-work product documentary evidence is sought, the subpoena process

²²See 126 CONG. REC. D219 (daily ed. Feb. 26, 1980).

²³See 126 CONG. REC. D535 (daily ed. Apr. 17, 1980); H.R. REP. NO. 96-1064, 96th Cong., 2d Sess. (1980).

would have to be followed until all appellate remedies were exhausted. The exceptions involve situations where: (1) The person possessing the materials has committed or is committing the criminal offense for which the evidence is sought; or (2) the immediate seizure of the material is necessary to prevent death or serious bodily injury to a human being; or (3) giving notice pursuant to a subpoena would lead to the destruction, alteration or concealment of the materials; or (4) delay in an investigation or trial occasioned by review proceedings would threaten the interests of justice. The possessor of the material would, under the fourth exception, be given notice and an opportunity to submit an affidavit setting forth the factual basis for any contention that the materials sought are not properly subject to seizure.

2. *Title II.*—Title II is similarly constructed but provides procedural protection to persons in possession of documents which would be privileged material under the law of the jurisdiction where the search would occur, for example, doctors or lawyers who are not suspects in the offense under investigation. There is no special protection afforded work product; therefore, the bill requires that doctors and lawyers in possession of documentary evidence be served with a subpoena unless they are suspects, or there is danger of bodily injury, or risk of destruction of evidence, or delay occasioned by review proceedings would threaten the interests of justice.

3. *Title III.*—Title III extends the subpoena-first rule to all innocent third parties in possession of documentary evidence unless one of the above four exceptions applies.

4. *Title IV.*—Remedies under this legislation lie against the government if officers were acting under color of their office. The law enforcement officer, state or federal, is not liable individually unless that particular state government has not waived sovereign immunity. The state officer who may be liable has a complete defense if he acted in good faith, but such a defense is not available to the government.

As amended, the Act becomes effective against the federal government on enactment, and one year from the date of enactment for state and local purposes.

III. *STANFORD DAILY*: THE CASE AND THE CONSTITUTIONAL ISSUES

The facts of *Zurcher v. Stanford Daily*²⁴ are well known. On April 9, 1971, the *Stanford Daily*, a student newspaper published at

²⁴436 U.S. 547 (1978).

Stanford University, dispatched reporters to cover a demonstration in progress at the Stanford University Hospital. The demonstration resulted in violence, and several police officers had been attacked and injured by demonstrators. Subsequent articles and photographs in the newspaper convinced the local prosecutor's office that the *Daily* may have had additional photographs in its possession which could assist in identifying and prosecuting those who had assaulted the police officers. On April 12, the Santa Clara County District Attorney's Office secured a warrant to search the newspaper offices. There was never any indication that the newspaper was involved with the criminal activity. Later that day, four Palo Alto police officers executed the warrant. The newspaper's filing cabinets, waste paper baskets, desks, and photographic laboratories were thoroughly examined. Although the police had an opportunity to read a number of notes and confidential memoranda during their search, they denied overstepping the bounds of the warrant. No additional evidence was found and the officers subsequently left.²⁵

Several *Stanford Daily* staff members filed suit under Title 42 U.S.C. § 1983²⁶ alleging violations of their civil rights. Both the United States District Court²⁷ and the Court of Appeals²⁸ agreed with the plaintiffs that the fourth and fourteenth amendments to the Constitution barred issuing warrants to search nonsuspect third parties when no probable cause was shown that a subpoena duces tecum would be impractical.²⁹ The United States Supreme Court, however, reversed the lower courts in a five to three decision, with Mr. Justice Brennan not participating.³⁰

Mr. Justice White, speaking for the majority, reasoned that neither the wording nor the history of the fourth amendment required a standard for searches of nonsuspects different from that for suspects.³¹ The majority held that all that the Constitution requires is a finding of probable cause that the items to be seized are in a particular location.³² If the search involves a first amendment interest, the only further protection afforded is a properly issued war-

²⁵*Id.* at 550-52.

²⁶42 U.S.C. § 1983 (1976).

²⁷*Stanford Daily v. Zurcher*, 353 F. Supp. 124, 132 (N.D. Cal. 1972), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

²⁸*Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977) (explicitly adopting the lower court opinion), *rev'd*, 436 U.S. 547 (1978).

²⁹Jerome B. Falk, lead attorney for the *Stanford Daily*, discusses the legal issues argued in the case in *1978 Hearings*, *supra* note 12, at 354-60.

³⁰436 U.S. at 568.

³¹*Id.* at 554.

³²*Id.* at 559.

rant applied with particular exactitude.³³ Insistence upon a subpoena, Mr. Justice White explained, would cause unnecessary delay and result in losing valuable evidence.³⁴ Mr. Justice Powell, joining as the majority's fifth vote, recognized the legitimacy of innocent third parties and of first amendment rights of the press, but concluded that issuing magistrates would adequately protect those interests from needless or overly intrusive searches.³⁵

The five man majority in *Stanford Daily* appeared to answer several first and fourth amendment questions never before specifically addressed by the Court. Foremost among those was the issue of the rights of third parties under the fourth amendment. Previously, any discussion of fourth amendment protections of innocent third parties had largely been confined to problems of standing which those parties faced when challenging the legality of a search.³⁶

Prior to *Stanford Daily*, the Supreme Court in *Camara v. Municipal Court*,³⁷ had rejected the notion that an individual had fully protected fourth amendment rights only when suspected of a crime. It is ironic that in *Camara* Mr. Justice White said:

It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.³⁸

Mr. Justice White apparently had a change of heart in *Stanford Daily* and chose to ignore the serious threat to personal and family security as well as the first amendment erosions *Stanford Daily* signaled.

The status of nonsuspect third parties in relation to the fourth amendment was effectively examined for the first time in our legal history with the case of *Warden v. Hayden*.³⁹ Until *Hayden*, the law in the United States restricted police searches and seizures to contraband and fruits or instrumentalities of a crime. Therefore, during this period, unannounced searches, even with a valid warrant, for

³³*Id.* at 565.

³⁴*Id.* at 561.

³⁵*Id.* at 570 (Powell, J., concurring).

³⁶*See, e.g.*, *Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165 (1973); *Jones v. United States*, 362 U.S. 257 (1960).

³⁷387 U.S. 523 (1967).

³⁸*Id.* at 530-31.

