ZURCHER v. STANFORD DAILY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 3486 AND H.R. 4181 AS RELATED TO ZURCHER V. STANFORD DAILY

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ZURCHER V. STANFORD DAILY

WEDNESDAY, APRIL 25, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 1:30 p.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Gudger, and Railsback.

Staff present: Bruce A. Lehman, chief counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order, please.

The Chair has an opening statement, and we expect to be joined by other members very shortly.

Privacy is an essential element in the law of civil liberties. This committee, which has jurisdiction over civil liberties legislation in the House of Representatives, has had a long standing involvement in protecting, expanding, and defining the law of privacy in an era of rapid technological change.

Our interest in first amendment privacy issues goes back almost 10 years, to September 1969, when we conducted hearings on legislation to define the law of obscenity. Our work in that area was followed by extensive hearings, spanning three Congresses, on the issue of the rights of journalists to protect the confidentiality of news sources.

The other great constitutional pillar of privacy laws, the fourth amendment, has also received considerable legislative attention from this subcommittee. Of course the entire legal framework governing the use of wiretapping and electronic surveillance in the United States emanates from title III of the 1968 Omnibus Crime Control and Safe Streets Act, which was processed by the Committee on the Judiciary during the 90th Congress.

Six years later, in April 1974, amid the plethora of revelations of Government spying associated with the Watergate crisis, this subcommittee began an extensive review of Government surveillance tactics, concentrating on national security eavesdropping, surveillance of the mails, and inspection of third party held records.

The results of the subcommittee's work were two bills, ultimately enacted with the cooperation of other committees of the House—the Foreign Intelligence Surveillance Act of 1978 and the Financial Institutions Privacy Act of 1978.

The Foreign Intelligence Surveillance Act, for the first time, requires a judicial warrant for all electronic eavesdropping, whether or not

conducted for purposes of national security. The Financial Institutions Privacy Act establishes the privacy rights of customers of banks and credit companies in records which contain information about their private affairs.

Of course, the efforts of the legislative committees have pot taken place in a vacuum. Independent study commissions and agencies within the executive branch have also been at work studying privacy issues.

Specifically, the Privacy Protection Study Commission, created by act of Congress in 1974, issued a series of recommendations on improved privacy protection in July 1976. Also, the National Commission on Federal and State laws relating to wiretapping and electronic surveillance issued a report containing some privacy recommendations in April of the same year.

After 2 years of study of the recommendations of these two commissions and other privacy issues the President, on April 2, conveyed to the Congress a series of legislative proposals designed to expand the privacy rights of Americans. Two of these proposals will require the attention of this subcommittee. The Privacy of Medical Information Act, introduced by Congressman Pryor, will be sequentially referred to the Judiciary Committee following its consideration by the Committees on Government Operations, Interstate and Foreign Commerce, and Ways and Means.

However, H.R. 3486, the First Amendment Privacy Protection Act of 1979, has been referred solely to the Committee on the Judiciary and specifically to this subcommittee.

The need for H.R. 3486 arose out of the decision of the Supreme Court last year in the case of *Stanford Daily* v. *Zurcher*. In that case the Court held that newspapers and other news media are subject to arbitrary search and seizure even when not themselves the target of an investigation. In so ruling, the Court overturned the holdings of the court of appeals and the district court that, where the object of a search is a newspaper, first amendment interests restrain searches to the rare circumstances where there is a clear showing that important materials will be destroyed if a subpena or other advance request for the information is employed.

Immediately following the decision in the *Stanford Daily* case, bills to reverse the Court's ruling were introduced in the 95th Congress by numerous Members from both sides of the aisle.

Although the Solicitor General initially argued as an amicus before the Court in favor of the right to search journalists, the President subsequently announced that he intended personally to study the issue and ordered the Attorney General to advise him as to a legislative recommendation which would in part overturn the Court's decision.

After consultation with constitutional scholars, civil libertarians, law enforcement authorities, and other Cabinet members, the Attorney General recommended to the President the bill before us today.

As we begin this initial day of hearings on the First Amendment Privacy Protection Act, I am reminded of the special way in which issues of this type link us to our Revolutionary Forefathers 200 years ago. Even before the first Congress, the Massachusetts House of

Representatives in 1768 issued a call to legislative action which is relevant to us even in these hearings today, and I quote:

> The liberty of the press is a great bulwark of the liberty of the people: It is therefore the incumbent duty of those who are constituted the guardians of the people's right, to defend and maintain it.

The defense and maintenance of the liberty of the press is, indeed, the subject of today's hearings.

I am very pleased to welcome our first witness, who has testified before other committees and before us in the past, and whom we greet back, the vice president of Columbia Broadcasting System, William J. Small.

You may proceed as you wish.

TESTIMONY OF WILLIAM J. SMALL, VICE PRESIDENT, WASHINGTON, CBS, INC.

Mr. SMALL. My name is William J. Small, and I am the CBS Washington vice president.

Last year I appeared on behalf of CBS before the House Subcommittee on Government Information and Individual Rights following the Supreme Court's decision regarding search warrants in *Zurcher* v. *Stanford Daily*.

In my testimony I expressed concern about police searches of innocent third parties resulting from that decision. I suggested, however, that the need to enact legislation barring police searches of newsrooms was particularly compelling.

We at CBS are greatly encouraged that the administration has responded with a specific legislative proposal and that you, Chairman Kastenmeier and Congressman Railsback, have introduced that legislation in the House. We welcome the serious attention you are giving to this important subject.

I should note that I have a personal and professional interest in the subject of these hearings since I have spent virtually all of my career as a working journalist and news executive. Before assuming my current position, I was the CBS news executive responsible for all hard news coverage and all hard news broadcasts. Previously I served as head of CBS News' Washington bureau.

In addition to my responsibilities at CBS News, I have served as president of the Society of Professional Journalists, Sigma Delta Chi, and of the Radio Television News Directors Association.

If you had asked me before May 30, 1978, whether, in light of all my experience I thought that our Constitution permitted public officials to invade a newsroom and rummage through its files, notes, films, desks, and trash baskets at will, I would have quite confidently offered an emphatic "no." I was wrong.

As we all know, the Supreme Court, in the *Stanford Daily* case, reached a different conclusion. While news organizations may find subpenas for unpublished information distasteful, at least the subpena procedure permits a news organization to state its case in court.

Stanford Daily, however, allows government officials to circumvent this adversarial procedure. The result is harmful to the press and the public it serves.

Because of the Supreme Court's refusal to recognize the fundamental dangers to a free press that are involved in police searches of newsrooms, I am here before you today to express CBS' support of H.R. 3486. This bill recognizes that the free flow of information contemplated by the first amendment can only occur in an environment well insulated from governmental powers—not the least of which is the power to search a newsroom.

This is not to say that we do not have some reservations about several provisions in the bill. For example, the bill allows searches of newsrooms on the government's showing that a news organization may possess national defense or certain classified information. One need not look too far into recent history to support our concern that this provision could permit easy abuse by government officials.

As the late Justice Hugo Black stated in the *Pentagon Papers* case:

> The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.

I also suggest that a potential for misapplication exists in another of the bill's provisions—the one authorizing searches for certain nonwork product information upon a showing that the target news organization may destroy the materials if they are subpenaed.

We question the necessity of this provision given the fact that there is no history of news organizations destroying materials in order to frustrate subpenas.

I wish to emphasize that despite concerns such as the ones I have outlined, we believe that, on balance, H.R. 3486 provides considerable protection against the threat to press freedom created by the *Stanford Daily* decision.

It must be recognized that the threat of the Supreme Court's decision is not theoretical or abstract, it is real. It doesn't require a great deal of scholarly research to conclude that public officials in the past have abused governmental processes in attempts to suppress and intimidate the press, nor does it take a great deal of foresight to conclude that government officials will try to abuse that power again.

In light of the *Stanford Daily* decision, is there any doubt that sooner or later some government official, if he or his political friends suspect that they are being investigated by the press, will inevitably take advantage of the opportunity to rummage through a newsroom to see what can be found, including the identity of a whistleblower?

And while we know that a large news organization with high-priced lawyers will not be easily intimidated, what about the thousands of small local news outlets, often barely solvent? How can they be expected to resist officials intent on harassing and disrupting their news operation through the use of easily obtained warrants?

More importantly, what about their sources? What about those sources in State and Federal Government, including this Congress, who regularly provide information to the press on assurance of anonymity?

I believe that the effect on potential sources is clearly one of the most devastating results of the *Stanford Daily* case.

The most frustrating aspect of the decision is that none of us will ever know or be able to measure the irreparable injury this decision will undoubtedly cause to our democracy. We will rarely learn about the potential source who might have revealed the next Watergate

or a new cost overrun, but who chooses not to because of the possibility of exposure.

Throughout our history the press has exposed wrongdoing, revealed corruption, and served as a check on the abuse of power by governmental officials. But the full informative potential of the press will never be realized in a society that permits the police to invade the newsrooms and rummage at will through desks and files. I am quite sure that this is now what the Founding Fathers intended when they adopted the first amendment.

Thus, CBS strongly supports the prompt adoption of legislation banning searches of newsrooms.

That concluded my statement, Mr. Chairman. I'd be happy to answer any questions.

Mr. KASTENMEIER. Thank you very much, Mr. Small, for a concise and compelling statement, to the point.

Of course you came today prepared to discuss the *Stanford Daily* case, and even almost as we entertain this issue one has to see it in the context of other notorious cases which arise, against the background of libel cases.

How do you view the *Stanford Daily* case in the light of some of these other cases? Is it of equal importance? Do you think they are related? Is the press and the media assaulted on several fronts, or how do you see this in the context of other press issues that have arisen within the last couple of years, even some more recently?

Mr. SMALL. Mr. Chairman, the focus of *Stanford Daily* is comparatively narrow. I think there is no question that when viewed with the Supreme Court decisions of the last several years we see a pattern of, as many in the press view it, a hostile court. And time and again, it seems to me, that the first amendment, if not abrogated, is certainly considered of secondary importance to other aspects of the Bill of Rights and the Constitution, particularly those involving the sixth amendment.

I think the importance of this case, as in the *Branzburg* case, involving shields, protection of sources, is that in both of these the Court specifically urged—or at least invited—the Congress to remedy the situation.

So in *Stanford Daily* you have a court which says, in effect, that the States or—not the States, but the Federal Government can take an action to protect a newspaper against this kind of search.

Mr. KASTENMEIER. You indicated a couple of reservations. One was the need for national security, within the bill.

* * * or withholding of such materials or the information contained therein * * *

and then there's a parenthetical,

* * * but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data * * *

Are you suggesting that we modify that?

Mr. SMALL. Yes, sir. It is our feeling that what we've seen in the history of the last 20 or 30 years has been many abuses of the classification privilege all through the Federal Government, but most

particularly in the national security area, material coming out of the Defense Department.

One need not search far to find some of these abuses. A man whose name I remember as Flowers, after retiring from the classification section of the Pentagon, said that 95 percent of the classified material need not have been classified at all.

What I'm fearful of is a loophole permitting those in Government who have the classification privilege, who have these vague definitions of national security, simply to use them as a device to circumvent the intent.

Mr. KASTENMEIER. Now, in terms of the focus which, as you say, is fairly narrow, of this bill, how would you react to a broadening of, let's say, to protect other third-party recordholders, such as doctors, lawyers, clergymen?

Mr. SMALL. I have no problem with that at all. I have addressed myself here to the CBS position, which deals only with journalistic aspects of the bill. That's a matter of special concern to us, obviously. And also because the first amendment specifically sites religion and the press as areas in which freedom should not be abridged by the Congress.

I think it is obviously the privilege of this committee to consider broadening it to third parties, and I believe some of the legislation offered by some of your Members and some Members of the Senate do just that.

Mr. KASTENMEIER. It's also been suggested that the bill conceivably be expanded to protect first amendment privacy to include protection of records of journalists in the possession of others, such as telephone call records, postal records, records of mailing of packages, and so forth. These have been separately looked at as areas in the past, but so long as we are looking at journalists or media, would you envision some added protection in that regard?

Mr. SMALL. Well, I don't think it addresses itself to the *Stanford Daily* decision. There's no question, well, you say telephone records. The courts have ruled that the Government could invade, if you will, the telephone privacy of reporters and subpena records of whom they called and when, in a case recently decided.

But the *Stanford Daily*, as I said earlier, is narrow in that it really focuses on the simple question of, does a policeman have a right to pick up that warrant as it goes out the door and come right into the newsroom and start going through all your material.

We are not happy, for example, with the question of the proliferation of subpenas that have been directed at news organizations, but at least the subpena process gives you the opportunity to say to the policeman at the door, "Hold on, we want to go to court and argue this case."

And, indeed, our experience at CBS, where we receive a good many subpenas, is that that also gives us the opportunity to narrow the focus of the subpena so that we don't go on a fishing expedition through all the notes and all the files, but narrow in on the specific that it was intended to deal with.

Mr. KASTENMEIER. The bill itself, of course, does not call for criminal penalties. Those cases are limited to civil liability on the part of any public officials. Do you think that sort of penalty is strong enough?

Mr. SMALL. I don't know. I was discussing this with a CBS lawyer, and someone at the table asked, "What do you think a proper penalty would be?" And his facetious response was, "Execution."

I don't think we advocate that. I would assume that the penalty in this bill is adequate, and if it turns out not to be, if it turns out that Government agencies are rather frivolous about just paying $1,000 fines of taxpayer money, again I'm sure that this Congress can revisit the question and decide upon a proper penalty.

I think the important thing is to establish the basis in law. I'm less concerned about the penalty not being adequate.

Mr. KASTENMEIER. A final question.

You were speaking here today on behalf of Columbia Broadcasting System. Do you have any knowledge, from discussions with others within the broadcasting community, of other points of view with respect either to the bill before us, or this general approach provided by this bill? Is it your view that the other networks, the other people in the media, news media, others in journalism, support this approach?

Mr. SMALL. I can't speak for the other networks, nor would I, but on the working reporter level—reporters, editors, people I have talked to—a good deal of this goes back to last year, when the whole matter was much fresher, and they expressed tremendous concern for the potential of this bill on two aspects:

One, the actual invasion of their offices; two, and maybe even more important, the chilling effect on the news sources.

And I found that nobody in the journalistic fraternity was sympathetic with the decision that the Court reached. I believe you will find that as your hearings continue, as is always the case, reporters and editors don't speak as one. Some will like aspects of this bill, some will not. They may have reservations other than the ones I've expressed, and they may have no reservations.

There's been no poll on this particular bill, as it's still rather fresh, but I think it's safe to conclude that with rare exception—I know of none—people in the news media are very troubled and concerned by the decision and welcome any kind of legislative remedies.

Mr. KASTENMEIER. Thank you for your statement.

Mr. RAILSBACK. Mr. Small, I want to welcome you, also I think the Chairman asked you most of the questions that I would have asked; however, I am curious if there is any move afoot in the area of shield legislation?

Mr. SMALL. Well, there's still a great deal of talk in the journalistic community, but the shield problem is buried in this and other committees at the moment, and I suspect will move slowly unless we have another dramatic example of the intrusion into the source question. We have not had any quite as dramatic as those that came up in the original decision.

I think in regard to shield legislation, one of the things interesting about the bill that you're cosponsoring is that, whereas in shield legislation one of the greatest difficulties we all have is defining who ought to be covered. It's extremely difficult to have a pertinent definition of a journalist without depriving others of first amendment rights. But the approach of this bill, which is to deal with the work product rather than trying to define a journalist, is a very healthy and fresh approach which ought to be considered as you go on with shield legislation.

Mr. RAILSBACK. Yes, I'm inclined to agree with that.

I get the feeling that what once was a forward movement supported by, at the time, a majority of the media, maybe now there has been a withdrawal of that movement. I think that many of the legislators are probably waiting to take a lead from the media, if there is any unanimity, which of course there never was, on the shield legislation.

As you may recall, at the time I strongly supported a bill. I just have the feeling that none of us are currently moving because we feel the press may not want us to move. Is that kind of your feeling?

Mr. SMALL. I think there are differences of opinion more so there than on this legislation, on this subject, because shield legislation, after all, is broader than protection against search by warrant. And I suspect you would continue to have disagreement in the journalistic society, including a number of editors who stubbornly insist that the first amendment is adequate and we don't need further legislation. Unfortunately, the Supreme Court of the United States ruled otherwise, and did invite legislation. And I, for one, would welcome it.

I think a drop in enthusiasm by various journalistic groups is only because nothing very much has happened either within the halls of Congress or on the outside in terms of a dramatic case of a source being exposed.

Mr. RAILSBACK. Yes, I agree.

Mr. SMALL. Although in the *Farber* case you did have exactly that sort of thing, and at the time it created a great deal of interest.

Mr. RAILSBACK. Yes. I personally agreed with Justice Douglas, who I believe, felt that the first amendment should afford protection in that kind of a case, as I recall.

Mr. SMALL. I'm not sure I'm the best witness on that——

Mr. RAILSBACK. Yes, there were differing views. But I think Justice Douglas, as I recall did make it clear that he thought there should have been first amendment protection.

But, in any event, I'm glad to see you, and I thank you very much for your testimony.

Mr. KASTENMEIER. One last point. I was wondering whether issuance of warrants might be handled by guidelines from the Justice Department, as the guidelines affecting cases involving newsmen's privilege should more or less work out satisfactorily, notwithstanding the fact that it's not law. This is something not immutable, which changes from one administration to another, or even from day to day.

You know, if we were to rely on the guidelines for one case, why should we not be able to rely on some sort of guidelines in terms of search and seizure?

Mr. SMALL. Well, one, the Justice Department guidelines, of course, affect only Federal Government employees. This legislation affects both State and local, and that's what we are dealing with in the *Stanford Daily* case.

Second, if the guidelines are loose and changeable with administrations, it sort of leaves the sword hanging over a newsman's head. Again, because the focus of this particular bill is comparatively narrow, I think it's obviously much easier to deal with then the shield legislation, for example, and I would hate to see it delayed awaiting expansion to other areas, or for action in the shield area.

Mr. KASTENMEIER. On behalf of the Committee, I want to express our thanks and gratitude to you for coming here today. Thank you very much.

The Chair is pleased now to welcome the Assistant Attorney General of the United States, Criminal Division, of the Justice Department, Mr. Philip Heymann.

I want to assure you that because the bill we are dealing with, H.R. 3486, is introduced by myself and Mr. Railsback, does not mean you are not free to fully criticize us with respect to it.

TESTIMONY OF PHILIP HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION; ACCOMPANIED BY ROGER PAULEY, OFFICE OF LEGISLATION, CRIMINAL DIVISION

Mr. HEYMANN. Mr. Chairman, I would like to introduce Roger Pauley, who is head of the Office of Legislation in the Criminal Division, and I know you've both met him.

Mr. KASTENMEIER. Indeed we have, and Mr. Pauley you are always most welcome.

Mr. HEYMANN. Mr. Chairman, if my statement can be introduced in whole, I will substantially abridge the presentation of it so that we can move quickly to questions and answers and discussion of the most difficult matters.

Mr. KASTENMEIER. Without objection, the statement in its entirety will be received for the record.

[The full statement follows:]

STATEMENT OF PHILIP HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

INTRODUCTION

I am pleased to appear before this subcommittee today to discuss H.R. 3486, an Administration bill which you, Mr. Chairman, introduced earlier this month The bill, entitled the "First Amendment Privacy Protection Act of 1979," would protect against unwarranted third party searches not only of the press, but of others who are involved in First Amendment activities through which information and ideas reach the public.

I have been intimately involved in the development of this legislation since June of 1978, when President Carter directed the Justice Department to conduct an exhaustive study of the issues which were raised by the Supreme Court's decision in *Zurcher* v. *Stanford Daily*,[1] and to assess the possibility of generating a legislative solution to the problems which arose out of the Court's decision. As I am sure you are aware, the Court held in that case that neither the First nor the Fourth Amendment stood as a bar to a search of a newsroom for evidence of a crime.

The concern of the President which was shared by many in the Congress and the nation as a whole was that third party searches of the press, such as the one which was upheld by the Court in *Stanford Daily*, could have the effect of hampering the ability of those involved in First Amendment activities to gather and disseminate information. Intrusions into the files of newspapers, authors and academicians are particularly harmful because of the important role that these institutions and individuals play in informing the public of the increasingly complex events which affect the quality of our lives and in preserving the flow of divergent ideas and opinions which are the cornerstones of a free society. The risk that the threat of government searches may lessen the willingness of these persons to investigate sensitive or controversial issues and hamper their ability to obtain information from confidential sources is one we can ill afford to take.

[1] 436 U.S. 547 (1978).

In response to the President's directive, Judge Bell formed a task force whose function it was to examine the issues raised by *Stanford Daily*, and to draw up a comprehensive set of options for solving the problems which arose from the decision. This option paper, together with my recommendation, was sent to the Deputy Attorney General and then to the Attorney General, who with some minor modifications accepted the recommendations and transmitted them to the President. In December of last year, the President announced the Administration position incorporating those recommendations. The bill before you today embodies that Administration position.

In transforming the Administration proposal into formal legislation, elements of the proposal were refined and amplified. This process included consultation with other departments and agencies of the federal government with divergent interests. The insights which these discussions provided were helpful in the formulation of the bill. At the same time, however, they underscored the complexity of the issues addressed by this legislation. The end result of the many months devoted to developing this bill is, we are convinced, a legislative solution which assures the preservation of First Amendment values in a manner that will not jeopardize the effectiveness of our criminal justice system.

The language of the prohibitions imposed by this legislation is general and inevitably imprecise, reflecting our intention that its restriction on the search authority of federal, state and local government officers have a broad sweep. In the long run, considering the importance of the values which are to be protected by this legislation, we felt it was better to assure adequate protection through the use of broad provisions than to opt for narrow and restrictive language. In an effort to delineate the intended reach of this legislation, I will use a number of examples to illustrate the application of the proposed provisions. I hope that they will resolve some of the questions you may have regarding the bill.

In beginning my explanation of the specific provisions of this legislation, I would like first to address the questions of exactly what kinds of materials are protected from search and what sorts of searches are covered by the bill. I will then turn to an equally important issue, the distinction between work product and non-work product materials and the differing levels of protection these two classes of materials are afforded. Finally, I will discuss the remedies provided in the bill.

KINDS OF MATERIALS COVERED

This legislation is entitled the "First Amendment Privacy Protection Act" because it provides broad protections against searches for materials which are obtained or prepared in connection with First Amendment activities. The bill describes the protected materials as those which are "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication". Thus, the protection provided by this legislation extends not only to the institutional press, but to academicians, authors, filmmakers, and free lance writers and photographers. While we considered the option of a press-only bill, this format was rejected partially because of the extreme difficulties of arriving at a workable definition of the press, but more importantly because the First Amendment pursuits of others who are not members of the press establishment are equally as important and equally as susceptible to the chilling effect of governmental searches as are those of members of the news media.

The bill focuses its search limitations on "documentary materials." This term is given an expansive definition in the final section of the bill in order to cover all "materials upon which information is recorded." Specifically included within the definition of "documentary materials" are written or printed materials, films, tape recordings, and interview files.

Documentary materials were selected for protection for three reasons. First, it is searches for these sorts of materials that pose a significant danger to First Amendment activities. Such searches often necessitate examination of numerous irrelevant papers and files in order to locate those materials which pertain to the investigation in question. The import or nature of documentary materials, unlike nondocumentary items such as weapons or narcotics, is not apparent at first glance, but instead requires examination of their contents. While the scope of a search for nondocumentary materials may be effectively limited so as to exclude scrutiny of papers and files, searches for documentary materials are not susceptible to such limitations and, as a result, are likely to entail rummaging through files containing sensitive and confidential information which bears no relation to the criminal activity being investigated.

A second reason for restricting the application of this bill to searches for documentary materials is the fact that the purpose of such searches is generally to gain access to the information contained in these materials. To the extent that this information is generated through the investigative efforts of a reporter or researcher, it may be duplicated by a similar effort on the part of law enforcement officers. On the other hand, searches for non-documentary materials, such as contraband or property of the defendant which may bear incriminating fingerprints or other physical evidence, arise out of a need to obtain these unique items which cannot be duplicated through further investigative effort. These non-documentary materials should remain as permissible objects of lawful search and seizure.

Third, the bill's focus on documentary materials has enabled us to narrow the exceptions employed in the bill and thereby provide significantly greater protection against searches for materials critical to the First Amendment activity of gathering and disseminating information to the public.

Of course, not all documentary materials held by a reporter or author bear a relation to his First Amendment activities. Obviously excluded from the scope of the statute would be, among others, the business records of newspapers or authors or documents indicating ownership of property. This legislation protects only those materials which are held "in connection with a purpose to disseminate . . . a form of public communication". This phrase, however, is intended to have a broad meaning. It reaches not only those materials which have been or are intended to be published or which contain information which has or will be incorporated in a form of public communication, but also those materials which were gathered and prepared in anticipation of publication although that effort was later abandoned. Thus, a reporter's notes and drafts of an article which his editor later determines is unsuitable for publication would continue to be protected, as would an author's background research notes which are never incorporated into the final published product.

Materials which are held for purposes other than the dissemination of a form of public communication are not protected from search. Thus notes held by a corporate officer which were made in preparing a confidential memo that is later made public in an expose of corporate fraud would not be protected since the corporate officer did not intend that the contents of the report be published. Similarly, business records or reports which are required to be filed with the government, and which as a result are available for public examination, would not come within the scope of the provisions of this legislation because they were prepared for the purpose of meeting the reporting requirements, not for the purpose of communicating with the public. Although public access to such documents may be achieved, for example, through a request under the Freedom of Information Act, this does not transform those documents into a form of communication intended for the public.

Determining what constitutes a form of public communication was one of the more difficult problems which arose in developing this legislation. Obviously radio and television broadcasts, and most newspapers, magazines, and books are the clearest examples of forms of public communication. The internal memoranda of a corporation or its communications with its employees, on the other hand, would not be forms of public communication.

The fact that a small town newspaper or an esoteric magazine has a small circulation does not mean that it is not a form of public communication. I believe that in borderline cases the appropriate test for ascertaining whether the communication in question is public or not is whether it would be available to persons in the general public upon simple request. Thus, a professional journal or a union newspaper which met this test would qualify as a form of public communication, while a book that was privately published for distribution only to the friends and relatives of the author would not. Other forms of public communication might include political campaign materials or a press conference.

TYPES OF SEARCHES COVERED

The bill provides comprehensive protections against searches by federal, state, and local officials in connection with the investigation or prosecution of any criminal offense. By covering law enforcement-related searches at all governmental levels, the bill would reach all of the previous situations in which searches of the media have been conducted.

Searches by private citizens are outside the scope of this legislation, just as they are outside the strictures of the Fourth Amendment. In addition, an assortment

of noncriminal searches are not addressed in this bill. Unaffected by this legislation would be searches and seizures which arise out of civil matters such as the seizure of assets to satisfy the payment of a debt or taxes owed to a government unit and routine inspections by government agencies such as examinations of records of regulated businesses or authorized monitoring of the purity of food and drugs. These types of searches are unlikely to involve the kinds of documentary materials protected by the bill. Searches conducted in the course of foreign intelligence gathering activities are also outside the ambit of the legislation. Such searches, which are exclusively federal in nature, are not only infrequent but also must be approved at the highest levels of the Executive branch.

While routine border searches for the purpose of facilitating the collection of duties and taxes imposed on property imported into the United States and preventing the introduction of contraband into the United States would not, in our view, constitute searches conducted "in connection with the investigation or prosecution of crime", and as such would be outside the scope of this legislation, it seemed appropriate in this instance to clarify that these searches at the borders and international points of entry are not subject to the limitations of the bill. Since members of the press and authors frequently travel internationally, we and the Treasury Department were concerned that they might misunderstand the application of this legislation and protest routine searches of their luggage and other property they were bringing into the United States. Therefore, routine border searches which are necessary to the enforcement of our customs laws are specifically exempted in section 3 of the bill from the restrictions of this legislation.

THE DISTINCTION BETWEEN WORK PRODUCT AND NON-WORK PRODUCT DOCUMENTARY MATERIALS

Central to understanding the operation of this bill is the distinction between documentary materials which constitute work product and those which are classified as non-work product; the former category of materials is afforded the protection of a general no-search rule, while the latter can be searched for in a broader range of cases, though still subject to a general subpoena-first requirement.

The term "work-product" encompasses those materials whose very creation arises out of a desire to communicate to the public. What triggers the work-product no-search rule is the fact that the materials which are sought were created by or for a person in connection with his plans, or the plans of the person creating the materials, to communicate to the public. Thus, the notes and drafts of a reporter would be work product, as would be the photographs which were the subject of the search in the *Stanford Daily* case. Furthermore, a report revealing government corruption prepared by a "whistleblower" and sent to a newspaper in hopes that it will be published, would constitute work product even though the report was not solicited by the newspaper.

If plans to disseminate information to the public are formed at a time after the creation of the materials, the materials would not constitute work product. If, for example, a citizen is taking photographs when a crime suddenly occurs and later decides to sell the photographs for publication, his photographs would not qualify as work product since they were was not created out of any desire that they be published in a form of public communication. However, similar photographs taken by a person on the staff of a newspaper assigned to cover the event at which the crime took place would meet the work product definition.

Contraband and the fruits and instrumentalities of a crime are excluded from the definition of work product. While it would be rare that such evidence would come within the work product definition since such materials are usually not created for the purpose of communicating with the public, one example of such evidence would be a ransom note—an instrumentality of the crime—which was sent by a kidnapper to a newspaper to broadcast his demands.

Since contraband and the fruits and instrumentalities of a crime, unlike work product materials generally, are intimately related to the commission of a crime and their production at trial is often necessary to securing convictions, these materials should not qualify for the stringent protections that the no-search rule affords to work product. If, however, such evidence is in documentary form, the protection of the non-work product provisions of the bill would be applicable. In other words, all documentary materials which do not constitute work product but which are nonetheless held in connection with plans to disseminate a form of public communication are covered by the bill.

PROHIBITIONS ON SEARCHES FOR WORK PRODUCT

Searches for materials which fall within the definition of work product are prohibited by this legislation with only two limited exceptions. The first of these two exceptions, which I refer to as the "suspect exception", allows a search for work product materials if there is probable cause to believe that the person possessing the materials has committed or is committing the crime for which the materials are sought. While this provision is cast in the form of an exception, it really codifies a core principle of this bill, which is to protect from search only those persons involved in First Amendment activities who are themselves not implicated in the crime under investigation, and not to shield those who participate in crime.

The suspect exception has been carefully formulated to insure that it does not provide a means for circumventing the no-search rule. The standard of proof which must be met by officers seeking a search warrant under this exception is the same as that which would be required to obtain a warrant for the arrest of the person possessing the materials. A mere suspicion or reason to believe that the possessor is implicated in the crime is not a sufficient basis for invoking this exception. As you know, proof of the complicity of the possessor of materials is not presently a prerequisite to obtaining a search warrant.

One further problem which arose in our consideration of the suspect exception was the possibility that a reporter who had received, for example, a stolen corporate report which discussed a defective product, knowing the report to be stolen, might be guilty of a crime of receipt or possession of stolen property and thus liable to search and seizure of the report under the suspect exception. We believed that it would unduly broaden the suspect exception to use the reporter's crime of simple "possession" or "receipt" of the materials (or the similar secondary crimes of "withholding" or "communicating" the materials) as a vehicle for invoking the exception when the reporter himself had not participated in the commission of the crimes through which the materials were obtained. Thus the bill makes clear that crime of receipt or possession of materials generally may not be invoked to trigger the suspect exception.

The suspect exception is retained, however, in cases where the receipt, possession, or communication of materials constitutes an offense under the existing language espionage laws or related statutes concerning restricted data. Because the gravity of the offenses involved, the legal authority to search is retained where there is probable cause to believe that a violation of these federal laws has been committed. By relying on the present laws in this area rather than attempting to devise a new formulation, we have sought to avoid unnecessarily burdening the First Amendment search protection proposal with complex and difficult espionage issues. It is important to remember here that these offenses involve exclusively federal matters and that there is no past history of federal searches of the media based on these statutes or any other federal laws.

The second circumstance in which a search for work product materials is permitted is that in which there is "reason to believe" that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being. In these instances, the preservation of human life must be our paramount concern.

I believe that when human life is in peril, requiring that the proof of this danger meet the more stringent standard of probable cause is unjustifiable. These are exigent situations which do not allow extensive investigation prior to the seizure of materials that are reasonably believed to contain information that may relieve the peril by indicating the location of hostages or the identify of the criminals who threaten human life. Therefore, the "reason to believe" standard, which is higher than mere suspicion but which is considerably less demanding than "probable cause," is to be employed in invoking this life-in-danger exception.

Unless one of these two exceptions applies, law enforcement officers may not conduct a search for work product materials which are being held in connection with the dissemination of a form of public communication. Instead, these materials must be sought through the use of an informal request or a subpoena duces tecum. In the face of a refusal to comply with a subpoena, the sanction of contempt may be imposed by the court. But even if the penalties of civil or criminal contempt do not result in production of the materials, a search for these work product materials is nonetheless prohibited.

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PROHIBITIONS ON SEARCHES FOR NONWORK PRODUCT DOCUMENTARY MATERIALS

Searches for non-work product documentary materials may be conducted in a broader range of circumstances than may searches for work product. In the case of these materials, the bill provides four exceptions to the general prohibition against search. The first two of these are identical to the suspect and life-in-danger exceptions which apply to work product.

In addition, a search may be permitted (if otherwise lawful) under a third exception if there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alternation or concealment of the materials being sought. Where non-work product materials are involved, the need to obtain and preserve evidence necessary to the successful investigation and prosecution of crime outweighs the need to avoid the disruptive effect of government searches where there is a demonstrated likelihood of destruction or concealment. This third exception might come into play, for example, where a reporter had in the past taken steps to obstruct an investigation or had announced that he would destroy the materials rather than turn them over to the police. In some instances, the fact of an extremely close, sympathetic relationship between the possessor of the materials and the suspect, or of a relationship in which the possessor was clearly dominated by the suspect, might suffice as a basis for invoking this exception. Similarly, a showing that the suspect had free access to the materials could constitute grounds for obtaining a warrant under this exception.

The fourth and final exception under which a search for non-work product may be conducted is that where non-compliance with a subpoena duces tecum, after a trial court has ordered production of the documents, threatens the interests of justice or where compliance is not forthcoming after all appeals have been exhausted. It is important to bear in mind that in no case will a search be permissible under this exception until such time as a trial court order directing compliance with the subpoena has failed to produce the materials sought. Even then, the possessor of the materials will be able to exhaust his appellate remedies before a search warrant may be obtained unless the government establishes that there is reason to believe that the delay in an investigation or trial occasioned by further proceedings concerning the subpoena would threaten the interests of justice. In the event that a search warrant is sought prior to the exhaustion of appellate remedies under this exception, the possessor of the materials must be given an adequate opportunity to submit an affidavit setting out the basis for any contention that the materials sought are not subject to seizure. Such contentions might include an assertion that there is not sufficient evidence to establish probable cause, or that the materials are in fact work product and thus not obtainable by search and seizure.

There are a number of situations in which the government might be successful in demonstrating that the delay attendant in awaiting final resolution of the appeal process would be likely to threaten the interests of justice. The most clearcut examples in which a search warrant might be obtained under this final exception prior to the exhaustion of appellate remedies would be difficulties in meeting the time constraints imposed by statutes of limitation, the Speedy Trial Act, or the expiration of grand juries. Other examples are situations in which the success of an investigation or prosecution is likely to be jeopardized by the interruption occasioned by a lengthy appeal. Often the effectiveness of the criminal justice system hinges on swift action. Awaiting resolution of an appeal that may take months or even years may be intolerable from a law enforcement standpoint, e.g., in investigating such crimes as highly mobile drug trafficking or ongoing crimes which endanger the health and safety of the public, or where the ability to obtain a conviction through eyewitness identification diminishes rapidly with the passage of time.

REMEDIES

The provisions of this bill are to be enforced through a civil cause of action for damages. This remedy will not only provide compensation to those persons who have been subjected to searches in violation of the bill, but will also serve as an effective means of deterring such violations.

The bill provides that these suits may be maintained by those persons who are "aggrieved" by the unlawful search in question. Generally, these would be the persons whose homes or offices are entered in the course of the search or who own the documents seized. Current law concerning which persons have standing to challenge an unlawful search and seizure under the Fourth Amendment will

serve as the guide for determining which persons are appropriate plaintiffs in suits brought to redress violations of this legislation.

Once a violation has been established, the plaintiff would be able to recover actual damages, but in no event would he recover less than liquidated damages of a thousand dollars. A provision for liquidated damages is important for it may be difficult to establish any significant amount of actual damages. In addition, a successful plaintiff may recover punitive damages, if warranted, and the court may, in its discretion, award litigation costs and attorneys fees.

If the violation complained of has been committed by a federal or local officer acting within the scope or under color of his employment, the government employing that officer will be *exclusively* liabel for that violation. Because of the Eleventh Amendment's limitations on the imposition of liablilty on the states for the payment of money damages, officers employed directly by a state will remain personally liable for their violations until such time as the state may pass legislation substituting itself as the sole plaintiff in cases brought under the provisions of this bill.

An important feature of the proposed civil damages scheme is that when a government is liable for a violation—and this will be the case in the vast majority of situations—it is precluded from asserting as a defense, normally available under the common law, the good faith of the officer or his immunity from suit. A bar on the use of these defenses will significantly increase the likelihood that a plaintiff will be successful in his suit against the government. There is, however, no such restriction on the defenses that may be raised in those comparatively rare instances in which an individual officer is properly made the defendant in the action.

Imposing exclusive liability on the employing government unit in most cases and prohibiting the government defendant from availing itself of the defenses of the officer's immunity and his good faith, is, I believe, a sound policy that we have borrowed from the Administration's proposed amendments to the Federal Tort Claims Act.

There are several advantages to exclusive government liability for the misconduct of its employees. It provides the plaintiff with a defendant who is capable of satisfying a substantial money judgment, and thus affords an adequate means of compensating the injured party. In addition, imposing liability on the employing government will encourage it to take measures to educate its officers about the restrictions imposed by the bill and to discipline officers in appropriate cases. In this way, the deterrent goal of the remedy may be better effected.

Individual officers should be freed from civil liability, because the fear of such liability, particularly when a large sum of liquidated damages is provided, may prompt the officers to excercise unwarranted caution in the performance of their duties and thereby hamper their effectiveness in investigating and preventing crime. However, freeing officers from civil liability does not mean that officers will not be held responsible for their acts. This bill requires that an administrative inquiry be commenced if a federal officer is found to have committed a violation of its provisions and calls for the imposition of disciplinary measures if the conduct of the officer merits such action. While such procedures are not imposed on states and local governments, I hope that they will adopt appropriate administrative mechanisms to respond to willful violations.

APPLICATION OF THE EXCLUSIONARY RULE

An issue which is not addressed in the language of the proposal and which we take the opportunity to clarify in these hearings is the intended inapplicability of the "exclusionary rule" to evidence obtained as a consequence of a violation of the provisions of the legislation. The existing federal case law on whether the exclusionary rule attaches to noncompliance with a statute regulating searches and seizures, as opposed to a violation of the Fourth Amendment, is not settled.[2]

[2] Compare *United States* v. *Caceres*, 42 U.S.L.W. 4349 (April 2, 1979). The Supreme Court has applied the exclusionary rule in a series of decisions involving violations of 18 U.S.C. 3109, which generally requires a knock and announcement of purpose and identity by federal law enforcement agency before they may "break open" a door or window of a house to effect entry pursuant to a search warrant. See *Sabbath* v. *United States*, 391 U.S. 585 (1968); *Miller* v. *United States*, 357 U.S. 301 (1958); see also *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Ker* v. *California*, 374 U.S. 23 (1963). But these decisions are not dispositive for two reasons. First, the issue of the applicability of the exclusionary rule in these cases was not disputed or discussed but rather assumed; and second, that statute, unlike the proposed legislation here, is likely a codification of requirements rooted in the Fourth Amendment itself—see *Miller* v. *United States, supra*, 357 U.S. at 313—and thus does not truly pose the question.

In our view, the exclusionary rule should not be applied to the proposed statute, which seeks to protect privacy interests of non-constitutional dimension. The uniquely generous civil damages remedies afforded by the bill provide an ample deterrent to violations. There is, therefore, no reason to penalize society through the costly additional sanction of excluding from a criminal trial reliable and probative evidence obtained as a result of violations which will be, I believe, in nearly all cases inadvertent and unintentional.

ANTICIPATED PROBLEMS IN APPLYING THE PROVISIONS OF THE BILL

The breadth and flexibility of this bill are two of its primary advantages; yet in order to achieve these qualities, the language of the legislation is necessarily general and at times imprecise. We recognize that as a result it may be difficult in some circumstances for law enforcement officers to determine with precision the applicability of the limitations on search and seizure imposed by this bill.

Where such doubts arise prior to the obtaining of a warrant, officers should, if possible, attempt to obtain additional information about the nature of the materials being sought and the activities of the persons possessing them. In these cases, the very imprecision of the terms employed in the bill will have the salutary effect of causing a more thorough investigation before a warrant is secured.

However, if in the course of executing a lawful search warrant, some question arises in the mind of the officer that the materials sought might be covered by this legislation—e.g., the person on the scene claims that the materials are being held in connection with his plans to publish a book or article—the officer should not abandon the search simply because he is not certain that the materials are not protected. If it is his good faith judgment that the search is probably permissible, he should proceed with the execution of the warrant.

In the event that it later results that the materials were in fact covered by the legislation and the officer was incorrect in his assessment, the federal or local government will, upon being sued, compensate the person injured by the search. State officers who have proceeded in the execution of a search reasonably believing their conduct to be lawful need not fear liability, for, just as is true today in suits arising under the Fourth Amendment, they may raise a good faith defense to defeat the claim for damages.

A bill such as this which has the breadth to protect the variety of materials held in connection with First Amendment activities necessarily contains elements of uncertainty and it must be recognized that good faith violations will occur despite the best efforts of law enforcement officers to comply. The government employing these officers will have to bear the financial burden of such occurrences, but the fear of such potential liability—which we do not anticipate will be extensive—should not prevent these law enforcement agencies from encouraging their officers to act according to their best judgement of the situation and not refrain from searching for or seizing documentary materials merely because questions about the application of this legislation are encountered in the course of the search.

CONCLUSION

The effect of this legislation will be to severely limit, and in many cases absolutely prohibit, searches by federal, state, and local law enforcement officers for documentary materials which are held in connection with a broad range of First Amendment activities.

A policy of restraint similar to that embodied in this legislation has for some time governed federal access to materials held by members of the news media. As a result, there is no record of a search warrant even having been executed by a federal officer against a press organization. Furthermore, for several years, requests by Justice Department officials for the issuance of subpoenas directed at members of the press have been subject to restrictive regulation.[3] Adherence to this policy has had no demonstrated detrimental effect on our law enforcement efforts, and I am confident that the experience of state and local law enforcement agencies would be the same if this legislation were enacted.

[3] 28 C.F.R. § 50.10. This regulation states, among other things, that subpoenas directed at members of the press are to be sought only after an attempt has been made to obtain the information from non-media sources, that such subpoenas be limited in most cases to the purpose of verifying the accuracy of published information, and that these subpoenas avoid requiring production of a large volume of unpublished materials. In addition, approval of the Attorney General must be obtained in order to request issuance of such subpoenas.

In sum, I believe that H.R. 3486 strikes an appropriate balance between the interests of law enforcement and the need to protect First Amendment values. Its restrictions on third party searches of persons involved in First Amendment activities, while significantly circumscribing existing authority to conduct searches, will not unduly compromise our ability to investigate and prosecute crime. Yet, at the same time, the bill's stringent limitations on governmental search authority will provide an effective means of protecting the privacy and independence of those persons whose vital work it is to inform and enlighten the public.

Mr. HEYMANN. I am pleased to appear before this subcommittee today to discuss H.R. 3486, an administration bill which you, Mr. Chairman, and Mr. Railsback, both introduced earlier this month.

The bill, entitled the "First Amendment Privacy Protection Act of 1979," would protect against unwarranted third party searches not only of the press, but of others who are involved in first amendment activities through which information and ideas reach the public.

The legislation is entitled the "First Amendment Privacy Protection Act" because it provides broad protections against searches for materials which are obtained or prepared in connection with first amendment activities. The bill describes the protected materials as those which are "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."

Thus, as Mr. Small just noted, the protection provided by this legislation extends not only to the institutional press, a body that's difficult to define and has caused trouble in the legislative process before, but to academicians, authors, filmmakers, and freelance writers and photographers.

We considered the option of a press-only bill but rejected this format partially because of the extreme difficulties of arriving at a workable definition of the press, but more importantly because we thought it was appropriate to have a first amendment bill, and not a press bill. The first amendment pursuits of others who are not members of the press establishment are equally as important and equally as susceptible to the chilling effect of governmental searches as are those of members of the news media, and the news media is the first to recognize this frequently.

The bill focuses its search limitations on "documentary materials." This term is given a very expansive definition in the final section of the bill in order to cover all "materials upon which information is recorded." Specifically included within the definition of "documentary materials" are written or printed materials, films, tape recordings, and interview files. In other words, the coverage is broad as to people, and broad as to anything written, taped, or photographed, that they may have for purposes of publication.

Documentary materials, rather than anything else, were selected for protection for three reasons:

First, it is the search of documents that poses the most significant danger to first amendment activities. Such searches often necessitate examination of numerous irrelevant papers and files in order to locate those materials which pertain to the investigation in question.

Now, all that means is that if we are looking for a particular document we have to read every other document that we find on the way, to see if we've got the right one or not. The meaning or nature of documentary materials, unlike nondocumentary items such as

weapons or narcotics, is not apparent at first glance, but instead requires examination of their contents.

While the scope of a search for nondocumentary materials may be effectively limited so as to exclude scrutiny of papers and files, searches for documentary materials are not susceptible to such limitations and require going through all papers and files, and necessarily entail rummaging through sensitive and confidential information.

A second reason why the bill is limited to documentary materials is the fact that the purpose of such searches is generally to gain access to the information contained in these materials. To the extent that this information is generated through the investigative efforts of a reporter or researcher, it may be duplicated by a similar effort on the part of law enforcement officers.

What we're looking for is information. We can frequently get it by ourselves, without piggy-backing on the press. On the other hand, searches for nondocumentary materials such as contraband or property of the defendant which may bear incriminating fingerprints, arise out of a need to obtain those unique items which cannot be duplicated through further investigative efforts. This is something unique, physical, concrete. If it is something that is not an information-bearing document, we feel we have to be as entitled to get it as the press.

Third, and perhaps most important, the bill's focus on documentary materials is really the secret of enabling us to narrow the exceptions employed in the bill and broaden the protection for anybody interested in providing information to the public. By narrowing the coverage to documentary materials held for publication, we are able to do the first two things I mentioned, and broadly include everybody in the United States and not just the press, and have very few and narrow exceptions.

I think I will pass over some of the categories of what are and are not documentary materials, and go to the question of what is a public communication.

The statute depends on the intention of the person searched to hold or to prepare materials for publication, and its jurisdictional base is Federal power and interstate commerce. Obviously, radio and television broadcasts, and most newspapers, magazines and books are the clearest forms of public communication. If someone is holding materials covered for use in a broadcast, in a book, and most newspapers, it's plainly covered.

On the other hand, the internal memorandum of a corporation or its communications with its employees would not be forms of public communication.

For a communication to be covered by the bill, it would have to be at least available to anyone in the public who wanted it. The fact that a small town newspaper or an esoteric magazine has a small circulation does not mean it would not be covered by the bill. It would still be a form of public communication. I believe that in borderline cases the appropriate test for ascertaining whether the communication in question is public or not is whether it would be available to persons in the general public upon simple request.

Mr. KASTENMEIER. Is a public speech a public communication?

Mr. HEYMANN. A public speech would be a public communication.

Mr. KASTENMEIER. In other words, the notes of the speaker and other materials relied upon by the speaker would be——

Mr. HEYMANN. Yes, there might be, in some cases, Mr. Chairman, a question as to whether it was covered by the bill because of the requirement of an effect on interstate commerce. But certainly if it were a campaign speech of a Presidential candidate, nothing could be plainer that it would be a public communication.

Mr. KASTENMEIER. I was thinking of, to test the proposition, say we're talking about a protester in the streets, or somebody where we might get into other questions as to whether such a person might otherwise be in the process of violation.

Mr. HEYMANN. Yes. There's no reason why a public speech under appropriate circumstances of likely impact on interstate commerce wouldn't be covered. I guess what I've said so far is that the bill that has been introduced by the Chairman and Mr. Railsback is one that broadly covers—it is a first amendment bill, not a press bill—everyone exercising his first amendment rights.

The secret of its capacity to be so broad, and yet, I think, to be workable, is that it covers only documentary materials and it protects against search and seizure of only those materials which are held for publication in interstate commerce. And we read those terms very broadly, publication in interstate commerce.

To just take one or two steps into greater refinement, the bill makes a distinction between what was specially prepared for publication and other documents that were prepared for other purposes but turned over to the press. What was specially prepared for publication, either by a whistleblower or a private citizen, or a reporter, enjoys the protection of an absolute no-search rule, subject only to two—I shouldn't have said "absolute"—subject to two narrow exceptions: for suspects, and for life endangering situations.

Whether it was prepared for the Assistant Attorney General in charge of the criminal division or the vice president of General Motors, or someone else, if documents prepared for other purposes were then turned over to the press, they enjoy a broad subpena first protection.

The difference there, the reason we're able to give an almost absolute protection to one and not the other, is, again, that the documents that are prepared for other purposes may be unique items; they may be the only source of evidence. What is prepared for the press is, in a sense, the creation of the press; giving up our right to seize it in a search and seizure is simply giving up our right to piggy-back there. When we're dealing with other documents, to give up our right to search completely would be to give up control of the document produced for other purposes to whoever got it first.

There is for all documents a broad subpena first rule, with four exceptions: suspects, danger to life or of severe physical injury, a likelihood that the documents would be destroyed or concealed if a subpena was used, and finally, an exception in a situation where a court has ordered production of a document, it has not been produced, the matter is on appeal, and yet the Speedy Trial Act or something else requires the Government to have it before the course of appeal could be carried out.

Even in that last category of exceptions, there is an additional protection for a person holding material for publication, and that is

the right to participation in an adversary way at the search warrant stage.

We went out of our way, Mr. Chairman, to try to see to it that the suspect exception didn't come to swallow the broad rule. The basic principle is you cannot search at all for the work product of somebody preparing materials for publication. We were worried that under State law or under Federal law receipt of stolen information might become a crime, or receipt of stolen documents under the nonwork product documents might become a crime, that would make every newspaper and every radio or television station, a suspect. Therefore, we wrote into our proposed bill a provision which said that receipt or possession of documents cannot itself be the crime that makes the holder of the documents a suspect and, therefore, searchable.

To that exception we added one limitation, relating to the espionage laws, that we will discuss, I take it, in the questions and answers. I hope the national security aspects will come up in the questions and answers.

I think that there is not much more that I have to say by way of summary, Mr. Chairman, except that we believe that civil penalties against a governmental unit are the most appropriate method of enforcing the statute. We believe that for a number of reasons. One is that we think that regardless of good faith or reasonable mistake, there should be a recovery whenever someone's rights under the statutes are violated. We also believe that they will constitute an adequate remedy. The statute itself requires the Attorney General consider administrative sanctions wherever civil penalties have been imposed.

The fact there is a civil penalty whenever the statute is violated means, finally, that there will be a body of developing case precedent on the question of what violates the statute or not.

We are proposing here a new body of law. The fourth amendment has been construed for 100 years. This statute will require court construction over the next 5 or 10 years, and start to fill out what gaps we cannot anticipate during the legislative process.

The notion of civil penalties means that there will be a number of suits that will address directly the issue of what is the precise coverage of the bill in the areas of uncertainty.

We do not urge the application of the exclusionary rule. We stress that this involves the creation of a new right, and we don't have much doubt that a combination of civil penalties, liquidated damages, attorney's fees and punitive damages, plus administrative sanctions by the Attorney General in any appropriate case, will serve the purposes of keeping law enforcement officials in compliance with the law.

I have no reason to question their full willingness to comply.

Finally, I think it should be understood that the absolute liability that the remedies provision imposes on a governmental unit—Federal Government, local government, and State governments if they agree—apply without regard to the good faith or the reasonableness of the officers' actions, but the officers themselves, whether it's Federal officers or State officers, can't be expected and shouldn't be expected never to make an error, never to make a reasonable mistake.

Officers will, in applying this statute, as in applying the Constitution and statutes under the fourth amendment now, have to use their own judgment and rely on their own good faith and reasonableness,

and that will mean sometimes courts will disagree, because courts now disagree under the fourth amendment. But police officers and Federal agents will have to understand, and will have to be told, that they are still in the position of exercising their good faith and reasonable efforts to comply with the law as it is passed by Congress.

The fact that there will be lawsuits arising and damages paid, even in cases where despite their good faith and their reasonable judgment the court holds that the matter should not have been searched and seized, will not mean that they behaved improperly. They will only behave improperly if they fail to exercise good faith and reasonable judgment.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Heymann.

You concede at the outset that this is a somewhat narrow approach to the *Stanford Daily* decision. Could you discuss the bill in terms of how it relates to the full scope of the Supreme Court's decision? After all, they discussed all sorts of records not just press records. And then would you state why this is limited to that, and does not in fact include the stated position of the Attorney General as to other possible searches?

Mr. HEYMANN. I wouldn't be frank, Mr. Chairman, if I didn't say that one reason that the bill goes only as far as it does is the one that Mr. Small—not the sole one, but it's an important one—that Mr. Small mentioned. This is a bill that we have confidence is workable and we believe can proceed now on its own merits through the legislative process, and not meet the fate of any measure that involved many more difficulties. That is to say, as in the case of the shield legislation, the situation with regard to other third parties, such as doctors, lawyers, and clergymen, is more difficult.

In what I say I will refer to many difficulties that led us to be concerned about adding additional categories, but I would like you to be aware that as I mention the difficulties I'm thinking not only of the fact that we not only don't know quite how to handle them properly, but also the fact that in the back of my mind I fear that they would hold back a needed and useful reform that can now move ahead.

The first question is, why not all third parties? Why not broadly prohibit searches of all third parties unless there were some reason to believe that they would conceal or destroy evidence?

There are serious constitutional questions about designing a statute which would reach that far. It would be the position of the Department of Justice that it would, in all likelihood, not be constitutional. But beyond that there seems to me to be an unworkability that arises from the exception. There has to be an exception for situations where people may conceal or destroy evidence. Evidence that is in the possession of a third party is generally in the possession of a wife or a husband, a father or a child, a mother or a child, a sister, brother, an accomplice, or a friend. Each of these are close relationships.

I don't have many of my possessions in anyone else's house except those of close friends or relations. Other people object when I leave my stuff there. That means that there is, in each case, an almost impossible question that the law enforcement officer and the magistrates would be forced to address.

Would the person holding the evidence, the third party holding the evidence, feel so close to the suspect as to present a real danger of

destruction? If that question is addressed in general, and if we answer it in terms of parents will destroy for children, but children won't destroy for parents, or both will destroy for the other, the bill is deceptive.

It's deceptive because the exception will swallow the rule. If what is wanted by the exception is a case-by-case analysis as to how Steven Heymann, my son, feels about turning over evidence as to Philip Heymann, his father, number one, it's unworkable; and, number two, it hardly presents a picture of furthering privacy interests. You don't further privacy interests by prying into how a son feels about his father, or a father about his son.

The question comes up separately as to whether we deal with certain privileged categories, doctors, lawyers, clergymen. There are two ways to deal with them. One way is for Congress to try to spell out the protective categories of people. I'm afraid that that is extremely difficult. It's hard to imagine why surgeons should be protected—well, it's easy to imagine why a psychiatrist should be, or the files of of a psychiatrist. It's hard to reason why you would protect the files of a surgeon and not the files of a psychologist, or a social worker, or someone else in a therapeutic relationship.

The same is true with regard to the difficulties in defining lawyers and clergymen.

The only other alternative is to piggyback on State privileges and say that wherever there's a privilege under State law, then there shall be no search.

Again, here we found great difficulties. One, it would provide a probably unjustified patchwork, countrywide, of what Federal officers would be searching for in Wisconsin and not searching for in Illinois. And, number two, it's by no means clear that the privilege that the State of Wisconsin or the State of Illinois gives should apply to searches as well as testimony. Sometimes the purpose of the privilege is just to avoid disrupting a further relationship by having one of the parties help convict another.

I think I've said enough. There's a world of difficulties out there when you go the route of all the different parties, or the route of only doctors, lawyers, clergymen.

There is a medical records statute that I think is before your subcommittee, Mr. Chairman, which seemed to us to be a more sensible place to address the entire broad question of the medical privacy. And certainly I feared getting us into this quagmire would set us way back in terms of a needed reform.

Mr. KASTENMEIER. All right. At the outset, conceptually one could possible envision a broad act going beyond the first amendment, perhaps applicable to Federal systems, but as I take it that would suggest itself as—or that the best line was to limit it to first amendment and then go all the way, Federal systems, State, and local, all the way through, to afford the far-reaching bounds or reach of this narrow scope.

Do you think that the bill in its present form is as well written for the purpose of first amendment coverage as it can be written? Does it conform to your thinking as to full first amendment coverage?

Mr. HEYMANN. I am entirely satisfied with it. Nothing has happened in the process of drafting, in the process of discussions, that leaves me other than satisfied with it.

I am delighted that it has to go through a legislative process, Mr. Chairman, because I will be even more confident when it's been poked and pushed at. But it's had a lot of that in the executive branch.

Mr. KASTENMEIER. You've used the term "work product." Does the term "work product"—is that to protect reports of Government agencies which might be leaked to a reporter, such as the Pentagon papers?

Mr. HEYMANN. I'm sorry, Mr. Chairman, I'm afraid I missed some crucial words in your question when the buzzer went off.

Mr. KASTENMEIER. Would the term "work product" protect reports of a Government agency which might have been leaked to a reporter, such as the reports of the Pentagon Papers?

Mr. HEYMANN. They would not be work product, because they were not produced for publication, Mr. Chairman. They would be protected documentary materials which would be subject to requirements of subpena first, subject to the four exceptions.

Mr. KASTENMEIER. What about a letter, a confidential letter, to a newspaper, to a reporter, with no intention that the letter itself be published? Could that letter be exempted from search?

Mr. HEYMANN. I'm not quite clear on what the letter would be. It's not intended for publication, but prepared——

Mr. KASTENMEIER. A letter to a reporter——

Mr. HEYMANN [continuing]. Pointing out or revealing——

Mr. KASTENMEIER [continuing]. Certain information to the reporter, with no intention that that be published.

Mr. HEYMANN. That would be work product. In other words, it would be materials prepared for purposes of publication. If the letter itself is saying, "Why don't you go look in such-and-such a place and talk to these people," that would be work product, because it was prepared for purposes of the publication process, even though it was meant to be kept confidential forever.

Mr. KASTENMEIER. What would you say about the possibility of broadening that work product somewhat to include not merely material created by the person and then communicated, but also assembled and organized to be disseminated? What effect would that have?

Mr. HEYMANN. I would have no objection, and it, indeed, is our position that in some cases, assemblage will be work product, but it will be difficult to sort out. This is a matter that will take a while for courts to sort out. If a reporter were, himself, to get a number of files or business records, or something else that were prepared for other purposes and it showed to the average eye nothing particularly interesting and newsworthy, and if the reporter were to assemble them in such a way as to show that they really told a very interesting story of where the money was going and what was being done, then the assembling of those materials in an appropriate way would be work product.

But it is a difficult area and is one that will have to be worked out, I think, case by case.

Mr. PAULEY. If I might interject something——

Mr. KASTENMEIER. Certainly, Mr. Pauley.

Mr. PAULEY. I think that the test under the bill is if the assembly or organization of records is itself done in a creative way, then they become materials created by the person assembling them.

But everyone organizes materials that he receives, or assembles them, whether it's in alphabetical order or in some other way. If one were to——

Mr. KASTENMEIER. Use the copyright test.

Mr. PAULEY. I'm not familiar with the copyright test, but the problem of applying a broader than creative test for assembly is that the work product category would swallow practically every record that someone received, and that in turn would mean that all those records would become immune from search, even in the face of a showing of likely destruction or concealment.

Mr. KASTENMEIER. Now, all that might be affected, of course, by the national security exemption, such as the C5A scandal, or the Pentagon Papers, or——

Mr. HEYMANN. The short answer, for example, on the C5A scandal would be that it would be clear, I believe, that there was no potential violation of the espionage statutes in publishing the C5A information and, therefore, there couldn't be a search of the press.

But I'd like to be more general about it. There is a longstanding debate, which is fortunately largely theoretical and has never been tested between the press and the executive branch, on the question of the criminal liability of the press for publishing national security secrets.

I believe it's true that in the history of the country, or at least since World War I, there has never been a prosecution of the press for publication of national security secrets.

It is the executive branch's position that in an extreme enough case the statutes would cover it. It is the position of much of the press that the arcane language of the statutes does not cover publication.

There never having been a prosecution, then perhaps there has never been a search of the press for these purposes.

The discussion goes on in terms of——

Mr. KASTENMEIER. At any level of government?

Mr. HEYMANN. Beg your pardon?

Mr. KASTENMEIER. At any level of government there has never——

Mr. HEYMANN. Well, it has to be Federal. And I think there has never been a search for these purposes, never a prosecution.

What we've tried to do with the bill is leave that age-old debate, which has had no practical consequences, to my knowledge, in the last 60 years, and perhaps never in the history of the country, exactly where it was and not deprive anyone of the right to continue to debate this issue in the years ahead.

It's obviously the same thing that was done in the criminal code, where the espionage provisions were in the Senate simply left in place.

Mr. KASTENMEIER. Yes. I haven't read through all these code references, but let me suggest that the *Progressive* case, that the Justice Department desires to search and seize certain material located throughout the magazine's office, you would be able to do that, would you not, if this bill were enacted?

Mr. HEYMANN. We could not search the Progressive's office under this bill unless we were prepared to say that we were searching for evidence of a violation of one of the espionage statutes. In that case, there are special atomic energy statutes.

If we had no contemplation of a criminal prosecution, we could not search for it.

If we didn't have the *Progressive* case, with its substantial dispute about whether there is really dangerous enough publicly held information involved or not, if we were talking about a diagram of a neutron bomb plainly taken from the Defense Department—that is the type of case that has been the subject of dispute over 60 years—which was about to be published, and it would be treated as a crime to publish it, in that case at least a claim would be made by the Federal Government that it had a right to search and seize.

I don't like to think about the *Progressive* case, because it's still a case that——

Mr. KASTENMEIER. Yes, I agree with you. I'd just as soon you'd take a hypothetical, but that was a case that suggested itself. I agree with you.

Actually, the truth of the matter is, if you had a Justice Department that was intent on prosecuting such a case, there's nothing in this bill that prevents it?

Mr. HEYMANN. That's correct. And if it were intent on prosecuting such a case, there's nothing in this bill that would prevent them from searching in connection with the prosecution.

Mr. KASTENMEIER. At this point I'd like to yield to my friend from North Carolina, Mr. Gudger.

Mr. GUDGER. Thank you, Mr. Chairman, I apologize for not arriving here at the outset.

I have read the Chairman's comments and opening remarks and regret that I didn't have the opportunity to hear them. I am pleased to have been able to hear the testimony of Assistant Attorney General Philip Heymann.

My concern is in three or four phases:

In the question asked about the diagram of the neutron bomb, which presupposes the acquisition of property in violation of the law, I assume that is classified information lifted corruptly and, therefore, this would be a product of crime. It seems to me that classically search and seizure has been available long before the current decision holding that evidence might be sought to secure the tools of crime or the product of crime.

Mr. HEYMANN. That's correct, Mr. Gudger.

Mr. GUDGER. Therefore, we would have no dilemma dealing with that problem, and we would not be under the work product rule which this statute presents.

Am I correct about that? Or do you think it would be helpful to this statute to declare again that this would not restrict the power of search and seizure for the product of crime?

Mr. HEYMANN. I think you've taken us through the statute, Mr. Gudger, with such finesse that I am startled. You are absolutely right The statute itself says that work product does not include instrumentalities of a crime, and a stolen diagram of a neutron bomb would not be work product. Since it isn't work product, there would not be an absolute ban on searches, and it would be in the provision—it would be documentary materials which you have to subpena first unless you think they're going to be destroyed.

But you're right, there would be no absolute ban on search for any stolen documents under the bill.

Mr. GUDGER. Even though the bill only deals with this subject inferentially, in the manner in which you have defined it, by declaring in effect that work product does not include the product of crime. It is saying that the law as it preexists remains available, and search and seizure without the restrictions imposed here, would still be available?

Mr. HEYMANN. I think it is very complicated, and I don't think, that's quite right, Mr. Gudger. What it does—well, let me begin two steps back:

Long before the *Stanford Daily* decision, it was the law that you could—indeed, for the last 100 years it's been the law—that you could search for any instrumentalities or fruits of a crime.

A stolen diagram of a neutron bomb would be the instrumentality or the fruit of a crime. Well, it would be the fruit of a crime.

This bill, however, does restrict the Federal Government's power to search for fruits of a crime. It doesn't say that there is absolutely no power to search, ever, because the fruits of a crime are never work product. Work product is always something that's created by the reporter himself, or somebody for the reporter. The fruits of a stolen document is never a work product.

However, there are other protections in the bill which apply even to fruits of a crime, like a stolen diagram of a neutron bomb. And those provisions say that we have to try to go to a court and get a court order to have it returned first, before we go in for a search. And those provisions would still apply.

Mr. GUDGER. I direct your attention to the language at the top of page 5 of the bill, reading:

> In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

This is a part of that section of the act which defines the four exceptions, and I assume that the process to be pursued would be that the application to the magistrate would set forth an assertion that these four exceptions did not apply in the instance under investigation, but that the person to be searched, or the publishing house to be searched, would be able to contest that negative assertion in the application for the search warrant.

Now, does that presuppose that there must be notice and an opportunity to present this counter affidavit before there is to be a search made, even though the search is privileged under item (3), where there is reason to believe that the giving of notice pursuant to subpena duces tecum would result in the destruction, alteration, or concealment of the materials?

Mr. HEYMANN. No, it does not. We are now in the section that would apply if there was a stolen document, like the stolen diagram of a bomb. In that category, the first three exceptions allow us to go ahead with the search without giving notice, without an opportunity to appear. The first three exceptions are life in danger, the person searched is himself a suspect, or the one that you just read where the document may be destroyed.

Those are all exceptions where we feel we have to be able to go right in and search with no notice. And, as you point out, Mr. Gudger, to give notice where you think it's going to be destroyed or altered would be to have it destroyed or altered.

Mr. GUDGER. Correct.

Mr. HEYMANN. The provision you read, which said that we will give notice and opportunity to contest, only applies to the fourth exception, or stolen documents.

Mr. GUDGER. The subpena duces tecum.

Mr. HEYMANN. That's right. And that's when we've issued the subpena, the court has said you're right, ordered the person to comply, the person hasn't complied and says they're going to appeal, and the appeal process is going on. If we have to get the material, then we'll go in and ask for a search warrant. But on that occasion, and on only that occasion, the suspect would have a right to submit an affidavit and be given notice.

Mr. GUDGER. Thank you for that clarification.

It seemed that we were dealing with item (4) within subsection (b), and when I saw the use of the term subparagraph it was not clear to me that it meant the sub-subparagraph. Possibly a little clearer language here would make it quite obvious that this does not restrict the other three circumstances.

Now, I have only one other question.

Other bills have been introduced dealing with this same concern, one of which I am cosponsor of, which would grant protection to all third parties and not single out the media. I am pleased that you have not, in this bill, narrowed it to the press but have extended it to all media. I think this is commendable, and I think the document's definitions are excellent.

Mr. HEYMANN. Thank you, sir.

Mr. GUDGER. On the other hand, there was quite a debate last year as to whether or not the privilege of innocent third parties should apply to all, and if we were justified in singling out media to give it a preferred protection uuder the law, as though it were a constitutional protection.

The reason that I addressed my bill to the broad concern of trying to afford protection to all third parties, and narrowed it, of course, to Federal jurisdiction, was with the thought that if we did adopt a procedural protection that would apply in all Federal cases and with respect to all Federal prosecutions, and give all innocent third parties the benefit of that protection, we would afford a model to the States which they, in turn, could adopt—and I was assured that my own State would at least consider adopting such a protection.

Do you see vast benefit in this approach, in lieu of the narrower approach so far as jurisdiction is concerned, the Federal approach, with the thought that perhaps the States might emulate a good example?

Mr. HEYMANN. I'm afraid I do, Mr. Gudger. I would like to persuade you that this is a better approach.

One way of saying it is that the problem with regard to searches of the press, and also in general the problem with regard to searches of third parties, is a problem at the State and local level, and not at the Federal level. There is no recorded example of the Federal Government searching anybody in the press.

Mr. GUDGER. May I ratify that and say that the Attorney General has already adopted the administration of procedures which assure protection at the Federal level.

Mr. HEYMANN. Yes, sir.

Mr. GUDGER. That I am aware of.

Mr. HEYMANN. So that it would not be effective to provide that the Federal Government, which is least perceived as a danger and is least dangerous to any form of third party, is the only party which is actually restrained or restricted.

Beyond that, it does seem to me that the problem we're dealing with is a problem of first amendment freedom, and a problem of fear of insecurity, and the consequences of fear in not keeping notes and not having sources in the first amendment area.

You referred, Mr. Gudger, a minute ago to the fact that not so much changed in 1968 with *Warden* v. *Hayden*, where the Court said law enforcement could seize mere evidence. Third parties have been searched for guns, shirts, documents, books, and records, for the history of the country. There aren't many cases that are more than 100 years old under the fourth amendment. But this is a very old problem. And there is nothing that has dramatically happened to cause new concern about third-party searches. Something dramatic did happen with regard to causing fears in those who want to publish materials.

Mr. GUDGER. Thank you so much, Mr. Heymann. You certainly have enlightened me and have been very responsive to my questions.

I yield back the balance of my time.

Mr. KASTENMEIER. I thank my colleague, and on behalf of the committee I thank you for your appearance today, which inaugurates our hearings on the subject. We will follow up with other hearings, and we will be announcing the precise persons, days, and times of hearings.

We would thank Mr. Heymann and the Justice Department for perhaps further elaboration on certain technical aspects of the bill as it develops, as we might call upon them.

Thank you very much.

The committee is adjourned.

[Whereupon, at 3:10 p.m., the subcommittee was adjourned.]

ZURCHER V. STANFORD DAILY

THURSDAY, MAY 24, 1979

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
Washington, D.C.

The subcommittee met at 10:35 a.m. in room 2226 of the Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Mazzoli, Gudger, Railsback, and Sawyer.

Staff present: Bruce A. Lehman, chief counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order. This morning the subcommittee will continue its hearings on the question raised by the *Zurcher* v. *Stanford Daily* case and represented by H.R. 3486, the so-called "Press Protection Legislation" and other pieces of legislation related to the general question raised by that Supreme Court case.

We are very pleased to have as our witnesses this morning two distinguished persons; Mr. John Shattuck, Washington director of American Civil Liberties Union and Mr. Paul Davis who is president of the Radio Television News Directors Association.

With the consent of the witnesses and because Mr. Davis does have a potential time problem, I will ask Mr. Davis to come forward first. And I might also indicate that Mr. Davis is from Illinois and is the news director of WCIA-TV in Champaign, Ill.

Mr. Davis, you are welcome. You have a brief statement and you may proceed, and I know other members will be momentarily joining us.

Mr. DAVIS. Thank you, Mr. Chairman.

Mr. KASTENMEIER. I am sure Mr. Railsback will be here shortly. He is from your state of Illinois.

TESTIMONY OF PAUL DAVIS, PRESIDENT, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION

Mr. DAVIS. I am also president of the Radio Television News Directors Association. We are an organization of 1,600 news personnel at television and radio stations across the country and at the major broadcast networks.

I would like to think I represent the search end of the search warrants.

49-531—79——3

RTNDA participated in the *Stanford Daily* procedures before the Supreme Court. We have actively supported efforts to provide statutory protection from the kind of broad scale search permitted in that case, and we appreciate this opportunity to comment upon the administration's proposal to protect the media from investigative abuse.

I might say that last year I testified on some of the factual aspects of the search warrant and I will be glad to raise some of those same concerns that we have at a practical level.

Today we are testifying on the substance of the bill as presented before you. In the previous testimony we supported the legislation to protect all the nonsuspects, not just journalists, from routine searches. We believe, along with Justice Stevens, that third party searches invade the privacy which the fourth amendment guarantees to all.

It does not prohibit searches of the files of lawyers or ministers or doctors, those professionals whose confidences are protected against disclosure by the laws of almost every State.

We would like to see the administration's bill broadened to restrict searches of property of all nonsuspects. But we recognize that there are special first amendment interests at stake in newsroom searches that make the need for protection of journalists most pressing.

Given that more limited goal, RTNDA supports the administration's bill with some qualifications. We approve the broad protection for journalists' work product, which Government can have little or no legitimate interest in obtaining.

Both with work product and other documentary material, however, we are concerned about the breadth of the exceptions which the administration has proposed to the general ban on searches.

First, in the present form of sections 2(a)(1) and 2(b)(1), the allowance of searches for national security or classified information disturbs us.

Many of the statutes listed allow documents to be classified indiscriminately, and national security agencies could thus hamper publication of embarrassing information by classifying it.

Under these exceptions, for example, no doubt the Pentagon papers would have been subject to seizure. We would require an agency requesting a search to demonstrate to an impartial magistrate that the use of the specific documents in question would pose a clear and present danger to the security of the United States before a search could be permitted.

RTNDA does not question allowing a search when it is truly necessary to prevent death, serious bodily injury to a human being, or destruction or alteration of required materials.

The administration's bill, however, would permit a search if there is only "a reason to believe" one of these events would occur.

That standard is too permissive, as it would allow searches on the basis of mere suspicion. Instead, we believe that "probable cause" should be used as the standard for determining the need for a search.

With that well-accepted standard, the interests in protecting human life and assuring the availability of records necessary for prosecution could be protected, while requiring the police to have information of probative value which clearly shows the danger of delay.

I come from central Illinois which has a number of small counties.

Our concerns about the exception we are talking about here, to be the rare occasion of abuse we anticipate rather than a daily experience of abuse.

And when this bill was directed to—when the issue was directed to Congress last year, at that very moment we had five police department investigations underway in my news department, including primarily small counties.

In one of those counties, there was a sheriff who had made a famous quote, "I am the law." He was under investigation by a weekly newspaper in this county. It is a very cozy county. The sheriff, the prosecutor, the judge, are all friendly. And it was conceivable to us at that time that that newspaper had the risk of a search warrant for one case when in fact they might be looking for information about the investigation of the sheriff.

I think it is in the rural areas where you will find the abuse most probably in the coming years. It is also in those rural areas where you have the magistrates who are not lawyers—or required in many States to be lawyers and not required by the Supreme Court to be lawyers—who understand probable cause because they deal with that issue on the daily basis, but may have some trouble discerning "Reason to Believe"—and partly because of our concern of the quality of the magistrates who would issue a search warrant, we would urge the stronger standard of probable cause.

Finally, RTNDA is concerned about section 2(b)(4) of the proposed bill, which deals with searches following resistance to a subpena duces tecum.

As we understand the bill, the validity of such a subpena could be contested either by a motion to quash before a court-order compliance with the subpena, or in a hearing before a search warrant is issued.

The right of a party to contest a subpena in an adversary proceeding before compulsory action is taken should be made clearer, because our thinking is that the present bill is somewhat disjointed on this point.

We are also troubled by the provision allowing a warrant to issue if there is reason to believe that further proceedings under the subpena would "threaten the interests of justice."

Since any delay in a judicial proceeding may, in some sense, be threatening to the interests of justice, this provision is far too broad.

Instead, the court issuing a warrant should be required to make a specific finding that the severity and immediacy of the need for the documents sought, as well as the societal importance of the Government's case, outweighs the first amendment and due process interests in allowing full judicial review of the defenses to the subpena.

With these changes, we believe that the administration's bill, which we are, incidently, very happy to see, applies to the States, which it did not in the testimony presented by Mr. Haymen last year—only to Federal officers. We feel it would provide the protection necessary in this area for the operation of a free press, protection dangerously weakened by the Stanford Daily decision.

Thus, RTNDA urges prompt action to pass this legislation if enactment of broader third party protection is not feasible.

[The prepared statement of Mr. Davis follows:]

STATEMENT OF PAUL DAVIS, PRESIDENT, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION

Mr. Chairman: I am Paul Davis, news director of WCIA-TV, Champaign, Ill., and president of the Radio Television News Directors Association. RTNDA is an organization of 1,600 news personnel at television and radio stations across the country and at the major broadcast networks. RTNDA participated in the Stanford Daily proceedings before the Supreme Court, and has actively supported the efforts to provide statutory protection from the kind of broad scale search permitted in that case by the Supreme Court. We appreciate this opportunity to comment upon the Administration's proposal to protect the press from investigative abuses.

In previous testimony, RTNDA has supported legislation to protect all non-suspects, not just journalists, from routine searches. We believe, along with Justice Stevens, that third party searches invade the privacy which the Fourth Amendment guarantees to all. In particular, the proposed bill does not prohibit searches of the files of doctors, lawyers, and ministers—professionals whose confidences are protected against disclosure by the laws of almost every state. We would like the Administration's bill broadened to restrict searches of the property of all non-suspects. But we recognize that the special First Amendment interests at stake in newsroom searches make the need for protection of journalists most pressing.

Given that more limited goal, RTNDA supports the Administration's bill, with some qualifications. We approve the broad protection for journalists' work product, which government can have little or no legitimate interest in obtaining. Both with work product and other documentary material, however, we are concerned about the breadth of the exceptions which the Administration has proposed to the general ban on searches.

First, in the present form of sections 2(a)(1) and 2(b)(1), the allowance of searches for national security or classified information disturbs us. Many of the statutes listed allow documents to be classified indiscriminately, and national security agencies could thus hamper publication of embarrassing information by classifying it. Under these exceptions, for example, no doubt the Pentagon Papers would have been subject to seizure. We would require an agency requesting a search to demonstrate to an impartial magistrate that the use of the specific documents in question would pose a clear and present danger to the security of the United States before a search could be permitted.

RTNDA does not question allowing a search when it is truly necessary to prevent death, serious bodily injury to a human being, or destruction or alteration of required materials. The Administration's bill, however, would permit a search if there is only "a reason to believe" one of these events would occur. That standard is too permissive, as it would allow searches on the basis of mere suspicion. Instead, we believe that "probable cause" should be used as the standard for determining the need for a search. With that well-accepted standard, the interests in protecting human life and assuring the availability of records necessary for prosecution could be protected, while requiring the police to have information of probative value which clearly shows the danger of delay.

Finally, RTNDA is concerned about section 2(b)(4) of the proposed bill, which deals with searches following resistance to a subpoena duces tecum. As we understand the bill, the validity of such a subpoena could be contested either by a motion to quash before a court ordered compliance with the subpoena, or in a hearing before a search warrant is issued. The right of a party to contest a subpoena in an adversary proceeding before compulsory action is taken should be made clearer, because our thinking is that the present bill is somewhat disjointed on this point.

We are also troubled by the provision allowing a warrant to issue if there is reason to believe that further proceedings under the subpoena would "threaten the interests of justice." Since any delay in a judicial proceeding may, in some sense, be threatening to the interests of justice, this provision is far too broad. Instead, the court issuing a warrant should be required to make a specific finding that the severity and immediacy of the need for the documents sought, as well as the societal importance of the government's case, outweighs the First Amendment and due process interests in allowing full judicial review of the defenses to the subpoena.

With these changes, we believe that the Administration's bill would provide the protection necessary in this area for the operation of a free press, protection

dangerously weakened by the Stanford Daily decision. RTNDA thus urges prompt action to pass this legislation if enactment of broader third party protection is not feasible.

Mr. KASTENMEIER. Thank you, Mr. Davis, for a brief, concise, but very clear and helpful statement.

Your organization is a large one: how do you arrive at positions? Do you meet occasionally in conferences or on occasion?

Mr. DAVIS. We have both regional and national meetings as well as the board meetings that occur three to four times a year. Most recently on issues before the Congress, including rewrite. And this position—under the first amendment positions—we at the board level have had lengthy discussions of the issues and taken positions at the end of such meetings. Obviously, the more technical points of law includes discussion with counsel. The board itself has not attorneys sitting on it.

Mr. KASTENMEIER. But you have been able within your organization to gain clear consensus about—which is reflected.

Mr. DAVIS. On this issue, yes, sir. That is not true of all issues. I might say.

Mr. KASTENMEIER. Also in your statement, as I understand it, you say the value of H.R. 3486 is that it does, in fact, go beyond Federal activity and extends to State and local applications for warrants or searches.

And without that, it wouldn't be particularly useful.

Mr. DAVIS. Nor clear to a journalist who might, as in my case, cover two States. I have Indiana coverage. Television stations and radio stations have two States, if not three, to worry about.

Mr. KASTENMEIER. This was a question we confronted before in connection with newsmen's privileges, to make sure that it was national in character, interstate.

I would like at this time to yield to my colleague from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman. I want to first of all welcome fellow Illinoian, Mr. Davis. Your statement was very concise and very understandable. Are you familiar with the Mathias bill that has been introduced?

Mr. DAVIS. No, sir.

Mr. RAILSBACK. The Mathias bill is pending in the Senate. As a matter of fact, I have recently introduced it in the House. The bill, H.R. 4181, would substantially expand the administration-type approach to cover other third parties as well.

And I must say that until I got involved with Senator Mathias I was not aware of what appeared to be many other instances of innocent third parties being kind of randomly riffled for information that did not relate to them at all. This causes me great concern.

So I am particularly interested to hear what you have to say about that problem as well as your thoughts that maybe there should be a broader approach to include all third parties.

Mr. DAVIS. There were several bills in the Senate last year at the time of inquiry on what I called the Bayh bill which was a third-party bill that was not restricted to press only. I don't know if the Mathias bill was introduced at that time or not, but our position then was one of concern about trying to define the press, which—Senator Heinz' bill that he introduced from Pennsylvania tried to identify and define the

press. And his definition would have probably excluded the Stanford Daily. So you get into a real problem trying to do that.

Now, in some of the States that have passed the remedy to the *Stanford Daily* decision, including California, they have done by identifying, as this bill does, the items or the situations rather than trying to define what the press is, and that's safer.

Mr. RAILSBACK. Yes. I think that Senator Bayh introduced a bill a year ago.

Well, I thank you for appearing and I appreciate your statement.

Mr. KASTENMEIER. I yield to the gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Thank you and welcome. I have no specific question, but let me just ask you to comment on why or how you would answer questions which are posed to me at home quite a bit, and that is, how come the press is seeking a preference here? How come you are putting them in a certain preferable position? Why aren't they treated like I am? I, meaning the people who are propounding the question to me.

I wonder how do you handle them when you hear these views? I assume you have your station set up in a fashion where you have letters sent in and comments. How do you handle that situation?

It's one thing to talk with a panel of lawyers in a setting of Washington, but talk to me like you are back at Springfield.

Mr. DAVIS. If you will allow first a sentence to say that our position on this bill is all third parties and not press. So we are not arguing for special preference.

We have said, however, I think, that we will accept it. It is a dilemma. In fact, in a meeting at Portland a week ago, I suggested we abandon the word "privilege" because it is misconstrued by the public or interpreted as being a desire for an elitist position.

And our position as the press is really to represent the public and their interests and to be their representatives in places they cannot go. And just by the very limitations of life.

And when we lose sight of that fact, then we have misconstrued our own associations and our work, which is what the privilege is all about.

I still believe there is a special role for the press that is separate, even though the Supreme Court is now suggesting that the citizen and the media have about the same protection and there is no greater. I disagree with that, but I think if we lose sight of the fact that the reasons for our exceptions provided in the writing of the constitutional Bill of Rights or in subsequent court rulings where they have talked about our special rule, if we lose sight of why it is there, then we lose the privilege.

Mr. MAZZOLI. That is interesting because I have said the same about our profession. Being Members of Congress, if we didn't decide the fact that we have to account for what we do and perhaps hold ourselves to a higher standard in some respect than the average person on the street, even though our interests may be common, then it seems we have lost sight of our particular role and responsibility, and then will be entitled to the lack of respect that seems to be rampant in the country.

Let me ask you one question. Assuming that we drop the word "privilege," do you feel that this bill and perhaps as Mr. Railsback talked about, the expansion of it, provide something other than a kind

of special handling for the press or perhaps those groups that might be fitted into the bill in that it indeed does provide a protection to the public rather than protection to these particular groups.

Mr. DAVIS. I think we would encourage the expansion of the bill, but I would not want to see the administration's bill that you are considering, delude what is meant for the press.

I am speaking of the word "privilege" as a red-flag word rather than a concept when you asked me the earlier question.

One of the things that concerns me about the public generally, Mr. Mazzoli, is the couple of polls recently taken that show that people tend to support reporter privilege, which I would have guessed incorrectly on.

I had the feeling from the letters that you mentioned and conversations, that there is a general hostility toward the press when it seeks a privilege.

On the other hand, they did support police invasions of the newsroom with the search warrant. So it left me a bit unsettled.

Mr. MAZZOLI. I think it left all of us here in Congress, unsettled. But I thank you very much, Mr. Davis. You have been very helpful.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Yes. I am particularly interested in your thoughts about expanding the bill. I have a bill in, myself. Recently, I was charged with a study group to explore this issue and we found in working with it that you can, without pinpointing the press, situationally identify the circumstances that would protect all of the legitimate interests of the press, as well as those of other innocent individuals from the execution of a search warrant.

I really don't know how many people on this panel or even maybe on the whole committee have ever been present at the execution of a search warrant. I have, a number of times, and it is a pretty scary thing if you are an innocent party.

They are almost invariably executed at night, preferably in the wee, small hours of the morning, because that is when you are most likely to find the occupants you are looking for in the execution of a warrant.

Normally, the door goes down and there are people going through the front and the back doors simultaneously, climbing stairs, and pulling people out of bed. In those instances where a search warrant is justified and you're dealing with people who you are intending to arrest anyway, it's probably the only way to do it.

This is particularly true in connection with drug cases, for example, where you actually have to get the drugs for the purpose of making chemical analyses, et cetera, to identify them. If you were to knock on the door, the drugs are easily flushed down the toilet and usually you are dealing in those circumstances with people who are very dangerous anyway, so it is not without risk.

But on the other hand, I can visualize some poor tourist in Washington, D.C., with his camera taking pictures of a riot. Then when he returns home, his door is broken down in the night, because somebody decided he had negatives that identify some rioters.

Another example would be a public bookkeeper for a number of businesses who, because one of his clients is suspected of something, is suddenly approached.

So it just seems to me that if we work carefully on this that it is possible to situationally identify the same concerns that the press is interested in and put under the umbrella perhaps even lawyers whose clients may be suspected of something as well as other innocent parties.

A privilege exception may work fine if you are challenging a subpena duces tecum, but it is not much help in the search warrant issues. Search warrants are usually issued by lower courts, which vary greatly in both their attitude toward search warrants and their own ability, let's say.

And it really is a scary thing, if you see how they are executed. So I am very happy to hear that your organization, too, feels that legislation should be expanded to cover all innocent third parties, similarly situated to the Stanford Daily.

I read that decision, and I believe it extends to numerous people and various circumstances.

Thank you very much. I enjoyed your presentation.

Mr. DAVIS. May I comment briefly?

Mr. MAZZOLI. Certainly.

Mr. DAVIS. The thing that really drove that home was the invasion in Montana which, I believe, is in the testimony this morning, which is a case that was most discomforting to professionals, lawyers, psychiatrists. They are not necessarily all that confidential to a search warrant.

You were talking about the disruption of the residents of Mattoon, Ill., which happens to be in my coverage area. I am thinking of a disruption to a broadcast news operation when the search warrant hit, and essentially being frozen from doing the work, as well as the fact that many of the pieces of information that they might seek to secure could be on a tape that is about to be used for another purpose in broadcasting.

One incident involved a tape on which there was an additional conversation that was a confidential conversation and was not the one being used.

So the AP had a dilemma there and refused to yield on the search warrant and also that case in Helena showed how much distrust there was about AP's method of handling materials, so they chose to ignore the subpena and use an available search warrant.

This distrust with the search warrant could be materially disrupting and there could be a lot of confidential information that I would not like anyone to see.

Mr. SAWYER. They are having that problem in Minnesota. There is an appeal in a case where they managed to move to quash the search warrant before it was fully executed.

It was allegedly for evidence establishing that a client had committed perjury.

But normally you don't get the privilege of testing a search warrant unless you are stronger or better armed than those executing it.

Mr. DAVIS. We recommended to our membership that they attempt to cause the information taken to be sealed and then go to court subsequent to any search warrant to try to act specifically on what was taken.

That is the only opportunity we know.

Mr. SAWYER. The situation is particularly bad when you are looking for just a document or a picture, for just about anything in the residence is subject to a thorough search, because it is reasonable that the picture or document could be in those places.

Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Davis, particularly in regard to our colloquy or your colloquy with Mr. Mazzoli. While privilege is not truly embedded in this legislation, it is analogous with the so-called newsmen privilege legislation.

I appreciate that you resisted the term "privilege." Many people in news and communications didn't like the term because it suggested something extraordinary beyond what ordinary people are given in terms of rights.

Some States have considered shield laws largely supported by the news community and euphemistically entitled "Free Flow of Information." Last week in my State, a Supreme Court Justice, referring to a number of cases including the progressive case, suggested that there was some hypocrisy on the part of publishers that protested secrecy when in fact such pieces of legislation on newsmen's privilege enabled the press to keep secret certain information. It was suggested that this was not dissimilar from the Government being able to keep secret certain information and perhaps they ought to be equated somewhat.

But nonetheless, I appreciate your view and the notion that this should be broadly applicable.

Mr. DAVIS. I think the problem with that attitude and it's my personal opinion, that it is too pervasive, that we are as reporters, protecting sources what haven't sought protection, because of our experiences in the late 1960's and early 1970's, when there was such constant dilemmas, a flow of dilemmas that we had to back up and become very stubborn and resist almost everyone and everything, otherwise our credibility was going down the tubes.

Today, journalists should be more selective. The protection is to the source, not to the reporter when we protect. The protection is the protection of the work product relating most often to sources and information and that is a part of the editorial function.

Ultimately it is for the benefit of the public and not to keep secrets.

Mr. KASTENMEIER. I appreciate your comments and I think your observation is totally correct.

Thank you very much for your appearance here today, Mr. Davis, you have been very helpful.

I yield to the gentleman from North Carolina.

Mr. GUDGER. The chairman heard from me very extensively yesterday and I think I probably have used up all the time I may be entitled to.

Mr. Davis, I wanted to state that during the 95th Congress I prepared, with the help official—in Georgetown—a bill designed to make procedurally unavailable, a search warrant, in any quest for evidence in the hands of an innocent third party. However, that act, if enacted by Congress, could only apply to the Federal jurisdiction and not to the States.

Of course, the *Stanford Daily* case and all of these cases that have been referred to, relate to situations where law enforcement agents of the State were involved investigating State law violations.

What we have here in H.R. 3486 is an attempt on the part of its introduction to deal with the broad problem whereby an act of Congress can presume a jurisdiction based on the inference that much medial material is going to go into interstate commerce and therefore, work product of those engaged in the media industry and indeed, documents secured by them on which work product may ultimately develop.

All may be a part of an interstate commerce service or function. Thus the legislation before us tries to create an area in which Congress may be able to act with universal application and create a protection that even the State and local law enforcement officers would have to offer, something that could not be done unless there is this interstate commerce inference relative to those engaged in the media function. This is my concept of the basic difference between the protection to be afforded to the innocent third party generally which might require State action to have any real legal constitutional application as distinguished from a protection, which may be available to the media because of its interstate commerce function.

Now with that explanation, I want to address one question to you that I don't think your comments directly relate to. There are two different classifications proposed by this act. One is the protection to be afforded work product. I assume that means your notes or tapes that you may have prepared for later use if desirable, based on documents or information procured. Then there are documents other than work products, photographs, and that sort of thing, such as the *Stanford Daily* situation.

Do you see this as a valid distinction? That your work product, your notes, what you yourself have produced, might have a higher privilege or protection than the documents which your vehicles may have produced?

Mr. DAVIS. Yes. I think we support the distinction, but it raises the spector of protection for a search warrant to be issued for a nonwork-product item that is in the building where the work-product item exists.

But we appreciate the distinction and accept it. It still opens the door some.

Mr. GUDGER. Do you conceive that work product should be less readily available or four exceptions should apply to work product than would apply to the documents which may have been?

Mr. DAVIS. Definitely. It is hard to conceive of material that would be construed as a nonwork product. Quite often it would be something sent to us from outside, not something we have developed on our own.

And so there won't be many instances where the nonwork product is involved on a daily basis. But it still—it opens the door for a search warrant. And I would hope in those instances the subpena would be the preferable route to take.

Mr. GUDGER. Now you are aware that your comments were referable to probable cause as opposed to reason to believe. That the instance where there is probable cause to believe that the person subject to search is involved in the criminal activities for which the search is undergoing—you realize that probable cause there would have a direct legal meaning and the proof of this exception would rely upon the same form of proof upon which warrant could issue against the offender.

Do you feel that is a valid classification?

Mr. DAVIS. We don't like the reason-to-believe applications to other than the exception you cite. We think that is weak. That the first amendment, for example, is an issue that may be—particularly when it relates to the question of invasion of a confidential area.

In our case the news department where we may have sources that we are trying to protect. That, I think, in the history of the bill that was supplied, it talks about using the same bases that Financial Privacy Act of 1978, for the formation of the reason-to-believe standard.

And we think that the first amendment issue may be a stronger issue there in philosophy and probable cause should issue for it.

And as I said earlier, we are quite concerned about the magistrate at the levels I think Mr. Sawyer addressed in the rural area, being asked to differ in his mind on what reason to believe means.

Mere suspicion and the willingness with a friendly prosecutor or police chief to issue on reason to believe, it would be much easier than if a probable cause test were required.

Mr. GUDGER. I seem to see probable cause and reason to believe in a little different light from the perception that you have.

I see probable cause to believe that a person has committed or is in the process of committing a criminal offense, as requiring the proof of all elements of that offense, at least substantial evidence sustaining all items necessary to lead to conviction.

Reason to believe, on the other hand, where the reason to believe only relates to one particular fact or one particular circumstance and not a pattern of facts or circumstances which is inherent in criminal law, and the probable cause definition; I don't know how probable cause would relate to probable cause to believe, that serious bodily injury is to include or death is to ensue.

I am trying to see how you define probable cause to believe as a criterion where the belief only relates as to the one question.

Is death or serious injury likely to ensue?

Mr. DAVIS. I'm not sure I can articulate well as a nonlawyer, the differences that you ask of me.

I can only say that I think we need to establish the most rigid possible test for issuance of a search warrant in a news department or newsroom where you have the potential abuse most often coming from people who may be themselves affected by the material in the news department.

So we thought the test of reason to believe to be a weaker test than probable cause act. I'm not sure I can articulate more clearly than that.

Mr. GUDGER. But you have no particular judicial decision or other writings by any lawyers or groups which draws that distinction?

Mr. DAVIS. I don't know of any. This is a fairly new field for us. Until *Stanford* we thought we had a constitutional protection.

Mr. GUDGER. Many did. Thank you very much. My apologies, Mr. Chairman, I have taken more time.

Mr. DAVIS. Well, I wish I could be more clear. And if I can come up with anything, I will provide it to you.

Mr. GUDGER. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Davis, for your appearance this morning.

Next I would like to invite forward the individual who has been a witness many times before this committee and other committees of

Congress, and is indeed welcome back, and it is of course, John Shattuck, Washington director of American Civil Liberties Union.

Mr. Shattuck?

TESTIMONY OF JOHN H. F. SHATTUCK, WASHINGTON DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. SHATTUCK. Thank you, Mr. Chairman and members of the committee.

I am very pleased to appear here this morning on a subject of great importance to the American Civil Liberties Union and especially to appear before your subcommittee, this subcommittee which has such a long and distinquished record of involving itself in legislation to protect civil liberties.

And let me just start by congratulating you, Mr. Chairman and the committee, on the overwhelming passage yesterday of H.R. 10, a very important bill supported by the American Civil Liberties Union, which would protect the rights of institutionalized persons.

We are very pleased to have been a part of floor support on that bill.

I have submitted, Mr. Chairman, a lengthy statement for the record, and I will summarize and cover part of it orally. Let me start by trying to put——

Mr. KASTENMEIER. Without objection, your statement will be received and made part of the record. It is an 18-page statement including the appendix.

[The prepared statement of Mr. Shattuck follows:]

STATEMENT OF JOHN H. F. SHATTUCK, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON OFFICE

Mr. Chairman: I welcome this opportunity to appear before your subcommittee on an issue of vital concern to the American Civil Liberties Union. The ACLU is a nationwide, nonpartisan organization of approximately 200,000 members dedicated to protecting the advancing individual rights guaranteed by the Constitution.

For many years the ACLU has worked in Congress and in the courts to secure the right of privacy under the Constitution. In recent years we have focused our attention increasingly on the threat to privacy posed by broad government access to private records. With the tremendous growth of recordkeeping and the wide exchange of personal information between private institutions and government agencies, the privacy of individuals is rapidly diminishing. It is not surprising that a recent nationwide Harris poll showed that 74 percent of the American public believes that the United States is "very close" or "somewhat close" to being an Orwellian society "in which the government knows almost everything about everyone." On the other hand, 67 percent of the public believes that "new laws could go a long way to help preserve our privacy." More specifically, an overwhelming 91 percent believe that a major reason for the erosion of privacy is the unregulated flow of private information from the files of third party recordholders—such as banks, insurance companies, private employers and credit card companies—and that the best way to solve this problem would be to prohibit recordholders from disclosing personal information without the permission of those to whom it pertains.

The Impact of Stanford Daily

This is the context in which the Supreme Court's decision last year in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) must be viewed. In *Stanford Daily* the Court struck a devastating blow at three major aspects of the right to privacy. First, it removed all privacy protection from the premises or files of persons not suspected of crimes and opened them to surprise searches by the police. Second, it shattered most people's reasonable expectation that the personal information they provide to doctors, hospitals, lawyers, journalists, insurance companies, banks and other

"third party recordholders" with whom they have communicated will generally remain confidential. And third, because the *Stanford Daily* case involved a police search of the offices of a newspaper, the decision severely undermined the First Amendment protection of the newsgathering process and chilled the willingness of persons who criticize the government or are under its scrutiny to become news sources.

Unfortunately, the *Stanford Daily* decision is only another step—although the most dangerous and far-reaching one to date—in a series of recent Supreme Court decisions removing most privacy protections from personal records and information. Three years ago for example, the Court ruled that a person has no legitimate privacy expectation regarding his or her bank records, on the ground that the records belong to the bank and a person voluntarily discloses certain information in opening an account and accepts the risk of disclosure. *United States* v. *Miller*, 425 U.S. 435 (1976).

In the same term, the Court upheld a search warrant which in addition to authorizing the unannounced seizure of specific papers, also authorized the sweeping and potentially boundless seizure of "other fruits, instrumentalities, and evidence of crime at this [time] unknown." *Andresen* v. *Maryland*, 427 U.S. 463, 479–80 (1976).

Several decisions in the last recent Supreme Court term have further undermined the privacy rights of individuals. The use of pen registers, which record the numbers dialed on targeted telephones, was held not to be "interception" of communications governed by the warrant procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *United States* v. *New York Telephone Co.*, ——— U.S. ——— (1977). In another decision, the Court ruled that law enforcement officials need not "minimize" the wiretap interception of private conversations under a court order if the factors of their investigation make it "reasonable" to listen to everything. *Scott* v. *United States*, ——— U.S. ——— (1978). The Court also refused to revie a lower court ruling upholding an FBI search of the premise of the Church of Scientology in Washington, based on a warrant authorizing a search for evidence "as yet unknown." *Church of Scientology* v. *United States*, 572 F. 2d 321 (D.C. Cir. 1977), cert denied, 46 LW 3886 (March 20, 1978). Finally, several weeks ago the Court upheld an FBI break-in conducted without a warrant for the purpose of installing a court-ordered electronic eavesdropping device, despite the clear absence of statutory authority permitting such an entry. *United States* v. *Dalia*, ——— U.S. ——— (1979).

The result of this disturbing Supreme Court trend is that the notice and specificity requirements of the Fourth Amendment have been all but abandoned in searches for private information. Unless this trend is reversed by Congress, the police can arrive unannounced at the premises of an innocent third party to search for information "as yet unknown" to the officers or investigators themselves. The resulting intrusion into personal privacy and disruption of journalistic, professional and business relationships will be staggering.

General Warrants to Search for Information

The *Stanford Daily* decision goes far toward authorizing the kind of "general warrants" that the Fourth Amendment was aimed at prohibiting. This aspect of the decision is in part an outgrowth of the Supreme Court's 1967 decision in *Warden* v. *Hayden*, 387 U.S. 294 (1967), which overruled the "mere evidence" rule. That rule had restricted all unannounced searches authorized by warrant to contraband and the fruits or instrumentalities of crime. In cases before 1967, the Court had stressed the distinction between searches for specific evidence in a specific location, and searches "exploratory and general and made solely to find evidence of respondents' guilt to the alleged . . . crime." *United States* v. *Lefkowitz*, 285 U.S. 452 (1932). The "mere evidence" rule adhered to before 1967 reflected a strong judicial repugnance to the despised "general warrant," used by English authorities before the Revolution to search at random for incriminating evidence in possession of the colonists. *Entick* v. *Carrington*, 19 Howell St. Tr. 1029 (1765).

Although the majority opinion in *Stanford Daily* claims to follow *Warden* v. *Hayden*, in fact it goes far beyond the earlier decision and virtually restores the validity of general warrants. Indeed, the Court in *Warden* clearly was not contemplating unlimited surprise searches of innocent third parties. In that case, police officers who were informed that a suspect in an armed robbery had entered his house five minutes before they arrived, began to search for the man and the weapons used in the crime. During the search of his home, items of clothing were seized, along with other items including weapons and ammunition. The Court

ruled that the "exigent circumstances" which justified entry and search of the house in "hot pursuit" without a warrant, also justified the seizure of the articles prior to or immediately contemporaneous with the suspect's arrest, as part of an effort to find a suspected felon. The Court stated that since the officers knew that the suspect was armed, and were looking for weapons when they found the clothing, the seizure of the clothing was justified.

It is clear that the "exigent circumstances" justifying the search of Hayden's home were not present in the innocent third party search authorized by the *Stanford Daily* decision. The search by California police of newspaper offices for photographs of a demonstration three days following the event certainly did not involve the "hot pursuit" of a criminal suspect. The staff of the newspaper were suspected of no criminal activity in connection with the demonstration. In short, nothing in the *Hayden* decision even remotely suggests that the Supreme Court was inviting the police to ignore the usual subpoena process—including prior notice and an opportunity to contest—to obtain documentary materials from innocent parties.

Privacy is disturbed far more by a search for documentary evidence than for contraband, fruits, or instrumentalities of crime. A search for contraband or instrumentalities is generally based on a specific description of the weapon, narcotic, or other item to be seized. Even a search for a weapon "as yet unknown" would not be offensive if there were probable cause that a weapon was located on the premises to be searched, since the searching officer's life may be endangered. An unannounced search for evidentiary materials, however, is justified by no such danger, and allows a wide-ranging intrusion into many areas of a home or office. A search for mere documentary evidence may involve the rifling of filing cabinets, desks, and even waste baskets, affording the police an opportunity to read notes and correspondence totally unrelated to the crime under investigation. Since virtually any document could contain evidentiary material relevant to an investigation, such a search is potentially boundless.

The impact of such a sweeping power to rummage through private records will be severe. The spectre of a surprise search will chill both freedom of the press and freedom of association. News sources cannot be assured of protection if a reporter's notes can be seized without notice by the police. Patients and clients will think twice before they provide personal information to doctors, psychiatrists and lawyers. Prospective contributors to and members of controversial organizations will refrain from participating if they cannot be sure that their lawful activities will not be investigated by government agents rummaging through organizational records.

It is precisely for these reasons that the Fourth Amendment originally did not include private records among the "things" that could be seized with a warrant. In the famous English decision which laid the groundwork for the Amendment, *Entick* v. *Carrington*, supra, Lord Camden observed that:

> Papers are the owner's goods and chattels. They are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection. . . . [O]ur law has provided no paper-search. . . to help forward a conviction.

This observation has echoed through the history of the Fourth Amendment. In *Stanford* v. *Texas*, 379 U.S. 476 (1965), for example, Justice Stewart observed in his opinion for the Court that a search of private records "must be awarded the most scrupulous exactitude" because it involves core First Amendment as well as Fourth Amendment values. In that case the Court invalidated a warrant authorizing the seizure of "any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings or any written instruments showing that a person or organization is violating or has violated" a Texas statute regulating certain Communist Party activities. In 1965 the Supreme Court had no difficulty in characterizing this authorization as a "general warrant". In the wake of Stanford Daily, the outcome might be different.

The Vulnerability of Institutional and Professional Records

Apart from the greater intrusiveness of unannounced third party searches for information than searches for contraband or instrumentalities, Stanford Daily has, for the first time, made vulnerable to search a wide range of institutional and professional records. As Justice Stevens observed in his lucid dissent:

> Just as the witnesses who participate in an investigation or a trial far outnumber the defendants, the person or persons who possess evidence that may help to identify an offender, or explain an aspect of a criminal transaction, far outnumber those who have custody of weapons or plunder. Countless law abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing investigation.

> The consequences of subjecting this large category of persons to announced police searches are extremely serious. [436 U.S. at 588.]

Let us look at the practical impact of this vast expansion of the number of institutions and people whose files are now subject to unannounced searches. The following example was set out in the Petition for Rehearing in Stanford Daily, which the Court denied without comment:

> A lawyer's file contains evidence relevant to a criminal investigation of his client. Since the Court has already indicated that common law or statutory privileges "are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment" [56 L.Ed. 2d at 543], the police could obtain a warrant authorizing an unannounced search of the attorney's files. In executing the warrant, the police could follow the same procedure that was used in Stanford Daily and search through the lawyer's file room and the files on all of his clients in order to obtain the documents they are seeking. In order to conduct this kind of search the police need not show a magistrate that the files would be destroyed or hidden, or that the lawyer or the suspect would flee if prior notice were given by way of a subpoena.

There is no other way to characterize this hypothetical situation but as a "general search". Nor is there any doubt that such a broad search—justified not on any exigent circumstances but solely on the convenience of the police—would pass muster under Stanford Daily. Indeed, there are several examples of actual "third party" searches conducted after the search in Stanford Daily which are even more disturbing than the hypothetical:

According to Jerome B. Falk, counsel for Stanford Daily, a case in San Diego involved a criminal defendant's father who found an incriminating document and delivered it to the defendant's lawyer. The prosecutor asked the lawyer to produce the document voluntarily, but the lawyer declined to do so without a subpoena. Instead of issuing a subpoena the police obtained a search warrant and searched the entire law office, including many files wholly irrelevant to their investigation.

In 1973, the Santa Clara police were investigating a sex offense and wanted to examine the psychiatric records of the victim, who had sought help at the Stanford University Psychiatric Clinic. The police had no reason to believe that the psychiatrist would disregard a subpoena or destroy evidence. Nevertheless, they obtained a warrant to search the files of the clinic. In the process of an unsuccessful effort to locate the records, they rifled all the patients' files, seeing at least the names of each person who had sought help there.

In the last two years at least three news organizations have been served with broad search warrants.

In April 1978 a warrant served by a sheriff in Helena, Montana on the Associated Press was quashed at the last minute when the police were at the newsroom.

In December 1977 a warrant was issued to search the premises of three San Francisco television stations for filmclips of a political demonstration.

In September 1977 a Providence, Rhode Island television station was searched pursuant to a warrant for the film of a picket line.

These examples show that the impact of Stanford Daily destroys the right of privacy in three major and equally important ways:

1. It makes vulnerable to general and unannounced search the files of third party recordholders like hospitals, doctors, lawyers and insurance companies who are not suspected of crimes.

2. It eliminates the reasonable expectation by patients, clients and others who seek professional or institutional advice or benefits that the information they provide about themselves will remain confidential.

3. It undermines the constitutional protection of news gathering by permitting general searches of newsrooms and the files and notes of journalists.

Framing The Appropriate Legislative Response

If ever a case could be made for overturning a Supreme Court decision by legislation, this is it. Since all three aspects of the Stanford Daily decision are equally important, Congress should address itself to each one. To do less is to ignore the public's demand for broad privacy protection. This was the position taken by Vice President Mondale shortly after Stanford Daily came down last June: "When serious commentators point out that every citizen's right to privacy may now be in jeopardy, we all have to listen."

In framing the appropriate legislative response, it is necessary to balance the three major privacy interests I have discussed against the legitimate interests of law enforcement. In light of the longstanding prohibition against information searches for "mere evidence," any claim that the police should be free to conduct

unannounced third party searches for records should be viewed skeptically. Before 1967 such searches were flatly illegal and, as we have seen, even after 1967, a search for "mere evidence" could only be directed at criminal suspects under "exigent circumstances." Moreover, there is no indication that the Supreme Court in *Warden* v. *Hayden* was sanctioning searches of personal records. It is hardly compelling, therefore, for the police to argue that they must now be permitted to engage in third party record searches which they were barred from conducting before Stanford Daily. There are virtually no reported decisions prior to Stanford Daily upholding the right of the police to conduct unannounced searches of records in the custody of innocent third parties. Since law enforcement managed to function for two centuries in this country without searching third parties, it is difficult to perceive any need for the police to start doing so now. Subpoenas have traditionally been regarded as entirely sufficient for obtaining evidence from law-abiding citizens.

The appropriate legislative response to the Stanford Daily decision is a return to the subpoena-first rule which governed third-party searches until 1978. As the dissenters in Stanford Daily pointed out, "[a] search, unlike a subpoena, will lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation" [436 U.S. at 573]. A subpoena, on the other hand, gives an innocent person in possession of sensitive information notice and the opportunity to produce the precise information requested or to seek to narrow the scope of the request. This is the most effective way to insure that "police officers [do not] ransack files . . . , reading each and every document until they have the one named in the warrant" [*Id.*].[1]

There is an even more compelling reason to require a subpoena-first rule to be used for third party records. Congress is currently beginning to consider a variety of legislative proposals to implement the recommendations of the President's Protection Study Commission. At the core of these recommendations is a proposal to limit government access to third party records by requiring that record subjects be notified of and given the opportunity to contest any government effort to obtain information about them for banks, hospitals, insurance companies or other third parties. Except in very narrow circumstances, this means that access could only be by subpoena, summons or other legal process served not only on the recordholder but on the record subject as well. This proposal has already been enacted into legislation covering certain financial records (the Financial Privacy Act of 1978), and its extension to medical, credit and insurance records, supported by the Carter Administration, is being considered by the 96th Congress. A warrant procedure authorizing unannounced searches of third party records would undermine this entire legislative effort disappointing the overwhelming public majority which supports it, according to the recent Harris poll.

Even under a subpoena-first rule, of course, there will be circumstances in which the issuance of a search warrant for records would ordinarily be justified. These are when the target of the search is (a) a criminal suspect, (b) in possession of contraband or the fruits or instrumentalities of a crime, or (c) likely to destroy or remove evidence if notice is given. These are the "exigent circumstances" under which a search for "mere evidence" would be permitted by the rule in *Warden* v. *Hayden*, and they should be incorporated, with appropriate modifications, into the subpoena-first legislation which we are urging you to adopt. A variety of bills have been introduced to achieve this result, and we endorse the general thrust of each of them. See H.R. 1373, introduced by Mr. Gudger; H.R. 1305, introduced by Mr. Sawyer; H.R. 368, introduced by Mr. Green; H.R. 322, introduced by Mr. Fish; H.R. 1437, introduced by Mr. Quayle; and H.R. 380, introduced by Mr. Guyer.

The Justice Department Proposal (H.R. 3486)

The Justice Department has drafted an imaginative proposal to protect "First Amendment materials" from the consequences of Stanford Daily. We urge the Subcommittee to broaden the proposal to cover all third party materials. First, however, I would like to draw your attention to two ways in which H.R. 3486 improves upon the bills listed above.

In one respect, H.R. 3486 provides ever greater protection for documentary materials compiled in connection with First Amendment publishing activities than

[1] In his dissenting opinion, Justice Stewart points out inevitable privacy invasion resulting from the execution of a warrant authorizing a document search: ' In order to find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document to see if it is the correct one. I thus fail to see how the Fourth Amendment [warrant procedures] would provide an effective limit to these searches [436 U.S. at 573 n. 7]."

do the proposals discussed above for protecting the records held by third parties not engaged in such activities. Thus, under H.R. 3486, the "work-product" of a journalist or any other person preparing information for public dissemination could not be obtanied by a search warrant under any circumstance short of probable cause to believe that the person is engaged in crime. We strongly endorse this key safeguard of First Amendment publishing activities.

We also endorse the broad jurisdictional scope of H.R. 3486, which would cover state and local as well as federal law enforcement officials.[2] Stanford Daily involved a local police search, and as we have seen, the temptation to conduct surprise searches of newsrooms appears to be greatest at that level. We agree with the Justice Department that Congress has the power to restrict state and local police activities in order to safeguard important privacy rights. Congressional Power in this area is derived both from the Commerce Clause of the Constitution which authorizes federal protection of interstate communication and business, and under the Enabling Clause (Section 5) of the Fourteenth Amendment which authorizes "appropriate legislation" to enforce the Due Process Clause against state action. A memorandum of law supporting this conclusion is attached as an appendix to my testimony.

Clearly, the Justice Department is to be commended for this imaginative effort to remove one of the three dangerous ways in which the right of privacy has been undermined by Stanford Daily. We support the protection in H.R. 3486 of journalists and others engaged in First Amendment publishing activities. Nevertheless, we have grave reservations about acting to protect journalists without also returning to the traditional subpoena-first rule for other third parties not suspected of crime. For all the reasons outlined above, we urge the Subcommittee to act decisively to restore the privacy rights of all the victims of Stanford Daily. Not to do so would be to sanction a major erosion of privacy.

Finally, there are several features of H.R. 3486 which we believe require amendment in order to avoid creating more problems than the bill is intended to resolve. First, the criminal conduct expection in Sections 2(a) and 2(b) would permit search warrants for the receipt or possession of information relating "to the national defense, classified information, or restricted data." This is an extremely broad category of information, and would appear to cover such controversial materials as the Pentagon Papers, the Glomar Explorer story, or any other arguably classified information being prepared for publication. Surprise searches of newsrooms should not be authorized for information whose publication is protected by the First Amendment.

Whether or not the espionage laws can constitutionally be used to prosecute a person who publishes information pertaining to the national defense—and we strongly maintain that they cannot—the surprise search of a newsroom to seize materials being prepared for publication would be a de facto prior restraint wholly inconsistent with the First Amendment. Indeed, the authorization of such a search by Congress would be worse than the sanctioning of an effort by the government to obtain a judicial order barring the publication of information on national defense grounds.

A second troublesome feature of H.R. 3486 is its permissive approach to searches by "non-work product" materials, In addition to the broad classified information exception which applies to both "work product" and "non-work product" materials, documents other than work product may be seized pursuant to Section 2(b)(2) under a law standard of "reason to believe" that death or serious bodily injury can thereby be prevented. While we recognize the importance of this exception, we submit that it should be covered by the same "probable cause" standard applicable to the criminal conduct exception. We are also concerned that the "destruction exception" applicable to nonwork product materials under Section 2(b)(3) could provide the basis for newsroom searches of all types of materials whenever a media company has a policy of routinely destroying documents after publication. This latter problem is magnified by the fact that newsrooms are unlikely to separate "work product" from "non-work product" materials, so that any search that is conducted under the proposed statute is likely to uncover both.

Another disturbing provision permits a search warrant to be issued for nonwork product materials after "all appellate remedies have been exhausted" or when "delay . . . would threaten the interests of justice." This would permit the police to seize documents whenever it is dealing with a recalcitrant journalist.

[2] H.R. 1373, H.R. 1305 and H.R. 322 apply only at the Federal level, although they cover all third party records.

We urge this Subcommittee to address each of these problem areas in H.R. 3486 and to combine the good features of the Administration's bill with the broader protections for all third parties contained in H.R. 322, H.R. 368, H.R. 380,H.R. 1305, H.R. 1373 and H.R. 1437.

CONCLUSION

Congress should act swiftly on legislation to protect all persons against the Supreme Court's intolerable erosion of privacy protections in the Stanford Daily decision. The ACLU is encouraged by the broad bi-partisan support given legislative efforts in this area, and looks forward to working closely with this Subcommittee to develop a strong and effective response to a serious constitutional problem.

Thank you.

APPENDIX

AMERICAN CIVIL LIBERTIES UNION,
Washington, D.C., June 16, 1978.

MEMORANDUM

Re congressional power to restrict third-party searches by State and local officials.
To: Interested parties.
From: American Civil Liberties Union, Legislative Office.

This memorandum responds to questions raised regarding the constitutionality of Congressional legislation restricting third-party searches by state and local officials, as well as by federal officers, in response to the Supreme Court's recent decision in *Zurcher* v. *Stanford Daily*. 46 LW 4546 (May 31, 1978). The bill introduced by Senator Bayh, S. 3164, as well as other bills (S. 3162—Senator Dole and H.R. 12952—Representative Drinan), reach third-party searches by "any person" acting under color of law, thereby encompassing state and local officials.

SUMMARY

We conclude that congressional power to include state and local officials within such legislation exists under both the Commerce Clause of the Constitution (Art. I, Sec. 8, cl. 3) and the Enabling Clause of the Fourteenth Amendment (14th Amendment, Sec. 5). We also note that precedent for congressional legislation regulating state and local police practices is found in the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[1] which restricts electronic surveillance by state and local, as well as by federal officials.