³⁹387 U.S. 294 (1967).

documents which would be useful in proving guilt, such as financial records or files or letters, were constitutionally prohibited because the materials were "mere evidence" and not intimately involved with the commission of a criminal offense or obtained by criminal conduct. A separate need to protect the press or innocent third parties, therefore, did not arise because the likelihood of these parties possessing contraband or fruits of a crime was very low. In *Boyd v. United States*,⁴⁰ Mr. Justice Bradley had described searches for and seizures of goods directly related to the crime as "totally different things from a search for and seizure of a man's private books and papers"⁴¹ He stated, "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property"⁴² In the Court's view, with personal papers "the Fourth and Fifth Amendments run almost into each other."⁴³ A long line of cases after *Boyd* limited police searches and seizures to contraband and fruits or instrumentalities of a crime as distinguished from "mere evidence."⁴⁴

In *Warden v. Hayden*,⁴⁵ the Court overruled this "mere evidence" limitation on searches and seizures.⁴⁶ The facts of the case involved the chase of a suspected robber into a house. The clothes alleged to have been worn by him during the robbery were found by police in a washing machine. The shirt was "mere evidence" with "evidential value only" under the old rule, and clearly "not 'testimonial' or 'communicative' in nature"⁴⁷ The Court ruled that it was subject to seizure. In reaching this conclusion, the Court abrogated the "mere evidence rule" as an evidentiary distinction unsupported by the language of the fourth amendment.⁴⁸ The Court

⁴⁰116 U.S. 616 (1886).

⁴¹*Id.* at 623.

⁴²*Id.* at 630.

⁴³*Id.*

⁴⁴The "mere evidence" rule was also known as the *Gouled* rule. *Gouled v. United States*, 255 U.S. 298 (1921). Difficulties in applying the rule were evident in lower court decisions. *See, e.g.*, *United States v. Lindenfeld*, 142 F.2d 829 (2d Cir. 1944); *Bushouse v. United States*, 67 F.2d 843 (6th Cir. 1933); *Foley v. United States*, 64 F.2d 1 (5th Cir. 1933); *United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951). The mere evidence rule was not repudiated by the Supreme Court, however, until *Hayden*. *See* 436 U.S. at 577 (Stevens, J., dissenting) for a discussion of the history of the mere evidence rule.

⁴⁵387 U.S. 294 (1967).

⁴⁶*Id.* at 310. *See also* *Berger v. New York*, 388 U.S. 41 (1967).

⁴⁷387 U.S. at 302.

⁴⁸*Id.* at 310. Justice Fortas, joined by Chief Justice Warren, concurred in the result regarding the admissibility into evidence of the seized items of clothing, but would not join in the majority's repudiation of the "mere evidence" rule. *Id.* at 310-12

was careful to limit its ruling, however, and cautioned: "This case . . . does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."⁴⁹

*Zurcher v. Stanford Daily*⁵⁰ finally made it clear that the Court would not distinguish items of evidential value whose "very nature" places them out of the reach of police searches. As a result of *Zurcher v. Stanford Daily*, a "man's private books and papers" are as susceptible of search and seizure as bloody shirts or guns; it does not matter if these papers are in the possession of the criminal suspect or someone not implicated in the crime, be he attorney, doctor, journalist, or neighbor.⁵¹

IV. S. 1970. A LEGISLATIVE ATTEMPT TO BALANCE LAW ENFORCEMENT AND PRIVACY INTERESTS

Mr. Justice Stevens in his dissenting opinion in *Stanford Daily* pointed out that the fourth amendment requires that the "offensive intrusion on the privacy of the ordinary citizen [be] justified by the law enforcement interest it is intended to vindicate."⁵² It is clear that the majority in *Stanford Daily* determined that the public interest in law enforcement was superior to a third party's individual interest. It has been my intention in drafting a legislative response to the Court's decision to restore some of the protections of personal privacy, while ensuring that any valid legislative balance does not ignore legitimate police means of investigating and prosecuting wrongdoers. After holding extensive hearings exploring the issues, I am convinced that the Supreme Court left the scales tipped too much in favor of law enforcement. I am confident that S. 1790 achieves a more desirable balance.

A. *Interests of the Individual*

The decision in *Stanford Daily* ignored two vital societal interests: the first and more obvious is the privacy interest of innocent third parties; the second is the lack of redress left for injured individuals.

(Fortas, J., concurring). Justice Douglas maintained that if the items were not contraband or fruits or instrumentalities of the crime, "[a]ny invasion whatsoever of [books, pamphlets, papers, letters and documents and other personal effects] is 'unreasonable' within the meaning of the Fourth Amendment" and their use as testimonial evidence was a violation of the privilege against self-incrimination. *Id.* at 321 (Douglas, J., dissenting).

⁴⁹*Id.* at 303.

⁵⁰436 U.S. 547 (1978).

⁵¹*Id.* at 559.

⁵²*Id.* at 581 (Stevens, J., dissenting).

1. *Consequences of Stanford Daily: Privacy.*—The privacy interest is most apparent when the party searched is professionally involved in a confidential relationship, as is a doctor or lawyer. In such cases the validity of the relationship itself is damaged. It is this threat to confidentiality which also lies behind the press' fear of the *Stanford Daily* opinion. During the course of hearings, we have had the opportunity to receive the testimony of those who have experienced such a search conducted subsequent to *Stanford Daily*. It should be emphasized, however, that *Stanford Daily* reaches further than journalists or psychiatrists. As one commentator has noted:

Subsequent to *Zurcher*, there is absolutely no rule prohibiting law enforcement agencies from regularly searching businesses that retain information on potential defendants and suspects. Groups such as credit agencies, computer companies, utilities or any other legitimate enterprise may now be searched without warning for any evidence related to a crime.

Zurcher, then, does nothing less than shatter the privacy expectations of businesses and individuals everywhere. These types of searches will undoubtedly be thorough and will necessarily expose numerous files containing confidential information concerning other individuals to the eyes of the police. Such a needless invasion of privacy may now occur as a matter of routine police procedure. Furthermore, searches of this nature will involve the unnecessary invasion of innocent parties' privacy without any demonstration that a subpoena would be impractical.⁵³

Although no search of a competitor's office for records in an antitrust case, for example, has yet been forthcoming, searches of doctors' and lawyers' offices have occurred. Representatives of the American Psychiatric Association have appeared before the Subcommittee and the Judiciary Committee.⁵⁴ In 1978 Dr. Maurice Grossman of Palo Alto, California, reviewed with the Subcommittee the facts of a police search of a psychiatric clinic which was a companion to the search of the *Stanford Daily*.⁵⁵ One year after the *Stanford Daily* district court decision was handed down by Judge

⁵³Cantrell, *Zurcher: Third Party Searches and Freedom of the Press*, 62 MARQ. L. REV. 35, 40 (1978).

⁵⁴Jerome S. Biegler, M.D., Chairman, American Psychiatric Association, Committee on Confidentiality, was accompanied by Maurice Grossman, M.D., in the 1978 Hearings. Nancy Roeske, M.D., Interspecialty Advisory Board, American Medical Association and American Psychiatric Association, testified during the hearing on March 28, 1980.

⁵⁵1978 Hearings, *supra* note 12, at 228 (testimony of Dr. Maurice Grossman).

Peckham,⁵⁶ the same district attorney's office obtained a warrant against the Stanford University Psychiatric Clinic, and the search warrant was executed in the clinic. The warrant sought the records of a nineteen year old victim of a sexual assault who had come to the clinic following the incident; the supporting affidavit described the offense in embarrassing detail. The warrant delineated the premises to be searched as not only the entire building housing the clinic with all offices, examination rooms, and closets, but also the home of the victim's doctor, including the attached garage and her 1967 Plymouth.⁵⁷ The police searched all the files with the appropriate identifying letter of the alphabet, and, failing to find the

⁵⁶353 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).

⁵⁷The search warrant read,

IN THE MUNICIPAL COURT FOR THE SAN
JOSE-MILPITAS JUDICIAL DISTRICT,
COUNTY OF SANTA CLARA, STATE OF
CALIFORNIA

SEARCH WARRANT

The people of the State of California To any Sheriff, Constable, Marshal, Policeman or Peace Officer in the County of Santa Clara:

Proof, by affidavit, having been made before me this day by Anthony Cvetan that there is just, probable and reasonable cause for believing that:

Evidence of the commission of felonies will be located where described below.

You are therefore commanded, in the daytime, to make immediate search of the Psychiatry Clinic of the Stanford Hospital at Stanford University, which premises consist of a two story brown woodframe building containing numerous offices, file rooms, examination rooms, record storage areas, filing cabinets, closets, storage areas and library, which building is located on the west side of the main hospital building; on the north entrance to the building a directory identifies the building as the Psychiatry Clinic, located at 1200 Pasteur Drive, Palo Alto, County of Santa Clara, State of California, and on the premises located at 1431 Pitman Avenue, Palo Alto, California, which premises consist of a one story U-shaped woodframe dwelling, dark brown in color, with a two-car attached garage with a second story above the garage; the structure has a shingled roof, blue curtains on the downstairs windows on the east side of the building, a green lawn with high hedges on both sides of the house; and in a 1967 Plymouth License No. USD 729, for the personal property described as follows:

1. Psychiatric medical file No. 41-09-66 prepared by Dr. Lederberg for patient _____ .

2. Any other records, papers, documents and notes, typed or handwritten, prepared by Dr. Lederberg or her staff relating to any examinations or treatment of _____ .

And if you find the same or any part thereof, to hold such property in your possession under Calif. Penal Code Sec. 1536.

Given under my hand this 31st day of May, 1973.

PAUL R. TEILH,
Judge of the municipal court.

victim's record, were preparing to search the rest of the premises when the University's legal counsel appeared and offered to surrender the documents sought. It was only that consent to turning over the victim's file which prevented the police from rummaging through numerous other files, cabinets, or even the doctor's personal automobile.⁵⁸

In the broadest sense, the search of a doctor's office is damaging to all of us. As Dr. Nancy Roeske of the American Medical Association and American Psychiatric Association testified, "I speak not only as a physician, I speak as a patient and I speak to all of you here as you are patients or will be patients of physicians."⁵⁹ Mr. Philip Heymann of the Department of Justice, while disapproving of legislation which would exempt certain protected relationships from searches, acknowledged the particular injury threatened by a search of a psychiatrist's office. "I . . . think the search of the psychiatrist's files is a very dangerous and questionable practice."⁶⁰

The immediate threat to society's interest in privacy after *Stanford Daily* was posed to members of the press as innocent third parties. When the third party is a newspaper, first and fourth amendment values converge. The fourth amendment commands that any search which is unreasonable violates constitutional protections. The first amendment prohibits any restrictions on the exercise of free speech. Given these considerations and the several Supreme Court opinions requiring a more restrictive standard for issuing search warrants when first amendment considerations arise,⁶¹ the precedential analysis of *Stanford Daily*, not to mention the policy considerations, are at best dubious.

The media's ability to gather, edit, and disseminate the news has been recognized by our courts.⁶² As Mr. Justice Stewart pointed

⁵⁸See 1978 Hearings, *supra* note 12, at 236 (testimony of Dr. Maurice Grossman). Another more recent search of a clinic has been reported. On February 8, 1979, a blanket warrant was used to obtain patient records in a surprise search of the San Francisco General Hospital methadone clinic. Police copied names, addresses, dates of birth and photographs of 35 patients. Although all patients were subsequently cleared in a criminal investigation, police have refused to return the data. A lawsuit has been filed for the return of the records which were seized. San Francisco Chronicle, Aug. 29, 1979, at 6, col. 1.

⁵⁹1980 Hearing, *supra* note 21, at 122 (testimony of Dr. Nancy Roeske, Professor of Psychiatry, Indiana University School of Medicine).

⁶⁰1978 Hearings, *supra* note 12, at 337 (testimony of Mr. Phillip Heymann). He went on, however, to doubt whether surgeons should be similarly protected. *Id.* at 338.

⁶¹See, e.g., *Roaden v. Kentucky*, 413 U.S. 496 (1973); *United States v. United States Dist. Court*, 407 U.S. 297 (1972); *Stanford v. Texas*, 379 U.S. 476 (1965).

⁶²See *Bursey v. United States*, 466 F.2d 1059, 1084-85, *rehearing en banc denied*, 466 F.2d 1090 (9th Cir. 1972) (discussing the use of a press subpoena in relation to these interests).

out in his dissent in *Stanford Daily*, all of these functions will be impaired when a warrant is preferred to the less intrusive subpoena duces tecum.⁶³ *Stanford Daily* also threatens to dry up the confidential sources that play an important role in assisting the media, who in turn, must inform the public. No file, desk drawer, or attic is insulated from a surprise police search under *Stanford Daily*.