COMMERCE CLAUSE

"It is established beyond peradventure that the Commerce Clause of Article I of the Constitution is a grant of plenary authority to Congress." [2] It is also well settled that "(e)ven activity that is purely intrastate in character may be regulated by Congress where the activity combined with like conduct by others similarly situated, affects commerce among the States . . . ." [3] Since S. 3164 protects the freedom of the press as well as the rights of other individuals, the bill is sustainable under the broad sweep of the Commerce Clause as a regulation affecting interstate communication.[4] Since the bill also secures the offices and business premises of other individuals,[5] its protection of perhaps wholly intrastate activity will surely have a significant impact on interstate commerce in other areas besides communications.

The recent case of *National League of Cities* v. *Usery*,[6] in which the Supreme Court invalidated the extension of the minimum wage and maximum hour pro-

[1] 18 U.S.C. §§ 2510–2520.
[2] *National League of Cities* v. *Usery*, 426 U.S. 833, 840 (1976).
[3] *Fry* v. *United States*, 421 U.S. 542, 547 (1975).
[4] The issue of Congressional power to protect the news media arose in a context similar to the current debate 6 years ago when considerable interest for a newsmen's "shield" bill followed the Supreme Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). The issue was extensively researched and briefed by the Congressional Research Service of the Library of Congress, which this memorandum relies on heavily. See generally "Newsmen's Privilege: A Testimonial Privilege for Representatives of the News Media," at 23–25, Congressional Research Service, Library of Congress, 76–116A, revised June 16, 1976.
[5] See *Zurcher* v. *Stanford Daily*, 46 LW 4546, 4554 (May 31, 1978) (Stevens, J., dissenting).
[6] 426 U.S. 833 (1976).

visions of the Fair Labor Standards Act to employees of states and their political subdivisions, is distinguishable from the regulation of police practices embodied in S. 3164. In National League, the Court stressed that these wage and hour "determinations are 'functions essential to separate and independent existence', so that Congress may not abrogate the states' otherwise plenary authority to make them".[7] The Court recognized that "there are (some) attributes of sovereignty attaching to every state government which may not be impaired by Congress . . .".[8] The "attributes of sovereignty" referred to in National League involve fiscal determinations which have historically been left to the judgment of state and local officials. In deferring to the maximum-grant limitation set by Maryland welfare officials in *Dandridge* v. *Williams*,[9] the Court stated that "the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds". The protections against intrusive and unnecessary third-party searches embodied in the proposed legislation, however, do not involve this deference to fiscal determinations. The protections involve constitutional concerns for privacy and personal security, based on a Congressional finding that the legislation's provisions will enhance the Fourth Amendment's proscription of unreasonable searches and seizures. Uniform national police procedures restricting third-party searches do not impair the "independent existence" of states and localities as did the budgetary strain struck down in National League. Furthermore, state and local police forces currently must follow many uniform procedures, including restrictions on electronic surveillance embodied in the Omnibus Crime Control and Safe Streets Act of 1968,[10] discussed infra at 7.

FOURTEENTH AMENDMENT

The Enabling Clause (§ 5) of the 14th Amendment by definition allows Congress to reach state and local officials. The Amendment has been termed "the centerpiece" of "the basic alteration in our federal system wrought in the Reconstruction era".[11] The clause gives Congress the power to enforce the provisions of the 14th Amendment "by appropriate legislation". In *Katzenbach* v. *Morgan*,[12] the Supreme Court ruled that:

> By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I § 8, cl. 18.

Accordingly, *Katzenbach* held that the formulation of the reach of the Necessary and Proper Clause established in *McCulloch* v. *Maryland* was the measure of what constitutes "appropriate legislation" under § 5 of the 14th Amendment:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[13]

Applying the M'Culloch standard, Katzenbach sustained the constitutionality of § 4(e) of the Voting Rights Act of 1965 as a valid exercise of Congressional power under the Enabling Clause of the 14th Amendment. In so doing, the Court explicitly held that an independent judicial determination of the unconstitutionality of the state law precluded by Congress in that Act was not required to uphold the Congressional enactment. Similarly, the fact that a third-party search may not in each instance make out a violation of the 14th Amendment does not render Congress powerless to extend the legislation to state officials. The determination by Congress that the restrictions on third-party searches embodied in the proposed legislation will enhance the purposes of the Fourth and First Amendments, made applicable to the states by the 14th Amendment, is sufficient to sustain the legislation under *Katzenbach* v. *Morgan*. Section 2 of Senator Bayh's S. 3164, the Citizen's Privacy Protection Amendment of 1978, explicitly states that the bill's purposes is "to assure the rights of citizens under the 4th and 14th Amendments

[7] *Id.* at 845–46 (citations omitted).
[8] *Id.* at 845.
[9] 397 U.S. 471, 478 (1970).
[10] *Supra* note 1.
[11] *Mitchum* v. *Foster*, 407 U.S. 225, 238–39 (1972).
[12] 384 U.S. 641, 650 (1966).
[13] 4 Wheat. 316, 321, 4 L. Ed. 579, 605 (1819).

of the Constitution and to protect the freedom of the press under the 1st Amendment",[14] and thereby rests on valid constitutional grounds under the Katzenbach decision.

Several cases make clear that the broad Congressional authority to regulate state operations under § 5 of the 14th Amendment was not diminished by the National League opinion, which involved only regulations pursuant to the Commerce Clause which threatened the states' "independent existence." In that case, the Court explicitly distinguished § 5 of the 14th Amendment (along with the spending power) as a source of Congressional authority that might support intrusions into state operations that would be impermissible if grounded on the Commerce Clause.[15] Four days later, in *Fitzpatrick* v. *Bitzer*,[16] the Court sustained the application of the remedial provisions of Title VII to state governments. In so doing, the Court expressly noted that the challenged extension of federal regulation to the states was an exercise of Congressional power under § 5 of the 14th Amendment, while the extension struck down in National League was not.[17] The Court stated:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority.[18]

In the recent case of *Monell* v. *Department of Social Services of the City of New York*,[19] the Court stated that "(t)he Tenth Amendment's reservation of nondelegated powers to the states is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." The Court therefore concluded that National League was irrelevant to the constitutional issues involved in the Monell case, the former being limited to the Tenth Amendment's reservation of nondelegated powers to the states. The protections against third-party searches embodied in S. 3164 involve constitutional determinations made applicable to the states through the 14th Amendment as in Monell, and do not involve the reservation of nondelegated powers as in National League.

The case of *Oregon* v. *Mitchell*,[20] which held that Congress could lower the voting age to 18 in federal elections but not in state elections, did not overrule Katzenbach, and is distinguishable from the constitutional issues involved in S. 3164.[21] The Oregon Court emphasized the states' explicit power in the Constitution to regulate voting qualifications in their own elections. Art. I, § 2 of the constitution provides that in determining the number of a state's representatives, only three-fifths of the slave population should be counted, and that qualifications of voters for those representatives should be the same as those established by the states for electors of the most numerous branch of their respective legislatures, Article I, § 4 provides that, subject to Congressional veto, the states shall prescribe the times, places, and manner of electing representatives.[22] The states are nowhere in the Constitution given explicit authorization to regulate police practices in the fashion of S. 3164. Moreover, police procedures have historically been uniformly regulated on a national basis by Congress.[23]

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[14] S. 3164, Sec. 2, 95th Congress, 2d session (1978). The issue of Congress' power to reach the States arose with respect to the coverage of title VII of the Civil Rights Act of 1964 by virtue of the Equal Employment Opportunity Act of 1972. The constitutionality of the 1972 Act was extensively briefed before the Supreme Court in the 1977 case of *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), though the Supreme Court did not rule on the issue since it was neither raised in the court below nor presented in the jurisdictional statement. This memorandum draws extensively on the Brief for Appellees in that case, prepared by ACLU Legislative Counsel Pamela S. Horowitz. See generally Brief for Appellees at 19-28, *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977).

[15] 426 U.S. at 852, n. 17.

[16] 427 U.S. 445 (1976).

[17] *Id.* at 453, n. 9.

[18] *Id.* at 452.

[19] 46 LW 4569, 4578, n. 54 (June 6, 1978).

[20] 400 U.S. 112 (1970).

[21] One commentator, Professor Lawrence H. Tribe, terms the Oregon decision "incomprehensible," since there were five separate opinions in the case, none commanding a majority. Four Justices concluded that Congress could lower the voting age in both Federal and State elections; four found no congressional authority to reach either election. Justice Black, who announced the Court's judgment, was the only Justice who found congressional power to regulate only Federal, but not State elections. L. Tribe, "American Constitutional Law" 266-67 (1978).

[22] *See* 400 U.S. 155 (separate opinion of Harlan, J.).

[23] *See, e.g.*, 18 U.S.C. §§ 2510-2520 (Omnibus Crime Control and Safe Streets Act of 1968).

PRECEDENT FOR CONGRESSIONAL REGULATION OF STATE POLICE PROCEDURES

Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[24] which authorizes civil and criminal sanctions for the illegal electronic surveillance of a citizen by "any person," is a valid precedent for congressional legislation regulating state and local police practices. Several cases have recognized that the purpose of Title III, like S. 3164, is to preserve individual privacy by setting uniform standards for the judicial authorization of wiretap searches for legitimate law enforcement purposes.[25] In *United States* v. *Giordano*,[26] Justice White, also the author of *Zurcher* v. *Stanford Daily*,[27] wrote:

> The purpose of the legislation, . . . was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the act . . . The judge must make certain findings before authorizing interceptions, including the existence of probable cause. [28]

The purpose of the legislation proposed by Senator Bayh and others is to prohibit third-party searches unless a judge makes a finding of probable cause that the persons in possession of the evidence sought may be involved in the crime under investigation or would destroy the evidence.

EVIDENTIARY AND SUPREMACY CONCERNS

Since a constitutional basis for S. 3164's application to state officials exists, any evidence seized in violation of the bill would be inadmissible in state as well as in federal court proceedings. In *Adams* v. *Maryland*,[29] the Supreme Court upheld a federal statute proscribing the use as evidence in any court (including state courts) of testimony given by witnesses in congressional inquiries. The Court wrote that "since Congress in the legitimate exercise of its power enacts 'the Supreme Law of the Land', state courts are bound . . . even though it affects their rules of practice".[30] In the Omnibus Crime Act,[31] Congress specifically provided for the exclusion of illegally seized wiretaps in all proceedings:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, . . . in or before any court, grand jury, . . . or other authority of the United States, *a State, or a political subdivision thereof* if the disclosure of that information would be in violation of this chapter.[32]

In the event of a conflict between the federal statute and a state law subsequently or previously enacted, the federal law would, by virtue of the Supremacy Clause (Art. VI, cl. 2) preempt the state law.[33] There would appear to be nothing to preclude the states from enacting even stronger safeguards than those embodied in the Congressional legislation, though any state statute must at least encompass those safeguards enacted by Comgress as "the Supreme Law of the Land".

CONCLUSION

The ACLU Legislative Office concludes that Congress possesses the constitutional power to include state and local officials in legislation restricting third-party searches. Cases limiting congressional power over the states are clearly distinguishable from the constitutional issues involved in legislation to restrict searches and seizures. Congress has regulated state and local police practices in the past, and is not precluded from doing so in the search and seizure context.

You may proceed.

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[24] *Id.*
[25] *See, e.g.*, Application of U.S. Authorizing Interception of Wire Communications, 413 F. Supp. 1321 (E.D. Pa. 1976); *Carter* v. *State*, 337 A.2d 415, 274 Md. 411 (1975).
[26] 416 U.S. 505 (1974).
[27] *Supra*, note 5.
[28] 416 U.S. at 514–515.
[29] 347 U.S. 179 (1954).
[30] *Id.* at 183; *see also, Ullman* v. *United States*, 350 U.S. 422, 434–36 (1956).
[31] *Supra*, notes 1, 32.
[32] 18 U.S.C. § 2515 (emphasis added).
[33] See *Swift & Co.* v. *Wickham*, 382 U.S. 111, 120 (1965); *Gibbons* v. *Ogden*, 9 Wheat. 1, 211, 6 L. Ed. 23, 73 (1824); see also *Jacobsen* v. *Massachusetts*, 197 U.S. 11, 25 (1905), holding that a local regulation of official practice, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the general Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.

Mr. SHATTUCK. Let me start by trying to put in perspective the privacy issues which you're considering today in the context of the specific legislative proposals before you.

In recent years there has been an explosion of the amount of personal information that is collected by so-called third parties, such as banks, insurance companies, doctors, hospitals, law offices, and the Government.

This information is widely and increasingly disseminated and used to make judgments about people—judgments which in many instances the people are prepared to have made about them.

Obviously if you are going to a doctor you want the doctor to judge whether or not you are sick. If you are applying for insurance you want to have your insurance application properly treated.

But you generally don't consider the information that you provide on these applications and to these third parties as widely available to others. But in fact, what we see increasingly and I think this has been demonstrated by the work of this subcommittee and by the Congress in general and by the courts, is the wide dissemination of personal information collected by third parties outside the relationship for which it is originally collected.

Now as this continues, I think the public is getting increasingly concerned about it.

Two weeks ago a national poll conducted by the Lou Harris Associates showed that 74 percent of the American public now thinks that we are near a so-called Orwellian society, where the Government knows everything about everyone.

I don't know whether that is the case, but that's the way a lot of people feel. On the other hand, the poll also showed that 67 percent of the respondents thought it would strengthen their rights of privacy enormously for new legislation to be enacted.

And I think most important to the issues before this subcommittee, 91 percent of the public in this Harris poll thinks that a key privacy protection would be to give notice and a chance for a person to be heard when there is an attempt by the Government to get access to records about that person in the hands of third parties, like banks, insurance companies, doctors, and employers.

Now this is the context in which I think that last year's Supreme Court decision in the *Stanford Daily* case should be seen. That decision struck not one, but three major blows at the constitutional rights of privacy.

First, it removed all protections against surprise searches, unannounced searches by the Government of the files and records of innocent third parties.

Second, it made the subjects of those records, the people whose records were collected by banks, insurance companies and the press, subject to indirect search, so that they couldn't do anything at all to protect the confidentiality of that information.

And third, because the case involved the search of a newsroom, it made the press particularly vulnerable to having confidential materials, like reporter's notes, seized at any time if the police think that infora-tion would be useful.

Mr. KASTENMEIER. Mr. Shattuck, I regret to interrupt you at this point, but we do have a recorded vote on the floor which we must

attend to and since we are just getting into it, it probably would be better that we go immediately and return promptly.

So that being the case, I would like to recess the committee for 10 minutes for us to take a vote and return. I beg your indulgence.

Mr. SHATTUCK. Thanks, Mr. Chairman.

[Recess.]

Mr. KASTENMEIER. The committee will come to order. When we recessed Mr. Shattuck was in the early presentation of his testimony and was, in fact, describing the three major aspects of the curtailment of the right to privacy represented by the *Stanford Daily* decision.

Mr. Shattuck?

Mr. SHATTUCK. Thanks, Mr. Chairman. Let me quickly review those again. The decision would cut deeply into privacy in three ways. For the very first time, at least in my research, by permitting searches of purely innocent people, not suspected of any crimes.

Second, by eliminating any expectation of confidentiality that people whose records are held by third parties might have.

And third, of course, as you have been exploring already this morning, by cutting deeply into the first amendment privacy of the press to protect their sources and materials.

This decision was probably the worst in a long line of recent Supreme Court cases which I have cited in my prepared statement that I think it is fair to say have virtually abolished all constitutional protections for records and private information as far as Government searches are concerned, except pursuant to a warrant, pursuant to the kind of search warrant that was issued in the *Stanford Daily* case.

So what we have, I think, following *Stanford Daily* and these other decisions, is a return in many respects to the old concept of a general warrant.

A general warrant, of course, was the concept out of which the fourth amendment itself sprang. And the general warrant did permit the crown officers who executed it during the colonial period to conduct searches of people who were innocent and searches that would go to virtually any kind of information or documents or materials that they might have.

Now there are three key elements to the *Stanford Daily* search which make it very much like the searches that are, in fact, general warrants.

First, we are dealing with innocent persons; second, the searches are a complete surprise; and third, the police are permitted to rummage through files and documents to find what they are looking for.

The Stanford Daily offices of course were searched for some 6 or 7 hours by the police who turned up all kinds of material in order to obtain the photographs of the demonstration that they were looking for.

Before the *Stanford Daily* case, it wasy generally accepted that subpenas, not search warrants would be used to obtain documents and private files from innocent people, and this would give the target of the search notice of the fact that the search was going on and an opportunity to contest.

The only circumstances prior to *Stanford Daily* which a subpena would not be used, were where the person who had the materials that were to be searched was in fact a criminal suspect, as was the case in *Warden* v. *Hayden*, which was decision on which the Supreme Court relied, and I think improperly relied, in its decision in *Stanford Daily*.

The other exceptional circumstances are where there was evidence that materials would be destroyed if notice were given or where the materials were actually contraband or the fruits and instruments of a crime.

But after *Stanford Daily*, all of these limitations are gone. And in practical terms, I think what this means is an extraordinary expansion of the kinds of searches that can be conducted pursuant to warrant.

You have already heard about reporters and press searches, but there are searches of patients and clients, searches of doctors' offices. And I think that patients and clients of lawyers are going to be very hesitant to divulge sensitive in formation about themselves if they can be—the offices of the doctors or lawyers with whom they are dealing can be searched.

I think contributors to controversial organizations will think twice before making contributions if the files of those organizations can be searched pursuant to warrant, without any kind of notice.

But I would like to go over in some detail with you for the record, I think, the kinds of examples of the practical impact that this *Stanford Daily* decision will have.

On pages 8 and 9 of my testimony I have cited a number of examples. The first one comes from the petition for rehearing on the *Stanford Daily* case and involves a hypothetical which turns out to be not that hypothetical—lawyers' files which contain evidence relative to a criminal investigation of the lawyers' client are subject to search.

And there would be no way for the police, in executing a warrant for that search, to avoid searching through the files of the lawyer which didn't relate to the materials that were named in the warrant.

There are a number of other examples that are, in fact, actual cases that have happened since the search in *Stanford Daily* was conducted.

In one case, cited on page 9 of the testimony, a San Diego case, the father of a criminal defendant who found an incriminating document and delivered it to the defendant's lawyer, apparently triggered a search warrant by the prosecutor which went to the lawyer, and the police searched the entire law office, even though they were simply looking for the supposedly incriminating single document.

In another case, the Santa Clara police in 1973 were investigating a sex offense and wanted to examine the psychiatric record of the victim who had sought help at the Stanford University psychiatric clinic.

The police had no reason to believe that the psychiatrist himself would destroy evidence, but they nonetheless obtained the search warrant to search the entire psychiatric clinic of Stanford University, and in the process, of course, obtained names or went through the names of all the people who had obtained assistance from that clinic.

And then there are the three news organizations that were served with broad search warrants after the Stanford Daily search was conducted.

There are three other cases that I have not cited in my testimony that just recently were brought to my attention. A search in July 1978 by the St. Paul, Minnesota Police Department of the law offices of an attorney of a person who was under investigation for liquor law violations.

And the law office was searched—not the person in question. And that case is now on appeal before the Minnesota Supreme Court.

And I think for the record I would like, Mr. Chairman, to submit the appellate briefs and materials which I think would be of interest to the subcommittee.

Mr. KASTENMEIER. Certainly.

[Information is presented in Appendix 1–B.]

Mr. SHATTUCK. There was recently another disturbing search of a law office in Los Angeles. A 60–person law firm, Kaplan, Livingston and Berkowitz, in April of this year, April of 1979, were searched in connection with a medical fraud investigation involving a client.

But again, there was an attempt by the police to search the files, many of the files in that law office without giving notice to the law firm.

Now the law firm made a challenge to the search and it was interrupted in midcourse when the superior court judge issued a restraining order barring the search from going forward.

And I think the judge's opinion on the restraining order is well worth quoting, because I think he indicates how disturbing this kind of search is.

The judge says, "If a search warrant of this kind can be upheld, either a reckless attorney general or a corrupt judge can give the power to go through offices. I see jackboots and armbands in this search warrant," said Judge Jerry Pacht. of the Los Angeles Superior Court.

And that case, interestingly enough, has been appealed by the State attorney general in California. They are seeking to go forward with the search on the ground that the California Attorney General's Office now has a policy, an announced policy of conducting these kinds of searches of lawyer's offices pursuant to a warrant in white collar crime cases.

And they expressly rely on the decision in *Stanford Daily* in order to conduct those searches, so we are really dealing with a very immediate and practical problem.

I mentioned the cases of lawyers and doctors. Obviously there are many other potential subjects and there probably are searches of subjects right now going on in the third party search area.

So if ever there was a case to be made for overturning a Supreme Court decision by legislation, this is it.

I think since all three of the aspects of the *Stanford Daily* decision are equally important, I would urge Congress to address each one of them, because I think to do anything less in light of the kinds of abuses that I am outlining, is simply to sanction the invasion of privacy by not covering all three parts in as practical a way as possible.

I would like to remind you for the record this was the position the Vice President took shortly after the *Stanford Daily* decision came by.

He was quoted as saying, "Every citizen's right to privacy may now be in jeopardy. We all have to listen."

The proper response to the *Stanford Daily* decision is a return to the subpena first rule which governed all third party searches until 1978.

But apart from this rule, which I have outlined extensively in my testimony, I think there is a very immediate and compelling reason to go to the subpena first approach for all third-party records, and that

is, as you know Mr. Chairman, Congress is now considering a wide variety of legislation proposals coming directly from the President's Privacy Protection Study Commission recommendations.

At the core of these recommendations and in legislation pending before the Government Operations Committee and in the Senate, is a proposal to limit the Government's access to third-party records by requiring that the record subjects, not just the doctors, lawyers, news organizations, et cetera, but that the record subjects themselves be notified and given the opportunity to contest any Government effort to obtain information about them.

This demonstrates that were you not to take the broad approach in this bill, I think you would be to a certain degree undermining the effort that is underway right now to provide the kind of notice and an opportunity to challenge for third parties in the context of medical records, credit records, and other records which are subject to protection.

Obviously, last year's Financial Privacy Act was the beginning of that process. Now even under the subpona first rule, of course we're aware of the fact that there are going to be circumstances in which a search warrant would be justified if it could be demonstrated that particular circumstances existed.

The principal one is the criminal suspect that's not a third party. A criminal suspect on whatever standard, is not a third party subject to the kind of protection we are talking about.

Second of all, those who are in possession of contraband or the fruits or instrumentalities of a crime are subject to search, under traditional fourth amendment law.

And then finally, perhaps somewhat more controversial and a little more difficult to apply, is an exception where there is a likelihood that materials may be destroyed or removed. One wants to be very careful with that exception, particularly in the area of press activities.

Now there is a wide variety of bills that have been introduced and are pending before your subcommittee, Mr. Chairman, which do address this broad third-party protection.

The most recent and I think the strongest is the bill that Mr. Railsback introduced yesterday, which has been introduced in the Senate by Senator Mathias. I am very pleased to note Mr. Gudger and Mr. Sawyer also are sponsors of broad third-party protections.

Let me just say a word or two about the Justice Department proposal and then open myself to your questions.

Mr. KASTENMEIER. Perhaps before, if I may again interrupt, you begin your Justice discussion, there is another recording vote on. We ought to go to the floor and return presumably one last time, Mr. Shattuck.

So bear with us and I'm sure a couple other people will come back, too.

Mr. GUDGER. I believe it is rather interesting to note that the absence of this committee could very well have affected the last vote.

The budget vote was enacted by a six-vote margin, and I think there were six of us that went to the House to cast ballots on the last vote.

Mr. KASTENMEIER. Well, this is on a rule. I don't think our vote will necessarily determine the outcome, but nonetheless for our purposes we must go.

And we will be in recess then.

[Recess.]

Mr. KASTENMEIER. The committee will come to order. Mr. Shattuck, you were about to review the Justice Department's proposal and then conclude your testimony.

Mr. SHATTUCK. Thanks, Mr. Chairman. The Justice Department's bill is an imaginative one in that it attempts to define and protect first amendment materials. But we are very disappointed that it is as limited as it is, and pleased that the other bills referred to in my testimony, three of which are sponsored by members of your subcommittee, are broader.

But let me touch quickly in two respects——

Mr. KASTENMEIER. Do you consider them broader if, in fact, they apply only to U.S. 18—U.S. Code of Federal Testimony?

Mr. SHATTUCK. It was true that, I believe, three of the seven bills which you have referred to on page 14 of my testimony only apply at the Federal level, although they cover all third-party records. We would strongly urge that they be broadened to cover State and local third-party records as well.

Mr. KASTENMEIER. Do you see any constitutional difficulties with that? If Federal law is extended to all third parties, State as well as Federal, this sort of protection?

Mr. SHATTUCK. I don't believe so, Mr. Chairman. The memorandum that I have submitted with my testimony covers the constitutional question.

Let me just summarize it very quickly by saying we believe that under the commerce clause, any activity in general which affects interstate commerce and which is interrelated with other activities affecting interstate commerce does permit Congress to go into the regulatory business, particularly with enforcement of the constitutional rights under section 5 of the 14th amendment.

An analogous piece of legislation in this area is the 1978 wiretap statute. There is an important States rights concept underlying the statute, and that is that it sets minimal standards,but certainly not all the procedures that would be employed on a State-by-State level.

And many States have, in fact, adopted their own wiretap laws following the enactment of the 1978 act, which set procedures that are unique but nonetheless comport with the general standards set forth in the wiretap bill.

In the context of the third-party records question, obviously there will be differences from State to State of particular types of privileges—attorney/client privileges, doctor/patient privileges—and those could well be embodied in State laws enacted following the passage of a Federal statute which would set minimal procedures in the area.

There is one other way in which the Justice Department proposal, I think, is good in addition to its coverage of State and local, which I would just like to mention.

And that is that it gives particular protection to the work product materials of journalists, the notes and most sensitive information that is prepared in the course of getting materials ready for first amendment dissemination. There is no exception to the subpena-first requirement for those materials except in the case of criminal suspects.

So you cannot search for a reporter's notes on an assumption that they may be destroyed or the notice would otherwise lead to difficulties for law enforcement.

That is a very important first amendment protection and we recognize that in the bill.

There are a number of aspects of the Justice Department proposal which concern us. I would just like to mention one in concluding.

There is an exception to the supena-first rule with respect to information that "relates to the national defense, is classified information or restricted data."

The effect of that exception is that it really effectively creates a form of prior restraint, a very dangerous one.

It would apply quite arguably to cases like the Pentagon papers case, since the Pentagon papers were materials that were classified and were held by the New York Times in preparation for publication.

So a search warrant could authorize the police to go into the New York Times to seize the Pentagon papers. It would not even be necessary to go to court to get a prior restraint.

That is a very disturbing and hopefully unintentional meaning of that provision in the Justice Department bill. We would urge the subcommittee to address that so there would not be authority to search for supposedly classified materials with no notice to journalists, since this would, in very real terms, amount to a form of prior restraint.

Well, thank you Mr. Chairman. Let me just conclude by saying that I'm very happy to work with the subcommittee in expeditiously developing legislation and getting it to the floor of Congress.

We are not committed to any single approach, although we feel very strongly about the need to protect all third parties. And I think it would be a major mistake not to extend the bill as many members of the subcommittee seem to be thinking, because that would then sanction the very invasion of privacy which the *Stanford Daily* decision has created.

I would be happy to answer any questions or respond in writing. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Shattuck. Your statement suggests that the Supreme Court in the *Stanford Daily* case removed all privacy protection for persons not suspected of a crime.

Weren't there police searches of journalists conducted prior to the *Stanford Daily* decision or the fact situation?

Mr. SHATTUCK. There are no reported pre-*Stanford Daily* decisions that I or any of the other people who I know who have looked closely at this, have found that upheld search warrants directed at news organizations or any other third party recordholders. There simply aren't any recorded decisions.

Now that doesn't mean there may not have been instances, but it was certainly not the law that that kind of search could be conducted.

Mr. KASTENMEIER. Do you or does the ACLU have a bill of your own to offer as a model to solve this problem?

Mr. SHATTUCK. The bill that we feel is the strongest among all that been introduced so far, is the one that is sponsored by Mr. Railsback and was first introduced by Senator Mathias.

I don't know the number of it because it just went in yesterday. But it provides for all third-party coverage and has a criminal suspect exception that applies only to contraband.

Mr. KASTENMEIER. Well, we will certainly want to take a look at that bill and test that bill in terms of testimony of others including some from the Justice Department.

Do I understand you say that that we would be able to base it on a Commerce clause? Notwithstanding the fact that the individuals may not be Commerce in the ordinary context involved?

Mr. SHATTUCK. Well, I think there may become a point where it can be argued that the Commerce clause does not reach particular third parties.

I think that all the individuals——

Mr. KASTENMEIER. I am concerned because I think wiretapping and the Federal nexus to wiretapping and the ability to control it under title III, is somewhat distinguishable from this.

COUNSEL. Mr. Chairman, under the wiretap law the Congress reported not merely to control wiretapping or communications over the lines of communications—common carriers—by microphones, bugs, that sort of thing also—for which the only Commerce clause nexus would be the items clause themselves manufactured and then sold in interstate commerce would bring that situation much more closely than it might first appear on the surface to that particular factual situation.

Mr. KASTENMEIER. I thank counsel for that statement.

Mr. SHATTUCK. Mr. Chairman, if I could say that there is one other very important constitutional provision and that's section 5 of the 14th amendment which permits Congress to enact legislation to enforce constitutional rights.

If Congress were to determine that constitutional rights, until the *Stanford Daily* decision, were sufficiently important in this privacy area and wanted to carry them forward, it could make a factual determination that that was an area for enforcement.

Mr. KASTENMEIER. As far as the Mathias/Railsback approach, do you endorse it in its entirety? You have no particular exception conceptually to that approach?

Mr. SHATTUCK. The only exception is that that approach also does not solve the problem of the Pentagon papers that I just mentioned before, assuming that it could be construed, although we would strongly resist that construction that the Pentagon papers were contraband in some respect, or any other materials held by the press for publication that might be considered contraband.

Mr. KASTENMEIER. It doesn't use the term "classified."

Mr. SHATTUCK. No, that's right.

Mr. KASTENMEIER. Whatever term is used in the administration.

Mr. SHATTUCK. Off the top of my head, I think the legislative history of the bill could probably solve the problem I'm talking about without any amendment, but I think we need to look more closely at it.

Mr. KASTENMEIER. Well, I personally thank you for your testimony today. I am going to ask my colleague, the gentleman from North Carolina to assume the chair and continue. I am sure he has also some questions for you and will conclude the hearings this morning. I appreciate his doing that so I can attend a meeting for which I am somewhat late.

Mr. GUDGER. Mr. Chairman, thank you. I am pleased to take over. My questions to Mr. Shattuck are going to be very brief, but I do have one or two points that I would like to develop. Thank you, Mr.

Shattuck. I am gratified about your comments about the 14th amendment and the fact that section 5 of the amendment does give the Congress the power to enforce the rights which the 14th amendment protects.

Now, section I of the 14th amendment, of course, is the section that provides that no State shall make or enforce any law that shall ban a citizen of the United States, nor shall any State deprive any persons of life, liberty, or property without due process of law.

I presume that in reading the first section and the fifth section together, you are saying that if the Congress were to define a right of privacy from search and seizure in any instance where the search is against an innocent third party and the subject of the search was evidence only, that you feel that by declaring this right we may place a burden upon the States to recognize it by their own laws and by their own practices.

Because we could in effect, mandate that recognition. And you suggest that the surveillance provision of the Safe Street Act gives us some precedence in this area.

Is that the sense of what your testimony has been?

Mr. SHATTUCK. Yes; that is the sense of the testimony, but I want to stress that we're talking about minimum standards and not elaborate procedures or anything that would impact on the State court system.

Let's say the State of North Carolina has a magistrate system that differs from a judicial warrant system in North Dakota. There would be no reason for Congress to tell North Carolina precisely who ought to be making the determination as to who will be searched.

Mr. GUDGER. Thank you, I appreciate your drawing that distinction because I think it is a very important one.

Let me ask you a further question. Going down that trail, just an inch or two further, out of concern for the general lack of commerce clause connection in the State enforcement field and in the *Stanford Daily* situation for example, the act which I drew had restrictions in its terms only to Federal jurisdiction and was in effect defining Federal criminal practice and procedure.

It was in effect a procedural act rather than one that tried to define and declare a specific right of privacy under the 14th amendment.

You are suggesting that that approach presumes a constitutional problem which in your judgment does not exist, if we are specific in declaring this as a right deserving of protection and acknowledgement at the Federal and at the State level as a right contained within the privileges immunities definitions, we will say, of the 14th amendment?

Mr. SHATTUCK. That's right, Mr. Chairman, although I think again one can refer to the commerce clause even absent the 14th amendment, because, as counsel has suggested, and I would certainly agree, the wiretap statute, which has been held constitutional, does regulate a large number of techniques that in no way involve specific interstate activities, but there is an interrelationship between the conduct that is interstate and that which is intrastate in the wiretap statute.

I think the same thing would be true with respect to the kind of activities we are talking about in this bill.

Mr. GUDGER. One other very limited question that I would like you to comment on, if you feel free to do so now or perhaps you could comment on it by later correspondence to the committee.

You're aware, of course, that section II–A creates a protection for any work-product materials and section II–B refers to documentary materials other than work product.

It seems to me that the delineation between work-product materials and document nonwork product, may be very, very vague in many instances. The only situation it seems to me offers a clear parallel is the work-product immunity generally recommended under rules of discovery under the Federal Rules of Civil Practice.

So that my work product as an attorney may not be subject to discovery by opposing attorneys in civil litigation, whereas the documents which I have in my possession which are relevant to the controversy in litigation are clearly subject to being revealed or disclosed.

Do you feel that this might offer an area in which we might seek a line of definition between work product and nonwork product documents?

Mr. SHATTUCK. I think that sounds like a reasonable approach. I would like to think about it a little more and perhaps respond in writing.

There is one area in the work product/nonwork product distinction that I think raises some trouble that Mr. Davis was referring to earlier, and that is if there is a search authorized for nonwork product materials in an exception to the subpena first rule for those materials, which doesn't apply to work product, police are going to get in the door and once they are there, the newsroom is usually chaotic enough that it is not easy to distinguish between work product and nonwork product.

Once they are there, the search is likely to uncover a range of materials that include work product.

Now the practical solution to that is hard to come up with. I don't know whether you could simply eliminate some of the exceptions in the non-work-product area—that's what we have urged—or to raise the standard, for example, the standard of reasonable suspicion that you were talking about earlier. It could be raised to probable cause with respect to the life-endangering circumstances.

That would help.

Mr. GUDGER. If we were to take the broad route of trying to grant immunity and all innocent third parties from search and seizure of mere evidence, do you feel that it would be incumbent upon us to require the affidavit or other evidence on which the search warrant issues, to specify the document so as to avoid this riffling through vast batteries of material or sifting out entire file systems?

Do you see this as one of the shocking aspects of the *Stanford Daily* circumstance?

Mr. SHATTUCK. Yes, certainly. The most shocking aspect of it is that when there is a search warrant being executed by the police, it is the police who are making—or whoever is investigating, making the determination of what they ought to look at, unlike a subpena where you get a subpena and you have an opportunity to go up and check your files and pull out the document that is specified in the subpena.

So even when the warrant is specific, as to what is going to be

searched for, the police or the people executing the warrant are going to be going through the files to make a determination of where that material is.

I don't think it is enough just to provide for specificity in the warrants. That is precisely why a subpena-first rule is necessary.

Now where a warrant exception exists in some of these categories we have talked about obviously should be as specific as it possibly can.

Mr. GUDGER. Is there any justification in your mind for our having a broader rule of defining the subject of search than we have in the rules defining the item to be produced under subpena duces tecum?

Mr. SHATTUCK. A broader rule to define the subject of the search? I'm not sure I quite understand.

Mr. GUDGER. Do you feel that if a search for evidence is authorized against someone who is subject to search, say the newspaper is charged with some fraudulent practice and it is subject to being searched in that direction or in that connection, should the search warrant be as specific as a duces tecum subpena?

Mr. SHATTUCK. Yes; I think that is a very important point to make.

Mr. GUDGER. And should this legislation relate to points as well as the broad aspect of what areas of protection it's going to raise if it's going to deal with media protection, work product protection beyond media, say in the lawyer's situation, the media situation, et cetera?

Or protect all third parties in the possession of all items of evidence only? Do you still feel that specificity of the warrant should be required in any instance and should perhaps be as specific as the duces tecum subpena?

Mr. SHATTUCK. Definitely. I think that the evolution of the cases in this area, as I pointed out in the testimony, is very disturbing. There are warrants that have been upheld for searches of testimony "yet unknown."

The police go in and they are authorized by the warrant to search for materials which aren't specified. That should be addressed in the legislation as well.

Mr. GUDGER. I thank you very much for this very enlightening testimony.

As we have been taking your oral testimony here, I have been scanning this very excellent written testimony and I commend you for it and thank you very much for your contribution to this particular meeting.

Mr. SHATTUCK. Thank you, sir.

Mr. GUDGER. The meeting stands adjourned.

[Whereupon, at 12:45 p.m., the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, was adjourned.]

ZURCHER V. STANFORD DAILY

FRIDAY, MAY 25, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier and Gudger.

Also present: Bruce A. Lehman, counsel; Joseph V. Wolfe, associate counsel; Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order.

This morning we are meeting again on H.R. 3486 and other legislation relating to protections against certain searches conducted by government.

I will be joined momentarily by Mr. Gudger and Mr. Mazzoli.

It is my understanding Mr. Hansen has not yet arrived, but I would like to call up Prof. Mark Tushnet, Wisconsin Law School in Madison, and a very distinguished professor and student of this and other important public policy and legal questions.

I am very pleased to greet you this morning.

TESTIMONY OF MARK TUSHNET, PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN

Mr. TUSHNET. Thank you, Mr. Kastenmeier.

I have submitted a statement and I will just touch on some of the points in it. Then I will be happy to respond to any questions you may have.

[The statement follows:]

STATEMENT OF MARK TUSHNET, ASSOCIATE PROFESSOR AND ASSOCIATE DEAN, UNIVERSITY OF WISCONSIN LAW SCHOOL

My name is Mark Tushnet. I am Associate Professor and Associate Dean at the Law School of the University of Wisconsin. My primary concern in teaching and writing has been with problems of federalism and of congressional power with respect to state and local governments, and I am therefore pleased to appear before this subcommittee to discuss the constitutional aspects of H.R. 3486, the "First Amendment Privacy Protection Act of 1979."

I want to emphasize at the outset that my prepared statement will discuss only the constitutional aspects of the proposal—that is, does Congress have the power to enact the proposal, and, even if it does have that power, would the bill transgress constitutional limitations, particularly those arising out of the interests of state

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and local government. As you will see, I regard the two questions, of power and of limitation, as separate. My general argument will disregard the details of the proposal, except in one respect, and, more important, will largely ignore the policy arguments—the competition between first amendment and law enforcement interests—that you must consider. Again, there is one exception.

I believe that, ultimately, the policy and constitutional arguments collapse into one. That is, if you as members of Congress deliberately weigh the policy questions, and in particular the question of whether the gain to first amendment interests outweighs the impairment of state and local law enforcement interests, then you have discharged your constitutional obligations.

I will develop this argument in a moment, but there is one brief and another more extended preliminary point. First, I have spoken of first amendment "interests". In light of the unfortunate decision in *Zurcher* v. *Stanford Daily*, to which this proposal is a response, we know that the bill does not simply create remedies for constitutional violations; the activities it prohibits and for which it provides remedies are not themselves violations of the Constitution. At the same time, however, the activities clearly may directly affect freedom of inquiry and expression. Thus, the bill seeks to create a non-constitutional framework within which freedom of inquiry and expression may be pursued more vigorously than the first amendment itself requires. But this raises constitutional questions about the bill. Substantive first amendment law—for example, the prohibition on punishment of speech that does not incite to imminent lawless conduct—embodies the constitutional accommodation between freedom of expression and other interests, such as law enforcement. Non-constitutional "extensions" of the first amendment necessarily embody a different accommodation, less concernd with those other interests. To the extent that the other interests themselves have constitutional roots, as state and local law enforcement does, the new accommodation may be unconstitutional.

The second preliminary point deals with the application of the statute to officers of the United States. Many constitutional questions are foreclosed by the bill's use of a remedy of money damages rather than of exclusion from evidence. As to officers of the United States, all the bill says is that if they behave in a way of which Congress disapproves, though the Constitution does not, the United States will compensate those aggrieved by their misconduct. This is so obviously proper under the Constitution that extended discussion seems unnecessary. We know, for example, that most ordinary torts committed by government officials do not violate the Constitution; and yet the Tort Claims Act allows recovery by injured people.

This portion of the proposal, then, is supported by Congress' general power to act as employer and personnel manager, a power that may perhaps not be tied to any particular enumerated power in article I, section 8, but which is plainly inherent in the structure of our government. If one feels pressed, perhaps by concerns about intrusion on the powers of the executive branch to act as personnel manager, one can identify specific sources of power. The bill regulates behavior in connection with investigation of criminal offenses. Each federal crime is based upon some enumerated power—over the mails, over interstate commerce, over the armed forces, and so on. Limitations on investigatory activities as to each crime can be based upon the enumerated power that allows Congress to enact the criminal statute itself. That is, the power over the mails justifies both the enactment of the mail fraud statute and of limitations on the way mail fraud may be investigated. But all this is really unnecessary; the structural argument is overpowering anyway.

If there are constitutional questions raised by the proposal which deserve serious inquiry, they arise from the inclusion of state and local governments within its remedial sections and of their employees within its substantive sections. At this point, the distinction between congressional power and constitutional limitations must be carefully drawn. The bill obviously rests on Congress' power to enforce, by appropriate legislation, the guarantees of the fourteenth amendment. Many commentators have been troubled by the justification that some statute is an appropriate means of enforcing, say, the first amendment where the Supreme Court has already decided that the amendment does not compel states to adopt the statute's rules. Part of the concern has been fear that if Congress could reject a Supreme Court decision refusing to extend protection, it could also reject one extending protection. That, however, confuses questions of power with questions of limitation: the difficulty with a statute repudiating a protective decision is not that no grant of power authorizes the statute, but that the statute transgresses some limitation on the power granted.

Viewed in this way, section five of the fourteenth amendment is just like all the other grants of power to Congress. It authorizes Congress to adopt statutes that Congress regards as "necessary and proper" means for protecting the rights guaranteed by the first section of that amendment. And "necessary and proper," of course, means "reasonable." Thus, if the First Amendment Privacy Protection Act is a reasonable way of advancing first amendment interests, it is within Congress' power to enact. I have indicated that I do not want to address the policy questions raised by the bill, but I cannot refrain from expressing my own view that, given even the most modest notion of reasonableness, the bill is obviously within Congress' power to enact.

Somewhat more difficult is the question of whether the proposal would transgress limitations imposed by our federal system on Congress' powers. I can answer by pointing first to authority and then to principle. In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the Supreme Court upheld the extension of Title VII's prohibition on employment discrimination to state and local governments. Mr. Justice Rehnquist's opinion for the Court noted that Congress had exercised its power under section five of the fourteenth amendment, and that the other sections of the amendment, by their express terms, limited the powers of the states. Thus, Congress' section five powers may authorize more severe intrusions on state and local government than would be allowed under Congress' other powers. I must confess that I find the distinction between section five powers and other powers unpersuasive; after all, the commerce clause was intended to be, and has been interpreted to be, a severs limitation on the powers of the states, too. Further, the Court in *Fitzpatrick* addressed only an objection based in terms on the eleventh amendment, and its opinion leaves open the possibility that a statute might surmount an absolute eleventh amendment hurdle but fail in the face of a more general federalism objection.

Thus, authority alone, while it supports the constitutionality of the proposal is not conclusive. We must turn to constitutional principle. That principle is straight-forward: in our constitutional scheme of things, Congress is the primary guarantor of the interests of state and local governments. Congress is designed, structured, to enact legislation that intrudes on federalistic interests only in circumstances where it is reasonably clear that national interests are more important, in those situations, than the interests of state and local governments. You have the constitutional duty to conclude, before voting in favor of any legislation, that the proposal satisfies those conditions—that is, that the bill is wise public policy, all things, including its impact on state and local government, considered.

I believe, too, that as a matter of constitutional principle, your judgment should be conclusive of the federalism issue and that the courts have no proper role to play in reviewing congressional enactments for federalism reasons. But the Supreme Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), rejected, in my view wrongly, that position. What are *League of Cities*' implications for the present proposal? Unfortunately, *League of Cities* is a decision that is exceedingly hard to understand. I can offer two interpretations.

First, Mr. Justice Rehnquist's opinion for the Court faults the application of minimum wage legislation to states and cities because Congress tried to directly displace those governments' decisions about how they chose to perform integral governmental functions. One can play with the implicit distinction between direct and indirect displacement, but the same points can be made more generally. How do minimum wage laws affect government functions? Simply by increasing the cost of performing them. The proposed bill would do the same, as, indeed, do almost any federal laws applicable to state and local governments. Law enforcement officials are given a choice: pursue the prohibited course and be subject to monetary liability, or refrain from the use of an investigatory technique that they believe is better than other techniques in the situation facing them. Although the proposal would make states liable for monetary damages only if they chose, there are costs—perhaps non-monetary but nonetheless real—imposed by the intended deterrent effect of the statute.

The first interpretation of *League of Cities* would ask whether those costs are enough to invalidate the statute. Here two lines of authority are relevant. First, the general liability of state officials under 42 U.S.C. § 1983 has the same kind of deterrent effect as the proposal would, and that provision has not, of course, been invalidated on federalism grounds. Thus, the indirect costs to law enforcement through deterrence of preferred activities would not invalidate the act. Second, recent Supreme Court decisions suggest that the Court is working with a line, almost explicit in some of the opinions, between large monetary effects, which are constitutionally questionable, and small ones, which are not. Thus, it refused to

allow recipients of public assistance to recover benefits wrongfully withheld from them and refused to apply minimum wage laws to government employees, adverting in both cases to the size of the state's potential liability. Yet it upheld the taxation of attorneys' fees against the state and the sending of a notice to the same public assistance recipients, the effect of which will be to secure repayment for at least some of them, again adverting in both cases to the fact that the state's monetary liability would be small. The question then is whether the costs to the states, both monetary and in foregoing preferred activities, would be large or small. This s a factual issue to which *League of Cities* directs attention. Although I have not investigated the question, from all that I have read about the *Stanford Daily* case, t seems that the costs would be small; material covered by the bill appears to bei rarely central to criminal investigation and searches rather than subpoenas seem to be more rarely necessary.

The second interpretation of *League of Cities* is found in Mr. Justice Blackmun's concurring opinion, which treats the decision as involving, not just an assessment of the costs as the first interpretation has it, but a balancing of the national interest promoted by legislation against the intrusion on state and local concerns the legislation embodies. As I have said, it is your responsibility under the Constitution to determine whether or not that balance favors enactment of this bill, and I think that Mr. Justice Blackmun was wrong to suggest that the Court should rebalance the same items. But *League of Cities* has been decided, and, according to Mr. Justice Blackmun, the Court stands ready to determine for itself how the balance should be struck.

What are the implications for your deliberations? It is tempting to think that you should conscientiously evaluate Supreme Court decisions to pry out of them the relative weights the Court assigns to various interests, but I believe that that would be mistaken. First, I doubt that even the most diligent search through the reports would reveal enough to be helpful, even if you thought that you should anticipate the Court's balancing. But second, and more important, attempting to predict how the Court will balance national and state interests would be not just difficult but wrong in principle. After all, the Court's balancing involves exactly the same considerations that you will take into account—what I have called the policy issues—when deciding the fate of this bill. If there is to be any benefit from the Court's balancing, it must derive from the differences between the Court and Congress in evaluating the same interests. If you try to predict what the Court will do, you will be precluding any opportunity for a healthy interchange between two institutions with different perspectives. The balancing interpretation, then, leads us to the same point that pre-*League of Cities* authority, and constitutional principle, did: you discharge your constitutional duties by fairly considering the policy issues raised by this bill.

It is not easy to interpret *League of Cities*, and it may well be wrong to attempt to force it into a purely doctrinal framework. Perhaps the case should be understood as a reminder to you that among the policy issues you must consider is the impact the bill would have on state and local law enforcement efforts. I can hardly believe that you would have thought about the proposal without thinking about that impact, but if my appearance serves any purpose at all, it will be because I have brought the federalism issue directly to your attention.

That completes my constitutional analysis of H.R. 3486, but I do have the one detail that I said I would mention. The proposal, in section 4(a)(1), conditions its absolute liability for damages against states on a waiver of sovereign immunity. As a matter of constitutional law, it is reasonably clear that no such waiver is required. *Fitzpatrick* v. *Bitzer* and later cases go far toward establishing the proposition that Congress, if it believes it "necessary and proper," may impose monetary liability even on an unconsenting state and despite the terms of the eleventh amendment. All that seems to be required is a clear statement of an intention so to impose liability. The law of the immunity of states from liability determinations by federal courts is one of those constitutional swamps from which few emerge better off than before, and I can sympathize with the effort to stay away from it. I should point out, however, that the reference to waiver of immunity is unnecessary, since a state is always free to waive its immunity. Although this is indeed one of those policy issues on which your sensitivity to federalism issues gives you better judgment than an outsider, I must note that the proposal would be neater—in treating states and cities alike, for example—and more likely to accomplish its goals if it authorized civil actions against any state, not just against those which waive immunity.

I am pleased to have been given the opportunity to present my views on the constitutionality of H.R. 3586, and would be happy to discuss any matters of concern to you.

Mr. TUSHNET. My statement is concerned exclusively or almost exclusively with constitutional aspects of the proposed First Amendment Privacy Protection Act of 1979.

I want to get out of the way at the outset one preliminary detail about the bill, and that is a question I have really about its limitation of absolute liability for damages against States.

It conditions that liability on a waiver of sovereign immunity. As I indicated in my statement, I think it's reasonably clear as a matter of constitutional law that no such waiver is required.

It also makes the legislation somewhat asymmetrical. For example, localities would be liable without being able to present a good faith defense while States would not be liable unless they waive sovereign immunity and their employees, such as representatives of the Tennessee Bureau of Investigation, would have the good faith defense available.

That asymmetry just makes the legislation look a little awkward. I can understand why the provision is in the bill. The question of sovereign immunity and waiver and legislation imposing a waiver is a very tricky constitutional one, and it may make sense just to avoid that problem.

As I say, I just wanted to flag that.

Mr. KASTENMEIER. On that point, if I may interrupt you, I wonder why it was inserted. As you know, the bill is essentially a bill written by the Justice Department, which I was pleased, along with Mr. Railsback, to introduce in their behalf and at their request. It does not represent a product of our own.

I concede that. I assume they must have assumed that the question might be raised by the States and to forestall that they conceded the point, and forestalled the fact of raising the question.

Mr. TUSHNET. I assume that that is the reason.

Mr. KASTENMEIER. But it is your judgment that was not necessary and it makes the bill somewhat, as you point out, asymmetrical.

Mr. TUSHNET. Yes; I think the case law is becoming clear. It's still not absolutely established, but it is becoming clear that if legislation clearly indicates an intention on the part of Congress to impose liability on the States, the 11th amendment poses no barrier to such legislation.

There may be some qualifications to that. I touch on them in my statement, but I think those qualifications would not affect this legislation either.

At the same time, of course, most of these searches are likely to be conducted by local officers, employees of local police agencies, and so on, and it may not be worth worrying about. It may be worth conceding the soverign immunity question.

I should also note, however, that the legislation may not gain a great deal for having done so because in a large number of States there are statutes by which the State agrees to indemnify its employees for personal liability and many States' attorneys general are asserting such indemnification statutes as 11th amendment barriers to actions against their employees.

Those claims have not succeeded. Nonetheless, to the extent that the provision was designed to avoid litigation over a question of State liability, it is not entirely clear it will succeed in doing that either.

I would like to turn now to my primary points about the constitutionality of the proposal.

I suppose the best way to put my basic position is that, as a legislator, the statute raises for you and for Congress questions of policy.

Would it be a good idea to enact the statute in light of its impact on law enforcement, on the one hand, and its promotion of privacy and first amendment interests on the other?

My position, and I will suggest that it is supported both by principle and by recent Supreme Court authority, is that once you resolve the questions of policy, once you decide that on balance it would be a good idea to enact this bill, then you have at the same time concluded that the statute is constitutional.

I want to divide the analysis into two parts: First of all, the question of congressional power and, second, the question of limitations on congressional power.

In terms of the power that lies behind this bill, again there have to be two divisions made, although one really does not deserve much attention. The bill applies its restrictions both to Federal law enforcement officials and to State and local law enforcement officials.

With respect to Federal law enforcement officials, there is really no substantial problem, it seems to me. Congress is acting as a personnel manager directing the employees of the Government to act in a particular kind of way. There may be some mild, moderate separation-of-powers problems; that is, can Congress direct the officials who are employees of the executive branch to behave in this kind of way.

I think a signature of the President on the bill would go a long way to establish that there would be no separation-of-powers problems. In any event, I outline in the statement another kind of response to the separation-of-powers issue.

The more important division is the application of the statute to the State and local law enforcement officials. The question then is, what power of Congress justifies enacting such a statute?

Now, had the decision in *Zurcher* v. *Stanford Daily* been different, had the Court held as a matter of the first or fourth amendments State and local law enforcement officials had to subpena these materials, there would be no question about the statute. It would provide a new or a supplemental remedy to either exclusionary rules or existing damage remedies which have good faith defenses in them.

After the decision in *Zurcher* v. *Stanford Daily*, however, we cannot say that the bill aims to provide additional remedies for constitutional violations. The activities it prohibits and for which it provides remedies are not themselves violations of the Constitution.

At the same time, however, of course, the activities may directly affect freedom of inquiry and expression. The fear that generates this kind of proposal is that rummaging through newspaper files is troublesome and may affect the way newspapers go about gathering information.

By protecting newspapers and other producers of these materials from searches, the bill attempts to create a nonconstitutional framework by essentially protecting more than the first and fourth amendments themselves protect.

Now, it is that extension or overprotection that raises the constitutional questions about the bill. After all, substantive first amendment

law, a prohibition on punishment of speech that does not incite to imminent lawless conduct, for example, embodies the accommodation in the Constitution between freedom of expression and other interests, such as law enforcement.

The police have to be able to intervene in order to protect riots, for example, and the incitement to imminent lawless conduct test expresses the judgment that the constitutional accommodation between freedom of expression and law enforcement is that test.

Now, if we extend the first amendment in this nonconstitutionally required way, Congress is presenting its judgment that a different accommodation would, as a matter of policy, be wise. But once first amendment interests are given more protection, the other interests are given less, or are promoted less effectively.

To the extent that those other interests have constitutional roots, the new accommodation may be unconstitutional, and I take it that State and local law enforcement has some constitutional underpinning.

The clear source of power for the application of the statute to State and local governments is section 5 of the 14th amendment which provides that Congress has the power to enforce by appropriate legislation its guarantees. The question of power then is, would the First Amendment Privacy Protection Act of 1079 be appropriate legislation enforcing the guarantees of the 14th amendment?

I indicate in my statement that there has been, I think, some confusion over the nature of section 5 of the 14th amendment. I think both on authority and principle that section 5 of the 14th amendment is like all other grants of power to Congress. It is a plenary grant of power.

Congress can adopt statutes as it requires as necessary and proper means for protecting the rights graranteed by the first section of the amendment.

Necessary and proper, as it has come to have been used, means reasonable, and so in terms of the grant of power to Congress, if the First Amendment Privacy Protection Act is a reasonable way of advancing first amendment interests, it is within Congress power to enact. It seems to me there is very little question about the reasonableness of the legislation as a means of advancing first amendment interests, although we have to turn in a moment to whether advancing first amendment interests in that way would infringe on on other constitutional interests.

But the question under section 5 in terms of Congress power is simply, is it a reasonable way of advancing the first amendment and, as I say, it seems to me unarguable that it is reasonable.

The second half of the question, then, is whether the proposal would limit, would transgress limitations imposed by the Federal system on Congress powers. Here again authority and principle indicate it would not transgress such limitations.

The authority is *Fitzpatrick* v. *Bitzer*, which I cite and describe in my statement. The court there held in essence, I believe, that Congress, acting under section 5 of the 14th amendment, may intrude on State and local interests more deeply than it could under some exercise of some other power, and I will address in a moment how deep the intrusion is here. But, given *Fitzpatrick* and its interpretation of section 5, we can go a fair way.

In terms of principle, the basic principle, it seems to me, is one that has been well established almost from the beginning of the interpretation of the Constitution.

In our constitutional scheme of things, Congress is the primary guarantor of the interests of the State and local governments. Congress is structured so it enacts legislation that intrudes on State and local interests only where it is reasonably clear that the national interests are more important than the interests of State and local governments.

That is why I said at the outset the policy question was the constitutional question. Obviously, before the statute is enacted, Members of Congress have to conclude that the interests it promotes are more important than the interests that it intrudes on.

Congress, under our constitutional scheme, is the body to make that judgment.

If the proposal satisfies the condition that the interests it promotes are more important than the interests it intrudes on, if the proposal satisfies those conditions, then it is, in my judgment, constitutional.

Now, the next question is, what happens after the statute is enacted? I believe that as a matter of constitutional principle, Congress judgment should be conclusive of the federalism issue, and that the court should not intervene to displace Congress judgment. The Supreme Court in the *League of Cities* case rejected, wrongly in my view, that position, and so, in order to fully evaluate the constitutional problem, we have to interpret the *League of Cities* case.

It seems to me there are two possible interpretations of *League of Cities*. One comes through Mr. Justice Rehnquist's opinion for the Court. It essentially examines the cost the legislation imposes on the States and local governments. Now, how substantial are the costs that the First Amendment Privacy Protection Act would impose?

The costs are of two kinds; one, if the States waive their immunity the costs are direct, monetary liability. Or, if the States do not waive their immunity, the costs are of deterrence of an investigatory technique that law enforcement officials believe is what they ought to use under the circumstances they face.

In terms of monetary liability, it seems likely that the costs will be quite small. The number of situations in which the prohibited searches are thought to be essential seem to be rare. In reading about the *Stanford Daily* case, very few examples, under 20, seem to be cited, and the monetary liability would be small.

The second cost is this deterrent effect, and it generally seems to have been regarded that the deterrent impact is not significant enough to warrant the invalidation of similar statutes on federalism grounds.

Of course, a primary example is 42 U.S.C., section 1983.

On the whole, then, the costs of the statute would seem to be small. Under this interpretation of *League of Cities*, my judgment would be it would survive this first interpretation of *League of Cities*.

The second interpretation of *League of Cities* is found in Mr. Justice Blackmun's concurring opinion. He was the fifth vote for the majority in *League of Cities*, and so there is some reason to treat his opinion as especially important.

That opinion treats the decision as involving not just the assessment of the costs as the majority opinion does, but a balancing of the national interests against the State interest.

As I have said, it seems to me that it is Congress responsibility to determine whether or not that balance favors enactment of the bill and not the courts. But, in any event, given *League of Cities*, the Court appears to stand ready to determine for itself how the balance between national and State and local interests should be struck.

Well, what are the implications for congressional deliberations? There is one natural response, and that is, if the Court is going to ask what the proper balance is, we should try to guess what the Court will do.