Granted, the fourth amendment does not bar search warrants "simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement."⁶⁴ When the media is the party to be searched, however, special considerations should attach. A less intrusive method of gathering the same evidence is available to the prosecutor in the subpoena.⁶⁵ The *Stanford Daily* decision, though, does not require the issuing magistrate to consider such an alternative. The newsman or other person engaged in first amendment activities is left without the constitutional protection insured in *Branzburg v. Hayes*,⁶⁶ the opportunity under a subpoena to engage in an adversary hearing.

No searches of newsrooms have been recorded since *Stanford Daily*. However, early and mid-nineteen seventies searches which preceded the Supreme Court's opinion⁶⁷ and the decision itself have

⁶³436 U.S. at 571 (Stewart, J., dissenting).

⁶⁴*Id.* n.1. (Stewart, J., dissenting).

⁶⁵353 F. Supp. at 132.

⁶⁶408 U.S. 665 (1972).

⁶⁷The Reporters Committee on the Freedom of the Press provided a list of newsroom searches.

SEARCH WARRANTS SINCE 1970

FIFTEEN INCIDENTS OF SEARCH WARRANTS

ISSUED ON THE NEWS MEDIA SINCE 1970

1. April 1971, *Stanford Daily*, Palo Alto, Ca. Police were seeking unpublished photos of demonstration at a hospital.
2. October 1973, *Berkeley Barb*, Berkeley. Police sought letter from the August Seventh Guerilla Movement; warrant served on the attorneys for the *Barb*.
3. February 1974, *Berkeley Barb*, Berkeley. Police were seeking a letter from the Symbionese Liberation Army concerning the Patricia Hearst kidnapping.
4. March 1974, *KPFA-FM*, Berkeley. Police were seeking letter to station from the Symbionese Liberation Army regarding the death of an Oakland school official.
5. June 1974, *Berkeley Barb*, Berkeley. The Federal Bureau of Investigation was seeking a letter from the Black Liberation Army; warrant issued on attorneys.
6. June 1974, *Phoenix*, San Francisco. The Federal Bureau of Investigation was seeking a letter from the Symbionese Liberation Army; warrant issued on attorneys.
7. October 1974, *KPFK-FM*, Los Angeles. Police were seeking tape recorded message from the New World Liberation Front concerning a hotel bombing.

been viewed by the press as serious threats to the confidential relationships essential to the smooth dissemination of information.

The many representatives of the press who have appeared before congressional committees on the *Stanford Daily* issue have unanimously urged passage of a broad third party bill on the ground that the rights of all citizens as well as those of the press are infringed by the decision. At the same time, however, they have explained the repercussions of the decision on the journalistic world. As Charles Bailey, editor of the Minneapolis Tribune testified before the Committee on March 28, the

Tribune, like many other newspapers, has taken steps to protect its confidential files, and those of its staff members, from the kind of surprise, sweep-and-rummage search legitimized by the court in *Stanford*. It is one of the minor ironies of the climate that now exists in American newsrooms that it seems prudent for me not to know where the confidential notes and working papers of my reporters are kept.

All I do know is that they are not in the building where we work. I think that is a lousy way to run a newspaper — or a country.⁶⁸

The impact of *Stanford Daily* is felt most directly by attorneys. Perhaps perceiving that for the first time in the nation's history they are free to ignore the courtesy of a subpoena, police authorities in several states around the country have appeared at lawyers' offices with a search warrant for confidential information. In none of

8. October 1970, KPOO-FM, San Francisco. Police were seeking a letter written by the New World Liberation Front regarding a hotel bombing.

9. October 1974, L.A. Star, Los Angeles. Warrant issued for search of tabloid's offices; police were seeking unpublished articles, address books, and unpublished photos in regard to a complaint by a star that her face was used without authorization superimposed in a nude photo.

10. September 1977, WJAR-TV, Providence, R.I. Police were seeking out-takes of picket line disorder in Warwick, R.I.

11. December 1977, KRON-TV, San Francisco

12. December 1977, KTVU-TV, San Francisco

13. December 1977, KGO-TV, San Francisco

14. December 1977, KPIX-TV, Oakland

In all four of the above situations, police were seeking unpublished film of a disorder at a houseboat community.

15. April 1978, Associated Press bureau, Helena, Mont. Police were seeking unpublished notes and tape recording of interview with murder suspect in custody.

1978 *Hearings*, *supra* note 12, at 147.

⁶⁸1980 *Hearing*, *supra* note 21, at 88 (testimony of Mr. Charles Bailey).

these cases was the attorney himself a target of a criminal investigation.⁶⁹

The federal government has indicated that searches by its agents of attorneys' offices are the rare exception. In a survey of United States Attorneys undertaken in 1978, it was found impossible to isolate and positively identify such searches, in part because the responding United States Attorneys expressed difficulty in defining the third party search concept and its application.⁷⁰ In response to a written question following the last hearing, the Department of Justice made a separate effort to identify attorney searches and located none involving nonsuspects, although again the Department pointed out that its answer could not be considered definitive because data on the number and nature of executed search warrants are not routinely compiled.⁷¹

2. *Consequence of Stanford Daily: Ignoring Society's Interests in Providing Redress.*—The lack of definitive data on searches of attorneys' offices may also be due in part to the second societal interest left unaddressed in *Stanford Daily*: providing redress for injury to a nonsuspect third party. Without the remedy afforded by a subpoena, attorneys may have had materials seized from their files, but have been unable to get into court to protest the seizures. It is ironic that *Stanford Daily* may have left us with the anomalous result that nonsuspect third parties are afforded less protection against searches than criminal suspects.⁷²

⁶⁹Recent searches of attorneys' offices have been reported. In March 1977, a search warrant was issued to search all the offices and files of a 60-lawyer firm in Beverly Hills, California. The law firm was not accused of any wrongdoing, but one of its clients was a medical management firm targeted by the state in a health insurance program investigation. Although a Los Angeles Superior Court judge found the warrant to be overbroad and unconstitutional, by the time the search was stopped, agents had rummaged through the firm's files for six hours. In April 1979, unannounced searches pursuant to a warrant were made of the Morningland Church in Long Beach, California and its attorney's office. Confidential records and financial files were removed during a seven-hour period. A challenge to the constitutionality of the search is being planned. CAL. ST. B. REP., May 1979, at 10-11. See also National Law Journal, Apr. 30, 1979, at 4, col. 1; *id.*, June 18, 1979, at 4, col. 2; *id.*, Aug. 6, 1979, at 19, col. 4; *id.*, Aug. 27, 1979, at 6, col. 1; *id.*, Nov. 26, 1979, at 3, col. 1.