I think that if you guess what the Court would do, it would strike the balance in favor of the legislation. The costs to local governments seem to be relatively small. The promotion of first amendment interests, while it may not be enormous, seems to be significant, and so on.

Mr. KASTENMEIER. On that point, and it's a very interesting one and it's good advice you are giving this committee, does the fact that it tends as a matter of policy and/or law to overrule the Court or frustrate the Court's decision in the *Stanford Daily* case enter into the Court striking a balance in connection with the legislation affecting the prior decision?

Mr. TUSHNET. I would think as a matter of principle it should not. In the *Stanford Daily* case the Court was reacting to a situation in which there had been no focused congressional attention to the balance between State law enforcement and first amendment interests.

The very fact that Congress has directed its attention in a focused, precise manner to the problem would, I think, carry some weight with the Court, and it would make the situation sufficiently different from the *Stanford Daily* situation for the Court not to take offense at congressional action.

I think in addition that as a matter of principle, given congressional power, as I have suggested under section 5, the Court ought properly not to take into account the fact that it had made a different prior determination, and although I confess the cases don't come directly to mind at the moment, I know that there have been recent cases in which the Court has responded to legislation passed in response to prior decisions to which it has not been unreceptive.

I guess the case that comes most clearly to mind is the one involving the Civil Rights Attorneys' Fees Award Act of 1976, *Hutto* v. *Finney* in which the Court upheld the constitutionality of the statute where the legislative history was clear that the statute had been passed as a direct response to a restrictive decision by the court.

That is not precisely on point, but it indicates something of the Court's attitude to the problems.

As I say, if one were to guess what the Court would do in striking the balance, my guess would be that it would strike the balance in favor of this statute. I am not sure, however, that it's appropriate for Members of Congress to try to make that preliminary judgment, to condition their votes in favor of or against the statute on the basis of a guess about how the Court would react.

Mr. KASTENMEIER. I also gratuitously suggest that that is rarely a major factor in congressional decisions. Perhaps too rarely.

Mr. TUSHNET. I think that is a good thing. To the extent that what should be happening is a dialog between Congress and the courts, the dialog would be truncated if Members of Congress were

saying, well, we ought to do this because the Court is going to say we can't do something else. That is not what the Court ought to be hearing from Members of Congress. So in the end, I think the balancing interpretation comes back to the beginning.

The constitutional questions raised by the bill, would be resolved by Members of Congress fairly considering the policy issues of the bill.

It's not easy to interpret the *League of Cities* case and it may well be wrong to try and treat it as establishing some sort of doctrine. Perhaps the best that can be said about the case is that it serves as a reminder to Members of Congress that one of the policy issues that has to be considered is the impact the bill would have on State and local law enforcement efforts.

Now, given such things as the testimony by Attorney General Hansen, it's hard for me to believe that you would have ignored that impact. But I guess if my appearance serves any purpose at all it will be because I have highlighted federalism issues as part of the policy concerns.

I have been pleased to have been given the opportunity to present my views on the constitutionality of the Privacy Protection Act, and I will be happy to discuss any further matters of concern.

Mr. KASTENMEIER. I appreciate your statement and your analysis and your recommendations.

In the light of recent days there have been other formulations obviously than that suggested by the Justice Department on H.R. 3486 which we have discussed and which witnesses have discussed.

I observe that most of the committees and most individuals tend to be disposed to act affirmatively with respect to the *Stanford Daily* case and the question raised. As you know, the analysis of what can be done has produced other pieces of legislation which are commended to us, some which involve only Federal law, but do not stop at first amendment protection, and horizontally cover other privileged term, plus really all matters for private citizens in the context of searches.

Then there are others and this is sort of a vertical one which extends in a narrow area of Federal power to the federalism and into the State and local government with respect to first amendment only.

There is the question of whether then, and there are others which extend that far more, both vertically and horizontally, the question is might this extend to one, the press and others who communicate, authors, and the like, in terms of the first amendment protection.

Whether there may be another class of persons, less than the whole, doctors, lawyers, clergy, who may have otherwise special privileges in terms of protection of third-party information for certain purposes, and whether we might extend it to that group of cases and situations, or whether, indeed, it ought to be extended fully to all citizens irrespective of the first amendment or other types of selected out interests.

So I want to ask you about those cases. Let's take the most expansive case; I think it's the Mathias-Railsback bill, which was just recently introduced which, as I understand, does purport to extend to all of these classes of persons both Federal and State and local.

What is your view, if any, about the constitutionality of that? Could they, predicated on say the commerce clause, make an appropriate analogy to the wiretap bill, title III, which extended to State and local enforcement as well as Federal in terms of procuring a warrant in advance of a wiretap?

Mr. TUSHNET. Although I have not seen the proposal concretely, as you describe it, my inclination would be to first of all attempt to rest that proposal also on section 5 of the 14th amendment, not as enforcing the first amendment but as enforcing the fourth amendment prohibition on unreasonable searches and seizures.

One could treat it, for example, as a congressional definition of what is a reasonable search, which would have some weight under the Supreme Court's decisions.

To some extent, because of my interests in federalism and constitutional law, I am somewhat at a loss in evaluating the broader proposal, because the relevant question, as my statement does indicate, is how important are third-party searches generally to law enforcement efforts?

The response to the *Stanford Daily* case was, although the Court did address the third-party search question generally, primarily in terms of first amendment interests and it is, as I indicated in my statement, reasonably clear that these kinds of searches are not an essential tool of local law enforcement. I just don't know about the importance of third-party searches generally to law enforcement.

That seems to me in some ways that is an empirical question, and you can find out how important they are, and once you find that out, you will be able to assess the proposal more readily.

Mr. KASTENMEIER. Well, your answer then is really it's a public policy question, in part to be determined by need as assessed.

Mr. TUSHNET. Yes; I think that is absolutely right. If it turns out that third-party searches are both an important tool of local law enforcement but one that is widely abused, for example, the policy question might be resolved in favor of broad legislation.

If it turned out, it was an important tool of investigation and it was carefully used, it might be as a matter of public policy not worth enacting.

One advantage of the H.R. 3486 is that precisely because it is narrowly focused it's much easier to make a judgment of the policy question.

Mr. KASTENMEIER. Based on that analysis it would not be, let's say, necessarily rational to construct a bill which might include this variation I describe to you:

At the Federal level under title VIII, coverage of all classes I have mentioned, those who would be protected by the first amendment, those by any other privilege and, indeed, the entire category of private citizens, however situated under the Federal. Then have it extend to the State and local only in terms of first amendment protections or that narrow category of State and local.

That type of solution would not flow from your analysis.

Mr. TUSHNET. No; it wouldn't, primarily because, in terms of what you have just described as the broad horizontal coverage confined to Federal officers, I cannot see any serious constitutional question at all. It could cripple law enforcement but if Congress decided to do that, it would be plainly constitutional in light of Congress power to control Federal officials.

It might not be a good idea, but in constitutional terms it seems to me there would be no question at all.

Mr. KASTENMEIER. One other question and that would be all I have,

I note that the State of Wisconsin and Madison at this very time is considering some form of State third-party search legislation deriving presumably from the *Stanford* decision.

What is your view about that; this I guess is really not a constitutional question but, have you any view about whether each of the States should be independently pursuing these matters as they might under newsmen's privilege or shield laws or whether a national law might be preferable?

Mr. TUSHNET. The advantage of refraining from enacting legislation at this time, national legislation, is to allow the States to experiment with different forms of protection.

Wisconsin might adopt an analog to H.R. 3486; California might adopt a general prohibition on third party searches, and Congress, after 5 or 10 years of expereience with State laws might be able to evaluate experience and see which version would be best.

I think that is an advantage that attaches to legislation that raises broader policy questions. Because H.R. 3486 is sufficiently focused, it would I think be the core of any State legislation anyway, and the advantages of seeing how the different forms work out would probably be small. There would likely be very few variations on the kind of protection provided by H.R. 3486 and so confined to the narrow proposal, I see very little to be gained by deferring to the States.

As to broader proposals, it may make sense because there are a large number of variations that can be imagined, as you suggested.

Mr. KASTENMEIER. Thank you.

The gentleman from North Carolina?

Mr. GUDGER. Thank you, Mr. Chairman.

I have only one or two questions that I will ask of the professor.

One of those is this historically, as I recall the development of the law of search and seizure, not until about a decade ago was it not that mere evidence was proper subject for search. Prior to that time I think most of the decisions had turned on State and Federal statutes which clearly authorized search for contraband, clearly authorized a search for product of crime, clearly authorized search for tools of crime and that sort of thing.

I believe it was the character of the subject to be searched for that more commonly qualified the search warrant regardless of the person in whose hands it was to be found. If it was contraband, clearly it was to be taken, If it was tools of crime, clearly it was subject to seizure, and certainly if it was products of crime, subject to seizure.

Now, we come to this innocent third part holding evidence and evidence having been determined to be a proper subject for search and seizure. Is that a correct assessment of the status of the law now?

Mr. TUSHNET. Yes; it is. In a case called *Warden* v. *Hayden* the Supreme Court, I believe that was in 1965, held that the fourth amendment allowed searches for mere evidence and it was not until then.

Mr. GUDGER. But, thereafter, after *Warden* v. *Hayden*, there had not been a case dealing with innocent third party possession of this evidence to go to the Supreme Court until this case involving the *Stanford Daily*.

Mr. TUSHNET. Yes; I believe that is correct also.

Mr. GUDGER. Now, there have been I think several cases since then which test the doctrine further, but none of them have reached the appellate division. Is that substantially correct?

Mr. TUSHNET. I don't know of any. I don't know of any appellate decisions.

Mr. GUDGER. Now, my concern is this: We are confronted with several different approaches here, H.R. 3486 would create a new media immunity, with exceptions as noted within the act. Other legislation has been offered suggesting a restriction within the Federal jurisdiction which would act upon criminal procedures and deprive the magistrate of a right to issue a search warrant unless there were some involvement or suspicion of involvement by the possessor of the evidence.

Do you follow me there?

Mr. TUSHNET. Yes.

Mr. GUDGER. And then there seems to be a third contention that possibly Congress has the authority to write a 14th amendment immunity from search in all third persons, innocent third persons, which would be effective under section 5 of the 14th amendment.

You refer to this but you don't reach a firm conclusion in your written statement. Would you state how far you think Congress can go in clocking immunity from State search?

Mr. TUSHNET. I have to make two disclaimers before I do. One is that to the extent that that question calls for an evaluation of the necessity for third-party searches as a matter of law enforcement, I don't have any qualifications, except general reading in the area.

The second is that I regard myself in this connection as an ordinary citizen, and so have a sort of self-interest in saying it would be nice if I didn't have to worry about this kind of thing.

With those two disclaimers, my sense is that under section 514 of the 14th amendment Congress could enact a broad third-party immunity statute applicable to State and local governments.

Again, one advantage of the form of H.R. 3486 is that is takes the form of a damage action, not the imposition of an exclusionary rule, that might raise separate and more difficult constitutional questions. But in terms simply of a statute imposing monetary liability, my best estimate would be that the costs would be sufficiently low as to make the broad legislation constitutional.

Mr. GUDGER. One further question, Mr. Chairman, prompted by the reference to the damage features, damage suit features of H.R. 3486.

Assuming Congress did create an innocent third-party immunity, would not any breach of that immunity present a damage liability situation in all events, at least at the State court level?

Mr. TUSHNET. I am not sure I fully understand the question.

Mr. GUDGER. Would not there be a trespass at the very minimum which would create a civil action available in most State courts if the Constitution had immunized that person or that residence from search?

Mr. TUSHNET. The answer to that I think is very difficult to give. As a matter of State law, States may well have a color of authority defense which is broader than any good faith defense available either under existing statutes or under the subprovision of this one.

Mr. GUDGER. Are you referring now to sovereign immunity?

Mr. TUSHNET. No; as a defense, an official's defense to a charge of misconduct, to violating rights, as a matter of State tort law, there may well be an absolute under color of authority immunity, which is substantially broader than exists under Federal law.

An argument can, however, be made that given a Federal statute protecting against this activity, such restrictive State laws would be overridden either as a matter of interpreting the statute or as a matter of a claim arising directly from the supremacy clause.

Mr. GUDGER. You are saying, in effect, that whoever, whatever police officer executes a search warrant which gives him color of right to enter, that color of right could very well under State law immunize him, even though it was a violation of a congressional interpretation of a constitutional right.

Mr. TUSHNET. Yes; as a matter of State law I think there would be a significant number of States who would take that line. There would also be States in which there would be liability. I don't want to suggest I am describing what 48 out of 50 States would do. But there are a number of States that would immunize the official from damage liability.

Mr. GUDGER. But you are saying that it would create a twilight area in which there could be a lot of litigation and a lot of turmoil.

Mr. TUSHNET. Yes.

Mr. GUDGER. If we are not very, very clear in what we do here.

Mr. TUSHNET. Yes.

Mr. GUDGER. Thank you very much, Professor.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Professor Tushnet, for your contribution to the committee.

We appreciate your testimony and your answers to questions, and we wish you and your family a nice stay here in Washington.

Mr. TUSHNET. Thank you.

Mr. KASTENMEIER. Next the Chair is pleased to call as a witness the Honorable Robert B. Hansen, attorney general of the State of Utah.

TESTIMONY OF HON. ROBERT HANSEN, ATTORNEY GENERAL, STATE OF UTAH, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. HANSEN. Thank you.

Would there be any point in my reading the statement in the record?

Mr. KASTENMEIER. Your statement is brief, only four pages. Suit yourself. If it were a 20-page statement I would say no. Suit yourself.

Mr. HANSEN. Let me say this, that I think that the main thrust of my statement deals with the necessity of the proposed legislation, in view of the fact that there have been, according to Assistant Attorney General Heymann, no Federal searches of any media organizations, offices—zero.

When I found that out, I was curious to find out what the history had been with respect to State searches and so I called his office and was referred to Ronald Stern.

Mr. Stern gave me the information that is attached to the three-page appendix to my statement that indicates that there have been only 15 instances since 1970, one being the *Stanford* case itself, so there are only 14 other searches.

Twelve of those came from the State of California, and I submit, under a situation like that, that the legislature in Sacramento rather

than the Federal Government in Washington, D.C., probably ought to be addressing that problem.

I took it upon myself to call the two non-California media organizations involved, the Associated Press in Helena and the radio station in Rhode Island, to find out what happened in those two instances, because if they are as rare as that indicates that they are, and this came from a committee that was obviously in favor of overruling *Stanford Daily*, it's a pretty small problem, and I was informed, in Montana at the Associated Press when they found out this had happened, they just called a judge and said, "Hey, judge, don't we ordinarily handle these things by subpena rather than by a search warrant?"

The Montana judge issued an order staying that until there could be a hearing on whether there was a need for a search warrant as distinguished from a subpena duces tecum, determined that there was not sufficient grounds for a search warrant, a subpena was issued, and there really was no problem.

In the Rhode Island situation, I think it was almost a comedy of errors as it was described to me by the news director there when I reached him this morning, as I had been unsuccessful in the last few days in finding out what the details were.

In that case, the television station had allowed the police, without either a search warrant or a subpena, to view the video tapes to find the identity of certain people involved in suspected criminal activity, and it was only after the police had obtained really what they needed—and I think under the impression they needed to get a search warrant that preserved this evidence for trial—that the search warrant was, in fact, issued.

It's totally different, that instance, from the *Stanford Daily* because in the *Stanford Daily* case, and that is the most misunderstood case that I think in the history of jurisprudence, the media of this country had gone paranoid over a case that I think would never happen again, because in the first place it grew out of the dramatic experience out of the Vietnam war and the antiwar process which was a very unusual situation, to say the very least.

Second, you had a media organization which was not a commercial organization. This was a school paper which had very strong political views. Third, they had published their stand that they would destroy the evidence rather than cooperate with the police, so you had a very clear indication from the very people whose offices were going to be searched that a supena would absolutely do no good.

Thr thrust of all the bills that I have heard about on this subject—I have studied only two in any detail but I have seen summaries in media organization publications—indicate basically that search warrant may only be used when the subpena won't do the job. If police can get the job done with a subpena, that is the way to go, and nobody quarrels about that.

As a matter of fact, the history is very clear from that appendix that that is what has happened throughout the country. It is the rare exception based either on extremely rare situations, such as you had in the *Stanford Daily* case, or on a lack of understanding, I think basically on the law enforcement side that you had in the Montana and Rhode

Island situations. It seems to me that you don't need to create a situation where you immunize, or rather create sanctuaries that the law enforcement can't reach into, in a situation that the Congress can't begin to imagine what the particular circumstances are, that would make it very important for the law enforcement to reach that particular evidence, and I think basically, and as the professor indicated, it is a question, I think, of policy, policy first between the Federal Government and the States, and second a question of balancing the interests of the press and media on the one hand against law enforcement on the other.

I submit that the person most likely to make a judgment that is fair and reasonable is the person that has all of the facts before him, and who is that? That is the judge after it happens, not the lawmakers before it happens. At best, you as lawmakers can only speculate as to what all the circumstances and the ramifications of that are, but the judge, when he has it before him, has the focus of all of the facts.

It seems to me that we are experiencing here a gross overreaction to a most extraordinary factual situation, and if you read the media editorials on this subject, you would think that law enforcement had declared war on the media when, as a matter of fact, it was the reverse.

The reason that the attorneys general of this country, by and large, came into this case and urged the Supreme Court to decide, as they eventually did decide, in the *Stanford Daily* case, is the fact that you had a $49,000 judgment against the prosecutor and against these law enforcement officers who were simply carrying out an order of court which seemed to them to be very much in keeping with what the law was when they got this search warrant which the judge issued after a showing of probable cause, and they go in there, and they are liable for $49,000 in attorneys' fees as a result of this whole thing, and who was damaged?

The Supreme Court decision in the *Stanford Daily* case indicates that there was no obstructive examination of files and searches of reporters' notes and all that sort of thing to learn about unrelated criminal activities. The *Stanford Daily* police were getting at pictures, pictures that were taken in a public place, that could have been taken by anybody. In fact, there were police photographers on the scene, but they didn't get pictures of the particular scene. In short, there was no aspect of confidentiality

It seems ironic to me that we have all this hullabaloo over the *Stanford Daily* case, and that doesn't impact on first amendment rights anywhere near the impact of the 1972 decision of the U.S. Supreme Court in the *Branzburg* case, where they upheld the required disclosure of confidential sources, and Congress has not seen fit to legislate against that decision.

In the *Standord Daily* case there was no factor of confidential sources, and yet the media has lived, lo these last 6 years, and it really hasn't been a source of great abuse. So my plea to the Congress is, let's wait and see for another 7 years and see if these horror stories that are conjured up on that case really come to pass. If they come to pass, the Supreme Court itself has said that it is time enough then to deal with the matter. In fact, quoting the court of appeals on page 3 of my statement:

The fact is that respondents and amici have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough then to deal with it.

I think that is really all that I have to say on the subject.

Mr. KASTENMEIER. Thank you, Mr. Hansen.

First of all, I would like to yield to my colleague from North Carolina, Mr. Gudger.

Mr. GUDGER. Mr. Hansen, in your trial experience, and you are now attorney general of the State of Utah, did you have in this court experience, did you try cases as a county prosecutor or as a district prosecutor in your State before becoming an attorney general?

Mr. HANSEN. I practiced law for 18 years before I spent 10 years in the attorney general's office. When I was in private practice, I was on the defense side, so my experience has not been as a prosecutor.

Mr. GUDGER. Fine.

Now in how many instances, either during your experience as attorney general or during your experience in private practice in criminal trials, have you seen search warrants used against interested third parties to procure evidence? Have you seen any of it in Utah, or has there been any use, except against contraband? You heard my earlier question?

Mr. HANSEN. Yes, I did, and that has been the only use. It has been so limited. As a matter of fact, when the *Stanford Daily* case came out, I asked our Statewide Association of Prosecutors if they knew—and some of those had been prosecuting cases for 20 years or more—of any instances in all that time where a search warrant had ever been used with respect to any media organizations, and none of them knew of any such instance.

Now there have been subpenas, or course, to get evidence of the type that we are dealing with in Rhode Island and Montana, but not search warrants.

Mr. GUDGER. What I am asking you to do is to broaden your sphere of concern beyond the search warrants addressed to media.

Mr. HANSEN. And to third parties?

Mr. GUDGER. Against third parties. It may be a psychiatrist.

Mr. HANSEN. Yes.

Mr. GUDGER. It may be a doctor, it may be a hospital, or it may be any facility that has some evidence that may play upon some issue involved in a criminal trial, for example, the procurement of evidence from a mental institution.

Mr. HANSEN. Yes.

Mr. GUDGER. And the accused is pleading innocence by reason of insanity.

Mr. HANSEN. Yes.

Mr. GUDGER. And maybe you require the procuring of medical records and that sort of thing.

Do you know of any instance where the search process has been used, search warrant has been used, in lieu of duces tecum?

Mr. HANSEN. I don't. I don't know of any, and although my question of prosecutors was not as broad as your question is, I am sure if there had been, they probably would have brought that up, because I think that all of the discussion on the subject has not been limited

to media organizations, because there is that question as to how broad that ought to go, and the court itself in the *Stanford Daily* case made reference to that, and they pointed out the difficulty that law enforcement has sometimes of determining whether or not the person is innocent. In fact, they said this is the first we focused on the involvement of the owner or possessor of the place, because our focus has always been only on the place to be searched, not with relation to how involved the person was who was in control of the place to be searched.

Mr. GUDGER. I suppose that the decision in *Warden* v. *Hayden* surprised you a bit, because you had not thought in terms of the search warrant being used as a method of procuring evidence for use in a trial, except where that evidence was of the nature of the contraband—I say contraband—product of crime, of tools used in the commission of a crime, or an article the possession of which makes it subject to the violation of the law and therefore contraband.

Mr. HANSEN. As a matter of fact, I have always assumed that all documents that would be an indication that a crime had been committed were within the ambit of the fourth amendment searches, and so I really am not surprised with that decision.

Mr. GUDGER. You were not surprised.

Mr. HANSEN. No, I thought that was totally consistent with what the history of the fourth amendment has been, that our documents are subject to being searched if there is probable cause to believe that they indicate that crimes have been committed.

Mr. GUDGER. Even though not contraband?

Mr. HANSEN. Yes.

Mr. GUDGER. And not at fault with the crime directly?

Mr. HANSEN. That is right.

Mr. GUDGER. And not in the hands of someone?

Mr. HANSEN. Right.

Mr. GUDGER. But you, yourself, in your own processes have always used duces tecum——

Mr. HANSEN. Yes.

Mr. GUDGER [continuing]. To produce documents and papers. That is the point.

Mr. HANSEN. Yes, that is the point I make, and that is the point I think is true not only in Utah but in all the other States. The only State that looks like they have got a problem like I say is California, and as I look at that list of who they are, it looks like they grow out of some pretty extraordinary circumstances that may well come within the very exceptions that the Justice Department built into their proposed legislation, because in some of those instances of the Patty Hearst type situations I think might very well be at stake in those, and therefore the exception qualifications met.

Mr. GUDGER. Of course, there has been a vast battery of horror stories involving the invasion of dwellings or hotel rooms or private residences for the purpose of making arrests or to stop a criminal offense allegedly seen through a window or observed through an open door, and the door then being closed, and that sort of thing. We have had some very bad situations in one or two instances in North Carolina where law enforcement officers, entering after having seen an obvious game of poker taking place, and for the purpose of suppressing this offense that was committed in effect in their presence and then,

entering, are shot by those inside, and the litigation that ensues can become very serious in the civil liability field and in the homicide charges that ensue. Search and seizure and forcible entry by law enforcement personnel is a very, very dangerous and inflammatory area, and that is why I was curious as to what your own experience had been——

Mr. HANSEN. Yes.

Mr. GUDGER [continuing]. Vis-a-vis the use of search warrant for procurement of paper evidence and documentary evidence in the hands of an innocent third party from the standpoint of whether or not it presents more hazards than are justified if we concede that *Warden* v. *Hayden* is a proper decision, relating not only to media, but relating to the private home and the private office.

Mr. HANSEN. I am very interested in your comments on that. It does recall my recollection at the last meeting of all the prosecutors of the State that the professor of law at the University of Utah dealing with criminal law pointed out that, with the new development of technology and the ability to seek, search far beyond what the naked eye could do and the casual observer observe, that we were getting into areas that were questionable and counseled them to be very careful not to get into apparently the very type of situations you have related from North Carolina's experience. That would seem to fortify his warning in that area, and I think that prosecutors generally do recognize that we have to make sure that the law enforcement officers in their enthusiasm to fight crime don't go beyond what is right and proper into areas where the courts have not yet addressed concerns, and I think that would be an area that we ought to look at very carefully, but one that I hadn't really considered in depth, because I was concerned only about the scope of the pending bill, the Justice Department's 3486, is it?

Mr. GUDGER. Yes, it is 3486.

Of course, I guess really the question that I previously phrased relating to warrantless search, but by doing that, pointing out the hazards that are inherent in forcible search, offers no clear parallel when you are dealing with a search with warrant against someone who is innocent of involvement with a crime, but the search process is a powerful process; it is one that creates a tremendous amount of authority in the hands of those who possess it.

Mr. HANSEN. Yes, but because it has to reach past impartial judicial scrutiny and our judges I think are more and more inclined to be very tough on issuing those. And I think that you have to recognize the balance that needs to be done, and someone has to make that determination. I would think that this system basically has worked very well by-and-large, and that we are getting, as our society gets more complicated and our methods have to become more sophisticated, I think that we are maintaining a fair balance in that.

I would hate to see the overreaction to the *Stanford Daily* case prevent a situation where law enforcement was not going to obtain the necessary evidence that it needs to successfully prosecute crime in those very, very rare and unusual cases where a subpena would not do the job. I think the *Stanford Daily* case is the only one that has happened, and I do not think that is very likely to occur again.

It would be unfortunate to have that pendulum swing and the balance be a substantial detriment to law enforcement, because I don't think that we are really winning the war against crime the way I would like to see us win it.

Mr. GUDGER. One final question.

Of course *Stanford Daily* was dealing with photographs.

Mr. HANSEN. Right.

Mr. GUDGER. And it is very hard to describe a specific photograph in such a fashion that the person against whom the process issues knows exactly what photograph or cannot deny knowledge of exactly which photograph is involved.

Newspaper offices, like photographer shops, may have thousands of photographs on hand and on file.

Mr. HANSEN. Yes.

Mr. GUDGER. I think one of the things that was abhorrent about *Stanford Daily* was the idea of a law enforcement officer going in with a broad process where he can screen all the photographs within the confines of that publishing house.

Do you conceive of any way that we could require such specificity in a search warrant as would afford a process whereby the person of which an idea was demanded could have opportunity to produce it and avoid an actual sifting of documents?

Mr. HANSEN. Well, I think that——

Mr. GUDGER. You see what I am driving at?

Mr. HANSEN. Yes.

Mr. GUDGER. Let's say an officer has gotten his warrant. His warrant has authorized him to get a specific photograph, with a specific definition of it. He knocks on the door of the place of business or the home. He says, "I have a warrant to search for this item. Do you have it? Do you want to give it to met here at the door or do I come in?"

Mr. HANSEN. It would seem to me that is the very advantage of the subpena process, so that you can have the magistrate as an arbiter between the two parties, one trying to get the information, the other to resist giving up anything that is not really pertinent, to get that negotiated down to that type of specificity.

I think it would be pretty hard, as you have indicated yourself, to describe that picture or to satisfy someone who thinks that the other party is holding back. And of course that is the only reason he would really use the search warrant rather than a subpena anyway, to look at all those things to tell. But in pictures it seems like you would be able to see at a glance whether or not this was the scene that could be generally described.

Here you had nine police officers being beat over the head with chair legs, and so you would have some specificity on that. In other words, it would seem like they could screen out the picture showing a single individual, which a lot of pictures would be in a newspaper office of individuals, and this sort of thing. So I think there could be some specificity, but that is a very difficult problem, no question about it.

Mr. GUDGER. Thank you very much.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Without objection your prepared statement, your written statement, together with the appendix, will be accepted and made part of the record.

[The statement follows:]

STATEMENT OF ROBERT B. HANSEN, ATTORNEY GENERAL, STATE OF UTAH

H.R. 3486 was introduced to reverse the decision in the United States Supreme Court in the *Stanford Daily* case. Together with 17 other Attorneys General, I urged the United States Supreme Court to rule as it did and I appear today to oppose this bill.

The *Stanford Daily* case was a most unusual case. It is a much misunderstood case in my opinion. It was correctly decided as a matter of law. As a matter of policy, I think it should stand. In our complex society, there are numerous conflicting principles that need to be harmonized and balanced for the good of all. What were the interests that clashed in that case? Law enforcement officials needed certain photographs which were taken in a public place by a news photographer to identify the assailants who attached members of the Palo Alto Police Department. The police had been called to Stanford University on April 9, 1971, to remove a large group of demonstrators. The officers were beaten with chair legs and other weapons. One was knocked to the floor and struck repeatedly on the head. Another suffered a broken arm. The student newspaper office (which was not involved in the unlawful acts) was subjected to a 15-minute search of photographic laboratories, filing cabinets, desks and wastepaper baskets, by law enforcement and district attorney personnel armed with a warrant issued on a judge's findings of probable cause. Locked drawers and rooms were not opened. There was a dispute as to whether the searching officers read copy notes or correspondence during the search, which took place in the presence of the staff, and the officers were not advised that the areas they were searching contained confidential materials.

The case established the principle that a state is not prevented by the Fourth and Fourteenth Amendments from issuing a warrant to search for evidence simply because the owner or possessor of the place to be searched is not reasonably suspected of ciminal involvement.

The media has read the case as creating a very substantial threat—that searches of media offices will now become frequent and will compromise confidential sources. A similar fear resulted from the 1972 U.S. Supreme Court case of *Branzburg* v. *Hayes*, 408 U.S. 665, in which the Court held that the public has a right to every man's evidence and thus upholding an order requiring the disclosure of a confidential source. That fear has not been found to be well founded.

Searches of media offices simply have not happened. Mr. Philip Heyman, speaking for the Department of Justice, to you on April 25th, 1979, said: "There is no record of a search warrant even having been executed by a federal officer against a press organization." Mr. Ronald A. Stearn, Special Assistant to the Assistant Attorney General, informs me that a survey of national news organizations has produced only 14 other such instances concerning state warrants since the one in question. I attach as an appendix hereto a copy of Mr. Sterns' letter and the enclosed list of those instances. You will note that all but 2 of them took place in California which hardly indicates a national problem. Only 6 of them have occurred since 1974 and 4 of those related to a single situation. I urge this committee to have its staff investigate each of those instances. I would be very surprised if each of them was not as justified as the search warrant in the *Stanford Daily* case. It is even less likely that the present fear will be realized. If it is, then it should be dealt with then as the Court, itself, suggested in these words:

"The fact is that respondents and amici have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough then to deal with it."

It has been my experience and observation that the judiciary is very sensitive to First Amendment concerns. The U.S. Supreme Court in the *Stanford Daily* case expressed concern for the press by counseling their fellow judges as follows:

". . . state and federal magistrates should be aware that 'unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.' *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 (1961). Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' *Stanford* v. *Texas*, 379 U.S. 476, 482 (1965)."

Finally, I would like to point out that the District Court Judge and the Circuit Court of Appeals, who both ruled in favor of the *Stanford Daily*, and Justice Stewart, who wrote the dissenting opinion in which Justice Marshall joined, would have held otherwise if there were "probable cause to believe that a subpoena would be impractical." Justice Stewart wrote on this subject as follows:

"The District Court and the Court of Appeals clearly recognized that if the affidavits submitted with a search warrant application should demonstrate probable cause to believe that a subpoena would be impractical, the magistrate must have the authority to issue a warrant. In such a case, by definition, a subpoena would not be adequate to protect the relevant societal interest. But they held, and I agree, that a warrant should issue only after the magistrate has performed the careful 'balanc/ing/ of these vital constitutional and societal interests.' *Branzburg* v. *Hayes, supra,* at 710 (concurring opinion of Mr. Justice Powell)."

The proposed bill thus goes beyond the protection which legal critics of the Court's opinion in question feel necessary to protect the sources of information necessary under our First Amendment. I, therefore, urge you not to enact this bill. If you do, I am fearful you will be creating sanctuaries in which evidence can be deposited and put beyond the reach of law enforcement officers. For instance, one who is not personally involved in Mafia activities generally might well be willing to cooperate on a particular illegal transaction such as one involving computer fraud and be in possession of the software program which he is ostensibly using or planning to use in connection with a book he is writing or planning to write on the subject.

It would be much better in my opinion to permit a judge having full knowledge of the actual facts to balance the interests of law enforcement and the interests of the press than for lawmakers to make that determination in advance of knowing all the facts concerning which the statute would later be applied. I respectfully urge you to deter action on this matter to see if the anticipated abuses really do occur and are not corrected by the courts themselves.

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., May 16, 1979.

HON. ROBERT B. HANSEN,
Attorney General of the State of Utah,
Salt Lake City, Utah.

DEAR MR. ATTORNEY GENERAL: Per our conversation, I am enclosing a list of state media searches since 1970. The list was compiled by the Legal Defense and Research Fund of the Reporters Committee for Freedom of the Press. I am not aware of any additional state searches of the news media either prior to or during the period covered by the Reporters Committee list.

Sincerely,

RONALD A. STERN,
Special Assistant to the
Assistant Attorney General,
Criminal Division.

Enclosure.

IV. SEARCH WARRANTS SINCE 1970

15 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 regarding a hotel bombing.
8. October 1974, KPOO–FM, San Francisco. Police were seeking a letter written by the New World Liberation Front concerning 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 outtakes 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.

Mr. HANSEN. Thank you very much.

Mr. KASTENMEIER. I just have a question or two.

Mr. Hansen, your views represent the official position of the association?

Mr. HANSEN. Oh, no.

Mr. KASTENMEIER. Of attorneys general?

Mr. HANSEN. I was asked by the attorney general of California to enter the case, not enter the case but join in an amicus brief that I think 17 attorneys general did file. I am not saying—that is a large number as compared with most Supreme Court cases when that many come in. There weren't any to my knowledge that came in on the other side of that case, but the association itself has not taken a position, but because there was a large number of attorneys general that felt an interest in this matter, I was asked to come and present the views of those.

I might say this: That it certainly has not been a partisan line-up of the attorneys general. You find a pretty good balance between Republican attorneys general and Democratic attorneys general, between those that are considered quite liberal and those that are considered quite conservative.

I think that basically attorneys general, of course, tend to favor support for law enforcement, but most of us are elected officials, and we are certainly not anxious to be seen as opponents of and enemies of the media. So we have a real concern, and our concern has been one of educating the media to recognize what the *Standard Daily* case means and, more important, what it does not mean, because they I think have very exaggerated fears as to what is now permissible, and which is simply not going to happen in my opinion.

Mr. KASTENMEIER. Of course I am aware that the association does take positions on public matters. My recollection was it took a very clear position in opposition to a bill that passed the House this week, H.R. 10, which permits the Attorney General to initiate suits affecting constitutional rights of institutionalized persons.

Mr. HANSEN. Yes.

Mr. KASTENMEIER. But you say with respect to this particular matter they have not taken a position?

Mr. HANSEN. No; they have not.

Mr. KASTENMEIER. One of the problems is that there are pieces of legislation—and this may be our fault for referring to H.R. 3486—other pieces of legislation before us which have different parameters entirely.

Now I would assume you would have no objection to a bill which would affect the use of search warrants in the Federal system exclusively?

Mr. HANSEN. No; I would have no objection to that.

Mr. KASTENMEIER. And you are aware that there are some bills which go well beyond the media?

Mr. HANSEN. Yes.

Mr. KASTENMEIER. The 13 or 14 cases you mentioned, in California or otherwise, and an effect generally?

Mr. HANSEN. Yes, I am aware of that, and I have studied generally this H.R. 1373, and my reaction to that is that although I prefer to have it as limited as possible, and this does go to third parties as well, it gives the court a great deal more flexibility so you do not have an automatic screening out of situations such as the rare *Stanford Daily* cases, where you might well need to have—and a fairminded person hearing all the facts would say yes, that is a case where we ought to allow a search through a search warrant rather than a subpena.

Mr. KASTENMEIER. One might be impressed, for the purpose of argument, with your discussion on top of that of Professor Tushnet, that certainly, as refers to the media, that this legislation would not have great application, because the law enforcement at the State or local level generally follows different procedures, procedures which involve issuance of subpena, and do not commonly rely on search warrants, certainly in the field of the media, and that accordingly adoption of this legislation would have little effect in terms of law enforcement, might have beneficial effect in terms of public policy in reassuring the public and others with respect to the curbing of issuance of search warrants in such situations.

Mr. HANSEN. Well, I think that is certainly true, but to the extent that it does apply to those rare cases, it requires the results to be wrong, because if you had this law in effect, then there would never have been a search warrant issued, and there would have been no prospect that those assailants of those nine police officers, one of whom had a busted head and another a broken arm, would have been brought to justice.

I think that is very unfortunate. I think if we are going to have a lawful, orderly society, those that attack our law enforcement officers above all should be prosecuted.

Mr. KASTENMEIER. I can appreciate that analysis. I would not in terms of that particular case be inclined to disagree with it other than in balancing off, as Professor Tushnet was talking about, the other balance may be that this is an invitation to law enforcement officials throughout the country to access themselves of search warrants?

Mr. HANSEN. Yes.

Mr. KASTENMEIER. When very often that may not have been necessary?

Mr. HANSEN. And if they react that way, I would be the first to favor the enactment of this type of legislation, but the Supreme Court says let's wait and see if that happens, and I think that is good counsel.

Mr. KASTENMEIER. Thank you very much for your appearance here this morning, Attorney General Hansen. We are very pleased to have had you.

Mr. HANSEN. Thank you, sir.

Mr. KASTENMEIER. Accordingly, the committee will have hearings next week on the question on Thursday and Friday, and we would like the attendance of our membership, and trust that they will be further enlightened on the subject.

The committee stands adjourned.

[Whereupon, at 11:30 a.m., the committee adjourned.]

ZURCHER V. STANFORD DAILY

THURSDAY, MAY 31, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE
ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Gudger, Matsui, Railsback, and Sawyer.

Also present: Bruce A. Lehman, chief counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This is the fourth of five scheduled hearings on the question of governmental search and seizure on bills such as H.R. 3486, press protection legislation, and other bills of which there are a number, related to the subject.

This morning, we are very pleased to have a distinguished group of witnesses who all have, certainly in terms of the press if not as citizens in general, a profound interest in the question raised by the *Stanford Daily* case and prospectively by practices in this country within the last decade or so relating to search and seizure.

This morning, I am very pleased to greet a panel of witnesses: Mr. Charles W. Bailey, editor of the Minneapolis Tribune and chairman of the Freedom of Information Committee of the American Society of Newspaper Editors; Mr. Jerry Friedheim, who is executive vice president of the American Newspaper Publishers Association; Mr. Robert Lewis, president of the Society of Professional Journalists and Washington correspondent for Newhouse News Service, and also representing Sigma Delta Chi: finally, someone who has been before us before, and we are happy to greet again, Mr. Jack Landau, who is executive director of the Reporters Committee for Freedom of the Press.

Accordingly, I would like to call on you, Mr. Bailey. Would you like to go first? You may proceed in any order you wish, and also, if you care to give your complete statement, fine, or if you prefer any other course of action, that would be agreeable, too.

TESTIMONY OF CHARLES W. BAILEY, EDITOR, MINNEAPOLIS TRIBUNE, AMERICAN SOCIETY OF NEWSPAPER EDITORS; JERRY W. FRIEDHEIM, EXECUTIVE VICE PRESIDENT, AMERICAN NEWS PAPER PUBLISHERS ASSOCIATION; ROBERT LEWIS, PRESIDENT, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, WASHINGTON CORRESPONDENT, NEWHOUSE NEWS SERVICE; AND JACK LANDAU, EXECUTIVE DIRECTOR, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ACCOMPANIED BY JOY KOLETSKY, STAFF ATTORNEY, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Mr. BAILEY. Thank you, Mr. Chairman.

I think I may skip over several points in the prepared text that might unduly take the committee's time.

My name is Charles W. Bailey. I am editor of the Minneapolis Tribune, and I am appearing here today on behalf of the American Society of Newspaper Editors and its Freedom of Information Committee, of which I am the chairman. The society's members include more than 800 supervising editors of daily newspapers throughout the country.

Members of the Freedom of Information Committee are: James Ahearn, managing editor, the Record, Hackensack, N.J.; Edward Cony, vice represident/news, Wall Street Journal; Gil Cranberg, editorial page editor, Des Moines Register; Anthony Day, editorial page editor, Los Angeles Times; James D. Ewing, publisher, the Sentinel, Keene, N.H.; John Finnegan, executive editor, St. Paul Pioneer Press, St. Paul, Minn.; Meg Greenfield, editorial page editor, the Washington Post; Michael Grehl, editor, Commercial Appeal, Memphis, Tenn.; Robert Healy, associate editor, Boston Globe; Stuart Loory, managing editor, Chicago Sun-Times; John McMullan, executive editor, Miami Herald; A. M. Rosenthal, executive editor, the New York Times; Jospeh Sterne, editor, Baltimore Sun; David Stolberg, assistant general editorial manager, Scripps-Howard Newspapers; Edwin Yoder, associate editor, Washington Star.

Officers of ASNE are William Hornby of the Denver Post, president; Thomas Winship of the Boston Globe, vice president; Robert Clark of the Louisville Courier-Journal, secretary; and Michael O'Neill of the New York News, treasurer.

As the committee is no doubt aware, newspaper editors all over the country were alarmed by the decision of the Supreme Court in the *Stanford Daily* case. ASNE testified last year in the Senate in support of remedial legislation, and I have been instructed by the society's FOI Committee and board of directors to reaffirm that position here today.

We believe that the *Stanford Daily* decision represents a very serious threat to the right of citizens generally to be secure from unannounced police searches, and a serious threat to the operation of the free press. In using the term "free press" I mean to include all forms of publishing—books, magazines, broadcasts, photographs, films, and other forms of public communication—as well as the traditional newspaper.

The Supreme Court made it explicitly clear that legislative remedies are available, and proposed legislation has in general taken one of two forms—either what might be called a "fourth amendment" approach, dealing with all warrant searches of innocent third parties or a "first amendment" approach, focused solely on publications.

Our reservations about a press-only approach stem from two beliefs: First, we believe the American press should in general try not to ask for special legislation—many of us believe that a proper interpretation of the first amendment gives us all the protection we need. Second, we believe that the rights of others in our society—for example, doctors and lawyers—are as much infringed by this decision as are the rights of the press.

Therefore, as Tony Day testified for ASNE last year before the Senate, most of us would prefer broad legislation to protect not only the press but all other citizens. We base this preference on considerations such as those cited by Mr. Justice Stevens in his *Stanford* dissent:

> Countless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possesion that relate to the ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The ex parte warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object.

I might note in passing at this point that there are cases pending which deal with warrant searches of lawyers' offices and which go to material that the lawyers in question claim is covered by attorney-client privilege. The committee may be aware of these. But, if not, the April 1979 edition of the American Bar Journal at page 532 describes a case in St. Paul, Minn., which is presently before the State Supreme Court, and there is also at least one Los Angeles case, which I found reference to in the National Law Journal on April 23. There was a story in this morning's Washington Post on page A–3 in which the allegation is made by the past president of the California Attorneys for Criminal Justice that 24 southern California lawyers have had their offices searched by local prosecutors within the past 3 or 4 years. So I think it is clear that it is not just a press matter.

We prefer the enactment of legislation that would protect all citizens—legislation along the lines of S. 115, the bill introduced earlier this year by Senator Mathias of Maryland, and other similar measures.

We regret that the administration has not supported broad legislation for the protection of all citizens. We agree with the position taken in the *Stanford* case by the district and circuit courts, and by Mr. Justice Stevens in his dissent; we think it would leave Federal and State officials with adequate tools to enforce the laws. We believe the Justice Department, like many law enforcement groups at all levels of government, takes too pessimistic a view of the possible difficulties that such legislation might create in the administration of justice.

One other digression: There is another approach which I just became aware of in the last day or two after I submitted this testimony. In the Wisconsin Legislature on May 3, a bill identified as

Senate bill 221 was introduced, sponsored by 34 Members of the House and Senate, which would establish an investigative subpena procedure as a substitute for a search warrant. This strikes me as an intriguing approach to the problem that the committee might want to take a look at.

I have got a copy of the bill which I would be glad to leave with the committee if you would like to have it.

Mr. KASTENMEIER. The Chair is familiar, in general terms, with the Wisconsin initiative. We do not, as a matter of fact, however, have the bill, and we would appreciate a copy of the bill for the record——

(See appendix 4B.)

Mr. BAILEY. Fine.

Mr. KASTENMEIER [continuing]. Because we are interested in all approaches to the question.

As you have suggested, the Wisconsin approach is somewhat intriguing. I am not clear on what the powers are inferred by an investigative subpena, but we will be interested in analyzing it.

Mr. BAILEY. Thank you.

The *Stanford* decision does have a special and immediate effect on the press. Mr. Justice Stewart noted the "burden" involved in the possibility that police rummaging through newsrooms would find information received from confidential sources—and might be able to identify, and disclose, the sources themselves.

Every editor I know is deeply skeptical—to put it mildly—about Mr. Justice White's statement, in the majority opinion in Stanford, that magistrates will be careful in considering search warrant requests affecting the press. Anyone who has ever covered police court knows that search warrants may be issued as a matter of course, with very little inquiry; and in some jurisdictions, of course, they may be issued by magistrates who are not even lawyers.

The Minneapolis 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 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—but that's the way we have to do it these days.

Mr. KASTENMEIER. If I may interrupt, is that a general practice among major American newspapers?

Mr. BAILEY. Mr. Chairman, I think it is fair to say that most major newspapers have taken steps of one kind or another to deal with the perceived threat posed by this decision. I think different newspapers have adopted different techniques. In our case it was simply a matter that the basic principle is that you buy time and you do that by not having the material which is likely to be sought where they are likely to seek it in the first instance.

The real problem in this situation, as anybody who has had to deal with it can tell you, is that you have got to get time to get your lawyer there and you have got to find a way to get into court. A search warrant is not a process that allows for that under normal circumstances.

Mr. KASTENMEIER. So there is a new procedure, go to Jack Landau's house and seize his reporter's notes there.

Mr. BAILEY. If the reporter's notes are there, they may find them there. They may not be there. The real difficulty is that with material of this kind, the newspapers and its counsel are presented with a problem because that material has to be retained in many cases as a protection against libel suits. If you don't have the material, you can't defend yourself. I do not know what effect the most recent Supreme Court decision in *Herbert* v. *Landau* will do to that question of documentary stuff, but you do have to keep it. It is the best way to deal with complaints, whether they go to court or not, but you can't keep it at the office nowadays.

My own newspaper, like many others, has urged and will continue to urge the enactment, at both Federal and State levels, of broad remedial legislation to protect all citizens. But if Congress and the legislatures are unwilling to enact such legislation, virtually all editors are willing to accept legislation giving the press special protection against search warrants. If that is the direction the Congress chooses to take, we believe the formulation worked out by the administration and embodied in the measure already introduced by the chairman of this subcommittee is an appropriate one. It has the considerable merit of dealing with the product, rather than the producer—thus simplifying the problem of defining who is protected by the first amendment. It protects the publications, and the working notes, of the "lonely pamphleteer" as well as the great metropolitan newspaper or the nationwide broadcasting network.

We do have a number of specific suggestions about the language and I would inquire of the chairman whether he wants me to go through them or just summarize them. There are four or five points—a couple of pages here.

Mr. KASTENMEIER. I would be inclined to urge you to go through them, since at least the principles, whether we ultimately work from H.R. 3486 or some other bill, it seems to me the points you raise about the language may be relevant to other bills as well as this.

Mr. BAILEY. Addressing that proposal, as spelled out in H.R. 3486, we would like to suggest some modifications in present language:

1. On page 2, line 23, after the word "data" and on page 4, line 5, after the word "data," add the following: "which would constitute a direct immediate and irreparable injury to the national security."

We believe it would be wise to include this wording, which picks up the prior-restraint test specified by Mr. Justice Stewart in the *Pentagon Papers* case. We strongly believe that to leave the wording of the bill as it is now would contravene the court's restriction of the prior-restraint power of the Federal Government.

2. On those same lines, incidentally, we would raise a question about the use of "restricted data." We do so because ASNE and its counsel have serious doubt as to the constitutionality of the section of the Atomic Energy Act that establishes the "restricted data" classification. We are now raising this issue in the brief we have filed amicus curiae in the *Progressive* magazine case in the U.S. Court of Appeals for the Seventh Circuit.

It is our contention that those sections of 42 U.S.C. cited are overbroad and vague. For example, when those sections discuss the com-

munication, transmission, or disclosure of "restricted data," we must look to their definition of "restricted data" as defined in 42 U.S.C. 2014(y):

> The term "restricted data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the restricted data category pursuant to section 2162 of this title.

Under current Government interpretation, it appears that any information whatever about atomic weapons or special nuclear material, whatever its origin, is classified—and that its disclosure provides the basis for criminal sanctions unless and until the Government sanctions it.

The crime described is not limited to information about nuclear weapons but would even include a journalist's idle musings about the nature or use of weapons or the operation and development of nuclear power facilities. That could well constitute a crime under the Government's current interpretation.

Could stories about Three Mile Island or the studies of victims at Hiroshima bring about such a search? I suggest it is not entirely an academic question. Some 20 years ago, I took part in writing a book about the first atomic bomb in which we had extensive access to material which I think now, looking at the law, might have subjected us to prosecution if somebody had wanted to make trouble.

It is for these reasons that we think the language "which would constitute a direct, immediate, and irreparable injury to national security" should be included.

Third, in three places, as I cite there, we would eliminate "there is reason to believe" and substitute the words "there is probable cause to believe."

We note that on page 2, line 10; page 3, line 17; the act as drafted uses a "probable cause" test. "Probable cause" has been interpreted by the courts and seems to provide a definitive legal guideline, but we do not know what is meant by "there is reason to believe," and it appears to us that the act should be consistent by utilizing "probable cause" throughout.

4. On page 4, line 19, eliminate the word "appellate" and substitute the word "judicial."

It is conceivable to us that a person could well have exhausted all of his "appellate" remedies at the State level but still have a legal premise to move into the Federal court system. This would not in the strictest sense of the word constitute an "appellate" proceeding but would be in effect a de novo action. Therefore, we feel it is better to utilize the word "judicial" rather than "appellate."

5. On page 4, eliminate all of line 21 through 24, and on page 5 eliminate all of the material in lines 1 through 5.

The language contained in section (b) on page 4 commencing with line 21 through line 24 seems to us to open a "back door" opportunity to obtain a search warrant. To state "there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice" establishes a test that we believe is too loose and too easily met.

If you accept our premise as to the looseness and vagueness of this test, then there is no need for the additional language on page 5, lines 1 through 5.

6. On page 6, eliminate the entire sentence beginning with the word "it" on line 5. This language would establish a kind of Nuremberg or "good German" defense, and it would be an open door for anyone to escape liability in this matter. That officer or employee would pretend that he had anything other than a "reasonable good faith belief in the lawfulness of his conduct"?

7. We believe an exclusionary rule should be included in this legislation. We respectfully disagree with the assistant attorney general on this point. I am a good deal less optimistic than he seems to be when he predicts in his testimony to this committee that violations of the proposed statute "will be, in nearly all cases, inadvertent and unintentional."

8. We also believe language should be added to insure that State laws which provide greater protection than the Federal legislation will not be preempted by the Federal law. Mr. Justice White, in his majority opinion in Stanford, wrote that "State shield law objections that might be asserted in opposition to compliance with a subpena are largely irrelevant to determining the legality of a search warrant under the fourth amendment." We believe such protection laws should not be ignored, and that any Federal statute should make that clear.

9. We are also concerned over Mr. Heymann's comments—at page 7 of his April 25, 1979, statement to this committee—that "materials which are held for purposes other than the dissemination of a form of publication are not protected from a search." I think the legislation should make completely clear that all documentary materials in the file of someone who prepares material for publication are protected—regardless of their source—except for those specifically exempted.

What concerns us here is that precisely the kind of documents cited by Mr. Heymann as examples of nonprotected material are often at the core of important reporting, and that seizure and disclosure of such materials might often reveal a reporter's sources.

If the committee will indulge me, let me add a couple of closing thoughts.

First, it may seem that we deal in nothing but worst-case suppositions. Well, we do, and for good reason. Over time, most journalists learn that sooner or later the authorities, including sometimes the courts, will create a worst-case situation. And when that happens, only the most carefully drawn protections will help.

We do not deal in academic hypotheses in these matters. I could name at least two judges, one prosecutor, and several other government officials who would be delighted to embarrass or otherwise disrupt the operations of my newspaper because of things we have published about them in the past—things we published not for the fun of it but as part of our responsibility to a self-governing community.

Finally, we are dealing here with matters which go to the heart of our system of government and which have been in contention since the earliest efforts to free our self-governance from the weight of tyranny. Protection of the printer, his papers, and his press against surprise search and seizure was one of the root causes of the eventual adoption of the first amendment; and judges on both sides of *Stanford* have stated that the fourth amendment arose primarily out of conflicts between the Crown and printers.

The case law reaches back to 1765 and to the opinion of the Lord Chief Justice of England in a case intriguingly entitled *Entick* v. *Carrington and Three Other King's Men.* Lord Camden, ruling for printer John Entick and against the royal search warrant, said:

> Papers are the owner's goods and chattels; they are his dearest property, and they are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of trespass, and demand more considerable damages in that respect.

If you will permit a personal note in closing: My ancestors on my father's side came to the Plymouth Colony from England 351 years ago. My mother's father, by contrast, came here only about 80 years ago, fleeing the oppressions routinely inflicted on the Jews of Eastern Europe. But despite the time difference, in both cases these men came to this country so they could live and speak freely.

We are all, as Franklin Roosevelt once remarked, "fellow immigrants." Well, let us remember why our forebears became immigrants, and let us preserve as best we can the freedom that drew them to this country. The enactment of legislation to offset this misguided and mischievous ruling will help preserve that freedom.

Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Bailey, for a most thoughtful statement.

I will say to my colleagues, the panel consists of four this morning, and we hope to hear from them all, but I think it might be appropriate, if you have questions of Mr. Bailey, to ask them now, or if you wish, you can hold them for a later point, when all members have concluded their statements. If you have questions you wish to ask Mr. Bailey now, I will yield to you.

The gentleman from Illinois.

Mr. RAILSBACK. I would just as soon wait.

Mr. KASTENMEIER. The gentleman from North Carolina?

Mr. GUDGER. Mr. Chairman, I submit no questions now. There may be questions later in the course of other testimony that we may be prompted to ask Mr. Bailey questions.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. SAWYER. I don't really have any questions. However, I would just like to concur in the observation of the gentleman that search warrants are not, contrary to Mr. Justice White's comments, carefully scrutinized by magistrates. They are scrutinized by the honest, dedicated prosecutor, who is not concerned that the magistrate won't issue the warrant, but who is afraid that the evidence he might get as a result of the warrant may be suppressed in court where the word is given a very fine examination. But that doesn't really help the person whose decision may affect the criminal who is being prosecuted with the material and who inadvertently may defeat the purpose of the prosecutor. But warrants are routinely issued, and I concur.

Mr. KASTENMEIER. The gentleman from California.

Mr. MATSUI. I will reserve my questions, Mr. Chairman.

Mr. KASTENMEIER. In which case we invite the next member of the panel, Mr. Friedheim.

Mr. FRIEDHEIM. Thank you, Mr. Chairman.

I represent, as you indicated, the American Newspaper Publishers Association. On behalf of ANPA's 1,339 member newspapers, I want

to thank this committee for the opportunity to testify on the Supreme Court's action on *Zurcher* v. *Stanford Daily*, a decision which we have tended to call the quick-warrant-and-ransack decision. This decision was handed down exactly 1 year ago today.

Mr. Chairman, protection against unlawful search of a newsroom is essential to the maintenance of a free press, and H.R. 3486 and other bills similar to it are, we believe, a worthwhile approach to this problem. The problem is a very simple one. Newsroom searches must be distinguished from the more usual types of searches for hard evidence.

In a newsroom, the expected object of a search and seizure is not the instrumentality or fruit of any crime, but merely information. If reporters and the publishers with whom they work are to cooperate free of government coercion, then police must not be allowed to waltz into the newsroom and see what has last been filed under "Local Political Corruption, Pending" or "Police Misconduct, Pending" or even "Criminal Trials—Miscellaneous Notes." ANPA believes that the constitutional distinction between the free press and the government must remain unmistakable. To play their proper roles in maintenance of a free society, the two must operate separate from one another. Anything which tends to diminish the independence of the press from the official authority of the government is a dangerous development.

Mr. Chairman, 1 year ago the "rule-of-rummage" decision struck most of the free press—and it still strikes us today—as an outrageous and erroneous decision that hurts every American citizen.

Thus, legislation in response to the decision should not be "press-only" in orientation; the rights and liberties which the press exercises in this area are the rights and liberties of every individual citizen.

ANPA also believes that the free press needs this protection for another reason: The inherent inhibition on vigourus reporting as long as this decision is the law of the land.

Every day, Mr. Chairman, newspapers are involved in gathering information and in reporting to the people about the operation of government—including the police, the prosecutors and the courts. Much of this information, as you know, comes from confidential sources.

This flow of information is vital if the press is to fulfill its watchdog function for the public, and the flow could slow to a trickle if newspapers can no longer guarantee confidentiality.

It is perhaps not unfair to note that confidential sources can range from sheriffs to Senators—even Representatives and Presidents; and search sites under the court's ruling, it seems to us, might even be the homes of Members of Congress, not just newsrooms.

And, ANPA notes that the careful structuring of search warrants, as Mr. Sawyer pointed out, is far from an exact science. Even the warrant which meets the strictest requirements as to specificity is no guarantee against an occasional overzealous searcher using the opportunity of a newsroom search to rifle and rummage and intimidate and obstruct indiscriminately.

An unannouced police raid on a newsroom at edition deadline time might well be so disruptive as to imperil publication itself, producing de facto the very "prior restraint" which the Supreme Court has normally ruled impermissible.

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The fact that these dire possibilities have not been realized in the time since the Court's decision is of no great solace to us. It is largely due to the quick and proper response of Attorney General Bell, of several state attorneys general, and of state legislatures around the country which promptly issued guidelines and rules that reined in the police power to search the press.

ANPA and the newspaper business appreciate these responsible actions, but we believe they are but short-term solutions. These remedies exist—for the most part—at the discretion of those who now happen to hold office. Lasting protection from the daily threat posed by the court's decision can come only from statute.

Mr. Chairman, ANPA's concerns in this matter are based in part on what we have seen happen in other countries. The record is clear that in those countries where the press has been fettered by government, where it has been used as part of a government's investigatory apparatus, where it functions at the whim of government police—in those countries neither the press nor the people are free.

Let me turn briefly now to the provisions of H.R. 3486. May I say that ANPA concurs in all of the suggestions which Mr. Bailey made to you a few moments ago. We recognize that the Justice Department and representatives of this subcommittee and their counsel have labored long and hard to develop a piece of legislation which would protect those involved in first amendment activities from unnecessary and unreasonable third-party searches.