In July 1978, a warrant was issued for a search of an attorney's office in St. Paul, Minnesota. The lawyer was not a suspect, but one of his clients was being investigated on a charge of perjury. When the police arrived at his office, the attorney resisted the execution of the warrant by asserting the attorney-client privilege. The Minnesota Supreme Court, having original jurisdiction in the matter, held that a search warrant which encompassed an attorney's office was unreasonable if the attorney was not a suspect. *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979).

⁷⁰1978 Hearings, *supra* note 12, at 346 (letter from Mr. Philip Heymann to Senator Birch Bayh Aug. 21, 1978).

⁷¹Letter from Philip B. Heymann to Senator Birch Bayh, May 2, 1980.

⁷²See *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 269 (1960).

If he is not a criminal defendant, the third party involved in a government search is subject to the *Alderman* rule of "restricted standing" which states that fourth amendment rights are personal rights which may not be vicariously asserted.⁷³ The exclusionary rule⁷⁴ is unavailable to suppress illegally obtained evidence, and thus police are not deterred from unlawful searches because the restraints inherent in the exclusionary rule are absent. Damage actions are virtually unavailable because a good faith defense must be overcome. Finally, the nonsuspect may find it difficult to retrieve his documents when he has not been accorded an adversary hearing to challenge a subpoena.

In Portland, Oregon, in October 1979, an attorney was confronted with a police search for confidential files, and his experience aptly illustrates the affront on personal privacy and the lack of redress which are legacies of *Stanford Daily*. On the morning of October 10, 1979, "police officers arrived at the law offices of Milton Stewart with a search warrant for '. . . papers, records, and three sealed manila envelopes . . .' that related to the Transit Bank, a non-profit corporate client"⁷⁵ which Mr. Stewart represented pursuant to an earlier request of the Portland Police Department.

Despite repeated protestations by Mr. Stewart and the other unassociated lawyers with whom he shared space, the police . . . conducted a search not only of Mr. Stewart's office, but of some of the other offices as well, and they rummaged through numerous active attorney-client files, page-by-page. The police remained in the law offices for over two hours. . . .

Eventually, the officers opened several filing cabinets and seized Mr. Stewart's attorney-client case file and records pertaining to the Transit Bank. No criminal charges were then pending or have since been filed against the Transit Bank⁷⁶

There was never a suggestion that Mr. Stewart was implicated in any wrongdoing.

Mr. Stewart considered himself injured. He believed the search warrant to have been overly vague; he felt he should not have been forced to relinquish his client's files and records because they were privileged materials; and he wanted the files back. However, not be-

⁷³*Alderman v. United States*, 394 U.S. 165 (1969).

⁷⁴*See generally* *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

⁷⁵1980 *Hearing*, *supra* note 21, at 108 (prepared statement of Mr. Stephen Kanter, Professor, Lewis and Clark University School of Law and President, Oregon American Civil Liberties Union).

⁷⁶*Id.*

ing a criminal defendant, after the search and seizure had been executed, he was in danger of being left without a judicial forum. His attorney spoke to this problem.

We almost didn't get into court because of that. In fact, the Government argued long and hard that there had been no injury because Mr. Stewart was not a criminal defendant, in fact, no charges have ever been filed out of that case. The Government argued we had no standing to appear in court.

As a matter of Federal law, they might well be correct today. Fortunately, Oregon has an old statute that had not been repealed, that had never been used, that we managed to find which provides an innocent third party the opportunity to go into court to get [his] property back.

So, we were able to convince the judge that statute applied in this case.⁷⁷

Once into court, Mr. Stewart's case went well. After a week of hearings, the judge held that attorney-client privileged materials were not seizable under a search warrant, that the particular warrant and affidavit were basically invalid, and that all Mr. Stewart's papers were to be returned to him.⁷⁸ Without Oregon's provision for the return of improperly seized material,⁷⁹ Judge Peckham's prophesy in his lower court decision might well have come true: "[I]f law enforcement agencies were not required to first explore the subpoena alternative in third-party situations, . . . there would be the rather incongruous result that one suspected of a crime would receive *greater* protection against unlawful searches than a third party."⁸⁰

B. *Interests of Law Enforcement*

The issue of *Stanford Daily* is not whether police may obtain relevant evidence, but how they may obtain it. There are of course three legal methods available by which law enforcement authorities may procure documents or other evidence of a crime. The first and least intrusive method is to request the person in possession to produce it voluntarily. There is no legal obligation to comply with the request, and the possessor may destroy the evidence if he so desires. The second method is to make a formal legal demand using a subpoena. Obligation to produce attaches upon service of the subpoena, but the custodian of the evidence has the opportunity to

⁷⁷*Id.* (testimony of Mr. Kanter).

⁷⁸*In re Stewart*, No. DA-180-730-7910 (Dist. Ct. Or. Dec. 4, 1979).

⁷⁹OR. REV. STAT. § 133.633 (1979).

⁸⁰*Stanford Daily v. Zurcher*, 353 F. Supp. at 131.

challenge the subpoena in court to test its legality. As with the voluntary request, whether the evidence is ultimately given over depends in large part on the honesty of the possessor, although, if the government is able to prove dishonesty, the person is subject to sanctions for contempt of court. The third method is the search warrant, and if the evidence is in danger of being altered or destroyed, it is the only reliable means available. It is also the most intrusive and the least precise. The purpose of S. 1790 would be to require the service of a subpoena unless the government could show that the possessor of evidence was himself implicated in the offense under investigation, or that the evidence was in danger of being concealed, altered, or destroyed, or that there was immediate risk of bodily injury. Also, if the possessor fails to comply with a subpoena, then the government may seek a search warrant.

The opposition from law enforcement officials to legislative proposals has followed two courses. First, it is argued that search warrant powers are not abused and the number of third party searches is extremely low; therefore, it is foolish to pass legislation which would purport to solve a problem which does not exist. Second, it is maintained that should the bills become law, law enforcement would be severely crippled. The inconsistency of these two lines of attack has always rendered them suspect; they deserve exploring and questioning. Both state and federal police agencies contend that they have used restraint in searching innocent third parties. The district attorneys admit that searches of nonsuspects are not uncommon, but they maintain that the frequent unavailability of subpoenas in the different states and localities necessitates the use of search warrant procedures.⁸¹ In recognition of that fact, S. 1790 as now amended gives the state and local governments one year from date of enactment of the Act before its provisions become effective. The purpose of the delay is to allow the legislatures to provide adequate subpoena procedures.

The Department of Justice, on the other hand, has consistently stated that innocent third party searches are rare, and cites a record clear of abusive incidents.⁸² In light of this information, Mr. Philip Heymann, Assistant Attorney General, restated the Department's position to the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice: "The Department of Justice has previously stated, and again reiterates, its position

⁸¹1978 Hearings, *supra* note 12, at 297 (testimony of Mr. Paul L. Perito). Mr. Perito, however, pointed out that according to an ongoing survey, searches of newsrooms were rare. Indiana had reported no cases where a search warrant for news sources had been sought. *Id.* at 322.

⁸²See *id.* at 345 (Survey of United States Attorneys on Third Party Searches.)

that restricting searches for materials held by all third parties would significantly undermine the ability of law enforcement to investigate and prosecute crime."⁸³ It is probable that the number of factual instances necessitating compliance with a bill such as S. 1790 would be relatively low. It is commonly estimated that about ninety percent of warrants are issued for narcotics,⁸⁴ thus falling outside the legislation's application to documentary evidence. Of the remaining ten percent, the number of search warrants directed toward non-suspect third parties would undoubtedly be minimal.

If law enforcement authorities resort to third party searches only rarely (and it is my position that it is only since *Warden v. Hayden*⁸⁵ that searches of third parties have become a significant possibility) and if the number of cases which would be affected by the bill is relatively insignificant, it is a fair question to ask why district attorneys and the Department of Justice have registered such strong opposition to third party protections under S. 1790.⁸⁶ They will reply that it is because a subpoena-first rule will create serious obstacles to effective law enforcement. I do not believe that this objection will stand up to close scrutiny, and I also am inclined to suggest that several other reasons are indicated. First, however, I propose to examine the proposition that legislation protecting third parties from searches will cripple law enforcement.

The arguments by the district attorneys and the Department of Justice remain very much the same as those first offered in the Department's amicus brief to the Supreme Court in *Stanford Daily*. They can be stated concisely. First, it is contended, the government would have a difficult time differentiating a suspect from a non-suspect at an early stage in an investigation; next, proceeding by a subpoena would cause delay and increase the risk of loss of evidence, because such a rule would facilitate the harboring of evidence by criminal figures; and finally, an issuing magistrate can

⁸³Letter from Philip B. Heymann to Robert W. Kastenmeier (November 7, 1979).

⁸⁴Although records are kept for the total number of applications granted for search warrants in the federal system, no breakdown of types of cases is available nationwide. However, Lawrence S. Margolis, Secretary of the United States magistrate for the District of Columbia, reports that approximately 80% of the warrants issued for the District are narcotics related, and estimates that these figures are atypical and well below the national average. Interview with Lawrence S. Margolis, in the District of Columbia (May 23, 1980).

⁸⁵387 U.S. 294 (1967).

⁸⁶The Department's active opposition to third party legislation in the House of Representatives is described in 38 CONG. Q. 1052 (1980): "Robert W. Kastenmeier, D-Wis., chairman of the Courts Subcommittee and the bill's cosponsor [is quoted as observing after] full committee action, 'They [the Justice Department and the FBI] worked over some members pretty good.'"

be relied on to ensure the reasonableness of a search under the fourth amendment's standards.⁸⁷

Opposition to the press protection sections of the bill has diminished. First amendment considerations have always been acknowledged. Eight states have now passed some kind of similar legislation,⁸⁸ and fear on the part of district attorneys seems to have abated with this state and local experience. As for the federal government, it has moved from its position as *amicus curiae* in *Stanford Daily* arguing against the newspaper, to its present sponsorship of a press protection bill.⁸⁹ The press statement at the time of announcing the Administration's legislative proposal in December 1978, read:

The Carter Administration has concluded that the [*Stanford Daily*] decision poses a serious threat to the ability of the press to gather information and to protect confidential sources.

. . . .

The Supreme Court's decision immediately raised concerns in the Carter Administration and Congress about the potential threat to the time-honored freedom of the press [and] the possibility of increased use of press searches.⁹⁰

The first argument against broad third party protection is that it is too difficult in the early stages of an investigation to differentiate suspects from nonsuspects, making the use of subpoenas impractical. In reply, it can be said to be doubtful that, as a general rule, targets are not established by the time particular documentary evidence is identified and needed. If they are *not* established in the very early stages of an investigation, when many innocent people may still be within the dragnet of an inquiry, wholesale searches and seizures at this juncture appear to me to be a dubious practice constituting an unwarranted invasion of privacy. Surely, proceeding

⁸⁷See Brief for United States as Amicus Curiae at 9-10, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

⁸⁸CAL. PENAL CODE § 1524 (West Supp. 1980); Act Prohibiting the Use of Search Warrants in Offices of the Press and Broadcast Media, Pub. Act No. 79-14, 1979 Conn. Pub. Acts 8 (to be codified at CONN. GEN. STAT. § 54-33a); ILL. REV. STAT. ch. 38, § 108-3 (1979); NEB. REV. STAT. §§ 20-144 to -147 (1977); N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1979-80); OR. REV. STAT. § 44.520 (Supp. 1979); TEX. CRIM. PRO. STAT. ANN. § 18.01(e) (Vernon Supp. 1980); Act of Nov. 28, 1979, ch. 81, 1979-81 Wis. Legis. Serv. 574 (amending WIS. STAT. § 968.13) (broad third party bill).

⁸⁹For a discussion of the role of the Department of Justice in the Supreme Court opinion, see Lewin, *Press Freedom's Tarnished Hero*, THE NEW REPUBLIC, Jan. 6, 1979, at 12.

⁹⁰1978 Hearings, *supra* note 12, at 350-51.

by subpoena when many companies or individuals are within the broad scope of a preliminary investigation is the appropriate means to secure documents. Are twenty or thirty insurance offices to be searched, for example, when the F.B.I. begins an investigation of an insurance fraud scheme? In particular, if the documents are not able to be identified, the searches become nothing more than "fishing expeditions" and the warrant nothing but the "general" warrant which the fourth amendment proscribes.

In the unlikely event that the investigation is far enough advanced to have identified specific documents but the suspects are still not known, the law enforcement authorities acting under the legislation would have the opportunity, if necessary, to seek a warrant under the fruits or instrumentalities exception, or, more likely, under the exception for risk of alteration or destruction of evidence.

I believe the fears of delay, allegedly imposed by a subpoena-first rule, are exaggerated. Certainly, prosecutors, like anyone else, prefer to avoid litigation. However, the litigation which might ensue from the remedies provided under S. 1790 would only be minimal, in my opinion.⁹¹ It should not interfere with the progress of the criminal investigation but proceed as a civil matter.