ANPA strongly supports the approach of this bill, which does not protect just newspaper reporters, or just broadcast reporters, or just magazine writers, but which also covers a great many others involved in the development and promulgation of ideas.

Our first observation, however, remains our concern that the legislation stops there. We urge the subcommittee to expand the bill to cover, at a minimum, other professionals accorded a privilege of confidence in our society—and, preferably, to cover all nonsuspect, third parties.

Other key press organizations not represented here today agree with us on that point, including the National Newspaper Association, and I have included comments from NNA's president in my full written statement.

Mr. Chairman, ANPA also generally supports the approach of H.R. 3486 which would prohibit third-party searches for documentary materials and which would require, instead, production of such materials by subpena.

Of course, the bill provides several exceptions under which searches and seizures might occur. ANPA does not disagree with the conditions set forth in most of those exceptions, but we urge that the bill uniformly provide a test of "probable cause to believe" that those conditions exist. A test of "reason to believe," as Mr. Bailey pointed out, which appears in various places throughout the bill, seems to us to equate to mere suspicion on the part of law enforcement officers We believe that the first amendment values at stake here are far too sensitive to be left vulnerable to mere hunch and conjecture presented to a magistrate in an ex parte context.

One of the exceptions would allow police to rummage through documents in order to find information relating to national defense, information that is classified or restricted data. We believe, as Mr.

Bailey said, that this exception is overbroad. It allows for Government seizure of documents without a determination of their sensitivity to national security and without assessment of whether they legitimately deserve to be classified.

Under this approach, Mr. Chairman, a "secret" stamp sitting on the desk of some bureaucrat could become an instrument of authorization for a newsroom search.

ANPA urges adoption of an amendment to allow searches only for such information which, if disclosed, would cause "a direct, immediate and irreparable injury" to national security.

ANPA also is concerned that some sections of the bill would operate in such a way as to deny newspapers their due process rights to pursue an appeal through State courts and into Federal courts if necessary. The exception contained in section 2(b)(4)(B), which Mr. Bailey also mentioned, is so broad and ambiguous that it may undermine the protections this bill is designed to afford.

This exception would allow for a search when materials have not been produced in response to a court order directing compliance with a subpena, and where there is reason to believe that a delay in investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice.

It seems to us it would be easy to read this section as an authorization for a search immediately upon the denial of a motion to quash the subpena. Thus, this section could effectively preclude appellate or other judicial review of a trial court's denial of the motion to quash, eviscerating the due process rights of the press. We urge the subcommittee to delete this provision of the bill entirely.

Finally, we would like to address the broad scope and effect of H.R. 3486. The bill rightfully recognizes that any effective remedial legislation must be applicable not only to Federal, law enforcement officials, but also to officials of State and local governments. However, we believe that Congress should do nothing to subvert the efforts already made in State legislatures across the country to remedy this decision. Congress should not diminish the safeguards which have been adopted in any individual State.

Mr. Chairman, I thank you for the opportunity to present ANPA's views to the subcommittee. We are confident that the committee will consider the legitimate concerns of the free press, which is, of course, indispensable to our free society.

Thank you.

[The prepared statement of Mr. Friedheim follows:]

STATEMENT OF JERRY W. FRIEDHEIM, EXECUTIVE VICE PRESIDENT AND GENERAL MANAGER, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Mr. Chairman, I am Jerry W. Friedheim, Executive Vice President and General Manager of the American Newspaper Publishers Association.

ANPA is a trade association whose 1339 member newspapers comprise more than 91 percent of the daily and Sunday newspaper circulation in the United States. Several non-daily newspapers also are members.

On behalf of our membership, I thank the chairman and members of the subcommittee for this opportunity to testify on legislation to remedy the Supreme Court's "quick-warrant-and-ransack" decision in *Zurcher* v. *The Stanford Daily*—a decision handed down exactly one year ago today.

Mr. Chairman, protection against the unannounced, law-officer search of a news room is essential to the maintenance of our free press. HR 3486, which is before this subcommittee, is one worthwhile approach, and we will offer some specific comments on that bill.

The problem is a very simple one: newsroom searches must be distinguished from the more usual types of searches for "hard evidence."

In a news room, the expected object of a search and seizure is not the instrumentality or fruit of any crime, but merely information. In order to carry out such a search, officials want to examine irrelevant documents in order to find the ones subject to seizure. It is entirely likely that—while officers are rummaging through many documents to locate those sought—sensitive information and confidential sources will be exposed which have no bearing at all on the specific investigative intent of the searches.

If reporters and the publishers for whom they work are to operate free of government coercion, then police must not be allowed to waltz in the newsroom door to see what has last been entered in a file of "Local Political Corruption, Pending" or "Police Misconduct, Pending" or even "Criminal Trials—Miscellaneous Notes."

ANPA believes that the constitutional distinction between the free press and the government must remain distinct. To play their proper roles on maintenance of a free society, the two must operate separate from one another. Anything which tends to diminish the independence of the press from the official authority of the government is a dangerous development, indeed.

Mr. Chairman, ANPA appeared before the Subcommittee on the Constitution of the Senate Judiciary Committee last year to express our views on the need for legislation in this area. Those views remain essentially unchanged today.

As ANPA Chairman and President Allen H. Neuharth said, in the wake of the decision a year ago, the court's decision:

". . . puts a sledgehammer in the hands of those who would batter the American people's First Amendment rights. It authorizes harassment and intimidation of the public's right to know, and it literally and legally picks the lock that protects the exercise of a free press and, in effect, of free speech." And, Mr. Neuharth continued:

"I am not arguing that the press should be judge, jury and a law unto itself. But, if a newspaper possesses legitimate evidence, that material can and should be obtained only through the subpoena process and not through a search-first-ask-later policy. I am sure the free press will have the help and understanding of most American law enforcement officers; because they do not wish to become storm troopers any more than Americans wish to be stormed."

There were many similarly vigorous press responses. The "rule-of-rummage" decision struck most of the free press then, and still strikes us today, as an outrageous and erroneous decision which hurts every American citizen.

Thus, legislation in response to the decision should not be "press-only" in orientation; the rights and liberties which the press exercises in this area are the rights and liberties of every individual citizen.

ANPA also believes that the free press needs the protection for another reason. That is the inherent inhibition on vigorous reporting as long as this decision is the law of the land.

Every day, newspapers are involved in gathering information and in reporting to the people about the operation of government—including the police, the prosecutors and the courts. Much of this information comes from confidential sources—people who would not publicly provide this information about alleged abuses or outright criminality if they knew the police could identify them by using the newspaper's own files.

This flow of information—vital if the press is to fulfill its watchdog function for the public—could slow to a trickle if newspapers can no longer guarantee confidentiality.

Similarly, the investigatory spirit of a newspaper may be sapped in some instances. It would be regrettable, but understandable, for a reporter to be reluctant to pursue leads if he knew that perhaps the subject of his story, or the subject's friends, could obtain a warrant and uncover all of the reporter's information and sources. It is perhaps not unfair to note that confidential sources can range from sheriffs to senators—even representatives and presidents; and search sites under the court's ruling might even be the homes of members of Congress, not just newsrooms.

And, ANPA notes that the careful structuring of search warrants is far from an exact science. In many cases, the magistrates issuing the warrants would be laymen. Due consideration of First and Fourth Amendment protections easily could get lost in the ex-parte procedure between a magistrate and the law enforcement officials with whom he regularly deals.

Of course, even a warrant which meets the strictest requirements as to specificity is no guarantee against the occasional overzealous searcher using the opportunity of a newsroom search to rifle and rummage and intimidate and obstruct indiscriminately.

An unannounced police raid on a newsroom at edition deadline time might well be so disruptive as to imperil publication itself, producing de facto the very "prior restraint" the Supreme Court has normally ruled impermissible.

The fact that these dire possibilities have not been realized in the year since the court's decision is of no solace. It is largely due to the quick and proper response of Attorney General Bell, several state attorneys general, and state legislatures around the country that promptly issued guidelines and rules which reined in the police power to search the press. ANPA and the newspaper business appreciate these responsible actions, but we believe they are but short-term solutions. These remedies exist—for the most part—at the discretion of those who hold office. Lasting protection from the daily threat posed by the court's decision can come only from statute.

Mr. Chairman, ANPA's concerns in this area are in part based on what we have seen happen in other countries. ANPA, through a variety of active affiliations with international press organizations, plays an integral role in world press freedom matters. This experience makes us all the more appreciative of our free society with its independent press. For the record is clear that in those countries where the press has been fettered by government, where it has been used as part of a government's investigatory apparatus, where it functions at the whim of government police—in those countries neither the press nor the people are free.

Let me turn now to HR 3486.

ANPA recognizes that Justice Department officials and representatives of this subcommittee have labored long and hard to develop a workable piece of legislation which would protect those involved in First Amendment activities from unnecessary and unreasonable third-party searches.

H.R. 3486 provides a no-search rule for the work-products of those involved in protected First Amendment activities. And, it greatly restricts the power to search for and to seize all other documents and information in the possession of those engaged in such activities. The bill properly applies only to third-party, non-suspect searches, and only to "materials upon which information is recorded." Protection is not extended to instrumentalities or fruits of crime.

ANPA strongly supports the approach of this bill which does not portect just newspaper reporters, or just broadcast reporters to just magazine writers, but which also covers a great many others involved in the developiment and exposition of ideas.

Our first observation, however, remains our concern that the legislation stops there. We urge the subcommittee to expand the bill to cover, at a minimum, other professionals accorded a privilege of confidence in our society—and, preferably, to cover non-suspect third parties.

Other key press organizations agree with ANPA on this point. As one example, let me quote briefly from a letter from the president of the National Newspaper Association, James W. Gill of the Hemet, California, News. Mr. Gill says:

"As you know, the National Newspaper Association represents the interests of about 500 small-city daily and 5,000 community weekly newspapers published throughout the United States. Our Board has considered very carefully the matter of legislation in this area, and we feel very strongly that the Congress must make any legislative protection as broad as possible. 'Press-only' relief is not our goal, although quite naturally we are worried about the impact on community journalism—its ability to ferret out local issues of crucial importance to readers—if local police are free to roam through files and records. But we think the case for broad, third-party relief in this area is a sound one and we support it."

Mr. Chairman, ANPA also generally supports the approach of HR 3486 which would prohibit third-party searches for documentary materials and which would require, instead, production of such materials by subpoena.

However, the bill provides several exceptions under which searches and seizures might occur. ANPA does not disagree with the conditions set forth in most of these exceptions, but we urge that the bill uniformly provide a test of "probable cause to believe" that those conditions exist. The lesser test of "reason to believe which appears in various places throughout the bill, equates to mere suspicion on the part of the law enforcement officers. The First Amendment values at stake here are far too sensitive to be left vulnerable to mere hunch and conjecture, presented to a judge or magistrate in an ex parte context.

One of the exceptions to the prohibition against searches for work product, and to the limitation on searches for other documents, would allow police to rummage through documents in order to find information relating to national defense, information that is classified, or data that is restricted under the espionage laws and related statutes.

ANPAbelieves this exception is overbroad. It allows for the government seizure of documents without a determination of their sensitivity to national security and without assessment of whether they legitimately deserve to be classified. Under this approach, a "secret" stamp on the desk of a bureaucrat becomes the instrument of authorization for a newsroom search.

Thus, ANPA urges the subcommittee to adopt the standard articulated by the Supreme Court in the Pentagon Papers case. Sections 2(a)(1) and 2(b)(1) should be amended to allow searches only for restricted information which if disclosed, would cause "a direct, immediate and irreparable injury" to the national security.

Section 2(b)(4)(A) would allow a search and seizure if there existed a court order for complaince with a subpoena and appellate remedies for the subpoena had been exhausted. ANPA recognizes the legitimate aim of this exception—to preserve the authority of the court and its power to compel proper production of information. But ANPA is concerned that this section could be read to defeat due process rights of reporters and others engaged in First Amendment activities.

It is reasonable to suppose that a newspaper, faced with a subpoena from a state court, might file a motion to quash. It is equally reasonable to suppose that judicial action on this motion might be litigated through the state's appellate process. Upon exhaustion of appellate review, a court could issue an order directing compliance with the subpoena. Yet, the newspaper may still be faced with important constitutional and collateral questions concerning the subpoena which were excluded from the appellate actions by the state's procedural rules but which could be raised in federal court. Often, determinations of these issues may be paramount to a newspaper's response to a subpoena.

In order to preserve full due process rights, and in order to prevent abuse of this exception to the no-search protections of HR 3486, ANPA urges the subcommittee to replace the word "appellate" with the word "judicial."

ANPA further is concerned that the exception contained in Section 2(b)(4)(B) is so broad and ambiguous that it may undermine the protections HR 3486 is designed to afford.

This exception allows for a search when materials have not been produced in response to a court order directing compliance with a subpoena, and where there is reason to believe that the delay in an investigation or trail occasioned by further proceedings relating to the subpoena would threaten the interests of justice.

It would be easy to read this section as an authorization for a search immediately upon the denial of a motion to quash the subpoena. Thus, this section could effectively preclude appellate review of a trial court's denial of a motion to quash; eviscerating the due-process rights of the press. ANPA urges the subcommittee to delete entirely this provision of the bill.

ANPA also takes issue with the complete defense to civil remedies provided in Section 4(a)(2). This defense allows complete vitiation of liability for any law-enforcement official who has conducted a newsroom search with "a reasonable, good-faith belief in the lawfullness" of the search.

It is essential to keep in mind that the damage done by a newsroom search is an irretrievable intrusion upon the free exercise of First Amendment freedoms. It is simply unacceptable to render these freedoms subject to some hoped-for "reasonable good faith" of the police. It is a hazard which a free press and a free people dare not risk. It is, simply, the Russian way, not the American way.

ANPA urges the subcommittee to delete this defense. By striking the defense and thereby buttressing civil liability, the subcommittee would properly encourage law-enforcement agencies to conduct more-thorough investigations before a warrant is secured—a result that would benefit everyone.

Finally, ANPA would like to address the scope of H.R. 3486. The bill rightfully recognizes that any effective remedial legislation must be applicable not only to federal, law-enforcement officials, but also to officials of state and local governments. However, ANPA believes that Congress should do nothing to subvert the efforts made in state legislatures across the country to remedy this intolerable decision. California and Connecticut already have enacted laws on this subject, and bills currently are pending in many other state legislatures. Congress should not diminish the safeguards adopted in any state.

Mr. Chairman, I thank you and the members of the subcommittee for this opportunity to present ANPA's views. We are confident that the committee will duly consider the legitimate concerns of the free press which is indispensable to our free society.

Mr. KASTENMEIER. Thank you, Mr. Friedheim.

Are there any questions of Mr. Friedheim at this point?

Mr. Sawyer?

Mr. SAWYER. From the beginning I have had somewhat the same problem that you and Mr. Bailey enunciated; namely, the narrow scope of this bill. As I understand it, the obvious reason for the narrow scope is to try to reach State activities as well as Federal, with Federal cases comprising approximately 10 percent of the warrants issued.

What do you think of the feasibility of adding a new section to the bill, which would cover all cases under Federal jurisdiction? And secondly, I have been wrestling with the question of how to reach State law enforcement on a broad basis; and other than perhaps by providing an exemplary statute that States may emulate one way or the other, I don't see how it can be done.

Do you have any ideas on that?

Mr. FRIEDHEIM. Mr. Sawyer, I think we would regard that as an improvement in the bill as now drafted, if you found that you could broaden the coverage of H.R. 3486. I have no doubt that that would have an effect on the State legislatures which are now wrestling with this problem. It would certainly be useful to those of us who believe that is important. And, it would show State legislators that you felt broad coverage was important on the Federal level.

We think there are some ways that you might be able to address this problem while still utilizing legislation like H.R. 3486. We think for example, that maybe the definition of "work product" could be expanded so that it included material created, if you will, or used by some of these other people who enjoy confidential privileges in our society—doctors, lawyers, psychiatrists. That might be one way to approach it.

Mr. SAWYER. But even beyond the confidential privileges, I can conceive of a situation where the innocent tourist with a camera in Washington, D.C., takes a picture of a riot and goes back home. Under the theory of the *Zurcher* case, in the middle of the night his house is broken into to get his negative, even though he is a totally innocent party. Similarly, the community bookkeeper who does a bookkeeping service for a number of businesses would be subject to a random search under the theory of the *Zurcher* case. So there are a lot of people that would fall into the almost unrestricted category of innocent people, who should be afforded some type of protection. Therefore, I think legislation should cover all innocent third parties who have neither a peculiar relationship with the guilty party that might lead to probable cause that they might destroy or conceal evidence, or are themselves suspects.

I just can't see, except by limiting it to the press and the interstate commerce theory, how we could affect State law enforcement that broadly.

Mr. BAILEY. Could I suggest, Mr. Chairman, in response to Mr. Sawyer's inquiry—and this is not my idea; this is an analysis that Senator Mathias sent me earlier in the year. He suggests the answer to that question is that Congress could rely not only on the commerce power but on its authority under the spending powers to condition State receipt of Federal police-related funds on the adoption of special procedures governing the searches of all nonsuspects and on section 5 of the 14th amendment. There is an awful lot of Federal money going into law enforcement these days. This is not my thought, but this is one answer to that question that you raise.

Mr. SAWYER. Thank you.

Mr. LANDAU. Congressman, I think Mr. Bailey makes a good point. When Congress passed the Voting Rights Act, Congress said it was going to implement under section 5 the right to vote, the federally guaranteed right to vote, because it felt that vote was an extremely important right, and it implemented the Voting Rights Act, and as you know, the Southern States sued under *Katzenbach* v. *Morgan*, and the Supreme Court said that the Congress has the right to pass legislation under section 5 to implement the fundamentally guaranteed rights of the Constitution.

That being the case, it would seem very peculiar for the Justice Department, which of course argued in favor of the validity of that law, to come back now and say that the Congress does not have the right under section 5 to implement the protections of the fourth amendment.

Mr. SAWYER. The problem here is that the Supreme Court has ruled that fourth amendment protection doesn't apply. Thus, I believe it would be pretty hard to hang it on the fourth amendment now that the Supreme Court has interpeted it narrowly in the *Stanford* case.

Mr. LANDAU. But that is without a congressional determination. All things being equal, the court interpreted it its way, but if Congress steps in and says, "we feel that this is an unreasonable search under the fourth amendment," there is no reason why Congress can't step in just the way Congress stepped in and said, "We think literacy tests are unreasonable." The Supreme Court upheld literacy tests in the past. It wasn't until Congress exercised its jurisdiction under section 5 to come in.

The second hook in the commerce clause is that when Congress passed the 1968 omnibus crime control bill, it not only prohibited wiretapping, which obviously is in commerce, but it prohibited eavesdropping of private residences and offices under two separate standards: One, any office or residence which was used in commerce, and even a further extension of your power. You prohibited eavesdropping if there was reason to believe that the device came through commerce.

Now, if you can stop, if you can protect the privacy of an individual home based on a suspicion that the device used may be in commerce, there is hardly any home in the country that doesn't have something that comes in commerce, and this is your act, and once again the Justice Department has defended the constitutionality of it, so I find it rather ironic that Mr. Heymann comes up here arguing to the Congress that it doesn't have precisely the powers which the Justice Department has argued it has under *Katzenbach* v. *Morgan* under the 1968 act.

Mr. SAWYER. Thank you.

Mr. KASTENMEIER. Are there any other questions of this witness at this time?

Mr. GUDGER. No further questions, Mr. Chairman, but I think these last remarks are certainly pertinent with respect to earlier testimony which we have had on this same point, and I think it well to let these witnesses know that we have already gone into section 5 of the 14th amendment in earlier testimony.

Mr. KASTENMEIER. The scope of my proposal here is that horizontally should it include: one, communicators essentially under the first amendment; two, other professionals; or three, everybody that being the widest horizontal region, and vertically should it be Federal and

State, local? If so, under what theory? These are obviously important questions.

Mr. BAILEY. I think the exemplary force should not be underestimated. To follow out Mr. Sawyer's thought, the exemplary force of the Federal statute is not to be underestimated in terms of the State legislature.

Mr. KASTENMEIER. One of the witnesses argued—and I will not ask you to respond to this, but you can in due course—the attorney general from Utah said essentially this is not a Federal problem. The cases are not essentially Federal in character. In fact, they are, by and large, Californian, if you analyze the 16 cases, most recent cases. They tend to center in California, and that, as a result, this ought to be a State matter; as Wisconsin is dealing with the question, presumably California is, and really we shouldn't be interested in the questions to the extent of writing Federal legislation because of that. That is his analysis and his advice to us, and in due course, I will ask you to comment on that.

Mr. BAILEY. Could I respond to that right now, or would you rather wait?

Mr. KASTENMEIER. No, Mr. Bailey, you may.

Mr. BAILEY. This is a hard case, but it is a real case, and perhaps it answers the point.

Several years ago two FBI agents were shot to death on an Indian reservation in South Dakota. We had a reporter and a photographer in the reservation at the time following it. The reporter got a lot of information. The FBI was understandably anxious to pursue this case. They lost two of their agents who were ambushed and shot to death. They wanted very much to have some converstation with the reporter. They wanted to know who he had been talking to and on what he had based certain things in his story. It was a very difficult situation.

We were not able to give them satisfaction as they wished it because we suggested that it would be appropriate for them to pursue other avenues before they tried to breach confidential source material. There was no shield involved here. It was simply an assertion on my part, basically, that before they come to the reporter, they ought to see if they could get the information elsewhere.

They got it elsewhere, and those cases have been closed. But if they had had the power then to come at us with a warrant, they would have done it. I have no doubt about it, having talked to the two gentlemen from the FBI who came in to discuss the matter with me when they wanted to talk to a reporter. They would not have bothered to exhaust other sources. They would have simply gone and got a warrant, and they would have got it because if the FBI goes to a Federal judge and says two of our men were killed and we want a search warrant to get evidence to arrest and convict the people who did it, the judge is going to give them that warrant. They would have been in with a warrant, and they would have gone through our office. There is no question about it, and I don't make a judgment about that. But that is a specific case in point that bears on the point raised by the State officials in courts, Mr. Chairman.

Mr. FRIEDHEIM. If I could comment on that also. We find it a little bit remarkable that any State attorney general would indicate that because something happened recently in California, it has no applicability to the rest of our society. It might not seem the same way if the shoe were on the other foot.

The fact of the matter is, however, that even though some of these instances have arisen in California, there have been instances in other places. Mr. Bailey cited the Minnesota situation in which the law office might be searched. We have had threats, not carried out, but threats clearly made to newspapers in Philadelphia by a district attorney who said he might search the newspaper, and in Florida where the Pensacola Journal was challenged by the sheriff who said he just might come down and search.

So we would disagree with the attorney general of Utah that this exists only in California. We would also disagree that just because it exists in California we shouldn't address it. And, we would also point out that there are Federal statutes and Federal law enforcement offices involved here. So, you have every right to address this problem, and we urge you to do so.

Mr. KASTENMEIER. The reason I cited the attorney general was so that you understand what the other view is; namely, that this is a matter that ought to be pursued individually by the States.

Mr. BAILEY. I think the editor of that magazine in your district might be able to raise a question about whether a Federal search warrant might have affected him. If the Federal Government felt that he was violating the law if he had published that article in Progressive, and they had wanted to print it, and they wanted to prosecute under the Atomic Energy Act, under the law as it now stands as laid in *Zurcher*, I believe they could have rummaged his office with a warrant.

Mr. KASTENMEIER. I was going to ask you that. I didn't mean to pursue it at the time. Whether in the FBI *South Dakota* case or in that case, why would a search warrant be unavailable to the Justice Department or the FBI?

Mr. BAILEY. Well, the case that I spoke of arose prior to the holding by the court and I don't know the extent to which the FBI keeps up on this kind of thing, but the holding in that case at that point was the circuit court holding, if I remember correctly—the district or the circuit court holding, and I don't know. The matter had not yet gone before a grand jury and, at least I, not being a lawyer. In the case of the State of Minnesota, they don't have subpena under present State statutes in an investigative stage.

They don't have warrant power and they don't have subpena power. They have warrant power, but they don't have subpena power in a pre-grand-jury case. The grand jury can issue subpenas. The prosecutor said they can't, prior to that time, and that is where that Wisconsin approach would be an intriguing one because it would definitely extend power back to an earlier stage of the law enforcement process.

Mr. FRIEDHEIM. Mr. Chairman, those of us in the press who are really cognizant of the views of the law enforcement officers are among those who champion an independent judiciary and have supported law enforcement officers across the country. We understand that they don't want to be inhibited in pursuing criminal justice. We feel, however, that in our society the purpose of the law is not to make it easier for police forces to conduct searches of the citizenry, but to make it difficult for them to do so.

Mr. KATZENMEIER. I understand. As a matter of fact, I am not sure, really, that the view of the attorney general of Utah was antagonistic. He wasn't saying we shouldn't have a law forbidding such an easy search, but, rather, that it was really a matter of the States to determine that for themselves.

He didn't reach a judgment that some such law should eventuate. May we call on Mr. Robert Lewis, president of the Society of Professional Journalists?

Mr. LEWIS. Thank you, Mr. Chairman, for this opportunity to present the views of the Society of Professional Journalists, Sigma Delta Chi, on search-and-seizure legislation.

The Society of Professional Journalists is the oldest, largest, and most representative organization serving journalism. Founded in 1909, we have 300 chapters and nearly 35,000 members in all branches of communications. About 20 percent of our members are students and the rest are professionals.

I commend the subcommittee's efforts to find a legislative remedy to the problems raised by the U.S. Supreme Court's *Zurcher* decision. While there has been no proliferation of newsroom searches since the May 31, 1978, decision, the threat to a free press, nonetheless, exists. Police shouldn't have the license to search news files except under limited circumstances.

As long as they have that license, the result will be a chilling effect on journalists and their sources.

We would like to believe the Constitution is all the protection the press needs to fulfill its role as the public's watchdog. But the damage from the *Zurcher* decision is too great to ignore. We support legislative relief with the hope this does not establish a precedent for Federal regulation of the press.

The ingredients which we believe are essential in such a bill include the following: It should apply at all law enforcement levels, particularly the local level where the potential for abuse may be greatest.

Local magistrates are apt to give priority to any number of factors other than first and fourth amendment rights when considering approval of a search warrant. Local officials feel the sting of a crusading newspaper or broadcaster more directly than their State and Federal counterparts, and the temptation to retaliate may be greater.

Finally, small news organizations have fewer resources to fight intimidation through court challenges. They are the bedrock of American journalism and their protection will be assured by a law that covers all law enforcement agencies.

The bill, in our view, should apply to all innocent third parties. We seek no special privilege for the press. But more to the point, surprise police searches of persons not suspected of wrongdoing is foreign to this country's concept of justice and freedom.

I think it is interesting that, for 200 years, we have gone along on the assumption that the Constitution barred searches of innocent third parties. And now, 1 year ago, the Supreme Court said we were wrong all this time, that the Constitution does not prohibit it. I think it is incumbent on Congress to close the loophole that was raised in the *Zurcher* decision.

I would like to concur in Mr. Bailey's observation on what we feel are deficiencies in the administration's bill and I will not go into it further except to note that I would hope it would be the subcommittee's intent to report out a bill that would allow classified documents, such as the Pentagon papers, to be published, and would not bar the publication of documents just because they have been classified.

The practice of overclassifying Government information continues despite efforts by President Carter and others to limit its scope.

In a parallel case—*The Reporters' Committee for Freedom of the Press* v. *A.T.& T.*—the Supreme Court held last fall that Government agencies may subpena long-distance telephone records of reporters and news organizations without their knowledge or consent.

The secret subpenas had been obtained by the Nixon administration in the early 1970's in an attempt to identify the confidential sources of several Washington journalists.

While secret subpenas of telephone records may be justified in criminal investigations, we believe it is indefensible to subject reporters and news organizations to such subpenas when they are not suspected of criminal misconduct. And the society's board, at a meeting in Denver recently, voted to urge this subcommittee to extend the safeguards, against indiscriminate newsroom searches to also include telephone record fishing expeditions.

Finally, for several years, the society has endorsed Federal and State shield laws designed to protect the confidentiality of journalists' news sources, and we would urge you to consider incorporating such a provision in this bill.

Thank you.

[The prepared statement of Mr. Lewis follows:]

STATEMENT OF ROBERT LEWIS, CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, CONCERNING SEARCH AND SEIZURE

Thank you Mr. Chairman for this opportunity to present the views of the Society of Professional Journalists, Sigma Delta Chi, on search and seizure legislation. My name is Robert Lewis, I am a Washington correspondent for Newhouse News Service and chairman of the Society's Freedom of Information Committee.

The Society is the oldest, largest and most representative organization serving journalism. Founded in 1909, we have 300 chapters and nearly 35,000 members in all branches of communications. Twenty percent of our members are journalism students, 80 percent are professionals.

I commend the subcommittee's efforts to find a legislative remedy to the problems raised by the U.S. Supreme Court's Zurcher decision. While there has been no outpouring of newsroom searches since the May 31, 1978, decision, the threat to a free press nonetheless exists. Police shouldn't have the license to search news files except under limited circumstances. As long as they have that license, the result will be a chilling effect on journalists and their sources.

We would like to believe the Constitution is all the protection the press needs to fulfill its role as the public's watchdog. But the damage from the Zurcher decision is too great to ignore. We support legislative relief with the hope this does not establish a precedent for federal regulation of the press.

The ingredients which we believe are essential in such a bill include the following. It should apply at all law enforcement levels, particularly the local level where the potential for abuse may be greatest.

Local magistrates are apt to give priority to any number of factors other than First and Fourth Amendment rights when considering approval of a search warrant. Local officials feel the sting of a crusading newspaper or broadcaster more directly than their state and federal counterparts, and the temptation to retaliate may be greater. Finally, small news organizations have fewer resources to fight intimidation through court challenges. They are the bedrock of American journalism and their protection will be assured by a law that covers all law enforcement agencies.

The bill, in our view, should apply to all innocent third parties. We seek no special privilege for the press. But more to the point, surprise police searches of persons not suspected of wrongdoing is foreign to this country's concept of justice and freedom.

We believe it is important to carefully define the circumstances under which a newsroom search warrant could be obtained. I hope it would not be your intent to prohibit the publication of government documents such as the Pentagon Papers that pose no threat to the national security and yet have been classified. The practice of over-classifying information continues despite efforts to limit its scope.

In Section 2(a)(1) and Section 2(b)(1) of the Administration's bill, seizure of material "relating to the national defense, classified information or restricted data" would be permitted. It would be better to limit seizure to cases involving a direct, immediate and irreparable injury to the national security.

The administration bill authorizes seizure of non-work product documents that had been subpoenaed but are withheld pending court challenges of the subpoena, if "there is reason to believe that the delay in an investigation or trial . . . would threaten the interests of justice." (Section 2(b)(4)(B)). The phrase "threaten the interests of justice" is vague and should be replaced with more specific language.

The administration bill authorizes civil damages for illegal searches of newsrooms. But it virtually nullifies this provision by providing as a defense an officer's "reasonable good faith belief in the lawfulness of his conduct." (Section 4(a)(2)). We would urge that this language be deleted.

In a parallel case (*The Reporters Committee for Freedom of the Press* v. *AT&T*, the Supreme Court held last fall that government agencies may subpoena long-distance telephone records of reporters and news organizations without their knowledge or consent. The secret subpoenas had been obtained by the Nixon Administration in the early 1970's in an attempt to identify the confidential sources of several Washington journalists.

While secret subpoenas of telephone records may be justified in criminal investigations, it is indefensible to subject reporters and news organizations to such subpoenas when they are not suspected of criminal misconduct. We urge you to extend the safeguards against indiscriminate newsroom searches to telephone record fishing expeditions.

For several years the Society has endorsed federal and state shield laws designed to protect the confidentiality of journalists' news sources. We urge you to cinsider incorporating a shield provision in the search and seizure bill. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Lewis.

May I comment on the last point before going on to our last witness?

This subcommittee worked long and hard on what was then termed newsman's privilege. In fact, the gentleman from Illinois, Mr. Railsback, as well as others on the subcommittee, including myself, worked very hard to develop an approach during two Congresses and we wedded some of our ideas together. We did accept a modified two-tier approach but we thought it went well beyond the minority decision in that case.

My colleagues, Mr. Railsback, Mr. Cohen, accepted ultimately the principle that it must apply throughout the country, not Federal only, but Federal and State. That was an important concession on that part, and we had a reasonably good bill developed, although it was not possible to gain a consensus among the news community.

It is very important, just as in dealing with the civil rights on the basis of racial discrimination, that the community it affects be supportive of the effort. If that doesn't come about, then you have no solution. We found that the news community was very badly split on the issue and the longer discussion went, the more apprehension there was on the question of defining what constituted a newsman. Plus other nagging questions of, can we really rely on the first amendment in subsequent decisions to vindicate our own view of what it purports to cover.

I think that really took over, and I think there were at least four separate definable views—who didn't want any bill at all whatsoever because they thought the press already had too many privileges and that the decision was appropriate, as well as those that wanted, on the other hand, no legislation on the theory that this was really a matter of the first amendment which ultimately would be vindicated.

So eventually we conceded the point that we do not have enough of a consensus to move forward and the effort came to a slow halt. I must say, however, for those of you who went through this, we all had sort of mutuality of sympathy for one another's views and efforts.

I did raise a question with the Assistant Attorney General, insofar as I thought it was relevant, that in the question of search governed presently by guidelines the question of recognizing the privilege and writing guidelines down from a Justice Department standpoint, if they were analogous and if in fact the Justice Department decided to embrace a legislative approach in the search question, particularly one largely tied to the first amendment to news and communication, then it opened the question again whether the Justice Department view was that maybe we should be looking at the corollary for a legislative approach in terms of newsman's privilege.

So to some extent it is an open question although I would be unfair if I didn't suggest I think it is fraught with more difficulties legislatively hopefully than the search and seizure question before us.

Mr. LEWIS. Mr. Chairman, I think you will find, in view of some of the decisions that have come down in the last year, that support in the news community for a Federal shield law has increased. And I think one of the organizations represented here has recently switched its stand on that.

Mr. BAILEY. Mr. Chairman, I was going to say if you and your colleagues wish to wade into that swamp again this year, I think you would find somewhat more consensus in the press than before. ASNE, which has never taken a formal position on the shield law and which reflects some of the crosscurrent you are talking about, the board of directors earlier this month, by a 12 to 3 vote, came out and endorsed the idea of a Federal shield law, which is a substantial change in position for that organization, and I think that shift is reflected in other newsmen's thinking.

We have taken a lot of lumps in the last few years.

Mr. LEWIS. I think what has happened is, we used to think that the first amendment was our shield; we didn't need anything more than the first amendment. Now the Supreme Court, in both search and seizure and in the shield area—the *Farber* case—has stripped us of that protection and it appears if we are to have any protection, it is going to be from your hands.

Mr. RAILSBACK. Would you yield, Mr. Chairman?

Mr. KASTENMEIER. I yield.

Mr. RAILSBACK. I remember so well what the chairman of the subcommittee has just recounted and I believe it would be very, very helpful if some of you could take the lead and maybe determine what kind of shield legislation you could as a group support. A great deal of work was expended on the problems that the chairman has highlighted and it may be a good idea to resurrect it.

However, I think the impetus, as I told Bill Small of CBS, is probably going to have to come from the media itself because I don't think we want to take up shield legislation again unless we feel we are accomplishing something that would benefit you. It seemed that many of the media thought the shield legislation at that time would maybe not be helpful.

Mr. BAILEY. That is right, Mr. Railsback. You shouldn't underestimate the educational functions of the Congress, and I don't think

the effort is wasted. I guess you could say in a way it never is wasted, but in this case it appears to me that members of the committee may have been somewhat more impressed about the trend that court cases were likely to follow than some of us were in the news business, but it did reflect, as you know, I am sure, a sincerely troubled feeling that many of us had about this whole question of legislating around the edges of the first amendment.

What has happened is that it has become, I think, increasingly clear that the courts are willing to fool around with the edges of the first amendment and indeed venture to the core of it, and some of us take consolation from the wording of the first amendment, which, as it deals with the press, prohibits the abridging of the freedom of the press, a somewhat narrower prohibition than is applied to other forms of speech.

But I think your suggestion is a good one. I do think it is incumbent upon the press at this point to see whether it can reach some kind of consensus before it asks you to wade through that matter again.

Mr. RAILSBACK. The reason I mention that is, I remember when Bill Small was here he made a remark which seemed to imply that we had let the thing die. The reason, we did let it die—was because we felt that there was, as our chairman has said, such fragmentation among the media as to whether Justice Douglas' minority dissenting opinion would eventually be the law of the land. I can understand why some of you are having second thoughts in the light of what has happened.

Mr. BAILEY. I think you let it die, but I think you held the mirror to the mouth for a while and it didn't fog up.

Mr. RAILSBACK. That is about right.

Mr. KASTENMEIER. I must say in all candor it also appeared at the time that the Senate—I think Senator Ervin was chairman of the subcommittee—was not disposed to go forward with it and that it would have been largely unavailing in any event given that time. I would like to say that, while I think parenthetical discussion of it is appropriate during this set of hearings, I think it is impractical to think that there is any chance of tying the shield issue to the search and seizure question. Neverthless is is as a companion question which still confronts us.

It certainly confronts the news community, and, indeed, if the Congress is successful in writing an acceptable bill on search and seizure, then that may indeed inspire others to move forward on other fronts of newsman's privilege.

At this point I would like to call on Mr. Landau.

Mr. LANDAU. Thank you, Congressman.

We would certainly like to thank you for the time and effort you have taken and, of course, we do all remember the time and effort you and Mr. Railsback and Congressman Cohen took in 1974 and 1975 and the frustrations that developed on everybody's part in trying to work that out.

I think maybe Mr. Bailey made a point that it was a good idea but maybe it was just a little too early at that time.

I am here on behalf of The Reporters Committee, which is a legal defense and research fund primarily devoted to defending the first amendment rights of the press, and I would like permission to introduce Ms. Joy Koletsky, who is an attorney in our office, and who helped prepare this testimony.

Mr. KASTENMEIER. We are very pleased to have that introduction and on behalf of the committee I am pleased to accept your statement with its appendixes so that it will be printed in its entirety in the record.

Mr. LANDAU. Yes. I am not planning to read the whole thing.

Mr. LANDAU. We have been long involved in the *Stanford* case. As a matter of fact, after Judge Peckham's original decision voiding the search, we and some other news organizations in California filed a parallel case in the superior court in Los Angeles County against the sheriff there. That case, interestingly enough, is still pending, but may be mooted because of the new law which California has passed—and I think Mr. Bailey made reference to it—setting its own standards. It is, by the way, a press-only bill in California.

We agree with just about everything that is said here and I guess especially with Mr. Bailey's rather eloquent statement that this decision really strikes at the whole concept of a society which is supposed to be free from Government intrusion except in the most exigent circumstances. We have submitted a long statement going all the way back to *Entick* v. *Carrington*, and up through *Warden* v. *Hayden*, so I will only make a few brief points.

I think it is important that Congress take the initiative in this area and pass legislation protecting every citizen not suspected of a crime from surprise search warrant raids by the police because our committee feels, as I think do most of the other press organizations, that the fourth amendment was designed to guarantee the privacy of all homes and offices from instrusive police raids and not just the homes and offices of journalists.

I think that most people agree that the Supreme Court decision is really a travesty to the concept of privacy and that it is a particular outrage to the editorial privacy rights of the press to protect its confidential and other unpublished information from inspection and seizure by the Government.

I think, as the other speakers have made clear, the decision really does give local and Federal law enforcement agents blanket authorization to raid any home or office, even the tourists, as Mr. Sawyer pointed out, rifling through their files and private correspondence. It, of course, poses a particularly damaging problem to the press because it, in effect, converts a good newspaper which goes out and investigates these things, into an investigative arm of Government.

We support, and we hope you will strongly consider, expanding the bill to cover all citizens. I think that if you go into section 5 and in effect say to yourself, as the Congress said to itself in the Voting Rights Act, and in the 1965 Civil Rights Act, that there are certain issues which arise in society, such as racial discrimination or discrimination against women which Congress has been given the power under section 5 to correct, it would be as if the State's attorney general in the south in the early sixties came to Congress and said, "Well, don't fool around with us. We will work things out on an individual basis."

I don't think that discouraged Congress from passing the Civil Rights Act, and I certainly think that this issue, the privacy of people's homes, is in many ways as important an issue as that was, although, of course, the practice is not as widespread as racial discrimination was.

I have already answered in response to Congressman Sawyer's question the Federal preemption question. I do think that Senator Mathias' suggestion, which I have not heard before, is a very intriguing suggestion, although you know that the Appropriations Committees of both Houses are somewhat hesitant to tie substantive restrictions to the Federal appropriation powers. However, it has been done in the past, not, I don't think, in the first amendment area, but in the commercial area.

We think in general that the administration bill is an honestly conceived bill, which attempts to protect the press in a rather expansive reading of that definition and that, as far as it goes, it would probably achieve most of its goals. But we believe it doesn't go far enough and that, in addition to the jurisdictional coverage, I would like to point out a few things for your consideration.

One is that the administration bill, because it is tailored for the press, does make a distinction between work product and nonwork product material. Our committee has instructed me to suggest to you that we would really support eliminating that distinction. The reason is that most lawyers, or journalists, or doctors, or businessmen, do not divide their files up between work product and nonwork product material.

They will get nonwork product material, let's say a letter, from a third party and they will write their own thoughts on the top. So that permitting a search for nonwork product material is going to inevitably allow the police to rummage through work product material.

We find as a matter of practical recordkeeping—the way most people keep their files—that it doesn't really seem to be a very practical distinction, although in theory it sounds like a reasonable approach.

On the national security exemption, we agree with the other speakers that the whole bevy of statutes which the administration bill exempts—I think there are something like eight or nine of them—in addition to the vague difinition of restricted data in the Atomic Energy Commission Act, is simply too vague a loophole; probably what ought to be done is to just adopt the standard suggested in the *New York Times* v. *United States* case of a direct, immediate, and irreparable injury to the national security of the United States.

We also agree with the other speakers that the reason-to-believe exemption is very vague. We all know what probable cause is. We all know it has to be backed up by an affidavit. We all know that the source of information to the policeman who signs the affidavit has to be a reliable source and it has to be tested, and I think that it would open up really quite a loophole to get into the vague standard of whether they have reason to believe or whether they don't have reason to believe.

We feel the same way about the interest-of-justice exemption. If a journalist or another citizen loses litigation involving a subpena, he has at that point a choice. He can turn the information over or he can go to jail. Under the administration proposal, for example, after Mr. Farber refused to comply with the subpena against him and lost the appeal in the Supreme Court, Mr. Farber's home and the entire New York Times could have been searched.

We think that the law ought to be just what it is. Let the courts have their punitive power to punish those people who will not comply with the subpena, but don't use the litigation laws as an excuse to engage in a search.

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And, as to what causes a delay in an investigation or trial, that seems to me once again to be a terribly vague standard, the length of the chancellor's foot in any particular case.

We support the remedies in the administration bill and agree with the other speakers that there ought to be open the avenue of filing in Federal court which, because of the word "appeal" that has been used in the administration bill would appear to be foreclosed.

I make one other suggestion. Congress says that it shall be unlawful to do this, but we do not have any criminal penalties in this bill. It might symbolize to local and State law enforcement how strongly you feel about this if you were to include a criminal penalty for its violation in addition to the civil damages which the Justice Department bill suggests.

That is basically a summary of that rather lengthy statement we gave you and thank you for inviting us.

Mr. KASTENMEIER. That was certainly a brief summary, as you say, of a rather long statement, but I appreciate the work that has gone into the other statement and I commend perusal of it. Certainly the additions, the analyses made, are very useful and I commend all four witnesses.

I have a number of questions.

I am going to, however, in fairness, reverse the order here. I will postpone my questions.

I would like to recognize first the gentleman from California, Mr. Matsui.

Mr. MATSUI. I have no questions, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer?

Mr. SAWYER. I just want to make another observation that a search warrant is a poor method to use to obtain a document.

It may be that in certain national security cases you might have a highly trained group of FBI agents that are thoroughly conversant with the problem and could identify or recognize what a document's relevancy to something might be. However, the average deputy sheriff or detective that is executing these search warrants is not oriented to white collar type matters and probably would have a hard time identifying what document might fit into some intricate picture. By the same token, when you have documents in places where there are several of them, you almost need the person who maintains the documents to be able to get what you want, with reasonable dispatch.

So it doesn't seem to me that putting these limitations, if they be that, on search warrants is really any hindrance to legitimate law enforcement.

I would just make a guess that over 90 percent of all search warrants that are issued are issued for hard-drug-related crimes. I was a prosecutor for a while in an urban environment and I don't remember our writing search warrants for anything other than heroin.

I appreciate maybe in a murder case searching the suspect's home to find some bloody clothing or something. It seems to me those are the legitimate areas of search warrants, and there you have people who know what they are looking for and know it when they see it. However, to turn even a fairly large city's detective force, which we had, loose on a business office, to try and find some papers would be a useless exercise unless law enforcement officials took hours and hours and hours, and attempted to read every document.

It seems to me in this situation that it is inherently a misuse of the purpose of the search warrant from a pure working practicality.

That is all I have, Mr. Chairman.

Mr. LANDAU. You bring up one point we tried to address ourselves to in the testimony and that is that the privacy law for search and seizure has normally been thought of as protecting somebody's house where everything in the house is sort of theirs so that whatever privacy violation occurs would affect just the homeowner.

But, when raiding a newspaper office or a lawyer's office, you open a filing cabinet and you are destroying hundreds of privacy interests in one wall of files, so that it is not just the lawyer's privacy interest which is being destroyed as is the case with the single homeowner. Every desk that is opened that is of a different reporter or a different lawyer, and every set of files is a different set of informants and different confidential information. Therefore, a search of the offices of reporters or other professional people is in many ways much more intrusive because you may be violating the privacy of dozens of people when you raid an office rather than that of just the individual homeowner when you are confined to the single family house or apartment or roominghouse.

Mr. SAWYER. When you are engaged in civil discovery, you can get a court order or discovery order to obtain hundreds of files literally and then have trained lawyers who understand the case conduct the examination.

It is almost a self-defeating job just by the volume of materials and by the skill of the people you have who are attempting to recognize the importance of what they are seeing. It just seems to me that the search warrant is not a legitimate way to obtain a document in a normal case.

Mr. BAILEY. I might make one point that hasn't been brought up, again kind of a footnote, but I think it is relevant here. This does apply to newspapers, but I think it would also apply to other businesses and other institutions that use computerized data.

We now produce our newspaper and there is all kinds of fancy jargon that really isn't English and I will try not to use it.

We now write our stories on computer terminals. Often our people take notes directly into their computer file while listening to the telephone, for example, just as you used to write it down by hand, or type on a typewriter.

You now enter it into the computer. Any significant determinated rummaging search would include, I am sure, an attempt to pull data out of documents out of the computer system. If there were an intrusion into that system, it would automatically prevent the publication of the newspaper. Our own people can make that system crash without half trying all too often, and the prospect of a rummaging search through that kind of a piece of equipment would quite simply and totally stop the publication because we are now linked in this computer system for everything from the initial entry of news information, classified advertising, a good deal of display advertising, all of our typesetting, and within a few months in our case platemaking as well.

So that all you have to do is bang up one part of it and the newspaper is out of business. That is a new dimension ot this situation that really didn't even exist a year ago.

Mr. LANDAU. One thing that occurred to me, Congressman Sawyer. Congressman Kastenmeier mentioned Senator Ervin. Senator Ervin initially, when the shield law legislation came up, had the same reservations that some members of this subcommittee might have about the preemption question involving the States, and several weeks after the hearings he issued a statement which I think we will be able to send you, saying that he had changed his mind after considering the question and that he thought that the commerce power would permit Congress to reach the States, and, of course, he was certainly a strong defender of the sovereignty of the States vis-a-vis the powers exercised by the Congress, and if you wish, we can try to find that for you.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. GUDGER. Thank you, Mr. Chairman. I want to commend and thank each of these witnesses for a most stimulating testimony. I am impressed, particularly by Mr. Landau's brevity. His written testimony is very provocative and very penetrating, particularly I think with respect to his review of the history of this constitutional privilege against unreasonable search and seizure, and his reciting for the record in his testimony Mr. Justice Fortas' comment in *Warden* v. *Hayden* when he seemed to perceive in that decision an erosion of that right and said, "The Court today needlessly destroys root and branch, a basic part of liberty's heritage."

In other words, I think that you, by that quotation, Mr. Landau, interpreted *Warden* v. *Hayden* as something unexpected in your knowledge of our jurisprudence and our constitutional interpretations up to that time.

Now, my question though to you is this: You have intimated by your earlier statements that you felt that the Congress has power under section 5 of the 14th amendment to interpret and broaden the interpretation of the privilege against search and seizure so as to protect all innocent third parties from a documentary sifting.

That was the impact of our earlier statement. Is that correct?

Mr. LANDAU. Yes, sir.

Mr. GUDGER. Now, if the Congress has that power and if the Congress disagrees with *Warden* v. *Hayden*, and *Zurcher* v. *Stanford Daily*, and we do not act to protect all innocent third parties from such search and seizure, are we not approving the act and interpretation of the Supreme Court in all other aspects except as drawn by this bill laid before us if we approve it in its present form?

Mr. LANDAU. You are asking a question, of course, that the Court tangles with frequently, When a statute comes up and there is a debate on a point which is not passed, some Justices will say Congress considered this and rejected it. Other Justices will say Congress took no position on it. I don't think there is any pattern in the cases.

Mr. GUDGER. Let me phrase it this way. If Congress has the power to write the immunity around everybody and does not do so and writes it only about first amendment activities, are we not under the old philosophical principle of inclusio unius est exclusio alterius is perfectly all right everywhere except in first amendment activities, and no other protection is justified.

We do not suggest the State act; we do not suggest anyone else act to protect other than as we prescribe for the press.

Mr. LANDAU. I think it is a subjective decision that the Court will make. The justices will, for example, read these hearings and say

Congressman Gudger suggested that because we did not act, in fact Congress was approving all the rest of this. That is how legislative analysis is done in these decisions. Perhaps the way to cure that problem is simply to make a flat statement in the committee report of whatever bill comes out that by not dealing with everyone else, if, in fact that is what happens, by not dealing with persons who are not members of the press, Congress does not intend in any way to say that it approves of the rest of the decision, but that it just decided to deal with this issue at this time on this basis.

Now, I think if there was a formal committee report adopted by the conference committee with a policy statement of that nature, then the Court would not be able to go behind that conference report and say, "But they considered it and therefore they are approving it."

Mr. GUDGER. Thank you very much for that analysis.

Now, I want to address a question that is somewhat parallel to that to Mr. Lewis. Mr. Lewis, in your testimony you state: "We support legislative relief with the hope this does not establish a precedent for Federal regulation of the press."

Do I interpret that to mean that if this Congress is to enact H.R. 3486 and draw a pattern of protection from search and seizure around first amendment activities, that you perceive that hereafter the Congress might write fruther exclusions or exceptions in this area?

Mr. LEWIS. That is the fear of many of our members and that is the underlying fear in the new community for opposition to shield legislation. Some journalists felt that that would be a first step toward total or further or more complete Federal regulation of the press, and that is indeed a fear.

Mr. GUDGER. Isn't then your conclusion that maybe this problem should not be limited to the press, but that we should address the problem as broadly as Congress is able to address it, protecting all documents in the hand of innocent third parties.

Mr. LEWIS. Absolutely.

Mr. GUDGER. Let me ask you one final question and this will conclude my questioning. In this society of ours where presumably all of us are to some degree educated and capable of creative writing and are likely in that connection to undertake, as Mr. Bailey testified he did, from time to time, research with the possible thought of writing a book or with the possible thought of developing some theories for the future benefit of mankind, which may or may not be written. Why should not each of us be entitled to the same protection of those documents which we gather, which would contribute to that work product which we may or may not ultimately undertake, and the work product itself, even if it is in the form of notes and analyses?

Why should there be a distinction between Mr. Bailey, the researcher, and Mr. Bailey, the publisher? Mr. Bailey?

Mr. BAILEY. My view, Mr. Gudger, is that there should not be such a distinction. I personally feel very strongly, and the shorthand I use is that this is a fourth amendment matter and that what ought to be addressed here is the holding of the court that it is not a fourth amendment matter.

To me the whole business of the search warrant of a party not suspected of a crime is repugnant, and I really have searched my conscience on this and I really don't believe it is because I am a journalist that I feel that way.

I am an amateur at history, not a lawyer, as probably my testimony has made clear, but I am an amateur at history and I do know something of the sources of our system of self-governance in this country and the reasons therefore and I feel very deeply that what brought all of our forbears to this country was the deep desire to be free of the heavy hand of arbitrary government power. That desire takes many forms and, as you know, in your State, I think just about everybody that settled your State, was trying to get away from that kind of thing, whether it was from London or from Tidewater.

It is what drove people through the passes and onto the Great Plains and across to the west coast, that search to be left alone, and I don't see this as a press matter. I see it as a matter of the individual's right to be left alone except for due cause.

Mr. GUDGER. Mr. Chairman, I want to make an expression of appreciation. I want to thank these gentlemen again, but I would like to make this observation. Mr. Bailey has said he is not a lawyer. That is the loss of the legal profession. I have an idea that he would have made a great lawyer had he had that opportunity. Thank you very much.

Mr. KASTENMEIER. I thank my colleague for his observation.

Next I would like to recognize the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I might just say that Mr. Bailey is probably doing much better right where he is rather than being a lawyer somewhere else.

Mr. BAILEY. I don't know about that, Mr. Railsback.

Mr. RAILSBACK. Anyway, let me address the panel and ask is it the view of all of you that the administration's bill may be deficient in these respects: One, using a standard other than probable cause; that is, "reason to believe"; second, that the national security language may unintentionally be a loophole; and, third, that it should be expanded to include other third parties?

Is that a fair statement that all four of you would agree with?

Mr. FRIEDHEIM. Yes, sir.

Mr. BAILEY. Yes, sir.

Mr. RAILSBACK. Let me just mention then, Mr. Landau, that I I have introduced the Mathias bill, which is H.R. 4181, I think I would like to have you take a look at in addition to the other bills that you mentioned and please understand there is absolutely no pride of authorship. All of us on this committee want to do what we believe is right in correcting what may be a very serious problem. I happen to think after looking into it a little bit more than I had initially, that the problems that may be developing for lawyers or for doctors may be every bit as serious, if not more so, than the ones that obviously confront the press.

What I would like to get into now is what really concerns me.

Mr. LANDAU. Congressman Railsback, this wasn't brought out in the case, but in the raid against the Stanford Daily in California there was a simultaneous raid made on the office of the Stanford Psychiatric Services and their records were seized too.

Now, that was not litigated in the case, but is in the record, so we already have an example of this type.

Mr. RAILSBACK. What really bothers me about these rummagings and riflings of files is not only that the law enforcement people have

access to a particular individual's file, but apparently in some searches they have actually rifled other patients' files, which should be clearly offensive to all of us.

I am troubled. I have to do some more homework about the *Zurcher* case but apparently the case would not recognize either first amendment or fourth amendment protection. So then, in legislating, if we want to preempt, the States we can possibly use the rationale suggested by Senator Mathias, which is based on section 5, the implementing section of the powers section of the 14th amendment. Section 5 presumably would permit us to afford protection going back to either the first amendment or the fourth amendment, and given the finding in *Zurcher*, it appears to me that that may be difficult to do.

On the other hand, I am bothered by Senator Mathias' other statement that perhaps we ought to use the dangled carrot approach. In other words, we can preempt by saying if you want out money, then you have to agree to do this. That bothers me.

But, what is your feeling? Maybe you ought to elaborate a little bit more, Mr. Landau, on the holding of the *Zurcher* case, and what you think that it provides in trying to use what I think would be the desirable device, which would be section 5, using the rationale of the voting rights cases. What are the problems there as far as preemption of the State is concerned?

Mr. LANDAU. I can only point out to you without any determination by Congress the Supreme Court upheld the constitutionality of State literacy tests because Congress hadn't spoken in the area. When Congress then decided to speak, the Court deferred to the congressional determination as to what was necessary to protect the right to vote. I think we are in the same situation here. Congress has not said what an unreasonable search is and, based on that silence, the court, by a divided vote, has said it will interpret what is a reasonable or unreasonable search.

If Congress once again decides to step into the area and exercise its section 5 prerogative, I see no reason why the court wouldn't give Congress the same deference in the fourth amendment privacy area as it has given the Congress in the voting area.

Mr. RAILSBACK. Then just one final comment. I remember that we did try to design findings in the 18-year-old-vote legislation. The court in *Oregon* v. *Mitchell* was not willing to recognize the clear congressional findings, but I take it you would distinguish that case because, as I recall, the court held that there was express authority given to the States. Is that right?

Mr. LANDAU. The section says the State shall set the requirements.

Mr. RAILSBACK. Is it your belief that in finding support for legislation that would be preemptive in nature that we would be best to rely on section 5 of the 14th amendment, or the commerce clause, or the dangled carrot or perhaps all three possibilities?

Mr. LANDAU. I guess from our point of view I would suggest putting all three in and hoping that if they shoot down two, at least you will have a third one.

Mr. BAILEY. May I comment on that? I would agree with Jack that the more reasons you could find for doing what you do, the better, but I don't think you necessarily should be bashful about the dangling carrot.

I think the Congress has used it is a number of ways, usually in a positive rather than a negative way. I can remember covering, as a reporter, way back about 1957, the argument over the inclusion in the highway legislation of the three-quarters of 1 percent bonus for getting billboards off the highways.

It is an old and traditional, if somewhat soiled, device.

Mr. RAILSBACK. It works too.

Mr. BAILEY. It works and it has often been used.

Mr. RAILSBACK. A little bit heavy-handed.

Mr. LANDAU. Of course, you used it in title VI in terms of Federal grants to State institutions in terms of discrimination.

Mr. BAILEY. But the LEAA law and the administration of it, I think, in a number of cases, has hedged about with federally set standards, for instance, in the privacy area.

Mr. RAILSBACK. Yes.

Mr. BAILEY. On which the granting of money to the States is conditioned. The meeting of those standards is often set as a condition for it. So even in this law enforcement area it is a device that has been used.

Mr. LANDAU. I just made one note to myself. You asked Mr. Bailey if there was much evidence of newspapers being worried about this. We had a call just yesterday from a television station which had some dealings with a law enforcement agency and there were some implications that unless they turned over what the law enforcement agency wanted, they were going to search them, and they called us to say what can we do to protect ourselves, and we have had several calls like that.

We had a judge in Ohio several months ago just flat out tell the the editor that if they didn't produce what was wanted he was thinking about issuing a search warrant which, of course, threw the newspaper into a——

Mr. RAILSBACK. I believe it is significant that there have been something like 500 subpenas issued ever since the court upheld the other requirement that confidential sources be disclosed. That is kind of revealing.

I have nothing else, Mr. Chairman.

Mr. MATSUI. Mr. Chairman, may I just ask a question?

Mr. KASTENMEIER. Yes. The gentleman from California.

Mr. MATSUI. Thank you. This is just a follow up to Mr. Railsback's statement, Mr. Landau.