The subpoena process does not bring the immediate results of a search warrant, and it is contended that in some cases immediate access to documents is necessary. The unavailability of federal grand jury subpoenas is cited as one part of the potential problem. It is true that grand jury subpoenas are returnable on their face only on a day when the grand jury is in session.⁹² It is common practice, however, for the federal prosecutor to permit the witness or his attorney to deliver the documents to the prosecutor's office at a mutually convenient time. Moreover, there is nothing to prevent routine issuance of a subpoena by the prosecutor as the first step in the investigation of a crime, whether the jury is in session or not, or whether anyone knows whether an indictment will ever result. If a true emergency arises during the investigation and documents are needed at once, the United States Attorney has the option of calling in the grand jury to receive the evidence, or issuing a "forthwith" or *eo instantur* subpoena. Documentary evidence is customarily important, however, in offenses such as white collar crimes, and investigations routinely run for months or years and rarely demand emergency action. The delays which might result from challenges of subpoenas would undoubtedly be a nuisance to law enforcement authorities. However, as Mr. Nathan Lewin pointed out:

⁹¹In most instances where a party might perceive a course of action under the legislation, there would be little financial incentive for him to bring suit.

⁹²See 1 F. BAILEY & H. ROTHBLATT, COMPLETE MANUAL OF CRIMINAL FORMS, 157-58 (2d ed. 1974).

Such a challenge cannot, however, delay the grand jury process too long. In the federal system, courts have held that denial of a motion to quash a grand jury subpoena is not ordinarily applicable. Thus, unless the subpoenaed party is ready to risk imprisonment for contempt, appeals are not possible.⁹³

Perhaps the strongest objection to broad third party legislation is that it will vastly increase the dangers of evidence being destroyed. The subpoena-first rule, it is charged, will lead to harboring of evidence. As Mr. William Webster, Director of the F.B.I. has explained this perception:

[It] would create a presumption against these searches that could be overcome only by specific evidence demonstrating either that the possessor of the materials is a suspect or that he is likely to destroy, alter or conceal the evidence if it is sought by subpoena.

It is my firm belief, that the principals of organized crime and large white collar crime conspiracies will seize upon this presumption. Subjects of our investigations will deposit incriminating materials with third parties who are not subjects of our investigations. From that point on, society's interest in that evidence will not be protected by the "innocence" of the possessor, but rather will hinge on the relationship between the possessor and the subject. Subjects will carefully choose a third party under their control or influence, or one who owes a loyalty to them. These third parties, however innocent, will be under intense pressures, stemming from loyalty or fear of retribution, to destroy or conceal the evidence or at least create an opportunity for the subject to do so.⁹⁴

Although certainly no one wants to assist organized crime, it is difficult to hypothesize situations where one of the four exceptions drafted into the legislation could not be utilized in a hearing before an issuing magistrate. Further, one must ask if those engaged in organized or white collar crime might not be well advised to harbor documents in attorneys' offices at the present time, because from all available evidence given by the Department of Justice those offices are virtually inviolate from federal searches and seizures. Should S. 1790 become law, however, it would seem a dubious strategy to deposit a great quantity of potentially damaging evidentiary

⁹³1980 Hearing, *supra* note 21, at 83 (prepared statement of Mr. Nathan Lewin).

⁹⁴Letter from William H. Webster to Senator Edward M. Kennedy (April 25, 1980).

material in the office of one's lawyer or accountant if one knew that, with a single successful showing of complicity or the danger of destruction of evidence, police agents might seize the concentration of harbored documents in a single sweeping search.

Mr. Philip Heymann offered the Judiciary Committee a hypothetical situation which summarized the Department's fears in this respect:

Assume that you have an organized crime figure who has a list of people to whom he has paid money for "hits," or assassinations. Such lists occasionally exist

Assume that the organized crime figure, with an accounting list of whom he has paid for "hits," simply gives the list to his sister to keep for him; a most natural thing to do. I want to know what we are supposed to do if we know that the sister has the list.

Do you want an example a touch more dramatic? As we are approaching the organized crime figure's house looking for the list, to search the suspect, the organized crime figure crosses the street and hands the list to his sister, who puts it in her pocketbook and takes it into her house. We know for sure it is there. It is crucial evidence. It is important evidence.⁹⁵

The flaws in the above example are clear. First, it must be recognized that such a hit list with accompanying prices is highly improbable. As for the "serious difficulties" facing the law enforcement officer, the problems are easily handled under S. 1790. All that the officer must do is make a showing to a judge either that there is danger of bodily injury, or that there is, in fact, such a hit list and that, having been given to a sister, there is reason to believe that the list will be destroyed if she is served with a subpoena. Any issuing magistrate or judge presented with such evidence would grant a search warrant. The only critical difference in this scenario if it were to occur under the proposed legislation, as opposed to present practice, is that the government would be required to state in an affidavit that the evidence will be destroyed and provide reasonable evidence of the potential for destruction to an impartial judicial officer.

It had been argued by the attorneys in *Stanford Daily* and was accepted in the majority opinion that the finding of probable cause

⁹⁵1980 *Hearing*, *supra* note 21, at 35 (prepared statement of Mr. Phillip Heymann). The *New York Times* in an editorial on hypotheticals by law enforcement authorities characterized such situations as "the 'Al Capone's sister' problem." *N.Y. Times*, April 22, 1980, § A, at 22, col. 1.

in the search warrant procedure ensures the reasonableness of a search. A turning factor in Mr. Justice Powell's concurrence with the majority was that an issuing magistrate would guard special values in ruling on requests for warrants.

As the Court's opinion makes clear, *ante*, at 564-565, the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant. While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment—such as those highlighted by MR. JUSTICE STEWART—when he weighs such factors. If the reasonableness and particularity requirements are thus applied, the dangers are likely to be minimal.⁹⁶

Subsequent searches of attorneys and others have cast doubts on his assumption. Such putative protections offer little consolation when studies show that less than .25% of wiretap warrant applications since 1969 have been refused.⁹⁷ In 1979, none of the 553 applications were turned down.⁹⁸ It is evident that if attorneys, doctors, and ordinary citizens are to be safe from searches and seizures when less intrusive means are available, they cannot rely on magistrates to protect their privacy interests. It is evident to those of us proposing legislation that a showing of probable cause or reason to believe that the third party is a suspect, or a danger of destruction of the evidence or of bodily injury, is necessary to guarantee that sound judgment will be exercised. Surely it is better to place that judgment in the hands of an impartial judicial officer following the dictates of a statute, than to leave it to the discretion of those conducting the investigations. At the least there is a presumption which law officers must overcome. Without the law demanding a higher standard for searches, prosecutors will be forced to weigh their increased ability to avoid restraints inherent in a sub-

⁹⁶436 U.S. at 570 (Powell, J., concurring).

⁹⁷Of 7,314 applications for wiretap warrants since 1969, issuing magistrates denied only 18. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS 16 (April 28, 1980) (prepared by Statistical Analysis and Reports Division, Administrative Office of the United States Courts, Washington, D.C.).

⁹⁸*Id.*

poena, against their concern for a third party's privacy. It is reasonable to assume, I believe, that given no ultimate sanction against resorting to searches, they will frequently forego the subpoena.

The Justice Department maintains that as a matter of policy it proceeds by subpoena where the risk of delay is not deemed too great. Undoubtedly, all good prosecutors, whether state or federal, try to follow the same policy. The proposed legislation would simply substitute the court's judgment on the significance of the threat of loss or alteration of evidence for that of the prosecutor. If there is reason to believe that the documents are in danger, the magistrate or judge may grant the government the warrant it seeks. The difference is obvious and significant. The government, in seeking a warrant, may overstep, overlook, or overrule its policy, and the person searched has no redress. However, the court, in ruling on a subpoena request, exercises an objective judgment under the law, and the citizen is accorded an adversary hearing before any unlawful intrusion can occur. S. 1790 is drafted not to interfere with the government's ability to obtain evidence, but to ensure that the government will obtain it without invading the citizen's "indefeasible right of personal security, personal liberty and private property."⁹⁹

Why then should law enforcement authorities oppose legislation offering innocent third parties protection against searches if the authorities follow their avowed policy and resort to search procedures only rarely? Two possible answers arise. The first was suggested by Mr. Nathan Lewin in the March 1980 hearing. In speculating on the federal government's strong stance against legislation even though federal officers "abide by policy of restraint,"¹⁰⁰ Mr. Lewin commented:

The answer to the paradox on both sides lies, I believe, in the report of the survey conducted by the Department of Justice among its U.S. Attorneys, which was sent to Senator Bayh under date of August 21, 1978, and which appears at pages 345-348 of [the 1978 Hearings]. It seems that of 72 responding Offices, only 23 could say that they had never used third-party searches, and 11 of the 72—in excess of 15 percent—have used them in 6 to 20 percent of their cases. The fact is that notwithstanding the Department of Justice policy, warrants have [been] and are being executed upon third parties who have custody of evidence which a prosecutor deems useful.¹⁰¹

⁹⁹Boyd v. United States, 116 U.S. 616, 630 (1886).

¹⁰⁰1980 Hearing, *supra* note 21, at 83 (prepared statement of Mr. Nathan Lewin).

¹⁰¹*Id.*

Credence is given to this speculation by an example of the need for warrant procedures given by Mr. Heymann in the latest hearing. In his prepared statement, he mentions a New York fraud case involving VA and FHA mortgages, in which evidence "was seized during searches of mortgage companies and the offices of real estate brokers. The suspect status of all those persons whose offices were searched was not known at the time the warrant was obtained nor could it have been."¹⁰² If there were no showing of risk of destruction of evidence or that the companies were implicated in the crime, I would suggest that private businesses were subjected to the disruption of search and seizure to suit the convenience of the investigators. If such a showing could have been made, S. 1790 would allow the prosecutor to secure a warrant anyway.

A further reason for police agencies' resistance to restrictions on law enforcement despite policies and practices of proceeding by subpoena may well lie in their desire to resort to search warrants more frequently in the future. The Department of Justice has specifically denied such interest.¹⁰³ Whether, in fact, the law enforcement community would eventually come to rely more on the use of search warrants should no statutory barrier be erected is, of course, conjectural. There are obvious reasons, however, why prosecutors would prefer warrants over subpoenas if they felt no law discouraged use of the former. I cannot agree with the view of the Court in *Stanford Daily* that when a prosecutor chooses to use a search warrant he has selected the "more difficult course."¹⁰⁴ There is little question that in "the often competitive enterprise of ferreting out crime"¹⁰⁵ search warrants have advantages over subpoenas. They are quicker, less risky, and unlike subpoenas, they cannot be litigated in advance. With even the best of intentions with respect to privacy, a truly conscientious prosecutor would find good reason to more frequently avail himself of search warrant procedures, if he knew that there were no legal obstacles to their use.

V. CONCLUSION

The congressional response to the Supreme Court's decision in *Stanford Daily* has lagged for two years. The delay has in large part been due to the opposition of law enforcement agencies. Should there be legislation? First, a record of abuses exists. It is not lengthy, but it is sufficient to show us the dangers. Second, there is every reason to believe that the number of third party searches will

¹⁰²*Id.* at 58 (prepared statement of Mr. Philip B. Heymann).

¹⁰³Letter from Philip B. Heymann to Senator Birch Bayh (May 2, 1980).

¹⁰⁴436 U.S. at 563.

¹⁰⁵*Johnson v. United States*, 333 U.S. 10, 14 (1948).

increase. There are practical and selfish reasons for prosecutors and police to proceed by warrant rather than subpoena since the Supreme Court has told them that the Constitution raises no barriers and the Congress has taken no action to draw statutory lines. Mr. Justice White issued an open invitation to Congress to draw such lines. "Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish non-constitutional protections against possible abuses of the search warrant procedure" ¹⁰⁶ The Congress carries the burden to respond. Beyond evidence of existing abuse, it should look to the potential for abuse. Liberties are too fragile to be assumed. Thomas Jefferson repeatedly wrote to the drafters of the Constitution urging them to add a Bill of Rights to the new document when he heard that it had been omitted. Rights, he said, should never "rest on inferences." ¹⁰⁷ Surely Jefferson's assessment of the course of government is as true today as it was two centuries ago. As he wrote, "The natural progress of things is for liberty to yield and government to gain ground." ¹⁰⁸ The general assumption of a decade ago that innocent third parties were secure against government searches has been badly damaged by *Stanford Daily*. Government should not gain that ground.

¹⁰⁶436 U.S. at 567.

¹⁰⁷Letter from Thomas Jefferson to James Madison, December 20, 1787.

¹⁰⁸Letter from Thomas Jefferson to Colonel Edward Carrington, May 27, 1788.