Have you read any treaties or talked to any legal scholars on constitutional law that would say that this case does limit Congress from working under section 5 of the 14th amendment?

Mr. LANDAU. There is a great debate in the legal literature and has been ever since Katzenbach versus Morgan. There would be some people who would agree with Justice Frankfurter's views on the matter that section 5 was not intended to let Congress go to the substantive areas of the Bill of Rights, but there is a debate in the legal literature, but the Supreme Court action still stands, and it stands on a brief submitted by the United States, which is why I said I found it very curious that they come back 14 years later and argue that their own brief is not justification for what we suggest they can do.

Mr. MATSUI. Thank you.

Mr. KASTENMEIER. I might add that I share the gentleman from Illinois' reservation about relying on financial inducements to effectuate the purpose of this bill. I think it is probably a good, general, tactical position to rely on as many supports as you can, but I think we are really talking about LEAA, and that is a troubled administration. It is a bill which we are recently processing through this committee. It has a limited life, and one doesn't really know from one term to the next what will be included, how many dollars there will be.

For example, I think this year, like in past years, we excluded money for construction. In past years we included it, so to rely on such a device to have some sort of uniform application of the principles, we hope we can enact here, that is a very, very tenuous leg indeed to rely on.

I personally do not commend it because of the great uncertainty associated with LEAA.

On another point, in reading and remembering what Mr. Bailey has said, but nonetheless I will ask the point again, and that is, as far as bills covering the Federal cases only, Mr. Bailey suggested it could have an exemplary or model utility for States. There are situations which might have been covered and were not, and it might have some value in that context as well. But apart from that, we are really not talking about the problem as a Federal problem, are we? Essentially it is a State and local problem, the search and seizure problem. It is not essentially a Federal problem.

Therefore, if the act were by any means limited to Federal application only, its impact would be very, very greatly reduced in terms of where the problem is.

Mr. BAILEY. In the sense that criminal law and criminal justice proceedings generally, in terms of the numbers, the percentages, are overwhelmingly State and local, yes.

Mr. LANDAU. You raise another problem, Congressman, and that is we have a case in California where we know that the California authorities wanted to subpena a California reporter but were prohibited by California's absolute shield law. They then made an arrangement with the Federal Government to have the reporter called before a Federal grand jury, because the Federal case law is not anywhere near as tough as the California shield law. If you set up a Federal-only bill, you would then, I think, be encouraging the FBI to avoid the Federal stricture by making similar arrangements with States to serve search warrants in incidents where the FBI would be prohibited, and of course knowing the FBI's great cooperation between the State and Federal law enforcement, you might be doing two things: One, as Congressman Gudger has suggested, implying that this is a good thing to do; and, secondly, almost encouraging Federal law enforcement officers to avoid the law by dealing with the State officials.

Mr. KASTENMEIER. Mr. Landau, you list—and I think maybe we had the list before—the 15 or 16 cases. Of the 15, 13 are derived from California?

Mr. LANDAU. Right.

Mr. KASTENMEIER. You have also indicated in the meantime California has enacted a search and seizure law which would—would it prohibit these activities?

Mr. LANDAU. Yes; what they did was very curious. What they did was simply say you may not search for anything covered by their absolute shield law, so they absolutely prohibited all searches under, I think, all conditions. Destruction is not an exemption. National security is not an exemption. Death is not an exemption. It is as absolute as California's shield law is.

Well, of course, the California courts have sort of trampled over the California shield law, and now there is an effort in California to have a constitutional amendment to force the State courts to obey the shield law, so that the fight has really escalated due to what the California courts have done.

Mr. KASTENMEIER. Therefore, if we enacted H.R. 3486 more or less in its present form, with or without the amendments that you have suggested, as far as the State of California is concerned, wherein so many of the pieces of litigation and incidents have arisen in the last 10 years, it would be important that H.R. 3486 not preempt State law, because in California they have an excellent and a stronger law.

Mr. LANDAU. You have the same situation under title 7. Many States have passed antidiscrimination laws which are considerably more stringent than the laws which the Congress has passed, and of course the State authorities are obligated to adhere to the higher standard of their State law. In those States where there is no State law, they have to follow Federal law; and if a State were to pass a law with less protections than Congress has provided, they would still have to follow the Federal law.

Mr. KASTENMEIER. I want to personally thank you.

Are there any other questions?

If not, on behalf of all of us here this morning, I wish to commend you and congratulate you on your testimony. You have been of very great assistance to the committee. We have entered sort of the definitive phase of our hearings. On this important question, it is sort of a continuing exercise we are in, and I think some members of the committee may still be disposed to write a bill that does not include the scope and the problems addressed today. I think some of us are not quite as sanguine as members of the panel in terms of constitutional problems.

There has been testimony which was supportive and that suggested largely this was a policy question. We should measure policy, law enforcement versus other values, striking a balance, and then probably we could constitutionally justify it. But assuming there will be some resistance to accepting such a substantial change, I am sure there will be a strenuous constitutional test were we in fact to extend it to State and local, and give the widest possible scope to the bill as recommended by you this morning.

In any event, we trust that you will be able to aid us not only this morning but in the weeks to come as we deliberate on this question.

Thank you.

That concludes the hearing this morning.

Tomorrow morning at 10 o'clock, we have another hearing. I urge members of the committee to attend as it is the last scheduled hearing on this question. Until that time, the committee stands adjourned.

Mr. LANDAU. Thank you, Mr. Chairman.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned, to reconvene at 10 a.m., Friday, June 1, 1979.]

[The prepared statement of Mr. Landau follows:]

The Reporters Committee for Freedom of the Press

Legal Defense and Research Fund

Room 1112 • 1750 Pennsylvania Ave. NW
Washington, DC 20006 • Tel. (202) 347-6888

STATEMENT OF

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Delivered By

Jack C. Landau

Before

THE HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES

AND THE ADMINISTRATION OF JUSTICE

May 31, 1979

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INTRODUCTION

Mr. Chairman, Members of the Subcommittee:

My name is Jack C. Landau. I am a news reporter employed by the Washington Bureau of the Newhouse Newspapers, and I appear before you today on behalf of The Reporters Committee for Freedom of the Press,* a Legal Defense and Research Fund which concentrates on defending the First Amendment and freedom of information interests of the news media. I am accompanied by Ms. Joy Koletsky, a staff attorney with The Reporters Committee.

A. TWELVE PENDING BILLS TO REVERSE STANFORD DAILY

On behalf of our Committee, and of the working press we defend in court and in other ways, we should like to thank you for this opportunity to present our views on proposed legislation to reverse the recent Supreme Court decision of Zurcher v. Stanford Daily,[1] primarily, H.R. 3486, drafted by the Administration and introduced by Representative Kastenmeier, which is identical to S. 855, introduced in the Senate by Senator Bayh. This testimony will also cover issues raised in other search warrant bills introduced in both the House and the Senate:

H.R. 1373, introduced by Representative Gudger;

H.R. 380, introduced by Representative Guyer;

H.R. 1437, introduced by Representative Quayle;

H.R. 283, introduced by Representative Drinan;

H.R. 1305, introduced by Representative Sawyer;

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*The Reporters Committee would like to express its appreciation to Brona Pinnolis of George Washington University Law Center and Steven Helle of the University of Iowa College of Law who, as interns at The Reporters Committee, helped in the preparation of this testimony

H.R. 322 & H.R. 323, introduced by Representative Fish

H.R. 368, introduced by Representative Green

H.R. 1293, introduced by Representative Crane

S. 115, introduced by Senator Mathias

B. TWO MAJOR ISSUES: PERSONS COVERED AND GEOGRAPHICAL JURISDICTION

Although each of these bills varies somewhat, they basically address themselves to two primary questions:

First: Some of the bills would restrict the search warrant powers of both federal and state law enforcement officials (the Administration bill, Mathias, Guyer, Quayle, Drinan, Fish H.R. 323, Green, and Crane) and some would only restrict the search warrant power of federal law enforcement officials (Gudger, Sawyer and Fish H.R. 322.)

Second: Some bills would protect the privacy of all citizens not suspected of a crime (Mathias, Gudger. Guyer, Quayle, Sawyer, Fish H.R. 322, and Green). Some bills would protect only the privacy interests of the press (Drinan, Fish H.R. 323 and Crane). The Administration bill is somewhat different. It would protect "materials possessed by a person in connection with the purpose to disseminate to the public a newspaper, book, broadcast or other similar form of public communication" and is intended to cover scholars, researchers and others not normally thought of as being members of the conventional news media.

C. STANFORD DAILY'S EFFECT ON JOURNALISTS AND OTHER CITIZENS

This legislation was prompted by the Supreme Court's 5-3 ruling of May 31, 1978 that the First and Fourth Amendments to the U.S. Constitution do not prohibit local and Federal law enforcement officials from conducting no-notice surprise search warrant raids on members of the public and the press -- not suspected of involvement in any crime; not in possession of the fruits or

instrumentalities of any crime; and not suspected of intending to destroy information, should it be sought by subpoena.

All the police must show to a local magistrate, under the decision, is that there is probable cause to believe that any member of the public or the press has any type of documentary "mere" evidence remotely or indirectly connected to the commission of any crime.

Armed with the probable cause showing, the police are authorized to force their way into homes and offices and to inspect all of the contents in their effort to seek the information specified in the warrant.

There is no question that this decision is a travesty to the privacy rights secured to every citizen under the Fourth Amendment -- which prohibits "unreasonable" searches -- and that it is a constitutional outrage to the editorial privacy rights of the press to protect confidential and other unpublished information from inspection and seizure by the government.

This decision gives local and Federal law enforcement officials blanket authorization to raid virtually any home or office in this country -- rummaging through files, private correspondence, and confidential information -- and the public and the press subjected to this rummaging power are helpless to protect documents from the prying eyes of government.

It is particularly damaging to the independence of the news media because it converts every reporter and photographer into an investigative arm of law enforcement.

It is for these reasons, as this testimony will more fully develop later, that The Reporters Committee strongly favors Congressional legislation protecting every member of the public, including the press, from this type of destructive police power; and furthermore, that we urge the Congress to make this protection uniform for all citizens by restricting the surprise raiding power of both Federal and state law enforcement officials.

Our records show that since 1970, there have been fifteen search warrants issued for information in the possession of recognized news organizations -- thirteen obtained by state officials and two by the Federal Bureau of Investigation.

As usual in government harrassment of the press, the first victims were smaller news organizations: a student newspaper, an FM station and an alternative weekly. But within the last 18 months, search warrants were obtained against the four major television stations in the San Francisco area and the Associated Press bureau in Helena, Montana.

While there have been no raids we know of in the last 12 months, the fear of such raids has become an integral part of news gathering for many publications. In some cases, journalists are destroying or hiding their notes. In other cases, newspapers have developed standardized procedures in preparation for such raids such as making sure that a photographer accompanies the police, taking pictures of the rummaging and that a tape recording is made of all conversations between news personnel and the police. This fear has prompted a number of state press associations to

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obtain legislation in the states. For example, bills have been passed in California, Connecticut, Pennsylvania and Nebraska, while in other states bills have been introduced but not yet passed.

The reasons for the press's fears are based on bitter historical experience. For example, there were no more than a dozen subpoenas for confidential news sources served against the press from 1960-1969. Then, the courts started upholding these subpoenas. The result was, that from 1969-1978, we know of at least 500 subpoenas for confidential and unpublished information.

Even if we do not see dozens of raids against news organizations in the near future, we would still urge Congress to act because no journalist or news organization will feel secure living under the threat of a possible raid anytime a newspaper or broadcast station is working on any story involving crime. Furthermore, as other editors and reporters have pointed out, just one raid at the right time could do incalculable damage to the public's right to know the news. If the New York Times had been raided, the Pentagon Papers might never have been published; and if the Washington Post had been raided and its Watergate files seized early in its ivestigation, the entire Watergate story and the resignation of President Nixon might never have occured.

D. PRESS REACTION TO STANFORD DAILY

In the course of your deliberation on whether to move promptly, you have at your disposal the opinion of virtually every major

professional press association, many prominent individual journalists, and dozens of newspaper editorials.

These news media persons and organizations are unanimous in their condemnation of the police raid decision, not only based on their objective evaluation of the danger to confidential sources, but also based on their subjective evaluation of the danger to our whole Constitutional system of values.

Perhaps Howard K. Smith, a member of this Committee, put it best when he said: "When I was a new young reporter at the United Press in Nazi Berlin...there was a knock at the door... and 15 Gestapo men barged past me, began opening every desk and studying every piece of paper they could find...Six hours later they left... I remember thanking God this couldn't happen in America. Well, now it can. It is the worst, most dangerous ruling the Court has made in memory...."

If you were to tell someone that you had just visited a country where police have the authority to conduct surprise searches of innocent news organizations and innocent homeowners, and rifle through their files and correspondence, they would probably say that you had just come back from the Soviet Union or China. That is why I suggest that this decision symbolizes a police power alien to our whole concept of a free society. Modifications or limitations on this ruling are not enough. It must be excised from our law, root and branch. And, as the following list of amici curiae in the petition for rehearing in the Stanford Daily case demonstrates, we are not alone in our sentiments:

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, *et al.*,
Petitioners,
v.
THE STANFORD DAILY, *et al.*,
Respondents.

LOUIS P. BERGNA, *et al.*,
Petitioners,
v.
THE STANFORD DAILY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF IN SUPPORT OF PETITION FOR REHEARING SUBMITTED BY AMICI CURIAE

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
THE NATIONAL NEWSPAPER ASSOCIATION
THE NATIONAL ASSOCIATION OF BROADCASTERS
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS
THE ASSOCIATED PRESS MANAGING EDITORS
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
THE STUDENT PRESS LAW CENTER
THE SOCIETY OF PROFESSIONAL JOURNALISTS (SIGMA DELTA CHI)
THE NEWSPAPER GUILD (AFL-CIO)
THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFL-CIO)
THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION
THE NEWSPAPER ASSOCIATION MANAGERS, INC.*
THE NATIONAL PRESS CLUB

[List of amici curiae continued on inside cover]

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Arizona Newspapers Association, Inc.
Arkansas Press Association
Canadian Community Newspapers Association
Colorado Press Association
Florida Press Association
Georgia Press Association
Hoosier State Press Association, Inc.
Idaho Newspaper Association
Illinois Press Association, Inc.
Inland Daily Press Association
Iowa Press Association, Inc.
Kansas Press Association
Kentucky Press Association
Louisiana Press Association
Maryland-Delaware-D.C. Press Association, Inc.
Massachusetts Newspaper Publishers Association
Michigan Press Association
Minnesota Newspaper Association
Mississippi Press Association
Missouri Press Association, Inc.
Montana Press Association
Nebraska Press Association
Nevada State Press Association
New England Press Association
New Jersey Press Association
New Mexico Press Association, Inc.
New York Press Association
New York State Publishers Association
North Carolina Press Association, Inc.
North Dakota Newspaper Association
Ohio Newspaper Association
Oklahoma Press Association
Ontario Weekly Newspapers Association
Oregon Newspaper Publishers Association, Inc.
Pennsylvania Newspaper Publishers' Association
Publishers Bureau of New Jersey, Inc.
South Carolina Press Association
South Dakota Press Association
Southern Newspaper Publishers Association
Suburban Newspapers of America
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Texas Press Association
Utah Press Association
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The American Society of Newspaper Editors; and
The Associated Press Managing Editors

II

LEGAL DISCUSSION: STANFORD DAILY AND THE FIRST AND FOURTH AMENDMENTS

In the past when this Committee has testified, we have limited our suggestions to pending legislation affecting the interests of the press only. While we realize that it might be politically simpler for us to ask the Congress to limit the search warrant powers of police in regard only to the raiding of news offices, The Reporters Committee has decided that this privacy protection is important for all of the public, not just the press.

We have come to this conclusion based on the history of the Fourth Amendment which was passed to guard against the very type of raiding power upheld by the Supreme Court in the Stanford Daily case.

A. ENTICK V. CARRINGTON TO WARDEN V. HAYDEN

The List of Infringements and Violations of Rights drawn up by the Boston Town Meeting in late 1772 stated that "our houses and even our bed chambers are exposed to be ransacked, our boxes, chests and trunks broke open, ravaged and plundered...." by officers of the Crown using general warrants.[2/]

Patrick Henry, in urging limitations on the search warrant power, stated that "officers [may, unless subject to restriction] go into your cellars and rooms, and search, ransack, and measure, everything you eat, drink and wear. They ought to be restrained within proper bounds."[3/]

Judge Learned Hand, in reviewing the philosophy of the Fourth Amendment, stated: "[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the

search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence ...."[4]

And Judge Hand was only echoing the language of an 1886 Supreme Court decision, Boyd v. United States, in which the Court unanimously condemned any contravention of the Fourth Amendment principle of an "indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by [the] conviction of some public offense."[5]

In casting this Fourth Amendment principle as a "sacred right", the Boyd Court relied heavily on the reasoning of Lord Camden in the landmark English case, Entick v. Carrington and Three Other King's Messengers. In 1765, Lord Camden voided a warrant for personal papers and enunciated the rationale that was later to serve as the foundation for our own Fourth Amendment. Lord Camden voiced the fear shared by the esteemed Lord Coke that any right of the government to search through personal papers and effects to discover evidence confounded the innocent with the guilty, and was perhaps "more pernicious to the innocent than useful to the public."[6]

Despite the strong antipathy in England and the United States to the rummaging power, there was one exception to the rule. This exception permitted search warrants to issue to seize the fruits and instrumentalities of a crime or to seize contraband. That is the way matters stood for

178 years until May 1967 when the Supreme Court in Warden v. Hayden, reversed the teachings of Lord Camden, the Constitutional Convention and virtually every Supreme Court case until that time. It ruled that warrants could issue for the seizure of mere evidence from innocent third parties not themselves suspected of any involvement in the crime.

Because the items seized in Warden v. Hayden were seized incident to a lawful arrest and because 95% of the search warrants are for drugs or other instruments of crime, it was not until Zurcher v. Stanford Daily that the Supreme Court had the occasion to deal directly with the question of a search warrant for evidence against a citizen, in this case a newspaper, not suspected of a crime and not in possession of any fruits of a crime. But certainly the three dissenters in Warden v. Hayden saw the danger. For as Mr. Justice Fortas said on behalf of himself and Chief Justice Warren: "The Court today needlessly destroys root and branch, a basic part of liberty's heritage." 7/

The destruction of this heritage is particularly damaging to the press, a fact that was as clear to Lord Camden and to the colonial patriots as it is to us today. It should be remembered that the original limitations placed on search warrants in England in Entick v. Carrington stem from efforts of the Crown to bring libel charges against government critics whose papers were seized in raids authorized for the discovery of evidence. If

during such raids the agents found any books to be libelous against the church or state, [they were] to seize them and carry them before the proper magistrate."[8]

Lord Camden strongly criticized the trespass that resulted:

> Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.[9]

Entick v. Carrington and the effort of the Crown to prosecute John Wilkes for seditious libel were well known to the Constitutional Convention. The warrant against Wilkes, signed by Lord Halifax, authorized the King's messenger to search the offices of "authors, printers and publishers" and to "seize...their papers."[10] The Court of Common Pleas, in awarding Wilkes damages, said that this was "a ridiculous warrant against the whole English nation"[11] and every American statesman during our revolutionary and formative period as a nation was undoubtedly familiar with this monument of English freedom and considered it the ultimate expression of constitutional law.[12]

When the Framers of the Constitution met and looked over the history of the colonies in the previous forty years, they saw two institutional groups who had been continually subjected to persecution by the Crown: the religious dissenters and the Colonial Printers. For the religious dissenters, they constructed a protection against the establishment of a state religion. For the Colonial Printers, they established freedom of the press in the First Amendment and protection against the type of rummaging raids to which the Colonial Printers had been subjected by passing the Fourth Amendment.

As Mr. Justice White points out in Stanford Daily: "The struggle from which the Fourth Amendment emerged is largely a history of conflict between the Crown and the press."13/

It does, therefore, seem somewhat ironic that the Fourth Amendment was passed to guarantee that law enforcement officials would not invade the offices of Colonial Printers searching their papers for evidence of crime; and that 189 years later, the Supreme Court has permitted the police to do precisely what the Fourth Amendment was passed to prevent.

B. THE DANGERS OF THE STANFORD DAILY DECISION

We reject the theories put forth in Stanford Daily that there is any effective way to limit the damage suffered by a news organization subjected to no-notice surprise searches for a number of reasons.

1. Politically Appointed Magistrates

First, politically appointed or elected magistrates are not an adequate safeguard for the First Amendment interests of press organizations whose historical function is to expose the corruption and misdeeds of the very political structure of which the local magistrate is an integral part.

Local magistrates, who issue search warrants, are elected or appointed within the political processes of the local party structure. Frequently, they run on the same tickets as the prosecutor or the police commissioner who is seeking the warrant. Therefore, news media organizations believe it was completely erroneous for the majority of the Court to conclude that these politically appointed or elected magistrates are going to serve as an effective guardian of the very news organizations who may be their severest critics.[14/]

2. The Magistrate'sContempt Power

Second: A number of the most celebrated confidentiality cases have involved news organizations or news reporters who have refused to disclose confidential information indicating that court orders have been broken. In a number of cases, reporters have been held in contempt and have gone to jail rather than comply with these subpoenaes. As criminal contempt is itself a crime against the court, it is unrealistic to assume that a local judge -- when a crime has been committed against his own authority -- is going to serve as an effective guardian of the privacy of newsrooms.

3. Confidential Sources

Third: Every desk in every newsroom contains confidential information of some nature. Rarely does a reporter conduct an interview with anyone where some statements or background information is not given to the reporter in confidence or for use as a source or not attributable to the source.

Of course, the cases we hear about are the cases where confidential sources have produced evidence of serious crime or have provided a newspaper with confidential government documents, and the possibility of disclosure would probably stop major information of this sort from reaching the public in particular cases.

But what I am trying to point out is that the fabric of journalism on a daily basis is so intertwined with obtaining information of a confidential nature that permitting police to search through a newsroom jeopardizes the relationship of every reporter in the newsroom and virtually every person he has talked to; and so undermines the independence and credibility of the press that it would be virtually impossible to operate effectively.

Because newspapers frequently receive information which government may claim is itself a crime and because newsrooms -- unlike other premises -- contain dozens of separate privacy interests based on the notebooks, files and desks of every reporter, some attention should be given to the peculiar problems of the news media.

C. NEWS COLLECTION CRIMES

One problem which is common to most of the bills is the exception for search warrants if the person has committed or is committing a crime.

The government claimed, during the Pentagon Papers litigation, that both the New York Times and its reporter Neil Sheehan had committed a crime by merely receiving and possessing the Pentagon Papers.[15/] A reporter in California was prosecuted for the crime of receiving a list of undercover agents from local police officials.[16/] A reporter in Maine was accused of committing a crime by receiving a copy of a confidential letter to the Governor. Dr. Ellsberg was accused of obstructing the government's right to conduct the dissemination of its own information by giving the Pentagon Papers to at least four newspapers.[17/]

Therefore, we suggest that if the Congress is going to follow the approach taken by the Administration bill, then it must offer the same type of protection which the Senate inserted in S. 1437, prohibiting search warrants against news organizations involved in a crime if the crime is the otherwise lawful receipt of information intended for dissemination to the public.[18/]

D. NEWSROOM RUMMAGING

The second problem involves the power to rummage through the entire newsroom -- not only through the desk of the reporter who is alleged to have the information sought but through the desks of every other reporter and editor in the process of looking.

This is what happened in Stanford Daily and several other cases.[19/]

The courts have held that there are severable and protectible privacy interests within one buidling and even on one floor of one building. For example, police cannot search all the rooms in a rooming house because the owner of the rooming house or one of the roomers is suspected of having evidence of a crime. Each roomer is entitled to privacy.[20/]

In a very real sense, the newsroom presents the same problem where each desk or reporter's filing cabinet is like an adjacent room in a rooming house, a separate and protectible zone of privacy.

Therefore, we suggest that, even if there are circumstances under these bills where raids may be conducted against news organizations, the legislation restrict the search power to the particular desk or file cabinet of the particular news employee suspected of having the information, and that the power to search one desk should not be the power to search an entire newsroom.

The examples which come to mind would be a case where a news reporter is suspected, separate and apart from his reporting, of being in possession of illegal heroin. Under any of the bills, a search warrant could issue. But certainly one reporter's vulnerability to a search warrant for this type of crime should not subject the entire news organization to rummaging by local police any more than the possession of herion by one tenant of a rooming house would subject the other tenants to having police rummage through their personal possessions.

E. GENERAL LEGISLATIVE OPTIONS

Having said all this, the question remains as to which of these approaches appears to most adequately balance the legitimate needs of law enforcement with the legitimate rights of privacy of the public and the press. Here we are faced with an attempt to blend a number of different concepts and misconceptions which have developed over the years. Is the information sought "fruits and instrumentalities" of a crime -- a rule that has come down from the English common-law theory that persons who commit crimes forfeit common-law property interests in any items used in the crime? 21/

Is the search incident to a lawful arrest separate and apart from the search conducted under the search warrant? Is the restriction on the issuance of search warrants, (the first guarantee of the Fourth Amendent) identical to or different from the additional guarantee that the search when conducted cannot be "unreasonable?" Is there a presumption, underlying the fruits and instrumentalities doctrine, that because it is the instrumentality of crime, it is likely to be destroyed -- a consideration of recent vintage?

Certainly in view of these varying philosophies, it might be best to look at the end result sought today rather than the varying justifications which have developed as historical underpinnings for the rule.

Viewed in that light, the main goal would seem to be to preserve the evidence whether it be mere evidence, fruits and instrumentalities of a crime, contraband, weapons or whatever.

If that is the goal -- to preserve evidence in order to aid the police in seeking to solve crimes -- then certainly one sensible solution might be simply to ban all search

warrants except in those cases where police have probable cause to believe that the information would be destroyed if sought by subpoena.

By fashioning a rule designed for one goal only -- to preserve the evidence -- law enforcement officers would be obligated to provide an affidavit justifying their raiding power on the grounds that any other alternative would result in a loss of evidence.

III

THE CARTER ADMINISTRATION PROPOSAL

Because this Subcommittee is focusing on the Administration proposal, we would like to take this opportunity to discuss that bill in some detail.

It is the position of The Reporters Committee in general that the Carter Administration bill is an honestly conceived and sincere effort to protect news organizations from the danger of federal or state surprise raids and that -- as far as it goes -- it would substantially achieve its objectives of protecting the First Amendment news-gathering interests of reporters, editors, publishers and broadcasters. But it does not go far enough and we urge Congress to broaden the coverage in a number of ways.

A. LIMITED COVERAGE AS TO PERSONS -- REPORTERS, RESEARCHERS, ETC.

The Carter proposal takes a somewhat novel approach by providing search warrant protection to the news media and to authors, scholars, and researchers. It does this by offering search warrant protection to any person who has collected information "with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."

Reporters Committee Position

Our Committee feels, as we pointed out earlier, that this bill should protect every citizen not suspected of a crime, not just the press, because the protections of the Fourth Amendment were designed to guarantee the privacy of all homes and offices from intrusive police raids, not just the homes and offices of journalists.

Therefore, The Reporters Committee would suggest that the language of the bill be amended to cover "any person" not suspected of a crime.

B. BROAD GEOGRAPHIC COVERAGE: FEDERAL AND STATE WARRANTS

The Administration bill restricts no-notice search warrant raids by federal, state and local law enforcement because it applies to any person who collects information "with a purpose to disseminate" it "in . . . interstate or foreign commerce."

This means that virtually any publishing or broadcasting venture is covered because thay use the airwaves or the mails and are, therefore, in "interstate commerce."

Reporters Committee Position:

We agree with the geographic coverage of the Administration bill and think it is clearly within the power of Congress to not only cover the press but to cover virtually every home and office. We disagree with the Administration that this geographic coverage must be limited to the press.

1. Federal Preemption: The Dangers of a Federal-Only Bill

It seems clear that, because the Supreme Court has given Federal and state police nationwide the power to conduct surprise searches of innocent citizens, the Congress must fashion a nationwide solution.

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It makes no sense, either practically or constitutionally, to limit only the search warrant powers of Federal magistrates and Federal law enforcement officers.

First: As the history of searches since 1970 shows, the great majority are conducted by local officials. Out of fifteen search warrants for news organizations, only two were conducted by Federal officials.

Second: If the Congress were to limit only Federal search warrant powers, then an innocent citizen in Indianapolis would be protected from being searched by the FBI, but not by the Indianapolis police.

Third: Limiting Federal search warrants, while permitting state search warrants in the same circumstances, would only encourage collusion between the FBI and state police -- the very type of collusion we have evidence of in California as a way to avoid that state's shield law.

The Fourth Amendment is a guarantee for all citizens. A citizen's constitutional right to privacy should not depend on the happenstance of whether the search is conducted by Federal officials or state officials.

Fourth: The press has a special interest in being assured that the coverage will apply to the states.

In line with Mr. Justice White's suggestion in Branzburg[22/] we now have 26 states with shield laws that, in one form or another, prohibit newspersons from being forced to divulge confidential information sought by subpoena.

These shield laws have been weakened because, while they protect confidential information sought by subpoenas, they do

not protect confidential information seized by search warrant -- frankly because no one in the press ever conceived of a situation where police could march into newsrooms and seize files.

Limiting Federal search warrant powers, while permitting state officials to conduct surprise searches, can only encourage other states to follow the lead of California officials who have effectively voided that state's shield law by the simple expedient of the no-notice search.

2. Federal Preemption: Constitutional Justification

We believe the Congress clearly has the power to protect the privacy of all citizens by limiting the power of Federal and state law enforcement officials to conduct searches of homes and offices under two separate and independent constitutional powers -- Section 5 of the Fourteenth Amendment and the Commerce Clause.

a. The Fourteenth Amendment

Section 5 of the Fourteenth Amendment grants to the Congress the "power to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. As you know, one of the provisions of the Fourteenth Amendment is the Due Process clause, which the Supreme Court has said incorporates the protections of the First[23/] and Fourth[24/] Amendments.

As this Subcommittee knows, Congress utilized Section 5 of the Fourteenth Amendment when it passed the Voting Rights

Act of 1964. That Act prohibited certain states from using literacy tests. Congress determined that the reserved powers of the states to impose literacy tests were utilized in such a way as to restrict the federally guaranteed right to vote.

The states answered that Congress lacked the authority under Section 5 to implement a civil liberty -- such as the right to vote.

The U.S. Supreme Court, in Katzenbach v. Morgan,[25] upheld the Congressional power as a proper exercise of Congress' right to protect the constitutional guarantee.

Therefore, we would argue that in passing legislation to protect privacy in the states, Congress would be doing no more than exercising the very same powers under Section 5 that it exercised when it protected the right to vote.

Certainly, the Justice Department and the State Attorneys General cannot be heard to argue that the right to cast a ballot is more important than the right to be secure in one's home or office from unreasonable searches. In fact, one might argue, as Justice Brandeis has argued, that the Fourth Amendment is the most fundamanetal of all protections because it is "the right to be left alone" by government.[26]

b. The Commerce Clause and the Omnibus Crime Control Act

The Commerce Clause vests in the Congress the power to "regulate commerce...among the several states." Using this power, Congress has already enacted broad privacy protections for homes and offices against searches by wiretaps and other forms of electronic eavesdropping.

This nationwide privacy law was contained in the Omnibus Crime Control Act of 1968 which prohibits Federal and state officials from wiretapping the premises of an establishment, or seeking information relating to an establishment, "the operations of which affect interstate or foreign commerce."[27/] Nor may any device be used which the eavesdropper has reason to believe was sent through the mail or interstate commerce.[28/]

Only under precise conditions established in the Act by Congress is intrusion by search warrant permitted.

In short, the Congress has protected the privacy of virtually every business establishment and millions of individual residences from unreasonable searches by wiretaps and eavesdropping devices. Therefore, it clearly has the power to protect these same homes and businesses from unreasonable searches by police.

Furthermore the Act provides for civil and criminal penalties against Federal and state officials who conduct eavesdropping searches in violation of the Congressionally prescribed standards.

Of course, when we come to the press, the question becomes much simpler because every newspaper, broadcast station, book and magazine publisher -- and their employees -- are involved in commerce. Newspapers, magazines, and books travel across state lines as do broadcast signals.

In conclusion, it is quite clear that Congress has the constitutional power to protect the homes and offices of all citizens from surprise raids by Federal or state law enforcement officers under its power to implement the protections of the Fourth Amendment and under its power to protect persons and premises in any way related to interstate commerce.

C. INFORMATION PROTECTED--"Work product" vs. nonwork product "documentary materials."

The Administration bill breaks the information prepared by the news media into two categories: "work-product materials" which are given substantial protection from search warrants; and nonwork product "documentary materials" which are given less protection.

While these differences remain a little hazy, Administration officials have explained that "work-product" materials would cover such things as interviews, story drafts, internal memoranda, notes, etc; and nonwork product "documentary materials" would cover documents--such as a hostage note--prepared by a third person not for special use by the press.

1. Searches for "Work-Product Materials"

A search warrant is only permitted against a news organization or news person for "work-product materials" if,

(1) There is probable cause to believe that the reporter himself is involved in a crime (except it may not be a crime involved with the possession of the information itself.)

(2) The information sought relates "to the national defense, classified information or restricted data" as defined under various federal laws; or

(3) There is reason to believe "that an immediate seizure by search warrant is necessary to prevent the death of or serious bodily injury to a human being."

2. Searches for Nonwork Product or "Documentary Materials"

A search warrant for "documentary materials" against a news person or a news organization will be allowed in five circumstances:

(1) the news person has committed a crime (see above),

(2) the information relates to the national defense (see above),

(3) prevention of serious bodily injury or death (see above),

(4) danger of destruction of the materials sought, and

(5) the news organization has refused to obey a subpoena for the information sought and all court appeals have been exhausted or a delay--because of an appeal--"would threaten the interests of justice."

Reporters Committee Position:

It is the position of The Reporters Committee that no distinction should be made between work-product and nonwork-product material. The reasons for this involve the practical information collection methods of journalists, lawyers, physicians or other citizens whose files would be subject to search under the Administration proposal.

It is our experience that most reporters, like other professionals or businessmen, keep files by subject matter and do not generally break them up between files containing notes and files containing documentary materials supplied by a third party. In fact, many reporters will write notes on documentary materials supplied by third parties or conversely will intersperse documentary materials with their notes. This being the case, a search for nonwork-product materials will almost always permit police to inspect work-product materials.

It would, therefore, be our suggestion that the Administration bill should only permit searches against third parties not themselves involved in a crime except if: (1) there is probable cause to believe that the information sought relates to the national security (and we will discuss this exemption in more detail below); or (2) there is probable cause to believe that immediate seizure is necessary to prevent serious bodily injury or death, or (3) there is probable cause to believe that the information will be destroyed.

While we realize that we, in the press, would be giving up some protection for work-product materials designed specifically for journalists, we think that this would be a necessary and modest sacrifice in order to obtain broader coverage for all citizens who are potential targets of no-notice searches.

D. THE NATIONAL SECURITY EXEMPTION

The Administration has quite thoughtfully, we think, declined to give search warrant authority if the crime involves the receipt, possession or communication of information. However, if this information is considered "classified information" or "restricted data" under a number of federal laws, then the search could take place.

Reporters Committee Position

We find this exemption entirely too vague and overbroad. There is so much information which is misclassified by the government and so much "restricted data" which is of only peripheral interest, that permitting a search warrant for possession of these categories of information makes this purported protection virtually useless.

Therefore, we would only permit a search warrant to issue for possession of information if there was probable cause to believe by affidavit that the information fell under the doctrine of New York Times v. United States -- that it is a "direct, immediate and irreparable injury to the national security." Any lesser standard leaves in the hands of self-serving government officials the power to decide virtually, at their own discretion, which citizens may be searched and which may not be searched for national security information -- information which may be at best tangential or of mimimum danger.

E. THE "REASON TO BELIEVE" EXEMPTION

We believe that the standard of "reason to believe" that immediate seizure is necessary to prevent death or serious bodily injury is too vague. We suggest that the standard must be "probable cause" supported by an affidavit and we would suggest that this standard also be included in the exemption which permits a search for the information which would be destroyed or altered.

F. THE "INTERESTS OF JUSTICE" EXEMPTION

We would completely eliminate exemption 4 permitting a search if materials "have not been produced in response to a court order and all apellate remedies have been exhausted" or if the refusal to obey the court order would result in a "delay in an investigation

or trial would "threaten the interests of justice."

If a journalist or other citizen loses litigation involving a subpoena for information, he has at that point a choice: he may turn the information over or he may go to jail. For example, under the Administration proposal, after Mr. Farber refused to comply with the subpoena against him and lost the appeal in the Supreme Court, Mr. Farber's home and the entire New York Times could have been searched.

We think that the powers of the court to imprison and fine persons who lose subpoena litigation is quite sufficient punishment and does not warrant giving the government the additional power to raid and rummage at will.

In addition, there is no reason to permit a search warrant merely because there is going to be a "delay in an investigation or trial" which would "threaten the interests of justice." Once again, as in the national security exemption section, the government is giving a vague and completely discretionary power to the courts without any clear standards. Trials are delayed every day for all kinds of reasons: prosecutors are overworked or defense counsel have other commitments or judges have to attend graduation ceremonies of their children. We see no reason to grant the drastic remedy of a surprise search merely because of a delay in the trial.

G. REMEDIES

The Administration bill makes it a crime to serve a search warrant in violation of the law, but provides no criminal penalties.

Reporters Committee Position

It would be our position, that Congress should provide for criminal penalties for violation of this Act, signifying to both federal and state law enforcement officials that the search of innocent third parties is a serious matter and may be done only in compliance with the statute or not at all. We think it is vitally important to provide criminal penalties because the Supreme Court has fashioned extensive protection for public officials sued for civil damages on claims that these officials have violated constitutional or statutory rights. In a series of recent cases, the Court seems to be saying that civil damages cannot be levied against public officials for violation of constitutional rights unless the violations are intentional and not in good faith.

Therefore, given the practical difficulties of proving bad faith against a public official -- it would appear that a jail sentence might be as good, if not better, a deterrent to assure compliance with Congress' will.

Thank you.

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APPENDIX TO TESTIMONY

OF THE REPORTERS COMMITTEE

May 31, 1979

APPENDIX A

FOOTNOTES

1. 436 U.S. 547 (1978).

2. Warden v. Hayden, 387 U.S. 294, 315 (1967) (Douglas, J., dissenting) (quoting Rutland, The Bill of Rights 25 (1955)).

3. Id. at 316 (quoting 3 Elliott's Debates 448-49).

4. United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930).

5. Boyd v. United States, 6 S.Ct. 524, 532 (1886).

6. Id. at 531-32 (quoting from Entick v. Carrington and Three Other King's Messengers, [1765] 19 How. St. Tr. 1029).

7. Warden v. Hayden, supra, at 312 (Fortas, J., dissenting).

8. Id. at 313 (Douglas, J., dissenting) (quoting from Entick v. Carrington [1765] 19 How. St. Tr. 1029, 1065).

9. Boyd v. United States, supra, at 531 (quoting Entick v. Carrington [1765] 19 How. St. Tr. 1029).

10. Stanford v. Texas, 379 U.S. 476, 483 (1965)(quoting Lasson, Development of the Fourth Amendment 43).

11. See Stanford v. Texas, 379 U.S. 476, 483 (1965).

12. Boyd v. U.S., supra, at 530.

13. 46 U.S.L.W. 4546, 4550 (U.S. May 31, 1978)(Nos. 76-1484 & 76-1600)(quoting Stanford v. Texas, 379 U.S. 476, 482 (1965)).

14. See id. at 4551.

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

16. See People v. Kunkin, 9 Cal. 3d 245, 107 Cal. Rptr. 184 (1973).

17. See United States v. Ellsberg, Crim. No. 9373 (C.D. Cal. 1971).

18. See S. 1437 §§ 1301, 1344, 1733 (1977).

19. See generally Note, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 Stan. L. Rev. 957 (1976).

20. See also Warden v. Hayden, 387 U.S. 294, 325 (1967) (Douglas, J., dissenting).

21. See, e.g., id. at 310-11 (Fortas, J., dissenting); Boyd v. United States, 116 U.S. 616, 623-24 (1886); United States v. Kirschenblatt, 16 F.2d 202, 203, 51 A.L.R. (2d Cir. 1926)(L. Hand, J.).

22. Branzburg v. Hayes, 408 U.S. 667, 706 (1972).

23. See, e.g., Near v. State ex rel. Olson, 283 U.S. 697, 707 (1931).

24. See, e.g., Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

25. 384 U.S. 641 (1966).

26. [The makers of our Constitution] conferred, as as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrisuion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

27. 18 U.S.C. § 2511(1)(b)(iv).

28. Id. at § 2511(1)(b)(iii).

APPENDIX B

15 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 regarding a hotel bombing.
8. October 1974, KPOO-FM, San Francisco. Police were seeking a letter written by the New World Liberation Front concerning a hotel bombing.

-more-

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.

APPENDIX C

SUMMARY OF LEGISLATION RESTRICTING SEARCH WARRANTS --96th--

Sponsor Bill Number	Geographic Coverage		Persons Covered		Search Warrant Permitted IF...	
	Fed. Only	Fed. & State	All Persons	Press Only	Involvement in Crime	Danger of Removal
1. S.115 Mathias		x	x		x	x
2. H.R. 1373 Gudger	x		x		x	x
3. H.R. 380 Guyer		x	x		x	x
4. H.R. 1437 Quayle		x	x		x	x
5. H.R. 283 Drinan		x		x	x	
6. H.R. 1305 Sawyer	x		x		x	x
7. H.R. 322 Fish	x		x		x	
8. H.R. 323 Fish		x		x	x	
9. H.R. 368 Green		x	x		x	x
10. H.R. 1293 Crane		x		x	No exceptions	
(Administration) 11. H.R. 3486 Kastenmeier		x	Press & others publishing		x (See Media Alert)	x
(Administration) 12. S. 855 Bayh		x	Press & others publishing		x (See Media Alert)	x

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APPENDIX D

STATEMENTS OF LEADING MEDIA FIGURES

--from The News & The Law

Howard K. Smith, *ABC* News:
"When I was a new young reporter at the United Press in Nazi Berlin . . . there was a knock at the door . . . and 15 Gestapo men barged past me, began opening every desk and studying every piece of paper they could find . . . Six hours later they left . . . I remember thanking God this couldn't happen in America. Well, now it can. It is the worst, most dangerous ruling the Court has made in memory . . ."

James R. Reston, *The New York Times*:
"Let us suppose this new ruling of the Supreme Court had been in effect a few years ago. It would have been very easy for Richard Nixon to get a court order to raid the offices of *The New York Times* [for the Pentagon Papers] . . . The cops would have been able to come into *The Washington Post* [searching for Watergate sources] . . . ."

The Associated Press:
"It would open the door for harassment."
– Keith Fuller, general manager of AP

The American Newspaper Publishers Association:
"The decision puts a sledgehammer in the hands of those who would batter the American people's First Amendment rights . . . . It literally and legally picks the lock that protects the exercise of a free press . . ."
– Allen Neuharth, president of ANPA and president of Gannett Newspapers

"It is self-evident that police searches of newspaper offices burden freedom of the press."
– Jerry Friedheim, general manager of ANPA

Radio and Television News Directors Association:
"Search warrants in actual practice mean that law enforcement officials can go through everything in the newsroom including confidential and unpubished information . . ."
– Ernest Schultz, president of RTNDA and news director of *KTBY*-TV, Oklahoma City

William Thomas, *Los Angeles Times*:
"Incredible."

American Society of Newspaper Editors:
"The ruling could open the door for the greatest abuse . . . A warrant could be granted to a magistrate at midnight with no opportunity for a newspaper to present a counter point of view until the search has taken place. Obviously, this could have a chilling effect on the press."
– John Hughes, president of ASNE and editor of *The Christian Science Monitor*

"All we can hope for is that magistrates will keep the First Amendment in mind."
– Richard Schmidt, counsel for ASNE

Society of Professional Journalists, Sigma Delta Chi:
"By giving the police a new privilege to seize unpublished and unbroadcast material from radio and television files, the Court has rewritten the First Amendment."
– Scott Aiken, chairman of the FOI Committee and finance editor, *The Cincinnati Enquirer*

Walter Cronkite, *CBS* News:
"Journalists are appalled by the Supreme Court decision on the searching of newsrooms . . . . [A] warrant is signed by a judge, who [frequently] owes his election to the [local] political machine . . . [S]ources dry up, scandal dies, and the political machine is free . . ."

Anthony Day, *Los Angeles Times*; chairman, American Society of Newspaper Editors' FOI Committee:
"The decision makes newspapers the arm of the prosecutor."

Floyd Abrams, counsel to *NBC* News and *The New York Times*:
"This is a short cut to a wide range of already existing First Amendment protections . . . . What meaning do shield laws have any more?"

Benjamin C. Bradlee, *The Washington Post*:
"Just plain awful . . . . Beyond understanding. Under the ruling, the Pentagon Papers could never have been published."

The Reporters Committee for Freedom of the Press:
"A constitutional outrage . . . . The Carter administration must share the blame for this landmark injury to the First Amendment because its solicitor general urged the Supreme Court to approve of the kind of warrant involved in this case."
– Jack C. Landau, director and law columnist, Newhouse Newspapers

EDITORIAL REACTION TO THE STANFORD DAILY RULING

--from Editor & Publisher

Chicago Tribune:

"The question involved in the Stanford case is one which should be subject to solution on the basis of reason, not categorical decrees. Mr. White and the court majority have given us a broad decree which is bound to have a deterrent effect on any editor or reporter who sees a local wrong which needs righting. It will, in short, protect the Watergates of the future."

Newsday, Long Island:

"Newspapers suffer a debilitating conflict of interest in responding to attacks of this kind. On the one hand, the press to many is just another special interest, predictably aggrieved by erosion of a privilege. Yet the press was entrusted by the Founding Fathers with a special role in protecting the public from official arrogance—which is why the First Amendment was written in the first place . . .

"Fortunately, it's a rare day when the Supreme Court is so radically inclined—and radical is the correct word—as to tinker with the remarkably effective day-to-day functioning of the First Amendment over nearly two centuries.

"*Unfortunately,* it seems equally rare for journalists to succeed in convincing the courts that their prime concern is to guard the public interest rather than to enlarge newspaper circulation and profits. In this sense, at least, the media must look to their own perceived lack of profession-wide standards to understand why rulings like Wednesday's spring out of the woodwork."

Clearwater (Fla.) *Sun:*

"This week's court decision may give rise to a new breed of craftsman. He'll be the man who can design or build hidden wall panels or secret trap doors where evidence, no matter how innocent, can be hidden.

"Another branch of knowledge that may flourish is cryptology. A reporter talking to a Mafia informer will be well advised to couch his notes in as mysterious a script as he can conjure up. As he sits writing his expose, he may find himself looking up into the stern eyes of a deputy sheriff who has just marched through the door, waving a search warrant issued by a friendly neighborhood magistrate."

Toledo Blade:

"This decision, on a 5 to 3 vote, comes perilously close to giving law enforcement officials the right to engage in fishing expeditions against the news media.

"The Supreme Court's ruling appears to sanction police efforts to make news organizations an arm of law. As such, it is contrary to the spirit and intent of the First Amendment . . ."

Washington Post:

"The idea, now accepted by the court, that no place is immune from government scrutiny except a person's brain is alien to the precepts of the Bill of Rights."

Los Angeles Times:

"Over the strong protests of three dissenters, the U.S. Supreme Court has taken a narrow, crabbed, suspicious view of the First Amendment, and has given exuberant, indulgent and trustful approval to a sharp extension of police power.

Chicago Sun-Times:

"It was a landmark decision in press law—in the sense that a bomb crater or a strip-mine scar can be a landmark.

"When the U.S. Supreme Court ruled Wednesday that police can search newspaper offices even though no employ of the paper is involved in a crime, it set a horrid precedent. One can only hope some later court will reverse the move, perhaps heeding the eloquent dissents in the case."

Detroit News:

"The Supreme Court's ruling puts a fearsome weapon in the hands of malicious judges and policemen bent on harassing a newspaper that has been critical of them or their friends. On the flimsiest pretext they could go rummaging through a newspaper office, disrupting the operation, seizing documents and intimidating the employes—in brief, running roughshod over the First Amendment."

". . . When the press is subjected to police search and intimidation, the public interest suffers, for the press serves as the public's channel of information about politics, government, and other public affairs. Moreover, if the press can be muffled, the ordinary citizen can be muffled, too."

Providence (R.I.) *Journal-Bulletin:*

"The United States Supreme Court's decision permitting police to conduct unannounced searches of newspaper offices for criminal evidence strikes a powerful blow at press freedom in America . . .

"When government encroaches on the gathering of news and the free exchange of information, as it has done in this instance, it is democratic society that is the ultimate loser, and that means all of us."

Hartford (Conn.) *Courant:*

". . . Bank robbers are not camped out in newsrooms, free to store the fruits of their labor, while police wait helplessly outside.

"The evidence police yearn for within the newsroom walls is information—information gathered for the purpose of informing the public, information that will dry up if its sources are easily exposed to police scrutiny at will."

New York Daily News:

"Freedom of the press is directly threatened by the dismaying decision of the U.S. Supreme Court giving the police practically free rein to make unannounced searches of the property of innocent parties . . . Once it sees the enormous Pandora's box that has been opened, we hope the Supreme Court will have the intellectual courage to reverse itself."

Miami News:

"The courts have left newspapers no choice except to resist this legal assault on their freedom by taking special precautions to protect all sensitive material from police searches. Such action shouldn't be necessary in a democracy that has boasted about its press freedom for more than 200 years."

Minneapolis Star:

"It poses a threat of irreparable injury to the freedom of the press. Indeed, although the case before the court arose in 1971, it is no longer an isolated incident, there being 10 similar ones recently . . .

". . . In 1972 the Supreme Court held that journalists *are* entitled to have courts balance First Amendment interests against claimed law enforcement needs before confidential information must be produced. And 26 states, including Minnesota, recognize this principle in their reporters' shield laws. Those laws are jeopardized by the majority's anti-press doctrine."

Editorial Statements on the Stanford Daily Ruling

"The privacy rights of the law-abiding were shabbily treated by the Supreme Court the other day when it held that police may search for evidence of crime on the premises of persons who are not themselves suspected of any crime.

The Court's treatment of the First Amendment issue was just as cavalier...In this decade, it is hardly fanciful to worry that public officials bent on obstructing justice might invoke such authority malevolently. Even worse, wiretapping is merely one kind of search; there seems to be no Constitutional barrier to court approved wiretapping of reporters' telephones."

New York Times

"In an appalling display of muddleheadedness, the U.S. Supreme Court has ruled that police may swoop down unannounced on newspaper offices or any other innocent party's premises and search for evidence bearing on criminal investigations.

The 5-to-3 decision strikes at the very heart of the newspaper's role as an investigator of wrongdoing and a watchdog of government. Gone is the reporter's ability to promise confidentiality to his sources. Gone, too, is the protection that has kept police from trying to intimidate newspapers by conducting harrassing searches of their files and premises."

The Miami Herald

ZURCHER V. STANFORD DAILY

FRIDAY, JUNE 1, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Matsui, and Railsback.

Also present: Bruce A. Lehman, chief counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order.

The subcommittee again, for the fourth and final day, is meeting on the question of search and seizure occasioned by the Supreme Court decision, *Zurcher* v. *Stanford Daily*, concerning which a number of bills, including H.R. 3486, have been introduced dealing with this subject.

I am very pleased to have this morning two very distinguished witnesses. Two other witnesses were scheduled, namely our colleagues, Hon. Paul McCloskey of California and Hon. William Green of New York. They have not been able to attend this morning but their testimony will be accepted for the record.

[The prepared statements of Hon. Paul N. McCloskey, Jr., and Hon. S. William Green follow:]

STATEMENT OF HON. S. WILLIAM GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

In the wake of the Supreme Court's *Stanford Daily* and *Farber* decisions, several of our colleagues have submitted legislation attempting to balance the rights and responsibilities of the press, the public, and the government. We are dealing with an aspect of our democracy so awesome, yet so fundamental, that we cannot overemphasize the importance and care with which we must proceed as we consider Congressional action in this area.

In an effort to expand my sources of information and opinion in this area, I have contacted educators and journalists at communications schools across the country to get informed feedback on my bill, H.R. 368, the Media Source Protection Act. While the views of academicians, as those of journalists, are not homogeneous, the majority of the responses I received to H.R. 368 was favorable. Educators and journalists overwhelmingly expressed concern that the *Stanford Daily* and *Farber* decisions pose a threat to the freedom of the American press. I would like share some of the remarks extracted from more than 100 letters I received from journalism institutions in this country:

M. L. Stein, a professor of journalism at California State University, wrote: "I cannot accept the position of some that the First Amendment is protection enough. It should be, but the number of local, state and federal officials who don't take it seriously is growing at an alarming rate."

John Stevens, professor of journalism at the University of Michigan at Ann Arbor, commented: "I have been watching the erosion of these protections with some horror. We need federal legislation to halt this trend."

Ray Newton, chairman of the Department of Journalism at the University of Northern Arizona, wrote: "I am in total accord with the intent of your proposed legislation, to create a federal shield law which would protect journalists from forced disclosure."

Herbert Strentz, Dean of the School of Journalism at Drake University in Des Moines, echoed these feelings: "The *Farber* and *Stanford Daily* cases are troubling, partly because of the abuse which the court decisions invite. I think H.R. 368 can remedy some of these problems."

Finally, Harry Heath, Director of the School of Journalism and Broadcasting at Oklahoma State University, expressed quite a legitimate observation: "It seems to me that an unauthorized search allowed under *Stanford-Zucher* places reasonably innocent persons in a position where they must prove they are not guilty."

Clearly, the climate affecting the press in the United States today is one which threatens not only the media, but the general public. Search and seizure affecting persons not reasonably believed to be implicated in the commission of a crime is novel in the United States. "Shock Troop" behavior is contrary to our principles of privacy and the rights of our citizens.

With certain exceptions, such as the endangerment of life, I see no need for the courts or law enforcement agencies to use search warrants against the innocent without a subpoena duces tecum and prior court hearing with the proposed "target."

To prohibit surprise searches of the properties, homes and businesses of innocent parties presents no serious problems for government or its law enforcement agencies.

Regarding exceptions to a prohibition of search and seizure, I would hesitate to support the provision in H.R. 3468 for allowing sudden searches in any and all cases involving the loosely defined "national defense" and "restricted data."

We are all aware of the tendency of government agencies to hide evidence of their behavior under the false or exaggerated labels of "national defense" or "top secret." I suggest exceptions be limited to cases of clear and present danger involving life and the nation's defense. The government will still have an opportunity to present its cases for a subpoena in all other cases affecting innocent parties believed to possess material related to a crime.

A second, closely-related area of concern today involves the protection of "sources," individuals and groups who bring information to the media and who wish to remain anonymous in order to protect their jobs, ir, in some cases, their very lives.

Our society demonstrates mixed feelings toward those who tell of the wrongdoings of others. We often tag them with the derogatory names of "stoolie, fink, squealer, or turncoat." Yet, we often depend upon the bravery of such people to warn us of danger, tell us of criminal activity, reveal malfeasance or nonfeasance by those assigned important tasks in our society.

We all know of cases in which an informant, when known, has been subjected to harrassment and punishment. You recall, I am sure, the reassignment of the federal employee who blew the whistle on the military's C5A cost overruns. Retribution is not always so obvious, but even when slow to come and indirect, it warns other would-be whistleblowers that they disclose improprieties at great personal risk. Many, understandably, choose not to speak out.

Society needs these whistleblowers, without whom we would be subjected to more waste, more wrongdoing, more anti-social behavior. The only way to insure such people will step froward is to protect their identities. This is the basis for my proposal to exempt professional journalists from the requirement that they reveal their source's identities.

The aim is not to protect or shield the reporter or the editor, but the "source," the person who warns society of hidden problems.

A corollary to the protection of sources is protection of the raw materials or documents they bring to the media.

Naturally, the role of the journalist is to relay the basic information to the public. Yet, in doing so, they may have to disguise or limit the release of data that would reveal the identity of the source. A letterhead or even a fingerprint on a paper, if revealed to certain parties, could jeopardize the informant. If this material is unprotected, the name anonymity granted the source is worthless and we again discourage people from coming forward.

Any proposal to limit or prohibit the courts and other government agencies from compelling a reporter to divulge information may prompt the question: "Doesn't a reporter have a citizen's obligation to report knowledge of criminal behavior?"

Of course. The first amendment does not eliminate a citizen's duties, no matter what his or her position. But it is a substantial leap from *permitting* a journalist to retain certain information to protect a source and *assuming* the same journalist will unnecessarily ignore criminal activity or danger to others in his routine work (as a caveat, it should be noted that the vast majority of news stories involve named figures and not the whistleblower sources).

Are we then placing a great trust in the hands of professional journalists? Yes. But every citizen is capable of abusing rights—we hardly use this as an excuse for eliminating the Constitution. We also grant special, limited rights to attorneys and physicians on the belief that the public value of allowing them to maintain confidentiality with their patients and clients exceeds the public loss of this limited information.

It is to keep this confidentiality of information within reasonable bounds that I suggest it be applied only to full-time professional news journalists. If we attempt to go beyond this to include "novelists" and "writers" we would undoubtedly find tens of millions of people claiming to have an unfinished Great American Novel in their attic typewriter.

Finally, what we are dealing with here is *not* special treatment for journalists in order to make them more powerful or set them above others under the law.

The professional journalist is a messenger to the public. We are attempting to protect the messenger only to ensure that the public knows what is happening in this complex world.

The bottom line is that the public has the right to know, and the need to know almost everything that its government does, or fails to do. The public has the right to know and the need to know much of what occurs in the private sectors. The public has the right to know and the need to know about citizens and groups whose actions affect society. And journalists have the right to find it all out on our behalf.

Some of this information is released voluntarily and directly but much of the dissemination depends upon the media, the public messenger. Unless we protect the flow of information through the messenger, we subject the public to a dangerous ignorance of its society and its world. To keep secret the identity of a relatively few individuals seems a small price for knowledge of so much more.

Oklahoma State's Health said that: "to continually tinker with first amendment rights is to weaken that amendment and to place the media more in a special interest category and more in debt to Congress for special favors." I disagree. I do not question the propriety or value of adopting shield laws and forbidding unjustified searches of innocents. I would only question our audacity in not doing so. This is assuring our citizens their right to knowledge.

Perhaps the only thing as important as the public's right to be told is the individual's right to tell.

STATEMENT OF HON. PAUL N. MCCLOSKEY, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

By way of statement before your Subcommittee on the pending legislation in response to *Zurcher* vs. *Stanford Daily*, I would like to incorporate the legislative recommendations unaninously adopted by the House Government Operations Committee last year in its Twenty-Seventh Report as follows:

The committee recommends that legislation enacted to curtail effects of the decision in *Zurcher* vs. *Stanford Daily* should include the following principles:

(1) A search warrant to obtain evidence should not be issued against the property of a third party against whom there is no probable cause of guilt of a crime unless reasonable cause is shown that a request or subpoena would result in the danger that the evidence would be destroyed, removed from the premises or otherwise become unobtainable.

(2) If at all possible, the principle should apply to State court procedures.The 14th amendment arguably provides Congress with sufficient authority in this civil rights area. The committee has not resolved this constitutional issue. As a policy matter, however, restraints on State and local authorities in this search warrant area should be as strict as on Federal officers.

(3) Protection of the right of privacy involved should extend to all citizens, not just the news media or possessors of professional privilege such as lawyers, doctors and clergymen.

Mr. KASTENMEIER. In the event there is a future hearing, it may be possible for one or both of them to then appear.

Mr. RAILSBACK. Mr. Chairman, may I just say in that respect that I did get a call from Pete McCloskey and if we have another day of hearings he would like very much to testify. I apologize for not having the reason why he is not here. I did not get to talk to him myself.

Mr. KASTENMEIER. I talked to the gentleman from California this morning. He has a very serious conflict this morning; another urgent question has arisen so he is not able to appear. But perhaps he may at a later date.

In any event, we are very pleased to have as our first witness this morning Mr. Richard J. Williams, who is the prosecutor for Atlantic County, N.J., and is a distinguished member of the National District Attorneys Association, a member of their national board. He will likely become the president or vice president—a potential vice president of the association.

In any event, we are very pleased to have Mr. Williams.

Mr. Williams, do you have any colleagues with you?

TESTIMONY OF RICHARD J. WILLIAMS, PROSECUTOR FOR ATLANTIC CITY, N.J.; VICE PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Mr. WILLIAMS. We have our counsel here, Mr. Chairman.

Mr. KASTENMEIER. If you desire that he come forward, he may; otherwise, you may proceed.

Mr. Williams, you have a statement which you have offered the committee, a 14-page statement, in advance. You may proceed from it or if you care to summarize, the statement will be received in its entirety.

Mr. WILLIAMS. Thank you, Mr. Chairman.

I would like to offer the statement in the record and summarize and hit what we consider to be some of the high points of our testimony.

Mr. KASTENMEIER. Without objection, it is so ordered.

[Mr. Williams' statement follows:]

NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
Chicago, Ill.

To The House Subcommittee on Courts, Civil Liberties and Administration of Justice.

Mr. Chairman, members of the subcommittee: My name is Richard J. Williams. I am the County Prosecutor for Atlantic County, New Jersey and a member of the Board of Directors of the National District Attorneys Association on whose behalf I appear here today. I wish to thank you for the opportunity of appearing before you to express the views of NDAA on H.R. 3486 and similar proposals under consideration by the Congress. The National District Attorneys Association is a non-profit, nonpolitical tax exempt organization with over 7,000 members. NDAA is the largest association of prosecuting officials in the United States. Its members include Prosecutors in all of the fifty states reperesenting over 1,500 Prosecutor's offices ranging in size from the largest offices in Los Angeleles and Chicago to over 600 offices representing populations of less than 20,000.

As Prosecutors, we are mindful of the mandate of the Canons of Professional Ethics which hold that "the primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." The safety of our citizens and the integrity of our governmental process require Prosecutor's offices which have the desire and ability to investigate to ascertain facts in a fair, thorough and expeditious manner, to make decisions based on the results of such investigation

whether to initiate criminal charges, and where charges are brought to bring to light all relevant information so the cr minal trial process becomes a search for truth which will yield a just result. Because of this concern, NDAA respectfully opposes HR-3486 and other pending bills of a similar nature which would limit the traditional well-established authority of prosecutors, under our Constitution, in the investigation and prosecution of criminal offenses.

H.R. 3486 and similar pending bills were generated by the decision of the United States Supreme Court in *Zurcher* v. *The Stanford Daily*, __U.S.__, 56 L Ed 525, 98 S Ct__, in which the United States Supreme Court re-stated a long standing principle of Constitutional law in the area of search and seizure, that a search warrant should only issue upon a showing of probable cause, before an impartial magistrate or judge, that items are sought which are evidence of a crime or the fruits or instrumentalities of a crime and are located in a particular place at a particular time. The issue of whether or not the owner or possessor of the premises is or is not a suspect with regard to the crime had never been considered a determining factor on whether a search warrant should issue. The Supreme Court in restating accepted Constitutional law held that a state was not prevented by the Fourth and Fourteenth Amendments from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched was not reasonably suspected of criminal involvement. Because the offices of a newspaper were involved in *Zurcher*, the Supreme Court considered competing claims under the first, fourth and fourteenth amendments. The Court recognized that issuance of a search warrant is not a mere ministerial act but rather an objective decision made by a judicial officer requiring substantial preconditions, among which are probable cause and specificity with regard to the time and place to be searched and the Items to be seized. (Standards significantly higher than those required for the issuance of a subpena duces tecum.) In reaching its decision the Supreme Court weighed the competing claims and chose that course which would allow for a full and fair investigation to ascertain the truth.

We, as Prosecutors, recognize the importance of values of the first amendment as well as those of the fourth. It is significant to note that Prosecutors have traditionally exercised great restraint in order to avoid creating situations of confrontation between these values. Neither the interests of a free press nor effective prosecution are furthered by forcing such confrontations through pushing matters to the extreme. (It is interesting to note in the *Zurcher* case itself that the prosecution was forced to resort to a search warrant because of the expressed policy of the Stanford Daily that it would destroy any evidence that might aid in prosecution.) Based on informal surveys conducted by the NDAA as well as material compiled by the Reporters Committee for the Freedom of the Press, the restraint shown by prosecutors is clearly demonstrated. Since the issuance of the *Zurcher* opinion, several states, including my own, New Jersey, have recognized the delicate balancing of interests in this area and have adopted policies designed to avoid unnecessary confrontation between Prosecutors and the Press. Many states have adopted policies through legislation, such as California, with the support of the Prosecutors. Others, such as New Jersey, have done it as a result of administrative policies voluntarily adopted by the Prosecutors and Attorney General. We, as Prosecutors, strongly believe in the importance of a free and independent press. We do not view our relationship with the press as an adversarial one. Our adversaries are those who tear at the fabric of society through the commission of crimes, not reporters, editors and publishers. Our opposition to H.R. 3486 and similar bills should not be taken as opposition to the fundamental need for a free press. Rather, it must be understood in the context of support for time-honored Constitutional values, as interpreted by the United States Supreme Court, which will maintain the criminal justice process as a search for truth and justice.

The concept of placing federal legislative limitations on third party searches is a dangerous one which will have serious effects on reasonable law enforcement activities in the area of investigation and prosecution. I would first like to discuss the problems which arise from the general concept of restricting third party searches and then deal specifically with certain problems generated by H.R. 3486.

Proposals to limit the use of search warrants against nontarget third parties are based on the assumptions that: (1) investigation can effectively proceed making use of alternative legal resources such as the subpoena duces tecum and; (2) that whatever delay may be caused by resort to such other resources will not impede the investigation. These assumptions are erroneous.

Prosecutors traditionally have resorted to use of investigative tools other than the search warrant where such resort would not unnecessarily delay or compromise

an investigation. The practice cannot be followed in every instance, however, and the fact that prosecutors have exercised restraint where possible should not justify the extreme action of restricting the use of such warrants where restraint is not possible. It is important to note that in many jurisdictions the use of a grand jury and a subpoena duces tecum is legally unavailable. Even where a subpoena duces tecum is available, resort to such will unquestionably cause delay in an investigation. There are over 900 Prosecutor's offices in the NDAA representing populations less than 50,000. In these jurisdictions Grand Juries sometimes meet as seldom as once or twice a month. There can be substantial delay in the mere issuance of a subpoena. In addition, use of a subpoena duces tecum requires time to respond as well as time needed to resolve challenges and appeals in the trial in appellate courts. Even after all appeals are exhausted, the person possessing the evidence may still choose not to deliver the evidence but instead to subject himself to contempt sanctions.

The use of the subpoena duces tecum can never guarantee that the evidence will ultimately be available for whatever clarity it may shed on the criminal transaction under investigation and even when the evidence is ultimately obtained by the prosecutor, the delay in obtaining such may have destroyed its usefulness. When an item of critical evidence is obtained quickly, it may often provide leads and clues which are required for the progress of the investigation. Early leads and clues to other items of physical evidence and witnesses are essential to the search for truth. Where such do not occur, the prosecutor faces the risk of loss or destruction of the physical evidence as well as the hazards of fading memories and intimidation or corruption of witnesses.

Substantial problems may also be caused by reason of a fundamental difference between a search warrant and a subpoena duces tecum. A search warrant is directed against a place, while a subpoena is directed to a person. A law enforcement officer may know the location of critical evidence but may not know the identity of the person who is in possession of the evidence. Or, where he does know such identity, if the person to whom the subpoena is directed is not present within the local or state jurisdiction, service of the subpoena and compelling the production of evidence may be difficult or even impossible.

In addition to the potentially fatal problems of delay there is also serious danger of the risk of destruction or loss of evidence. Proposals to limit search warrants do not take into account the possibility that the person to whom the subpoena is directed may be a friend, relative or associate of the person under investigation. Where such occurs, common sense says there is a strong likelihood that such person would be motivated to destroy the evidence or at the least put the defendant on notice and thereby facilitate its destruction. In addition to possible destruction of the subpoenaed evidence itself, such notice can also result in destruction of related evidence to which the subpoenaed evidence would lead. Even where the person in possession of the evidence is not a sympathetic party to the criminal target, the security of the evidence in that person's hands will be uncertain and the risk of its ultimate destruction still great. As stated by the Supreme Court "it is likely that the real culprit will have access to the property, and the delay involved in employing the subpoena . . . could easily result in the disappearance of the evidence, whatever the good faith of the third party." Further, resort to the subpoena does not ensure that even where some evidence is produced that the evidence will be complete or that where statements are made that the person does not possess the evidence that in fact such statements can be verified.

The assumption that law enforcement officials can accomplish with the subpoena the same things which can be accomplished with a search warrant is erroneous in another respect. A person served with a subpoena may be entitled to defeat the subpoena on a self-incrimination claim. Use of a search warrant, however, does not require the person served to take potentially incriminating actions and his rights are therefore not violated. The ability of a prosecutor to cut through even a spurious objection to a supboena is minimal as the Supreme Court recognized in *Zurcher* where it observed that, "the burden of overcoming an assertion of Fifth Amendment privilege, even if prompted by a desire not to cooperate rather than any real fear of self-incrimination, is one which prosecutors would rarely be able to meet in the early stages of an investigation despite the fact that they did not regard the witness as suspect. Even the time spent litigating such matters could seriously impede criminal investigations."

The difficulty of distinguishing between suspects and non-suspects in early stages of an investigation is a further complication of an already difficult situation. The very purpose for conducting the search pursuant to a judicially issued warrant

may be for obtaining evidence which will lead to identification of the criminal suspect.

The aforesaid reasons indicate why this nation's prosecutors through the NDAA strongly oppose proposals to place unworkable and unnecessarily limitations upon the use of search warrants against third parties. With regard to H.R. 3486, there are additional problems which warrant more specific comment.

While the stated purpose behind H.R. 3486 is to provide greater protection for the press, this legislation actually goes considerably beyond that purpose through the use of terminology which is admittedly broad and imprecise. Use of the concept of "work product" places an impossible burden on investigating law enforcement officials. Whether evidence is subject to the protections of this statute, depends not so much on objective circumstances as it does upon the state of mind of the person possessing the evidence. Thus, before a law enforcement official may execute any third party search warrant, this legislation, in effect, requires that he know the identify of the possessor of the evidence and the intent and the purpose for which the person possesses the evidence. As a practical matter, ascertaining such facts in the early stages of an investigation may be impossible. If the purpose of the legislation is to protect the press, then it would be preferable to limit such legislation to representatives of the press rather than using the vague and overbroad concept of "work product". While a precise definition of the press may cause some difficulties, such would not be nearly as great as the difficulties caused by reason of the breadth and imprecision in the use of the term "work product." By limiting such legislation to the press, law enforcement officials would at least have some reasonably objective standard upon which they could govern the conduct of their investigations. A determination as to whether evidence is possessed by a representative of the press is one which can in most instances be made in advance of the search. A determination as to whether materials are possessed as "work product" is a determination which in many instances cannot be made until after a search and the resulting litigation in court. Use of the concept "work product" therefore not only causes law enforcement officials difficulty but may actually provide less protection for the press than would be the case were this legislation to contain a limitation specifically oriented to the press.

Difficulties with the concept of "work product" may also be understood when one considers the situation where investigating officers are lawfully upon the premises of one possessing "work product," looking for other evidence pursuant to a valid search warrant. The decision which must be made by the officer as to which evidence he may lawfully seize and which evidence he may not seize is one which may be difficult if not impossible and one which certainly places him at his peril when the sanction provisions of this legislation are considered.

We believe that there are other serious deficiencies with the section dealing with work product. The section provides for no protection where there is reason to believe that use of a subpoena would result in the destruction, alteration or concealment of the materials. In addition, should a person choose not to honor a subpoena duces tecum for "work product" the only remedy would be by way of contempt. There would be no assurance that the evidence could ever be obtained by law enforcement officials. To illustrate the difficulties raised by these two serious omissions, one need only to consider the situation which could have arisen had the White House Watergate tapes been placed in the custody of someone who was unconnected with any criminal offenses but who had the loyalty and persuasion of a person like G. Gordon Liddy. Under the structure of this legislation, those tapes would never have seen the light of day.

Finally, the provision dealing with remedies is also unclear. While the section provides for sanctions, it is nuclear against whom such sanctions should be applied. Where a search warrant is obtained and executed in violation of the provisions of this legislation, who is to be the subject of the sanction? Is it the affiant upon whose testimony the warrant was issued? Is it the neutral Judge who issued the warrant? Or, is it the officer or officers who pursuant to judicial order executed the warrant? Furthermore, which governmental body is the subject of sanctions when the affiant for the warrant is an officer of a municipal government, when the Judge is a representative of State government and when the officers executing the warrant are representatives of County government?

In my testimony today I have attempted to touch upon some of the practical working problems which will confront law enforcement officers by reason of the adoption of H.R. 3486 and similar legislation. The problems which I have indicated are not necessarily exhaustive and are subject to the limits of my law enforcement knowledge and experience. What I believe is of paramount importance, however, is to note that today without the passage of this or similar legislation

problems between prosecutors and the press are minimal. Our society has far more to gain through a healthy arms-length spirit of cooperation between representatives of prosecution and the Fourth Estate. In actual fact, examples of such voluntary cooperation between prosecution and the press are found every day throughout our country. What must be strongly resisted are those calls to the barricades which would destroy that current healthy relationship by pushing prosecutors and the press into extreme positions of confrontation with one another. We should not lose sight of the fact that *Zurcher* represents exactly such an extreme position. Prosecutors have seldom sought search warrants for newspaper offices. The avowed position of The Stanford Daily of destroying evidence is clearly not representative of the free press in this country today.

We, as Prosecutors, do not believe that the necessity for H.R. 3486 and similar legislation has been demonstrated. We do not believe that such legislation which would seriously affect the daily operations of our criminal justice system should be based on the extreme circumstances of a case like *Zurcher*. Above all, however, we believe that what may be most important is to avoid legislative action which forces both prosecution and the press to take extreme positions thereby destroying rather than enhancing what is currently a healthy and productive relationship in our society. In this regard, we ask for your thoughtful consideration.

On behalf of the National District Attorneys Association I appreciate the opportunity to appear before you and thank you for consideration of our views.

Mr. WILLIAMS. Mr. Chairman and Members of the subcommittee, my name is Richard J. Williams, the county prosecutor for Atlantic County, N.J., and a member of the board of directors of the National District Attorneys Association, on whose behalf I appear here today.

I wish to thank you for the opportunity of appearing before you to express the views of NDAA on H.R. 3486 and similar proposals under consideration by the Congress.

The National District Attorneys Association is a nonprofit, nonpolitical tax-exempt organization with over 7,000 members. NDAA is the largest association of prosecuting officials in the United States.

Its members include prosecutors in all of the 50 States representing over 1,500 prosecutors offices in size from the largest offices in Los Angeles and Chicago to over 600 offices representing populations of less than 20,000.

As prosecutors, we are mindful of the mandate of the Canons of Professional Ethics which hold that "the primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done." This is the pole star by which we must govern all of our actions.

It is important that I state at the outset that the opposition which we express to H.R. 3486 and similar legislation should not be construed as opposition to the fundamental need for free press. We strongly support the need for a free press in this Nation.

Rather our opposition must be understood in the context of support for time-honored constitutional values as interpreted by the U.S. Supreme Court which will preserve the criminal justice process as a search for truth and justice.

Since the opinion in Zurcher, and before that time, prosecutors throughout the country have demonstrated great restraint in the use of their powers. The committee, I believe, has available to it an informal survey conducted by the Reporters Committee for a Free Press, indicating the number of instances in which search warrants have actually been used. That and informal polls we have conducted in the NDAA indicate that searches of newspaper offices rarely occur.

It is important, I think, that we note that Zurcher itself represented an extreme situation, a situation in which the announced policy

of the Stanford Daily News was that evidence would be destroyed before it would be turned over to a prosecutor. We should state at the outset that our adversaries are those who commit violations of the criminal law and tear at the very fabric of our society. Our adversaries are not reporters, editors and publishers.

The reasons for our opposition, I think, are important. I would like to deal with our opposition generally to limitations on third party searches and then deal specifically with certain problems that we have had with H.R. 3486.

The concept of placing Federal legislative limitations on third-party searches is a dangerous one which we believe will have serious effects on reasonable law enforcement activities in the area of investigation and prosecution. Proposals to limit the use of search warrants against nontarget third parties are based on two assumptions:

One, that investigations can effectively proceed making use of alternative legal resources such as the subpena duces tecum and, two, that whatever delay may be caused by resort to such other resources such will not impede the investigation. These assumptions are erroneous.

The prosecutors traditionally have resorted to use of investigative tools other than search warrants where such resort would not unnecessarily delay or compromise an investigation. The practice cannot be followed in every instance, however, and the fact that prosecutors have traditionally used less intrusive measures jwhere possible should not justify the extreme action of restricting the use of warrants where restraint is not possible.

It is important to note that in many jurisdictions the use of a grand jury and a subpena duces tecum is legally unavailable. Even where a subpena duces tecum is legally available the resort to such will unquestionably cause delay in an investigation. There are over 900 prosecutors' offices in the NDAA alone representing populations of less than 50,000.

In these jurisdictions grand juries sometimes meet as seldom as once or twice a month. Therefore, there can be substantial delay first in the mere issuance of a subpena and, second, substantial delay because a subpena duces tecum requires time to respond beyond that as well as time needed to resolve challenges and appeals in the trial and appellate courts.

Even after all appeals are exhausted, the person possessing the evidence may still choose not to deliver the evidence but instead subject himself to contempt sanctions.

The use of the subpena duces tecum can never guarantee that evidence will ultimately be available for whatever clarity it may shed on the criminal action under investigation. Even if the evidence is ultimately obtained by the investigator the delay in obtaining such may have destroyed its usefulness. When it is obtained quickly it may provide leads and clues for the progress of the investigation.

Early leads and clues for other items of physical evidence and to witnesses are essential to search for truth. Where such do not occur the prosecutor faces the risk of loss or destruction of the physical evidence as well as fading memory, intimidation or corruption of witnesses. Substantial problems may also be caused by reason of a fundamental difference between a search warrant and a subpena duces tecum.

A search warrant is directed toward a place and a subpena toward a person. A law enforcement officer may know the location of critical evidence but may not know the identity of the person in possession of the evidence, or where he does know such identity, if the person to whom the subpena is directed is not present within the local or State jurisdiction, the service of the subpena and the compelling of production of evidence may be difficult or even impossible.

In addition to the potentially fatal problems of delay, there is also serious danger of the risk of destruction or loss of evidence. Proposals to limit search warrants do not take into account the possibility that the person to whom the subpena is directed may be a friend, relative, or associate of the person under investigation. Where such occurs, commonsense says that there is a strong likelihood that such person would be motivated to destroy the evidence or at the least put the defendant on notice and thereby facilitate its destruction.

In addition to possible destruction of the subpenaed evidence itself, such notice can also result in destruction of the related evidence not covered in the subpena but to which the subpenaed evidence could lead, once it were reviewed. Even where a person in possession of the evidence is not a sympathetic party to the criminal target, the security of the evidence, in that person's hands will be uncertain and the risk of its ultimate destruction is still great.

Further, resort to the subpena does not insure that even where some evidence is produced that the evidence will be complete or that where statements are made that the person does not possess the evidence that in fact such statements can be verified. The assumption that law enforcement officials can accomplish with the subpena the same things which can be accomplished with the search warrant is erroneous in another respect.

A person served with a subpena may be entitled to defeat the subpena on a self-incrimination claim. Use of a search warrant, however, does not require the person served to take potentially incriminating action, and his rights therefore are not violated.

The ability of a prosecutor to cut through even a spurious objection to a subpena is minimal, and in *Zurcher* the Supreme Court recognized that when it observed that the burden of overcoming a fifth amendment privilege, even if prompted by a desire not to cooperate rather than a real fear of self-incrimination, is one which prosecutors would rarely be able to meet in the early stages of an investigation, despite the fact that they did not regard the witness as suspect.

The difficulty of distinguishing between suspects and nonsuspects in early stages of investigation is a further complicating factor in an already difficult situation. The very purpose for conducting the search pursuant to a judicially issued warrant may be for obtaining evidence which will lead to the identification of the criminal suspect.

Some of the third party limitation proposals would cause additional problems, particularly in the areas of white-collar crimes, corruption, and organized crime, because it is in those areas frequently that it is the possession of documentary evidence, documents on which a case is based, and it is in those areas particularly that third parties, while not targets, may have a unique relationship with potential targets which could lead to the ultimate destruction of evidence.

While the stated purpose behind H.R. 3486 is to provide greater protection for the press, this specific piece of legislation actually goes

considerably beyond that purpose through the use of terminology which, admittedly, is broad evidence itself, such notice can also result in destruction of the related evidence not covered in the subpena but to which the subpenaed evidence could lead, once it were reviewed. Even where a person in possession of the evidence is not a sympathetic party to the criminal target, the security of the evidence in that person's hands will be uncertain and the risk of its ultimate destruction is still great.

Further, resort to the subpena does not insure that even where some evidence is produced that the evidence will be complete or that where statements are made that the person does not possess the evidence that in fact such statements can be verified. The assumption that law enforcement officials can appreciate with the subpena the same things which can be accomplished with the search warrants is erroneous in another respect.

A person served with a subpena may be entitled to defeat the subpena on a self-incrimination claim. Use of a search warrant, however, does not require the person served to take potentially incriminating action, and his rights therefore are not violated.

The ability of a prosecutor to cut through even a spurious objection to a subpena is minimal, and in *Zurcher* the Supreme Court recognized that when it observed that the burden of overcoming a fifth amendment privilege, even if prompted by a desire not to cooperate rather than a real fear of self-incrimination, is one which prosecutors would rarely be able to meet in the early stages of an investigation, despite the fact that they did not regard the witness as suspect.

The difficulty of distinguishing between suspects and nonsuspects in early stages of investigation is a further complicating factor in an already difficult situation. The very purpose for conducting the search pursuant to a judicially issued warrant may be for obtaining evidence which will lead to the identification of the criminal suspect.

Some of the third party limitation proposals would cause additional problems, particularly in the areas of white-collar crimes, corruption and organized crime, because it is in those areas frequently that it is the possession of documentary evidence, documents on which a case is based, and it is in those areas particularly that third parties, while not targets, may have a unique relationship with potential targets which could lead to the ultimate destruction of evidence.

While the stated purpose behind H.R. 3486 is to provide greater protection for the press, this specific piece of legislation actually goes considerably beyond that purpose through the use of terminology which, admittedly, is broad and imprecise.

Use of the concept "work product" places an impossible burden on investigating law enforcement officials. Whether evidence is subject to the protections of this statute depends not so much on objective circumstances as it does upon the state of mind of the person possessing the evidence.

Thus, before a law enforcement official may execute any third party search warrant, this legislation in effect requires that he know the identity of the possessor of the evidence and the intent or the purpose for which the person possesses the evidence.

As a practical matter, ascertaining such facts in the early stages of an investigation may be impossible. If the purpose of the legislation

is to protect the press, then it would be preferable to limit such legislation to representatives of the press rather than using the vague and overbroad concept of "work product."

While a precise definition of the press may cause some difficulties, such would not be nearly as great as the difficulties caused by reason of breadth and imprecision of the term "work product." By limiting such legislation to the press, law enforcement officials would at least have some reasonably objective standard upon which they could govern the conduct of their investigations.

A determination as to whether evidence is possessed by a member of the press is one which in many instances can easily be made in advance of a considered search. A determination as to whether materials are possessed as work product is a determination which in many instances cannot be made until after the search is completed and the resulting litigation ensues.

Use of the concept "work product" therefore not only causes law enforcement officials difficulty but may actually provide less protection for the press than would be the case were the legislation to contain a limitation specifically oriented toward the press. Difficulties with the concept of work product may also be understood when one considers the situation where investigating officers are lawfully on the premises of one possessing work product looking for other evidence pursuant to a valid search warrant.

The decision which must be made by the officer as to which evidence he may seize and which not is one which may be difficult if not impossible to make and places him at peril where the sanctions of the legislation are considered.

We believe that there are other serious deficiencies with the section dealing with work product. The section provides for no protection where there is reason to believe that use of a subpena would result in the destruction, alteration, or concealment of the materials.

In addition, should a person choose not to honor a subpena duces tecum for work product, the only remedy would be contempt. There would be no assurance the evidence could ever be obtained by law enforcement officials. We need only consider the situation which could have arisen a few years ago had the White House Watergate tapes been placed in the custody of someone who was unconnected with any criminal offense but who had the loyalty and persuasion of a person such as G. Gordon Liddy. Under this legislation those tapes would never have seen the light of day.

Finally, the provision dealing with remedies is also unclear. While the section provides for sanctions, it is unclear against whom such sanctions should be applied. Where a search warrant is obtained from a neutral magistrate and executed in violation of the provisions of this legislation, who is to be the subject of the sanction?

Is it the affiant upon whose testimony the warrant was issued? Is it the neutral judge who issued the warrant based upon the testimony given him, or is it the officer or officers who, pursunat to the warrant, a judicial order, conducted the search?

Furthermore, which governmental body is the subject of sanctions when the affiant or the warrant is an officer of a municipal government, the judge is a representative of State government, and when the officers executing the warrant are representatives of county government or

any combination of those circumstances that one may choose to imagine?

In my testimony today I have attempted to touch upon some of the practical working problems that will confront law enforcement officers by reason of H.R. 3486 and other similar legislation. The problems which I have indicated are not necessarily exhaustive and are subject to the limitation of my law enforcement experience.

What I believe is of paramount importance is to note that right now today without the passage of this legislation problems between the prosecutors in this country and the press are minimal. Our society has far more to gain through a healthy arm's length spirit of cooperation between representatives of prosecution and the fourth estate than from confrontation.

In actual fact, examples of voluntary cooperation between prosecution and the press are found every day throughout our country. What we must strongly resist are those calls to the barricades that would destroy a currently healthy relationship by pushing prosecutors and the press into extreme positions of confrontation with one another.

We should not lose sight of the fact that *Zurcher* itself represents exactly such an extreme position. Prosecutors have seldom sought search warrants for newspaper offices. The avowed position of the Stanford Daily destroying evidence is clearly not representative of the free press in this country today.

We as prosecutors do not believe the need for H.R. 3486 and similar legislation has been demonstrated. We do not believe such legislation which would seriously affect the daily operations of our criminal justice system should be based on the extreme circumstances of a case like *Zurcher*.

Above all, however, we believe what must be most important is to avoid legislative action which forces the press and prosecution to take extreme positions thereby destroying rather than enhancing what is currently a health productive relationship in our society.

In this regard we ask for your thoughtful consideration, and on behalf of the national district attorneys we appreciate the opportunity to appear before you and thank you for that consideration.

Mr. KASTENMEIER. Thank you, Mr. Williams, for a first-rate presentation and analysis of how you feel the bill might affect law enforcement.

On the latter point, namely, that relations are good between prosecutors and the press and it is not necessary to build barricades on such an issue, yesterday we had testimony from the American News Publishers Association, the American Society of Newspaper Editors, the Reporters and the Journalists Society, all four of them.

They were all quite concerned, not just about prosecutors, I might add. I think reaction is in part not only due to *Zurcher* v. *Stanford Daily*, the *Herbert* case and possibily the *Progressive* case and the implications thereof, and the preceding news and privilege cases as a total they are concerned about the status of themselves as part of the American news community and others.

So I am not sure that they would agree with your conclusions, notwithstanding that you make them in good faith.

Let me ask you; here is an interesting analysis. If one were to write such a bill dealing with this and were to consult you about how to write

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such a bill, you indicate that the search is directed to a place rather than a person and you suggest that the material, the evidence herein called the work product, is a very imprecise term and has lots of difficulties.

You ask that maybe we should go back to the defining notion, if we are to consider such legislation for newspaper people, of defining news people, what if one defined places that would be sanctuaries? Since it is directed to a place, what if one were to say offices of psychiatrists, offices of lawyers, newspaper offices shall not have warrants issued against them if they are third-party persons, save under certain circumstances?

I am just brainstorming this with you insofar as search warrants, according to your analysis, are directed at a place.

Mr. WILLIAMS. Two things I would like to separate, if I might, the press and newspapers from the other groups, because I think that may pose a separate issue, but at least with regard to, if I may respond, the definition of newspaper offices or news media offices or whatever, it would have at least one benefit, and that is that it would alert law enforcement officials at the outset to problems with which they are dealing.

It seems to me it would provide for some greater clarity if you were conducting an investigation and you developed a reason to believe that there was evidence of the fruits or instrumentalities of the crime at the newspaper office. You would note at the outset that you had a particularly sensitive issue that had to be dealt with and would require extremely careful attention.

You may not know, under the current legislation, you may not know you are dealing with a problem unless you already get into a place. So that while we are not necessarily supporting that legislation-that step, I think, would be a much more constructive step and probably provide greater protection than would the current statute.

Now, we have additional problems with the other examples which go beyond that. But at least insofar as the media, that I think would be a better step than what we have.

Mr. KASTENMEIER. In that regard, I take it your position and that of your association is that no legislation really in the area is needed, period.

Mr. WILLIAMS. That is correct.

Mr. KASTENMEIER. How do you react to that legislation—and we do have some—which affects Federal law only, that is pursuant to title XVIII of the code and does not affect State and local law enforcement? Do you have any views one way or the other about that?

Mr. WILLIAMS. Well, I guess, in degrees of gradation as to no legislation and the other extreme, something limited to the Federal area would be less objectionable than would legislation encompassing its entirety for a number of reasons, not the least of which is the traditional area of criminal law being one which is regulated by the States.

Mr. KASTENMEIER. Why would it be objectionable at all to you since the chief law enforcement officer, the Attorney General, requests such legislation?

Mr. WILLIAMS. I don't know that I am authorized to speak for the Federal Government. It would not necessarily affect our position so as a local prosecutor it would not affect what we do. As a citizen, whether or not I may think it is appropriate, that is another matter.

Would it affect my operations as a local prosecutor? The answer to that I believe would be no.

Mr. KASTENMEIER. In terms of scope, there are several elements, at least three dimensions and maybe more, to this.

One is the sort of horizontal scope of coverage. First you cover news media, community, et cetera, or first amendment, which is slightly broader, or do you cover in addition people with special privileges, clergy, lawyers, doctors, on the basis of privilege or indeed do you extend it all the way and cover everybody?

Then, the vertical analysis is, do you cover only the Federal Government at the top or do you cover Federal plus State and local? Forgetting the second one, just in terms of the first, do you feel from your analysis of the *Zurcher* v. *Stanford Daily*, if one were dealing with this question, do you see any reason to distinguish between first amendment or newspapers, let's say, from the rest, from all other persons or from persons with privileges?

Mr. WILLIAMS. Yes, I do. I think the first amendment represents some extremely important values at a constitutional level.

Second, any action would be a step placing greater restrictions than what are currently allowed under our Constitution. So I think that we should take such action in a very careful and prudent manner as opposed to precipitously because of its effect on law enforcement instead of doing it too quickly.

Third, there are problems in the other areas that do not necessarily equate with the protections that members of the press ought to have. By way of example, one of the considerations is attorneys' offices. I can indicate that in my own jurisdiction there would simply be problems if we were to limit the tool of a search warrant. We would not readily use that. In fact, quite frankly, in most jurisdictions the search warrant is used as a last resort if there are other effective ways of doing it and if it will not impede the investigation I think everyone would prefer to use the least intrusive measure.

In the area of attorneys, for instance, there is some practical experience in Atlantic County. It is very difficult to draw a distinction between the work of attorneys as attorneys and their involvement in matters of business. In our particular area perhaps the majority of the attorneys are involved in investing in real estate, involved in large real estate speculation, involved in many types of business opportunities all run out of the attorneys' offices.

Drawing a practical distinction would be exceptionally difficult. In fact, many of these attorneys make greater income from their outside activities than from the practice of law. There are other problems particularly in the area of types of crimes that involve relations, organized crime particularly, where I think effective investigation would be inhibited if we were to engage in those types of restraints.

Mr. KASTENMEIER. So in terms of efficacy in law enforcement you see distinctions between let's say newspaper offices, offices of persons with privileges, and all other persons, that is, in law enforcement there might be a reason to limit it to first amendment purposes?

Mr. WILLIAMS. That is right. We see some definite distinctions. The occasions for confrontation or conflict with the press I believe have been minimal. The statistics themselves show that.

Mr. KASTENMEIER. Although involvement with organized crime and other things would not necessarily be associated with the clergy or the medical community.

Mr. WILLIAMS. No, medical community not necessarily. You do run into problems with regard to medicaid fraud and those types of transactions. The problem is that the white collar corruption and even organized crime because I see organized crime not as limited to thuggery but really to overreaching monopolistic tendencies which is the real danger in organized crime, controlling legitimate businesses, controlling legitimate labor unions.

These are the real problems with organized crime and they are the kinds of problems that involved sophisticated operations involving records, materials. So that in that sense white collar corruption, organized crime matters have a great overlap.

Mr. KASTENMEIER. Well, this may have been different from jurisdiction to jurisdiction. The analysis of the law as presented by some witnesses as I recall suggested that it was not clear that prosecutors had a right to search and seize materials of innocent third parties from *Zurcher* v. *Stanford Daily* or at least one preceding case. Historically, that was not necessarily the case.

If that is true and if *Zurcher* v. *Stanford Daily* is presently the law, would you not agree then that there ought to be a great deal of apprehension on the part of would-be third parties insofar as then it would be assumed that *Zurcher* v. *Standard Daily* suggests whatever question may have existed in the past in terms of restraint, none now exists? It is an invitation to prosecutors to use the search warrants.

Mr. WILLIAMS. With due respect, I would have to agree with the majority opinion in that case which held that they were not establishing new law but that in fact this was a well recognized finding, in fact, that the district court really had rendered a decision contrary to what the longstanding law had been.

Nevertheless, it is important to notice that since *Zurcher*, to the best of my information and it is not exhaustive, but relying upon informal surveys with district attorneys and the Reporters Committee for a Free Press there appear to have been no searches in newspaper offices since that time.

If that is the case *Zurcher* would not seem to be taken, whether it is new law or whether, as I believe it is, merely a restatement of the old law. Certainly it has not been taken as an invitation to engage in a practice which had been rarely engaged in before.

Mr. KASTENMEIER. Most of the recent cases have come from the home State of the gentleman from California, Mr. Matsui. They have attempted to remedy that by adoption of a local law, restraint of the exercise of such warrants. So I am not sure that that is a good test.

Furthermore, we have to look beyond the effect on newspapers and look at the other classes of persons affected. We probably will not know what effect it has for some time. I don't think we have a ready analysis of the incidence of prosecutors excessing themselves of search warrants where they might not have in the past.

Mr. WILLIAMS. I think what we can say is at least to date for whatever reason it has not taken place. I think a good point which you touch on, Mr. Chairman, is that legislation has been adopted in California. I note it was supported by some of the District Attorneys that I talked to there, District Attorney Miller of San Diego, specifically, with whom I talked. Many of the States have taken it upon themselves to adopt legislation or policies.

My own State of New Jersey, the prosecutors and the attorney general in that State have adopted a policy with regard to searches on newspaper offices.

To the best of my knowledge we never have had any in the history of the State, but we have adopted a policy in any event which governs not only prosecutors' officers but all law enforcement agencies in the State voluntarily restricting the circumstances, in essence, doing what we believe is responsible in an attempt to protect important first amendment rights and at the same time allowing prosecutors to effectively deal with matters as a last resort when there are no other alternatives available and when the necessity for truth which we believe is paramount requires at that point that there be a search.

Mr. KASTENMEIER. Well, Mr. Sawyer is not here today. I assume that you would agree with the gentleman from Michigan, Mr. Sawyer, who has concluded that as far as restraint and exercise of judgment it is not of course a magistrate that truly enters into it. It is the prosecutor. In the final analysis it is the prosecutor's judgment that controls whether search warrants are issued.

Mr. WILLIAMS. It is in the sense that ultimately if a prosecutor were to act irresponsibly, the magistrate certainly would be in a position to control that. We as prosecutors, I think, have a built-in interest to act responsibly. I am not going to say we are altruistic, although I would like to think that there are prosecutors who are, but even if not there are other factors which mitigate against a prosecutor taking such precipitous action. I think that is important.

From one very practical standpoint I would not want to litigate a case like *Zurcher*. The time and effort involved would destroy the operations of my office. I just could not do it. These are setting aside altruistic matters. There are practical reasons why prosecutors do not want to put before magistrates orders which would blindly be signed and I don't believe that would happen in any event, but it is not in prosecutor's interest to introduce error in a proceeding.

It is in his interest to make certain that every step of the proceeding complies with the law because sooner or later if he does not he will have the price to pay for the error that he has introduced into the proceeding.

Mr. KASTENMEIER. Thank you for your statement.

The gentleman from California?

Mr. MATSUI. Thank you very much.

I have one series of questions.

In your written testimony, Mr. Williams, you indicated that the problems with the proposed legislation are, one, a possible delay after a subpena and, second, the destruction or loss of evidence. I think those are the two paramount ones that other people have been concerned about also.

Now, it seems to me that in having practiced law one of the problems with district attorneys' offices throughout the country is the fact that they usually wait until the last minute before they actually go after evidence in these things. I would agree with you that if practices that are prevalent throughout the country are continued, that would be a problem, because usaully there would be 3 or 4 days before the trial that they will go after the evidence.

Maybe this kind of legislation would prevent that from happening. Perhaps it would result in people in district attorney's offices going after evidence before trial with due time involved.

Mr. WILLIAMS. I think that may depend. Obviously there are 50 jurisdictions and prosecutors who operate differently. I can tell you from our experience in New Jersey, our office becomes involved in investigations at a very early stage dependeng on the type of investigation.

If it is the type of investigation for which many police departments are not equipped and trained to handle, sophisticated financial type matters, white-collar, organized crime matters, things of that sort, at least within our jurisdiction we would be involved in an investigation from the outset so that we would be seeking evidence at an early stage.

If you are seeking evidence 2 days before the trial then you have not prepared your case very well. I agree, but we will be involved there as well as in certain other types of important cases, homicide, arson, sexual assaults.

We have an arrangement in our county and most of the counties in New Jersey where the prosecutor becomes involved and is notified by the police immediately once an offense of that sort is committed.

Mr. MATSUI. In that case the delay issue would not really be a problem. If it is appealed, there is a provision in the act that would give the court discretion to issue the subpena in the event there is appeal in the interest of justice, so you can overcome the appeal situation.

Mr. WILLIAMS. With respect, I think delay would be a problem, because you are looking to develop your evidence at that early stage, and if you are not going to be able to develop the evidence—if it is going to take you weeks or months—you have problems. I can give you an example of the case—I guess war stories are not necessarily appropriate, but a case we handled involving a bank official involved in large amounts of kickbacks from persons who applied for loans. And in this particular case we used a subpena duces tecum for a third party, and when we reviewed the bank records we obtained, they indicated the possibility of money going to a third party and being funneled back to the particular bank official. We used the subpena duces tecum instead of a search warrant. When the person appeared at the grand jury, the records had vanished. They had been lost, a year's worth of records. There was nothing we could do.

Mr. MATSUI. That gets into destruction or loss of evidence. So the delay may have resulted from that, but you are talking about the second level, and, of course, in this piece of legislation, which I think is pretty carefully though out, you would not have to go after the subpena duces tecum in the event you had reason to believe there could be a loss or destruction of the evidence. In that case you could go ahead without the use of a subpena duces tecum and go with the warrant.

It seems to me those two major concerns you express in your written testimony are reasonably satisfied by this legislation, if it is properly carried out.

Mr. WILLIAMS. With respect, I have to disagree, particularly insofar as in the early stages, the obtaining of evidence, and it may develop that leads to other evidence and the destruction of other evidence, even if not the evidence that is called for here. If you do not obtain the material which you need to give you leads to other witnesses and other evidence in a timely manner, by the time you do get that as a result of delay of months, the other evidence either may not be available or useless to you at that time.

Mr. MATSUI. As far as destruction of evidence, the legislation, itself, may not cause the destruction of evidence. Whether you had it or not, it may be destroyed, because if the person in this case—you were referring to the war story—perhaps that evidence would be destroyed whether you had a search warrant or had the subpena duces tecum. The person may have said, they may come after my material so I think I will dump it or give it to somebody else.

Mr. WILLIAMS. I think it was the issuance of the subpena that alerted the person. We opted for the less obtrusive measure.

Mr. MATSUI. What a number of people that are in the newspaper business are telling us now—in fact, yesterday's testimony indicated that they just put the material in a different location so you don't know where it is, so when you issue the subpena you will issue it to the newsroom, and it will be hidden someplace else so that will result in people that have reason to want to keep records concealed to put it in a different place. So they can get around it whether you have this or not. So it would seem to me that your concerns may be more exaggerated than they should be.

Mr. WILLIAMS. I hope I haven't given that impression in my testimony.

Mr. MATSUI. Thank you very much, Mr. Williams, for your testimony this morning. You have been very helpful, and I trust the o her members of the subcommittee will carefully read your statement.

Mr. WILLIAMS. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Next, the Chair would like to call the distinguished psychiatrist, Dr. Jerome Beigler, who is immediate past chairman of the American Psychiatric Association Committee on Confidentiality. We are very pleased to hear you this morning.

TESTIMONY OF DR. JEROME S. BEIGLER, CLINICAL PROFESSOR OF PSYCHIATRY, UNIVERSITY OF CHICAGO, PRITZKER SCHOOL OF MEDICINE, AND IMMEDIATE PAST CHAIRMAN, AMERICAN PSYCHIATRIC ASSOCIATION, COMMITTEE ON CONFIDENTIALITY

Dr. BEIGLER. Thank you, Mr. Chairman. It is indeed a pleasure and privilege to be able to testify before this subcommittee. I have been a particular admirer of yours for some time, which makes it an additional pleasure.

I am Dr. Jerome S. Beigler, clinical professor of psychiatry at the University of Chicago, Pritzker School of Medicine, and immediate past chairman of the American Psychiatric Association's Committee on Confidentiality. I am pleased to have the opportunity to appear on behalf of the American Psychiatric Association, a medical specialty society representing over 25,000 psychiatrists nationwide, before the subcommittee to discuss our concerns about the significant implications of the Supreme Court's decision in *Zurcher* v. *Stanford* upon the confidentiality of medical records, particularly those of psychiatrists and the need for corrective legislation to include protection not only of media records, but also the records of physicians, lawyers, ministers, hospitals, and other innocent third parties.

As I understand the Supreme Court decision, its effects will be to permit the immediate search and seizure by Federal, State, or local police officials of property in the hands of an innocent third party such

as a psychiatrist, even if that person is in no way suspected of complicity in a crime for which such evidence is being searched. I believe this is not an appropriate standard for seeking evidence from innocent third parties.

To date, the predominant thrust of the testimony at your hearings has been to assess the impact of *Zurcher* on the first amendment rights of freedom of the press. We, too, are concerned about this aspect of the court's decision. However, the threat of *Zurcher* goes far beyond the press. As Justice Stevens stated—as you have heard many times, I am sure—in his dissenting opinion:

> Countless law abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The ex parte warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object. The search for the documents described in a warrant may involve the inspection of files containing other private matter. The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched.

The American Psychiatric Association has among its objectives to improve the treatment, rehabilitation, and care of the mentally ill, the mentally retarded, and the emotionally disturbed and to promote the best interest of patients and those actually or potentially making use of mental health services. Psychiatric treatment, by its nature, requires confidentiality of the communication between patient and physician. An inability to provide assurances of privacy constitutes a chilling factor as far as access to treatment is concerned. Thus, we are deeply concerned that pyschiatrists and indeed other health professionals maintaining health records, will become likely targets for searches.

If the authorities suspect that a person has been involved in a crime, and also have reason to believe that such person has seen or is seeing a psychiatrist, they might well seek a search warrant. Aside from the general intrusion of the confidential relationship between psychiatrist and patient, the search procedure is particularly pernicious since it does not allow the psychiatrist to challenge the disclosure of his records on the ground that they are both privileged and confidential.

Further, a search, particularly of a physician's office, raises the distinct likelihood that the police will also have access to and review the records of patients wholly unrelated to the matter under investigation. A search warrant need not be served on the third party before his or her premises are searched. It only need be posted on the door. The third party need not be present for a search to ensue. A search warrant may be utilized at any time, whether an office is open or not. While all of this may make procurement of the documents in question more prompt and while theoretically it may assure against the destruction of records, the warrant procedure has dangerous drawbacks, namely, the absence of an adversarial trial and the increased invasion of privacy.

In contrast to a search warrant, a subpena duces tecum allows the doctor or any innocent third party being served, the opportunity to litigate the privilege issue. Further, it also restricts turnover, should such a privilege claim fail, to the documents specifically at issue,

thereby protecting the records, property, and privacy of others. Moreover, the subpena process permits an individual to take advantage of the due process under law provided by the Constitution.

As an example of what may happen as a result of the *Zurcher* decision, I remind this subcommittee that the burglarization of Dr. Fielding's office for his psychiatric records on Daniel Ellsberg—re the Pentagon Papers—could have been obviated by the simple issue of a warrant if the *Zurcher* decision had been available at the time.

The value of sensitive medical and psychiatric records is further illustrated by the capacity of a multimillion-dollar-a-year industry to furnish unauthorized medical records as the result of deceptive and criminal practices as disclosed in the past 2 years by the Denver, Colo., State's attorney.

In addition, we have learned that in contrast to the case of *Zurcher*, itself, as was mentioned earlier this morning in which potential destruction of records was claimed, the California Santa Clara County State's attorney obtained a warrant to search the office and home of a Palo Alto psychiatrist for the record of a patient suspected of a crime. There was no claim that evidence might be destroyed without a warrant. No evidence was found. But the psychiatrist's home is also the residence of her husband, who happens to be a well-known scientist. His records, too, became accessible via the warrant. An interesting scenario regarding international and/or industrial espionage readily suggests itself.

Further in 1978, the State of Hawaii passed its Act 105, authorizing for the monitoring of the medicaid program search warrants for probable cause defined as "public interest." The law has been interpreted to mean that all that is needed for the issuance of a search warrant to inspect providers' records and premises is an affidavit indicating that the provider participates in the medicaid program and the public interest warrants a search. A Honolulu provider has already been walked in on and records not only of his medicare patients but also of his private patients have been seized. Again, there was no threat of destruction of records.

Recently we have been advised that the same California Santa Clara County State's attorney referred to above has had warrants issued to search the premises and records of the local public defender's office.

As Senator Birch Bayh, in his eloquent introduction of S. 855 on April 2, 1979, stated:

> The *Zurcher* decision has left us with a serious potential for governmental abuse of our rights to privacy—the most fundamental and comprehensive of all constitutional rights. . . . The right to privacy is the keystone of the Bill of Rights and our concept of civil liberties. It is the . . . one concept . . . which separates our society from the authoritarian systems which do not recognize the supremacy of the individual. In large part, the very independence of this Nation can be traced to the desire for individual privacy from unannounced and unwarranted governmental intrusion. Our founders drew up the Bill of Rights in order to secure for themselves and succeeding generations the individual dignity, security and privacy inherent in a government of free people. Congressional Record, Vol. 125, No. 41, April 2, 1979.

Mr. Chairman, the American Psychiatric Association is well aware of the importance of protecting the press from investigative abuses, but we also believe that third party searches invade the privacy guaranteed by the fourth amendment to all. We commend the innovative

definition in H.R. 3486 of the journalists' "work product," but we urge that the administration's bill be extended to protect the records and premises of physicians, psychiatrists, hospitals, lawyers, and clergymen from third party searches. There is mounting evidence that civil liberties are being eroded at so fast a pace that Orwell's "1984" may well be upon us ahead of schedule. There is much evidence of this. We hope the trend will be reversed by the passage of H.R. 3486 with amendments to provide third party protection to all.

I would like to ask unanimous consent that the attached article by Joel Klein, counsel for the American Psychiatric Association, and learned in his profession, which addresses the legal-medical aspects of the *Zurcher* issue be made part of the hearing record.

I appreciate the opportunity to have appeared before your subcommittee and would be pleased to respond to any questions you may have, and the American Psychiatric Association would be pleased in the future to be available for any further assistance.

Thank you.

Mr. KASTENMEIER. Thank you very much, Dr. Beigler, for that concise and clear statement of the position of your association, and, of course, the article you referred to attached to your statement will be received and made part of the record.

[The information follows:]

SUPREME COURT DECISION POSES BROAD THREAT TO CONFIDENTIALITY

RULING THAT GIVES POLICE RIGHT TO SEARCH NEWSPAPER FILES COULD BE EXTENDED TO FORAYS INTO PHYSICIAN RECORDS

(By Joel I. Klein, J.D.)

Stanford University is located in the quiet rolling hills that dot the landscape as the peninsula extends south from San Francisco. In the late 1960s and early 1970s, the turmoil that marked the campus stood in sharp distinction to its placid setting as student activists marched in protest against the Vietnam war and other perceived social evils. While the university has weathered the storm and now appears to be in the midst of a "fraternity revival" akin to the one in the movie "Animal House," the legacy of the antiwar movement persists at Stanford.

The most recent reminder of that legacy came in a decision by the U.S. Supreme Court on May 31, 1978, in the case of *Zurcher* v. *Stanford Daily*. The case involved a police search of the records of the campus newspaper, The Stanford Daily. In a far-reaching decision, the Court upheld the right of the police to search the newspaper's files even though the police were looking for evidence relating to possible crimes by people other than the Daily or its staff. The American press has, almost in a single voice, condemned the decision as a needless intrusion on First Amendment rights, sure to chill the sources of reporters who write about criminal or quasi-criminal activities. Not nearly so publicized have been the potential deleterious consequences the decision could have for groups other than the press, such as for doctors who retain confidential medical records about their patients.

The events that led to the Supreme Court's decision grew out of a takeover of the administrative offices at the University Hospital on April 9, 1971. Several police officers from the nearby Santa Clara Sheriff's Office were called in to monitor the demonstration. At some point, a fight broke out between the demonstrators and the police, resulting in serious injuries to several policemen. The police could only identify two of their assailants but did observe someone photographing the events.

On April 11, the Daily ran a special edition containing pictures of the hospital confrontation. The Santa Clara County District Attorney's Office then secured a search warrant from a local court that authorized a search of the Daily's offices for photographs and negatives of the hospital protest. The warrant application did not claim that any members of the Daily were involved in the allegedly unlawful assaults at the hospital. On the basis of the warrant, four police officers searched the Daily offices but found nothing other than the photographs previously published in the Daily.

Subsequently, members of the Daily brought a "civil rights" action in federal court, asserting that the search violated their constitutionally protected rights and seeking an injunction against future searches. The federal district court and the Ninth Circuit Court of Appeals both ruled for the Daily. Essentially, the courts found that, in view of the First Amendment interests of the press, such searches could be countenanced only when it appeared there would be no other way to prevent destruction of evidence.

The U.S. Supreme Court disagreed. In an opinion by Justice Byron White (joined by Chief Justice Warren E. Burger and Justices Harry A. Blackmun. Lewis F. Powell and William H. Rehnquist), the Court found that the search of the Daily was permissible and abridged no constitutional rights. In considering the general use of warrants in "third party" searches, the Court concluded that any rule not allowing a search warrant would undermine law enforcement concerns without truly protecting any significant privacy interests. Requiring the police to proceed by a subpoena, for instance, would allow for a court challenge before compliance. Nor did the Court find anything special about the First Amendment concerns of the press that would justify having a different rule for it.

There were two dissenting opinions. First, Justice Potter Stewart (joined by Justice Thurgood Marshall) argued that third-party searches applied to the press would unduly hamper news-gathering functions and therefore would infringe the exercise of First Amendment rights. In particular, Justices Stewart and Marshall were concerned with the effect of the majority's decision on newspaper sources, many of whom, according to the dissenters, would dry up without some guarantee of confidentiality. In the face of an unchallengeable search warrant, such assurances cannot be given.

Justice John Paul Stevens, the Court's most junior member, took a different approach in his dissent. In his view, the majority had gone awry in upholding third-party searches, whether aimed at the press or anyone else who is not a target of the criminal investigation. Reviewing several decisions concerning the Fourth Amendment's proscription on "unreasonable searches and seizures," Justice Stevens argued that the Court's decision needlessly intruded on the privacy of innocent third parties because legitimate law enforcement concerns could be served by a subpena. In those few cases where there was reason to believe that evidence would be destroyed. Stevens stated a warrant would be justified.

The outcry in the nation's press generated by the *Zurcher* decision was not unexpected. With few exceptions, however, the editorial comment focused on the provincial, albeit important, interests of the press and its need to shelter sources. Little regard was paid to the potentially devasting impact of the Court's decision on other areas, such as, for example, the doctor-patient relationship.

As general counsel to the American Psychiatric Association, I doubtlessly suffer from a bit of professional mypoia myself. But I do not think I dramatically overstate the case when I say that the abuses inherent in the *Zurcher* decision are as likely to be as grave for the psychiatrist-patient relationship as they are for the press. Indeed, I have talked with several prosecutors who seem to think a psychiatrists' record are likely to be a fertile source of evidence regarding suspected criminals who are in psychiatric treatment. The recent foray into Dr. Lewis Fielding's office to rifle through the psychiatric records of Daniel Ellsberg (and perhaps others) is a dramatic, but unfortunately not isolated, experience.

A series of events occurring in the wake of the issuance of the warrants to search the Stanford Daily firmly demonstrates this concern. Shortly after the search of the newspaper, the Santa Clara County District Attorney's Office again decided that a third-party warrant would well serve law enforcement interests. Apparently, the police had been called by a psychiatric outpatient at the Stanford clinic who complained of a homosexual assault. The complaint was examined and evidence corroborating his claim was found. The District Attorney's Office then proceeded to get a warrant to search the records at the outpatient clinic and also the car and home of the psychiatrist who was treating the patient. Shortly after the search, the patient terminated treatment. Obviously, we can only speculate why.

What is especially troubling about these third-party searches is that they are not really necessary because the police can proceed by using a subpoena. A subpoena allows the person whose records are sought to secure a judicial determination as to whether the records are privileged and therefore need not be turned over. In most states, for example, the law protects the records of a doctor (or lawyer or clergyman) from judicial disclosure. If such records are subpoenaed, this privilege can be raised and litigated. If the privilege is sustained, the records remain confidential—as the law intends they should.

But if a search warrant is used, there is no opportunity to protect confidentiality since a warrant is issued without a judicial hearing. To be sure, records that are seized may not be admissible in a judicial proceeding if they are found to be privileged. But by the time such a determination is made, confidentiality has already been destroyed.

Two other benefits may be gained by using the subpoena approach. First, a subpoena limits the inquiry to those documents the authorities have reason to request. A search warrant supposedly does the same thing. Unlike a subpoena, however, it allows the police officer to go right into the doctor's records. Once there, his eye may wander a bit to examine other material, perhaps even about other patients. Second, needless trauma can be eliminated by relying on the orderly issuance of a subpoena. The unannounced arrival of the police in a doctor's office can be a very disturbing experience, both for the physician and the patient.

Against all these advantages, the sole argument for use of a warrant is that the records in question might be destroyed after a subpoena is issued. This argument is vastly overstated. Destruction of documents after a subpoena is issued is a crime. One need not be overly cynical to suggest that, if the documents incriminate their possessor, he might well risk destroying them, but there is no basis to assume that an innocent third party would risk criminal conviction by destroying documents. Plainly, not many doctors would risk prison by destroying the subpoenaed records of their patients. Moreover, as Justice Stevens explained in *Zurcher*, when there is reason to believe that a third party might destroy records, a warrant would then be justified.

But there is no need to create a broad rule that can seriously undermine privacy in order to satisfy a few exceptional cases. A more refined approach would be preferable.

Help may be on the way. Several Senators and representatives have introduced legislation seeking to undo the effect of the Supreme Court's ruling in *Zurcher*. Some of these bills, however, are limited to protecting only the press from third-party searches. Their passage would be short-sighted in the extreme. Indeed, the press itself would be well served by supporting broad legislation that would curb all unnecessary third-party searches because history has shown that journalistic needs for confidentiality are best satisfied by a unified national commitment to privacy. Special interest legislation, although perhaps easier to push through, will not help generate the commitment toward privacy that is needed. Rather, it will result in needless squabbling and in-fighting among various groups that should share a common concern for privacy and confidentiality.

Mr. KASTENMEIER. In connection with the coverage of the bill, most of the journalists, if not all of them, who have appeared before us, have asked, or suggested, or recommended as their position, that not only they be included, but all other persons, including, of course, physicians, psychiatrists, hospitals, lawyers, clergymen, but other persons as well. So they would presumably go beyond your recommendation in that connection.

I assume that your statement that the bill be extended to protect the records of physicians, psychiatrists, hospitals, lawyers and clergymen is not meant to be necessarily limited to that, but that it surely include that. You would have no objection if it was extended to all persons.

Dr. BEIGLER. That is correct.

Mr. KASTENMEIER. May I ask, I note that the California Santa Clara County State's attorney office pursued not only a newspaper office, but a psychiatrist, and you also indicate a local public defender's office. Are those three separate, unrelated cases, or were they all interrelated?

Dr. BEIGLER. To my knowledge, the psychiatrist case is completely separate, and it is my understanding that this public defender's situation arose only recently; so it must be unrelated to *Zurcher*, and I believe it is indicative of the thrust of what the Supreme Court decision tends to predispose to.

Mr. KASTENMEIER. That is a fair conclusion, indeed may be circumscribed from pursuing newspapers' offices any longer; but under

California law, you can proceed against public defenders, psychiatrists. any and all other persons.

Dr. BEIGLER. Yes.

Mr. KASTENMEIER. In terms of, as an example, a psychiatrist, because of his or her particular relationship with patients, ordinarily would a psychiatrist respond to a subpena duces tecum? You mentioned it enables a psychiatrist to raise a privilege as defense. I ask the question so it may be understood what difficulty a prosecutor would presume to have; that is to say, would he assume if a psychiatrist would, as a matter of course, raise defense and may prevail against a subpena, or what judgment is exercised ordinarily by a psychiatrist in this connection?

Dr. BEIGLER. You raise a crucial and complex point. The problem is complex because the communications between a psychiatrist and a patient are a little bit different than in usual relationships.

Mr. KASTENMEIER. Even different, you would say, than between a physician, an ordinary physician, even pathologist?

Dr. BEIGLER. Yes, for example, should you come in for a back complaint and have X-rays, the communications are usually defined only to that tiny area of the relationship, but if a patient comes in for psychiatric help, particularly for psychotherapy or psychoanalysis, prerequisite to the treatment working is the assurance that anything that has to be said will be kept confidential. In the course of treatment the psychiatrist becomes a repository of all kinds of information that relates to the whole life of the patient, and because of that fact, the information he has is of considerable value to third parties.

For example, many corporate executives will not go into psychiatric treatment because they are afraid if this were discovered, it might jeopardize their careers. Insurance companies are very interested in the information that a psychiatrist has. In the Factual Services Bureau situation that I referred to earlier, Mr. Tooley, of Denver, Colo., the State's attorney there, uncovered this major industry over the country that trafficked in unauthorized medical information and the idea there was that the insurance companies wanted to have unauthorized medical information; first, realistically to assess their potential reserve that was necessary for future claims.

But second, when they had access to full hospital charts, in one instance, a man who was litigating for benefits that the insurance company was contesting, they found out that in the past he'd had venereal disease. When he became aware they knew about this, he was willing to settle for less than he otherwise would have rather than risk this private information becoming public. This is an example of unauthorized information being used to harass a patient.

So that when a psychiatrist is subpenaed, to get back to your question, in several States that have privilege laws (in about 10 States over the country), the word "relevant"—for relevant testimony is what is key—then it is a matter how one interprets what is relevant. The problem there is that again in the adversary process, a prosecutor, or defendant's attorney, if that is what the situation is, will use all the information he can get from a psychiatrist not necessarily for the issue at hand, but also for harassment, or intimidation. I had one case, for example, in which a woman was suing for a back injury. She was

parked in the parking lot of a supermarket and was hit by another car, resulting in a back injury with X-ray changes. Her lawyer brought suit and included pain and suffering as part of the claim for damages.

The very competent defendant's lawyer, in his discovery process, learned she had been coming to a psychiatrist, and subpenaed my records and testimony, with her permission. She wanted me to testify, but when I reminded her that she was involved in other situations, that she hadn't remembered the things she had told me, and if I were to disclose some of the material she told me about, it would complicate her future course of life, and this had nothing to do with the orthopedic problem.

So, in her interest, I had to do what I could to be sure that the testimony was focused only on the orthopedic injury. In order to do that, her lawyer had to take back the claim of pain and suffering because, with pain and suffering, mental condition had been brought into issue and technically, therefore, privilege had been waived. It thus became clear that a person going to a psychiatrist potentially jeopardizes his rights to legal redress otherwise available to any other citizen. So we had to contest that interpretation of pain and suffering and were successful in having corrective legislation enacted.

This is just to illustrate some of the complexities of why a psychiatrist needs to provide his patients with assurances of confidentiality and the complications that occur when discovery interventions are made. We have no peoblem with responding to a subpena if the evidence is kept to the relevant material. This is the issue in several California cases in which it went up to the California Supreme Court about the definition of relevance. Those are some of the complexities that are involved.

Mr. KASTENMEIER. I can see it is rather complex, and, I asked the question to determine as a matter of course would a psychiatrist normally resist a subpena in a criminal matter involving his patient without his patient's consent, and I assume that normally you would?

Dr. BEIGLER. Normally we would resist within the provisions of the law. It would depend on the situation. The criterion, as far as the psychiatrist is concerned, is the interest of the patient. I was trying to illustrate that in the woman's case with the back problem, but as far as resisting a subpena just for resisting, not so. And certainly not for destruction of evidence. We have no problem with the justice system if the justice system is allowed to operate.

Mr. KASTENMEIER. That is a useful statement.

Furthermore, you can certainly argue that a subpena would be much preferable to a search warrant on every possible ground. A search warrant would be imprecise; it would subject not only presumably the patient, but potentially others as well, as the doctrine, itself, as an unacceptable intrusion; whereas at least a subpena enables appropriate judgment to be made about, as you say, relevancy.

Does your association, in addition to the *Santa Clara* case, have other instances where search warrants have been directed to psychiatrists in recent years?

Dr. BEIGLER. I mentioned the *Hawaii* case that just surfaced last year. A psychologist happened to be involved in that.

Mr. KASTENMEIER. But would you conclude that the incidents to date of this particular kind are rare indeed?

Dr. BEIGLER. In my experience, or to my knowledge, yes.

Mr. KASTENMEIER. Is there any instance of which you are aware where a psychiatrist has been subject to a search warrant or search and seizure pursuant to Federal authority?

Dr. BEIGLER. Not to my knowledge. With the medicare and medicaid problems, of which there are some——

Mr. KASTENMEIER. They have involved physicians but not psychiatrists, is that correct?

Dr. BEIGLER. No, there have been psychiatrists, too, unfortunately.

Mr. KASTENMEIER. In that case they are not innocent third parties, presumably.

Dr. BEIGLER. That is right. I am out of my area of competence here, because you are asking questions in the technical area of the law. What you take for granted in your everyday work, is a completely alien frame of reference as far as I am concerned, so I am puzzled because we have had medicare and medicaid problems in the State of Illinois. The financing if through shared Federal and State funds, but the prosecution of fraud problems is through State agencies; so I am not able to distinguish at the moment what you mean when you say "at the Federal level."

But I don't know of any cases offhand.

Mr. KASTENMEIER. Thank you. Your testimony this morning has been very helpful, Dr. Beigler, and I do appreciate your appearance. It does contribute to the whole mosaic in terms of the need and the problems confronted by, in this case, your own profession, but by really so many Americans. I appreciate the quotations you made and your reference to the chairman.

Dr. BEIGLER. My pleasure, Mr. Chairman.

Mr. KASTENMEIER. This concludes our testimony today. The Chair will announce we have no further hearings presently scheduled. After review of the testimony, it may be concluded that we ought to have one or more witnesses, perhaps even the Justice Department in a return meeting to explore some of the questions that have been raised in the intervening hearings, so that we may proceed to the question of markup sometime during the month of June.

Accordingly, the committee now stands adjourned.

[Whereupon, at 11:30 a.m., the subcommittee adjourned, to reconvene upon the call of the Chair.]

APPENDIXES

Appendix 1—Legal Materials

A. *Zurcher, Chief of Police of Palo Alto, et al.* v. *Stanford Daily et al.*
B. *David O'Conner* v. *Robert F. Johnson, Judge of County Court, County of Ramsey, Minnesota.* Re: Petition to quash search warrant.

Appendix 2—Legislative Material

A. H.R. 3486 as introduced April 15, 1979.
B. H.R. 4181 as introduced May 22, 1979.

Appendix 3—Law Review Articles

A. John Kaplan, "Search and Seizure: A No-Man's Land in the Criminal Law", California Law Review, Vol. 49, No. 3, August 1961.
B. Mitchel Arnold, Communications Law Clinic, New York Law School, Memorandum: Constitutionality of Proposed Federal Legislation Overruling *Zurcher* v. *Stanford Daily*, July 11, 1979.

Appendix 4—Other Material

A. Statement of R. Michael Cole, Director of Legislative Activities for Common Cause.
B. Related Bills presently before the State of Wisconsin Legislature, 1979 Senate Bill 221 and 1979 Assembly Bill 94.
C. Statement of Robert W. Johnson, County Attorney of Anoka County, Minnesota, to the Minnesota County Attorneys Association, June 20, 1979.

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APPENDIX 1 A

Syllabus

ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET AL. *v.* STANFORD DAILY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1484. Argued January 17, 1978—Decided May 31, 1978*

Respondents, a student newspaper that had published articles and photographs of a clash between demonstrators and police at a hospital, and staff members, brought this action under 42 U. S. C. § 1983 against, among others, petitioners, law enforcement and district attorney personnel, claiming that a search pursuant to a warrant issued on a judge's finding of probable cause that the newspaper (which was not involved in the unlawful acts) possessed photographs and negatives revealing the identities of demonstrators who had assaulted police officers at the hospital had deprived respondents of their constitutional rights. The District Court granted declaratory relief, holding that the Fourth Amendment as made applicable to the States by the Fourteenth forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless there is probable cause, based on facts presented in a sworn affidavit, to believe that a subpoena *duces tecum* would be impracticable. Failure to honor the subpoena would not alone justify issuance of a warrant; it would also have to appear that the possessor of the objects sought would disregard a court order not to remove or destroy them. The court also held that where the innocent object of the search is a newspaper First Amendment interests make the 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." The Court of Appeals affirmed. *Held:*

1. A State is not prevented by the Fourth and Fourteenth Amendments from issuing a warrant to search for evidence simply because the owner or possessor of the place to be searched is not reasonably suspected of criminal involvement. The critical element in a reasonable search is not that the property owner is suspected of crime but that there is reasonable cause to believe that the "things" to be searched for and seized are located on the property to which entry is sought. Pp. 553–560.

2. The District Court's new rule denying search warrants against third

*Together with No. 76-1600, *Bergna, District Attorney of Santa Clara County, et al.* v. *Stanford Daily et al.*, also on certiorari to the same court.

parties and insisting on subpoenas would undermine law enforcement efforts since search warrants are often used early in an investigation before all the perpetrators of a crime have been identified; and the seemingly blameless third party may be implicated. The delay in employing a subpoena *duces tecum* could easily result in disappearance of the evidence. Nor would the cause of privacy be served since search warrants are more difficult to obtain than subpoenas. Pp. 560–563.

3. Properly administered, the preconditions for a search warrant (probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness), which must be applied with particular exactitude when First Amendment interests would be endangered by the search, are adequate safeguards against the interference with the press' ability to gather, analyze, and disseminate news that respondents claim would ensue from use of warrants for third-party searches of newspaper offices. Pp. 563–567.

550 F. 2d 464, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 568. STEWART, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 570. STEVENS, J., filed a dissenting opinion, *post*, p. 577. BRENNAN, J., took no part in the consideration or decision of the cases.

Robert K. Booth, Jr. argued the cause for petitioners in No. 76–1484. With him on the briefs were *Marilyn Norek Taketa, Melville A. Toff,* and *Stephen L. Newton.*

W. Eric Collins, Deputy Attorney General of California, argued the cause for petitioners in No. 76–1600. With him on the briefs were *Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *Edward P. O'Brien,* Assistant Attorney General, *Patrick G. Golden* and *Eugene W. Kaster,* Deputy Attorneys General, *Selby Brown, Jr.,* and *Richard K. Abdalah.*

Jerome B. Falk, Jr. argued the cause for respondents in both cases. With him on the briefs was *Anthony G. Amsterdam.*†

†A brief of *amici curiae* urging reversal was filed for their respective States by *William J. Baxley,* Attorney General of Alabama; *Avrum M.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The terms of the Fourth Amendment, applicable to the States by virtue of the Fourteenth Amendment, are familiar:

> "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."

As heretofore understood, the Amendment has not been a barrier to warrants to search property on which there is

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Gross, Attorney General of Alaska; *Evelle J. Younger*, Attorney General of California, and *W. Eric Collins* and *Dane R. Gillette*, Deputy Attorneys General; *Arthur K. Bolton*, Attorney General of Georgia; *Wayne L. Kidwell*, Attorney General of Idaho; *William J. Scott*, Attorney General of Illinois; *Theodore L. Sendak*, Attorney General of Indiana; *Francis B. Burch*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *A. F. Summer*, Attorney General of Mississippi; *Paul L. Douglas*, Attorney General of Nebraska; *David H. Souter*, Attorney General of New Hampshire; *Toney Anaya*, Attorney General of New Mexico; *James A. Redden*, Attorney General of Oregon; *Robert P. Kane*, Attorney General of Pennsylvania; *Robert B. Hansen*, Attorney General of Utah; and *Anthony F. Troy*, Attorney General of Virginia. A brief of *amici curiae* urging reversal was filed by *Frank Carrington*, *Wayne W. Schmidt*, *Glen R. Murphy*, *James P. Costello*, *Robert Smith*, and *Richard F. Mayer* for Americans for Effective Law Enforcement, Inc., et al.

Briefs of *amici curiae* urging affirmance were filed by *Dominic P. Gentile*, *John E. Ackerman*, and *Joseph Beeler* for the National Association of Criminal Defense Lawyers, Inc.; and by *Lloyd N. Cutler*, *Dennis M. Flannery*, *William T. Lake*, *A. Stephen Hut, Jr.*, *Arthur B. Hanson*, *James R. Cregan*, *Erwin G. Krasnow*, *Richard M. Schmidt, Jr.*, *J. Laurent Scharff*, *Christopher B. Fager*, *David S. Barr*, and *Mortimer Becker* for the Reporters Committee for Freedom of the Press et al.

Briefs of *amici curiae* were filed by *Solicitor General McCree*, *Assistant Attorney General Civiletti*, *Deputy Solicitor General Frey*, *Harriet S. Shapiro*, and *Elliot Schulder* for the United States; and by *Edwin L. Miller, Jr.*, *Richard D. Huffman*, and *Peter C. Lehman* for the National District Attorneys Assn. et al.

probable cause to believe that fruits, instrumentalities, or evidence of crime is located, whether or not the owner or possessor of the premises to be searched is himself reasonably suspected of complicity in the crime being investigated. We are now asked to reconstrue the Fourth Amendment and to hold for the first time that when the place to be searched is occupied by a person not then a suspect, a warrant to search for criminal objects and evidence reasonably believed to be located there should not issue except in the most unusual circumstances, and that except in such circumstances, a subpoena *duces tecum* must be relied upon to recover the objects or evidence sought.

I

Late in the day on Friday, April 9, 1971, officers of the Palo Alto Police Department and of the Santa Clara County Sheriff's Department responded to a call from the director of the Stanford University Hospital requesting the removal of a large group of demonstrators who had seized the hospital's administrative offices and occupied them since the previous afternoon. After several futile efforts to persuade the demonstrators to leave peacefully, more drastic measures were employed. The demonstrators had barricaded the doors at both ends of a hall adjacent to the administrative offices. The police chose to force their way in at the west end of the corridor. As they did so, a group of demonstrators emerged through the doors at the east end and, armed with sticks and clubs, attacked the group of nine police officers stationed there. One officer was knocked to the floor and struck repeatedly on the head; another suffered a broken shoulder. All nine were injured.[1] There were no police photographers at the east doors, and most bystanders and reporters were on the west side. The officers themselves were able to identify only two of their

[1] There was extensive damage to the administrative offices resulting from the occupation and the removal of the demonstrators.

assailants, but one of them did see at least one person photographing the assault at the east doors.

On Sunday, April 11, a special edition of the Stanford Daily (Daily), a student newspaper published at Stanford University, carried articles and photographs devoted to the hospital protest and the violent clash between demonstrators and police. The photographs carried the byline of a Daily staff member and indicated that he had been at the east end of the hospital hallway where he could have photographed the assault on the nine officers. The next day, the Santa Clara County District Attorney's Office secured a warrant from the Municipal Court for an immediate search of the Daily's offices for negatives, film, and pictures showing the events and occurrences at the hospital on the evening of April 9. The warrant issued on a finding of "just, probable and reasonable cause for believing that: Negatives and photographs and films, 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]." App. 31–32. The warrant affidavit contained no allegation or indication that members of the Daily staff were in any way involved in unlawful acts at the hospital.

The search pursuant to the warrant was conducted later that day by four police officers and took place in the presence of some members of the Daily staff. The Daily's photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched. Locked drawers and rooms were not opened. The officers apparently had opportunity to read notes and correspondence during the search; but, contrary to claims of the staff, the officers denied that they had exceeded the limits of the warrant.[2] They had not been advised by the staff that the areas they were searching contained confidential materials. The search revealed only the photographs that had already

[2] The District Court did not find it necessary to resolve this dispute.

been published on April 11, and no materials were removed from the Daily's office.

A month later the Daily and various members of its staff, respondents here, brought a civil action in the United States District Court for the Northern District of California seeking declaratory and injunctive relief under 42 U. S. C. § 1983 against the police officers who conducted the search, the chief of police, the district attorney and one of his deputies, and the judge who had issued the warrant. The complaint alleged that the search of the Daily's office had deprived respondents under color of state law of rights secured to them by the First, Fourth, and Fourteenth Amendments of the United States Constitution.

The District Court denied the request for an injunction but on respondents' motion for summary judgment, granted declaratory relief. 353 F. Supp. 124 (ND Cal. 1972). The court did not question the existence of probable cause to believe that a crime had been committed and to believe that relevant evidence would be found on the Daily's premises. It held, however, that the Fourth and Fourteenth Amendments forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless there is probable cause to believe, based on facts presented in a sworn affidavit, that a subpoena *duces tecum* would be impracticable. Moreover, the failure to honor a subpoena would not alone justify a warrant; it must also appear that the possessor of the objects sought would disregard a court order not to remove or destroy them. The District Court further held that where the innocent object of the search is a newspaper, First Amendment interests are also involved and that such a search is 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." *Id.*, at 135. Since these preconditions to a valid warrant had not been satisfied here,

the search of the Daily's offices was declared to have been illegal. The Court of Appeals affirmed *per curiam*, adopting the opinion of the District Court. 550 F. 2d 464 (CA9 1977).[3] We issued the writs of certiorari requested by petitioners. 434 U. S. 816 (1977).[4] We reverse.

II

The issue here is how the Fourth Amendment is to be construed and applied to the "third party" search, the recurring situation where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring. Because under the District Court's rule impracticability can be shown only by furnishing facts demonstrating that the third party will not only disobey the subpoena but also ignore a restraining order not to move or destroy the property, it is apparent that only in unusual situations could the State satisfy such a severe burden and that for all practical purposes the effect of the rule is that fruits, instrumentalities, and evidence of crime may be recovered from third parties only by subpoena, not by search warrant. At least, we assume that the District Court did not intend its rule to be toothless and anticipated that only subpoenas would be available in many cases where without the rule a search warrant would issue.

[3] The Court of Appeals also approved the award of attorney's fees to respondents pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. A. § 1988 (Supp. 1978). We do not consider the propriety of this award in light of our disposition on the merits reversing the judgment upon which the award was predicated.

[4] Petitioners in No. 76–1484 are the chief of police and the officers under his command who conducted the search. Petitioners in No. 76–1600 are the district attorney and a deputy district attorney who participated in the obtaining of the search warrant. The action against the judge who issued the warrant was subsequently dismissed upon the motion of respondents.

Committee NOTE: Can we have better copy

It is an understatement to say that there is no direct authority in this or any other federal court for the District Court's sweeping revision of the Fourth Amendment.[5] Under existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found. Nothing on the face of the Amendment suggests that a third-party search warrant should not normally issue. The Warrant Clause speaks of search warrants issued on "probable cause" and "particularly describing the place to be searched, and the persons or things to be seized." In situations where the State does not seek to seize "persons" but only those "things" which there is probable cause to believe are located on the place to be searched, there is no apparent basis in the language of the Amendment for also imposing the requirements for a valid arrest—probable cause to believe that the third party is implicated in the crime.

As the Fourth Amendment has been construed and applied by this Court, "when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue." *Fisher* v. *United States*, 425 U. S. 391, 400 (1976). In *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535 (1967), we indicated that in applying the "probable cause" standard "by which a particular decision to search is

[5] Respondents rely on four state cases to support the holding that a warrant may not issue unless it is shown that a subpoena is impracticable: *Owens* v. *Way*, 141 Ga. 796, 82 S. E. 132 (1914); *Newberry* v. *Carpenter*, 107 Mich. 567, 65 N. W. 530 (1895); *People* v. *Carver*, 172 Misc. 820, 16 N. Y. S. 2d 268 (County Ct. 1939), and *Commodity Mfg. Co.* v. *Moore*, 198 N. Y. S. 45 (Sup. Ct. 1923). None of these cases, however, stands for the proposition arrived at by the District Court and urged by respondents. The District Court also drew upon *Bacon* v. *United States*, 449 F. 2d 933 (CA9 1971), but that case dealt with arrest of a material witness and is unpersuasive with respect to the search for criminal evidence.

tested against the constitutional mandate of reasonableness," it is necessary "to focus upon the governmental interest which allegedly justifies official intrusion" and that in criminal investigations, a warrant to search for recoverable items is reasonable "only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." Search warrants are not directed at persons; they authorize the search of "place[s]" and the seizure of "things," and as a constitutional matter they need not even name the person from whom the things will be seized. *United States* v. *Kahn*, 415 U. S. 143, 155 n. 15 (1974).

Because the State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not, the premise of the District Court's holding appears to be that state entitlement to a search warrant depends on the culpability of the owner or possessor of the place to be searched and on the State's right to arrest him. The cases are to the contrary. Prior to *Camara* v. *Municipal Court, supra,* and *See* v. *Seattle,* 387 U. S. 541 (1967), the central purpose of the Fourth Amendment was seen to be the protection of the individual against official searches for evidence to convict him of a crime. Entries upon property for civil purposes, where the occupant was suspected of no criminal conduct whatsoever, involved a more peripheral concern and the less intense "right to be secure from intrusion into personal privacy." *Frank* v. *Maryland,* 359 U. S. 360, 365 (1959); *Camara* v. *Municipal Court, supra,* at 530. Such searches could proceed without warrant, as long as the State's interest was sufficiently substantial. Under this view, the Fourth Amendment was *more* protective where the place to be searched was occupied by one suspected of crime and the search was for evidence to use against him. *Camara* and *See,* disagreeing with *Frank* to this extent, held that a warrant *is* required where entry is sought for *civil* purposes, as well as when criminal law enforcement is involved. Neither

case, however, suggested that to secure a search warrant the owner or occupant of the place to be inspected or searched must be suspected of criminal involvement. Indeed, both cases held that a less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor.

We have suggested nothing to the contrary since *Camara* and *See*. Indeed, *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), and *United States* v. *Biswell*, 406 U. S. 311 (1972), dispensed with the warrant requirement in cases involving limited types of inspections and searches.

The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.[6] In *Carroll* v. *United States*, 267 U. S. 132

[6] The same view has been expressed by those who have given close attention to the Fourth Amendment. "It does not follow, however, that probable cause for arrest would justify the issuance of a search warrant, or, on the other hand, that probable cause for a search warrant would necessarily justify an arrest. Each requires probabilities as to somewhat different facts and circumstances—a point which is seldom made explicit in the appellate cases. . . .

"This means, for one thing, that while probable cause for arrest requires information justifying a reasonable belief that a crime has been committed and that a particular person committed it, a search warrant may be issued on a complaint which does not identify any particular person as the likely offender. Because the complaint for a search warrant is not 'filed as the basis of a criminal prosecution,' it need not identify the person in charge of the premises or name the person in possession or any other person as the offender." LaFave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," U. Ill. Law Forum 255, 260–261 (1966) (footnotes omitted). "Furthermore, a warrant may issue to search the premises of anyone, without any showing that the occupant is guilty of any offense whatever." T. Taylor, Two Studies in Constitutional Interpretation 48–49 (1969). "Search warrants may be issued only by a neutral and detached judicial officer, upon a showing of probable cause—that is, reasonable grounds to believe—that criminally related objects are in the

(1925), it was claimed that the seizure of liquor was unconstitutional because the occupant of a car stopped with probable cause to believe that it was carrying illegal liquor was not subject to arrest. The Court, however, said:

> "If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *Id.*, at 158–159.

The Court's ultimate conclusion was that "the officers here had justification for the search and seizure," that is, a reasonable "belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.*, at 162. See also *Husty* v. *United States*, 282 U. S. 694, 700–701 (1931).

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place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 358 (1974) (footnotes omitted).

"Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. By comparison, the right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has 'reasonable grounds to believe'—sometimes stated 'probable cause to believe'—that a felony has been committed by the person to be arrested. Although it would appear that the conclusions which justify either arrest or the issuance of a search warrant must be supported by evidence of the same degree of probity, it is clear that the conclusions themselves are not identical.

"In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location." Comment, 28 U. Chi. L. Rev. 664, 687 (1961) (footnotes omitted).

Federal Rule Crim. Proc. 41, which reflects "[t]he Fourth Amendment's policy against unreasonable searches and seizures," *United States* v. *Ventresca*, 380 U. S. 102, 105 n. 1 (1965), authorizes warrants to search for contraband, fruits or instrumentalities of crime, or "any . . . property that constitutes evidence of the commission of a criminal offense . . . ." Upon proper showing, the warrant is to issue "identifying the property and naming or describing the person or place to be searched." Probable cause for the warrant must be presented, but there is nothing in the Rule indicating that the officers must be entitled to arrest the owner of the "place" to be searched before a search warrant may issue and the "property" may be searched for and seized. The Rule deals with warrants to search, and is unrelated to arrests. Nor is there anything in the Fourth Amendment indicating that absent probable cause to arrest a third party, resort must be had to a subpoena.[7]

The Court of Appeals for the Sixth Circuit expressed the correct view of Rule 41 and of the Fourth Amendment when, disagreeing with the decisions of the Court of Appeals and the District Court in the present case, it ruled that "[o]nce it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime." *United States* v. *Manufacturers Nat. Bank of Detroit*, 536 F. 2d 699, 703 (1976), cert. denied *sub nom. Wingate* v. *United States*, 429 U. S. 1039 (1977). Accord, *State* v. *Tunnel Citgo Services*, 149 N. J. Super. 427, 433, 374 A. 2d 32, 35 (1977).

The net of the matter is that "[s]earches and seizures, in a

[7] Petitioners assert that third-party searches have long been authorized under California Penal Code § 1524 (1970), which provides that fruits, instrumentalities, and evidence of crime "may be taken on the warrant from any place, or from any person in whose possession [they] may be." The District Court did not advert to this provision.

technical sense, are independent of, rather than ancillary to, arrest and arraignment." ALI, A Model Code of Pre-Arraignment Procedure, Commentary 491 (Proposed Off. Draft 1975). The Model Code provides that the warrant application "shall describe with particularity the individuals or places to be searched and the individuals or things to be seized, and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that such individuals or things are or will be in the places, or the things are or will be in possession of the individuals, to be searched." § SS 220.1 (3). There is no suggestion that the occupant of the place to be searched must himself be implicated in misconduct.

Against this background, it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest. And if those considered free of criminal involvement may nevertheless be searched or inspected under civil statutes, it is difficult to understand why the Fourth Amendment would prevent entry onto their property to recover evidence of a crime not committed by them but by others. As we understand the structure and language of the Fourth Amendment and our cases expounding it, valid warrants to search property may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities, or evidence of crime is located on the premises. 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.

This is not to question that "reasonableness" is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever executed, may never

be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized. We do hold, however, that the courts may not, in the name of Fourth Amendment reasonableness, forbid the States from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement.

III

In any event, the reasons presented by the District Court and adopted by the Court of Appeals for arriving at its remarkable conclusion do not withstand analysis. First, as we have said, it is apparent that whether the third-party occupant is suspect or not, the State's interest in enforcing the criminal law and recovering the evidence remains the same; and it is the seeming innocence of the property owner that the District Court relied on to foreclose the warrant to search. But, as respondents themselves now concede, if the third party knows that contraband or other illegal materials are on his property, he is sufficiently culpable to justify the issuance of a search warrant. Similarly, if his ethical stance is the determining factor, it seems to us that whether or not he knows that the sought-after articles are secreted on his property and whether or not he knows that the articles are in fact the fruits, instrumentalities, or evidence of crime, he will be so informed when the search warrant is served, and it is doubtful that he should then be permitted to object to the search, to withhold, if it is there, the evidence of crime reasonably believed to be possessed by him or secreted on his property, and to forbid the search and insist that the officers serve him with a subpoena *duces tecum*.

Second, we are unpersuaded that the District Court's new rule denying search warrants against third parties and insisting on subpoenas would substantially further privacy interests without seriously undermining law enforcement efforts. Because of the fundamental public interest in implementing

the criminal law, the search warrant, a heretofore effective and constitutionally acceptable enforcement tool, should not be suppressed on the basis of surmise and without solid evidence supporting the change. As the District Court understands it, denying third-party search warrants would not have substantial adverse effects on criminal investigations because the nonsuspect third party, once served with a subpoena, will preserve the evidence and ultimately lawfully respond. The difficulty with this assumption is that search warrants are often employed early in an investigation, perhaps before the identity of any likely criminal and certainly before all the perpetrators are or could be known. The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends, or at least not to notify those who would be damaged by the evidence that the authorities are aware of its location. In any event, it is likely that the real culprits will have access to the property, and the delay involved in employing the subpoena *duces tecum,* offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, whatever the good faith of the third party.

Forbidding the warrant and insisting on the subpoena instead when the custodian of the object of the search is not then suspected of crime, involves hazards to criminal investigation much more serious than the District Court believed; and the record is barren of anything but the District Court's assumptions to support its conclusions.[8] At the very least, the

[8] It is also far from clear, even apart from the dangers of destruction and removal, whether the use of the subpoena *duces tecum* under circumstances where there is probable cause to believe that a crime has been committed and that the materials sought constitute evidence of its commission will result in the production of evidence with sufficient regularity to satisfy the public interest in law enforcement. Unlike the individual whose privacy is invaded by a search, the recipient of a subpoena may assert the Fifth

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burden of justifying a major revision of the Fourth Amendment has not been carried.

We are also not convinced that the net gain to privacy interests by the District Court's new rule would be worth the candle.[9] In the normal course of events, search warrants are

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Amendment privilege against self-incrimination in response to a summons to produce evidence or give testimony. See *Maness* v. *Meyers*, 419 U. S. 449 (1975). This privilege is not restricted to suspects. We have construed it broadly as covering any individual who might be incriminated by the evidence in connection with which the privilege is asserted. *Hoffman* v. *United States*, 341 U. S. 479 (1951). The burden of overcoming an assertion of the Fifth Amendment privilege, even if prompted by a desire not to cooperate rather than any real fear of self-incrimination, is one which prosecutors would rarely be able to meet in the early stages of an investigation despite the fact they did not regard the witness as a suspect. Even time spent litigating such matters could seriously impede criminal investigations.

[9] We reject totally the reasoning of the District Court that additional protections are required to assure that the Fourth Amendment rights of third parties are not violated because of the unavailability of the exclusionary rule as a deterrent to improper searches of premises in the control of nonsuspects. 353 F. Supp. 124, 131–132. In *Alderman* v. *United States*, 394 U. S. 165 (1969), we expressly ruled that suppression of the fruits of a Fourth Amendment violation may be urged only by those whose rights were infringed by the search itself and not by those aggrieved solely by the introduction of incriminating evidence. The predicate for this holding was that the additional deterrent effect of permitting defendants whose Fourth Amendment rights had not been violated to challenge infringements of the privacy interests of others did not "justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.*, at 175. For similar reasons, we conclude that the interest in deterring illegal third-party searches does not justify a rule such as that adopted by the District Court. It is probably seldom that police during the investigatory stage when most searches occur will be so convinced that no potential defendant will have standing to exclude evidence on Fourth Amendment grounds that they will feel free to ignore constitutional restraints. In any event, it would be placing the cart before the horse to prohibit searches otherwise conforming to the Fourth Amendment because of a perception that the deterrence provided by the

more difficult to obtain than subpoenas, since the latter do not involve the judiciary and do not require proof of probable cause. Where, in the real world, subpoenas would suffice, it can be expected that they will be employed by the rational prosecutor. On the other hand, when choice is available under local law and the prosecutor chooses to use the search warrant, it is unlikely that he has needlessly selected the more difficult course. His choice is more likely to be based on the solid belief, arrived at through experience but difficult, if not impossible, to sustain in a specific case, that the warranted search is necessary to secure and to avoid the destruction of evidence.[10]

IV

The District Court held, and respondents assert here, that whatever may be true of third-party searches generally, where the third party is a newspaper, there are additional factors derived from the First Amendment that justify a nearly *per se* rule forbidding the search warrant and permitting only the subpoena *duces tecum*. The general submission is that searches of newspaper offices for evidence of crime reasonably believed to be on the premises will seriously threaten the ability of the press to gather, analyze, and disseminate news. This is said to be true for several reasons: First, searches will be physically disruptive to such an extent that timely publication will be impeded. Second, confidential sources of infor-

existing rules of standing is insufficient to discourage illegal searches. Cf. *Warden* v. *Hayden*, 387 U. S. 294, 309 (1967). Finally, the District Court overlooked the fact that the California Supreme Court has ruled as a matter of state law that the legality of a search and seizure may be challenged by anyone against whom evidence thus obtained is used. *Kaplan* v. *Superior Court*, 6 Cal. 3d 150, 491 P. 2d 1 (1971).

[10] Petitioners assert that the District Court ignored the realities of California law and practice that are said to preclude or make very difficult the use of subpoenas as investigatory techniques. If true, the choice of procedures may not always be open to the diligent prosecutor in the State of California.

mation will dry up, and the press will also lose opportunities to cover various events because of fears of the participants that press files will be readily available to the authorities. Third, reporters will be deterred from recording and preserving their recollections for future use if such information is subject to seizure. Fourth, the processing of news and its dissemination will be chilled by the prospects that searches will disclose internal editorial deliberations. Fifth, the press will resort to self-censorship to conceal its possession of information of potential interest to the police.

It is true that the struggle from which the Fourth Amendment emerged "is largely a history of conflict between the Crown and the press," *Stanford* v. *Texas,* 379 U. S. 476, 482 (1965), and that in issuing warrants and determining the reasonableness of a search, state and federal magistrates should be aware that "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrant,* 367 U. S. 717, 729 (1961). Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." *Stanford* v. *Texas, supra,* at 485. "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden* v. *Kentucky,* 413 U. S. 496, 501 (1973). Hence, in *Stanford* v. *Texas,* the Court invalidated a warrant authorizing the search of a private home for all books, records, and other materials relating to the Communist Party, on the ground that whether or not the warrant would have been sufficient in other contexts, it authorized the searchers to rummage among and make judgments about books and papers and was the functional equivalent of a general warrant, one of the principal targets of the Fourth Amendment. Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

Similarly, where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to "focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant, supra,* at 732; *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 210 (1964); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U. S. 636, 637 (1968); *Roaden* v. *Kentucky, supra,* at 502; *Heller* v. *New York,* 413 U. S. 483, 489 (1973).

Neither the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants, however, call for imposing the regime ordered by the District Court. Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated. Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The warrant issued in this case authorized nothing of this sort. Nor are we convinced, any more than we were in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

The fact is that respondents and *amici* have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it. Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated—nor should it be.

Respondents also insist that the press should be afforded opportunity to litigate the State's entitlement to the material it seeks before it is turned over or seized and that whereas the search warrant procedure is defective in this respect, resort to the subpoena would solve the problem. The Court has held that a restraining order imposing a prior restraint upon free expression is invalid for want of notice and opportunity for a hearing, *Carroll* v. *Princess Anne*, 393 U. S. 175 (1968), and that seizures not merely for use as evidence but entirely removing arguably protected materials from circulation may be effected only after an adversary hearing and a judicial

finding of obscenity. *A Quantity of Books* v. *Kansas, supra.* But presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial. Not every such seizure, and not even most, will impose a prior restraint. *Heller* v. *New York, supra.* And surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the Daily or on its communication of ideas. The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits.

We note finally 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. Further, Fifth Amendment and state shield-law objections that might be asserted in opposition to compliance with a subpoena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment. Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants.

V

We accordingly reject the reasons given by the District Court and adopted by the Court of Appeals for holding the search for photographs at the Stanford Daily to have been

unreasonable within the meaning of the Fourth Amendment and in violation of the First Amendment. Nor has anything else presented here persuaded us that the Amendments forbade this search. It follows that the judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE BRENNAN took no part in the consideration or decision of these cases.

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and I write simply to emphasize what I take to be the fundamental error of MR. JUSTICE STEWART's dissenting opinion. As I understand that opinion, it would read into the Fourth Amendment, as a new and *per se* exception, the rule that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena could be used as a substitute procedure. Even aside from the difficulties involved in deciding on a case-by-case basis whether a subpoena can serve as an adequate substitute,[1] I agree with the Court that there is no constitutional basis for such a reading.

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[1] For example, respondents had announced a policy of destroying any photographs that might aid prosecution of protesters. App. 118, 152–153. While this policy probably reflected the deep feelings of the Vietnam era, and one may assume that under normal circumstances few, if any, press entities would adopt a policy so hostile to law enforcement, respondents' policy at least illustrates the possibility of such hostility. Use of a subpoena, as proposed by the dissent would be of no utility in face of a policy of destroying evidence. And unless the policy were publicly announced, it probably would be difficult to show the impracticality of a subpoena as opposed to a search warrant.

At oral argument, counsel for respondents stated that the announced policy of the Stanford Daily conceivably could have extended to the destruction of evidence of *any* crime:

"QUESTION: Let us assume you had a picture of the commission of a crime. For example, in banks they take pictures regularly of, not only

If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief. As the opinion of the Court points out, the struggle from which the Fourth Amendment emerged was that between Crown and press. *Ante,* at 564. The Framers were painfully aware of that history, and their response to it was the Fourth Amendment. *Ante,* at 565. Hence, there is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press, as to every other person.

This is not to say that a warrant which would be sufficient to support the search of an apartment or an automobile necessarily would be reasonable in supporting the search of a

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of robbery but of murder committed in a bank and there have been pictures taken of the actual pulling of the trigger or the pointing of the gun and pulling of the trigger. There is a very famous one related to the assassination of President Kennedy.

"What would the policy of the *Stanford Daily* be with respect to that? Would it feel free to destroy it at any time before a subpoena had been served?

"MR. FALK: The—literally read, the policy of the *Daily* requires me to give an affirmative answer. I find it hard to believe that in an example such as that, that the policy would have been carried out. It was not addressed to a picture of that kind or in that context.

"QUESTION: Well, I am sure you were right. I was just getting to the scope of your theory.

"MR. FALK: Our—

"QUESTION: What is the difference between the pictures Justice Powell just described and the pictures they were thought to have?

"MR. FALK: Well, it simply is a distinction that—

"QUESTION: Attacking police officers instead of the President. That is the only difference." Tr. of Oral Arg. 39–40.

While the existence of this policy was not before the magistrate at the time of the warrant's issuance, 353 F. Supp. 124, 135 n. 16 (ND Cal. 1972), it illustrates the possible dangers of creating separate standards for the press alone.

newspaper office. 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.[2] *Ibid.*

In any event, considerations such as these are the province of the Fourth Amendment. There is no authority either in history or in the Constitution itself for exempting certain classes of persons or entities from its reach.[3]

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, dissenting.

Believing that the search by the police of the offices of the

[2] Similarly, the magnitude of a proposed search directed at *any* third party, together with the nature and significance of the material sought, are factors properly considered as bearing on the reasonableness and particularity requirements. Moreover, there is no reason why police officers executing a warrant should not seek the cooperation of the subject party, in order to prevent needless disruption.

[3] The concurring opinion in *Branzburg* v. *Hayes*, 408 U. S. 665, 709–710 (1972) (POWELL, J.), does not support the view that the Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment. That opinion noted only that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime. The concurrence expressed no doubt as to the applicability of the subpoena procedure to members of the press. Rather than advocating the creation of a special procedural exception for

Stanford Daily infringed the First and Fourteenth Amendments' guarantee of a free press, I respectfully dissent.[1]

I

It seems to me self-evident that police searches of newspaper offices burden the freedom of the press. The most immediate and obvious First Amendment injury caused by such a visitation by the police is physical disruption of the operation of the newspaper. Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time [2] will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing. By contrast, a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it.

But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves. Protection of those sources is necessary to ensure that

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the press, it approved recognition of First Amendment concerns within the applicable procedure. The concurring opinion may, however, properly be read as supporting the view expressed in the text above, and in the Court's opinion, that under the warrant requirement of the Fourth Amendment, the magistrate should consider the values of a free press as well as the societal interest in enforcing the criminal laws.

[1] I agree with the Court that the *Fourth* Amendment does not forbid the issuance of search warrants "simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement." *Ante,* at 560. Thus, contrary to the understanding expressed in the concurring opinion, I do not "read" anything "into the Fourth Amendment." *Ante,* at 568. Instead, I would simply enforce the provisions of the *First* Amendment.

[2] One search of a radio station in Los Angeles lasted over eight hours. Note, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 Stan. L. Rev. 957, 957–959 (1976).

the press can fulfill its constitutionally designated function of informing the public,[3] because important information can often be obtained only by an assurance that the source will not be revealed. *Branzburg* v. *Hayes*, 408 U. S. 665, 725–736 (dissenting opinion).[4] And the Court has recognized that " 'without some protection for seeking out the news, freedom of the press could be eviscerated.' " *Pell* v. *Procunier*, 417 U. S. 817, 833.

Today the Court does not question the existence of this constitutional protection, but says only that it is not "convinced . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches." *Ante*, at 566. This facile conclusion seems to me to ignore common experience. It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed. And it cannot be denied that confidential information may be exposed to the eyes of police officers who execute a search warrant by rummaging through the files, cabinets, desks, and wastebaskets of a newsroom.[5] Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist's

[3] See *Mills* v. *Alabama*, 384 U. S. 214, 219; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.

[4] Recognizing the importance of this confidential relationship, at least 26 States have enacted so-called "shield laws" protecting reporters. Note, The Newsman's Privilege After *Branzburg*: The Case for a Federal Shield Law, 24 UCLA L. Rev. 160, 167 n. 41 (1976).

[5] In this case, the policemen executing the search warrant were concededly in a position to read confidential material unrelated to the object of their search; whether they in fact did so is disputed.

access to information, and thus the public's, will thereby be impaired.[6]

A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant,[7] while a subpoena would permit the newspaper itself to produce only the specific documents requested. A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public.

One need not rely on mere intuition to reach this conclusion. The record in this case includes affidavits not only from members of the staff of the Stanford Daily but from many professional journalists and editors, attesting to precisely such personal experience.[8] Despite the Court's rejection of this

[6] This prospect of losing access to confidential sources may cause reporters to engage in "self-censorship," in order to avoid publicizing the fact that they may have confidential information. See *New York Times Co.* v. *Sullivan, supra,* at 279; *Smith* v. *California,* 361 U. S. 147, 154. Or, journalists may destroy notes and photographs rather than save them for reference and use in future stories. Either of these indirect effects of police searches would further lessen the flow of news to the public.

[7] The Court says that "if the requirements of specificity and reasonableness are properly applied, policed, and observed" there will be no opportunity for the police to "rummage at large in newspaper files." *Ante,* at 566. But in order to find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one. I thus fail to see how the Fourth Amendment would provide an effective limit to these searches.

[8] According to these uncontradicted affidavits, when it becomes known that a newsman cannot guarantee confidentiality, potential sources of infor-

uncontroverted evidence, I believe it clearly establishes that unannounced police searches of newspaper offices will significantly burden the constitutionally protected function of the press to gather news and report it to the public.

II

In *Branzburg* v. *Hayes, supra,* the more limited disclosure of a journalist's sources caused by compelling him to testify was held to be justified by the necessity of "pursuing and prosecuting those crimes reported to the press by informants and . . . thus deterring the commission of such crimes in the future." 408 U. S., at 695. The Court found that these important societal interests would be frustrated if a reporter were able to claim an absolute privilege for his confidential sources. In the present case, however, the respondents do not claim that any of the evidence sought was privileged from disclosure; they claim only that a subpoena would have served equally well to produce that evidence. Thus, we are not concerned with the principle, central to *Branzburg,* that " 'the public . . . has a right to every man's evidence,' " *id.,* at 688. but only with whether any significant societal interest would be impaired if the police were generally required to obtain evidence from the press by means of a subpoena rather than a search.

It is well to recall the actual circumstances of this litigation. The application for a warrant showed only that there was reason to believe that photographic evidence of assaults on the police would be found in the offices of the Stanford Daily. There was no emergency need to protect life or property by an

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mation often become unavailable. Moreover, efforts are sometimes made, occasionally by force, to prevent reporters and photographers from covering newsworthy events, because of fear that the police will seize the newsman's notes or photographs as evidence. The affidavits of the members of the staff of the Stanford Daily give examples of how this very search produced such an impact on the Daily's own journalistic functions.

immediate search. The evidence sought was not contraband, but material obtained by the Daily in the normal exercise of its journalistic function. Neither the Daily nor any member of its staff was suspected of criminal activity. And there was no showing that the Daily would not respond to a subpoena commanding production of the photographs, or that for any other reason a subpoena could not be obtained. Surely, then, a subpoena *duces tecum* would have been just as effective as a police raid in obtaining the production of the material sought by the Santa Clara County District Attorney.

The District Court and the Court of Appeals clearly recognized that *if* the affidavits submitted with a search warrant application should demonstrate probable cause to believe that a subpoena would be impractical, the magistrate must have the authority to issue a warrant. In such a case, by definition, a subpoena would not be adequate to protect the relevant societal interest. But they held, and I agree, that a warrant should issue only after the magistrate has performed the careful "balanc[ing] of these vital constitutional and societal interests." *Branzburg* v. *Hayes, supra,* at 710 (POWELL, J., concurring).[9]

The decisions of this Court establish that a prior adversary judicial hearing is generally required to assess in advance any threatened invasion of First Amendment liberty.[10] A search by police officers affords no timely opportunity for such a

[9] The petitioners have argued here that in fact there was reason to believe that the Daily would not honor a subpoena. Regardless of the probative value of this information, it is irrelevant, since it was not before the magistrate when he issued the warrant. *Whiteley* v. *Warden,* 401 U. S. 560, 565 n. 8; *Spinelli* v. *United States,* 393 U. S. 410, 413 n. 3; *Aguilar* v. *Texas,* 378 U. S. 108, 109 n. 1; see *Johnson* v. *United States,* 333 U. S. 10, 13–14.

[10] *E. g., United States* v. *Thirty-seven Photographs,* 402 U. S. 363; *Carroll* v. *Princess Anne,* 393 U. S. 175; *Freedman* v. *Maryland,* 380 U. S. 51. Cf. *Roaden* v. *Kentucky,* 413 U. S. 496; *A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Marcus* v. *Search Warrant,* 367 U. S. 717.

hearing, since a search warrant is ordinarily issued *ex parte* upon the affidavit of a policeman or prosecutor. There is no opportunity to challenge the necessity for the search until after it has occurred and the constitutional protection of the newspaper has been irretrievably invaded.

On the other hand, a subpoena would allow a newspaper, through a motion to quash, an opportunity for an adversary hearing with respect to the production of any material which a prosecutor might think is in its possession. This very principle was emphasized in the *Branzburg* case:

> "[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered." 408 U. S., at 710 (POWELL, J., concurring).

See also *id.*, at 707–708 (opinion of Court). If, in the present litigation, the Stanford Daily had been served with a subpoena, it would have had an opportunity to demonstrate to the court what the police ultimately found to be true—that the evidence sought did not exist. The legitimate needs of government thus would have been served without infringing the freedom of the press.

III

Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect the freedom of the press.

For these reasons I would affirm the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, dissenting.

The novel problem presented by this case is an outgrowth of the profound change in Fourth Amendment law that occurred in 1967, when *Warden* v. *Hayden*, 387 U. S. 294, was decided. The question is what kind of "probable cause" must be established in order to obtain a warrant to conduct an unannounced search for documentary evidence in the private files of a person not suspected of involvement in any criminal activity. The Court holds that a reasonable belief that the files contain relevant evidence is a sufficient justification. This holding rests on a misconstruction of history and of the Fourth Amendment's purposely broad language.

The Amendment contains two Clauses, one protecting "persons, houses, papers, and effects, against unreasonable searches and seizures," the other regulating the issuance of warrants: "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." When these words were written, the procedures of the Warrant Clause were not the primary protection against oppressive searches. It is unlikely that the authors expected private papers ever to be among the "things" that could be seized with a warrant, for only a few years earlier, in 1765, Lord Camden had delivered his famous opinion denying that any magistrate had power to authorize the seizure of private papers.[1] Because all such

[1] "Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority

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seizures were considered unreasonable, the Warrant Clause was not framed to protect against them.

Nonetheless, the authors of the Clause used words that were adequate for situations not expressly contemplated at the time. As Mr. Justice Black noted, the Amendment does not "attempt to describe with precision what was meant by its words 'probable cause' "; the words of the Amendment are deliberately "imprecise and flexible." [2] And MR. JUSTICE STEWART, when confronted with the problem of applying the probable-cause standard in an unprecedented situation, observed that "[t]he standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion." [3] Today, for the first time, the Court has an opportunity to consider the kind of showing that is necessary to justify the vastly expanded "degree of intrusion" upon privacy that is authorized by the opinion in *Warden* v. *Hayden, supra.*

In the pre-*Hayden* era warrants were used to search for contraband,[4] weapons, and plunder, but not for "mere evi-

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to pronounce a practice legal, which would be subversive of all the comforts of society." *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 1066 (1765).

[2] "Obviously, those who wrote this Fourth Amendment knew from experience that searches and seizures were too valuable to law enforcement to prohibit them entirely, but also knew at the same time that while searches or seizures must not be stopped, they should be slowed down, and warrants should be issued only after studied caution. This accounts for use of the imprecise and flexible term, 'unreasonable,' the key word permeating this whole Amendment. Also it is noticeable that this Amendment contains no appropriate language, as does the Fifth, to forbid the use and introduction of search and seizure evidence even though secured 'unreasonably.' Nor does this Fourth Amendment attempt to describe with precision what was meant by its words, 'probable cause'; nor by whom the 'Oath or affirmation' should be taken; nor what it need contain." *Berger* v. *New York,* 388 U. S. 41, 75 (Black, J., dissenting).

[3] *Id.,* at 69 (STEWART, J., concurring in result).

[4] It was stated in 1967 that about 95% of the search warrants obtained by the office of the District Attorney for New York County were for the

dence." [5] The practical effect of the rule prohibiting the issuance of warrants to search for mere evidence was to narrowly limit not only the category of objects, but also the category of persons and the character of the privacy interests that might be affected by an unannounced police search.

Just as the witnesses who participate in an investigation or a trial far outnumber the defendants, the persons who possess evidence that may help to identify an offender, or explain an aspect of a criminal transaction, far outnumber those who have custody of weapons or plunder. Countless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The *ex parte* warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object.[6] The search for the documents described in a warrant may involve the inspection

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purpose of seizing narcotics and arresting the possessors. See T. Taylor, Two Studies in Constitutional Interpretation 48, and n. 85 (1969).

[5] Until 1967, when *Warden* v. *Hayden* was decided, our cases interpreting the Fourth Amendment had drawn a " 'distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.' " See *Warden* v. *Hayden*, 387 U. S., at 295–296, quoting from *Harris* v. *United States*, 331 U. S. 145, 154.

[6] The suggestion that, instead of setting standards, we should rely on the good judgment of the magistrate to prevent abuse represents an abdication of the responsibilities this Court previously accepted in carefully supervising the performance of the magistrate's warrant-issuing function. See *Aguilar* v. *Texas*, 378 U. S. 108, 111.

of files containing other private matter.[7] The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched.[8]

[7] "There are three considerations which support the conclusion that private papers are central to the concerns of the fourth amendment and which suggest that, in accord with the amendment's privacy rationale, private papers should occupy a type of preferred position. The first consideration is the very personal, private nature of such papers. This rationale has been cogently articulated on a number of occasions. Private papers have been said to be 'little more than an extension of [the owner's] person,' their seizure 'a particularly abrasive infringement of privacy,' and their protection 'impelled by the moral and symbolic need to recognize and defend the private aspect of personality.' In this sense, every governmental procurement of private papers, regardless of how it is accomplished, is uniquely intrusive. In addition to the nature of the papers themselves, a second reason for according them strict protection concerns the nature of the search for private papers. The fundamental evil at which the fourth amendment was directed was the sweeping, exploratory search conducted pursuant to a general warrant. A search involving private papers, it has been noted, invariably partakes of a similar generality, for 'even a search for a specific, identified paper may involve the same rude intrusion [of an exploratory search] if the quest for it leads to an examination of all of a man's private papers.' Thus, both their contents and the inherently intrusive nature of a search for them militates toward the position that private papers are deserving of the fullest possible fourth amendment protection. Finally, not only is a search involving private papers highly intrusive in fourth amendment terms, but the nature of the papers themselves may implicate the policies of other constitutional protections. In addition to the 'intimate' relation with fifth amendment values, the obtaining of private papers by the government touches upon the first amendment and the generalized right of privacy." McKenna, The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment, 53 Ind. L. J. 55, 68–69 (1977–1978) (footnotes omitted).

[8] "Whether the search be for rubbish or narcotics, both innocent and guilty will suffer the loss of the proprietary right of privacy. The search for evidence of crime, however, threatens the innocent with an injury not recognized in the cases. That is the damage to reputation resulting from an overt manifestation of official suspicion of crime. Connected with loss of reputation, standing, or credit may be humiliation and other mental suffering. The interests here at stake are the same which are recognized in

Of greatest importance, however, is the question whether the offensive intrusion on the privacy of the ordinary citizen is justified by the law enforcement interest it is intended to vindicate. Possession of contraband or the proceeds or tools of crime gives rise to two inferences: that the custodian is involved in the criminal activity, and that, if given notice of an intended search, he will conceal or destroy what is being sought. The probability of criminal culpability justifies the invasion of his privacy; the need to accomplish the law enforcement purpose of the search justifies acting without advance notice and by force, if necessary. By satisfying the probable-cause standard appropriate for weapons or plunder, the police effectively demonstrate that no less intrusive method of investigation will succeed.

Mere possession of documentary evidence, however, is much less likely to demonstrate that the custodian is guilty of any wrongdoing or that he will not honor a subpoena or informal request to produce it. In the pre-*Hayden* era, evidence of that kind was routinely obtained by procedures that presumed that the custodian would respect his obligation to obey subpoenas and to cooperate in the investigation of crime. These procedures had a constitutional dimension. For the innocent citizen's interest in the privacy of his papers and possessions is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment. Notice and an opportunity to object to the deprivation of the citizen's liberty are, therefore, the constitutionally mandated general rule.[9] An

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the common law actions for defamation and malicious prosecution. Indeed, the loss of reputation and the humiliation resulting from the search of one's home for evidence of a heinous crime may greatly exceed the injury caused by an ill-grounded prosecution for a minor offense." Comment, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U. Chi. L. Rev. 664, 701 (1961) (footnotes omitted).

[9] Only with great reluctance has this Court approved the seizure even of refrigerators or washing machines without notice and a prior adversary hearing; in doing so, the Court has relied on the distinction between loss

exception to that rule can only be justified by strict compliance with the Fourth Amendment. That Amendment flatly prohibits the issuance of any warrant unless justified by probable cause.

A showing of probable cause that was adequate to justify the issuance of a warrant to search for stolen goods in the 18th century does not automatically satisfy the new dimensions of the Fourth Amendment in the post-*Hayden* era.[10] In *Hayden* itself, the Court recognized that the meaning of probable cause should be reconsidered in the light of the new authority it conferred on the police.[11] The only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search. Probable cause to believe that the

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of property, which can often be easily compensated, and loss of less tangible but more precious rights: "'[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process.'" *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 611, quoting from *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597. See also *Michigan* v. *Tyler*, *ante*, at 514 (STEVENS, J., concurring).

[10] Even before *Hayden* had repudiated the mere-evidence rule, scholars had recognized that such a change in the scope of the prosecutor's search authority would require a fresh examination of the probable-cause requirement. It was noted that the personal character of some evidentiary documents would "justify stringent limitation, if not total prohibition, of their seizure by exercise of official authority." Taylor, *supra*, n. 4, at 66.

It is ironic that the Court today should adopt a rigid interpretation of the Warrant Clause to uphold this search when the Court was prepared only a few years ago to rely on the flexibility of the Clause to create an entirely new warrant in order to preserve the government's power to conduct unannounced inspections of citizens' homes and businesses. See *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, and 538.

[11] "There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required." 387 U. S., at 307.

custodian is a criminal, or that he holds a criminal's weapons, spoils, or the like, justifies that fear,[12] and therefore such a showing complies with the Clause. But if nothing said under oath in the warrant application demonstrates the need for an unannounced search by force, the probable-cause requirement is not satisfied. In the absence of some other showing of reasonableness,[13] the ensuing search violates the Fourth Amendment.

In this case, the warrant application set forth no facts suggesting that respondents were involved in any wrongdoing or would destroy the desired evidence if given notice of what the police desired. I would therefore hold that the warrant did not comply with the Warrant Clause and that the search was unreasonable within the meaning of the first Clause of the Fourth Amendment.

I respectfully dissent.

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[12] "The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice." *Fuentes* v. *Shevin*, 407 U. S. 67, 93–94, n. 30.

[13] Cf. *Marshall* v. *Barlow's, Inc.*, *ante*, at 336–339, and nn. 9–11 (STEVENS, J., dissenting).

APPENDIX 1 B

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STATE OF MINNESOTA
In Supreme Court

DAVID O'CONNOR,

Petitioner,

vs

ROBERT F. JOHNSON, Judge of County Court, County of Ramsey,

Respondent.

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

LEGAL ISSUES

1. Can a search warant be issued in the absence of the affidavit required by statute?

   The trial court apparently held that it could, since it issued one.

2. Can a search warrant for a lawyer's office be issued where its execution necessarily involves an impermissible invasion of confidentiality between lawyer and client?

   The trial court held in the affirmative.

STATEMENT OF FACTS

In this case, the prosecuting authorities of Ramsey County, pursuant to a search warrant, have been given the right to go through an attorney's file and extract such information as they may deem material to an investigation they are currently engaged in. The facts leading up to this situation are, in broad outline, as follows.

The Saint Paul Police Department believes that the ownership of certain liquor establishments in the city is not as has been stated to the City Council. In particular, it believes that a bar called Patrick's Lounge is really owned by one Steven Conroy, whereas the licensees of record have been other persons. It thinks that false statements in writing have been made in connection with license applications; if so, the persons making such statements would be guilty of a crime. (Steven Conroy is a client of David O'Connor, a Saint Paul attorney whom he retained in April 1978 after learning that investigators were making inquiries about him.)

After talking to a number of people the Police Department made application to the County Court for a warrant to search Patrick's Lounge, 1348 West Larpenteur Avenue, for business records of various kinds described in the application. After executing that warrant and obtaining some records, it obtained a further warrant authorizing a search of the offices of David O'Connor, an attorney at law, for business records of a similar description. It is this latter warrant with which the petition is concerned. A written application for this warrant was apparently not made — in any event there seems to exist no copy thereof.

Three officers came to the offices of Mr. O'Connor in Saint Paul on July 25 at three o'clock in the afternoon, showed him the warrant, and asked him to give them all records he had in

his possession corresponding to the description in the warrant. Mr. O'Connor showed the officers a cardboard box containing records of the type described, and also showed them his personal work file, containing many items typically found in such a file, including memoranda of conversations with the client, research notes, legal documents pertaining to the ownership of the land and building at 1348 West Larpenteur, legal documents pertaining to a corporation which is the legal owner of that land and building, correspondence with various persons, documents pertaining to the several license applications for Patrick's Lounge, notes of interviews and conferences with various people, etc. He refused to share the contents of the box and file with the officers.

A telephone call was then made to Judge Robert Johnson, who had issued the warrant, and Mr. O'Connor and the three officers appeared at his chambers at 3:30 in the afternoon. Mr. O'Connor brought with him the box and file described above. Assistant County Attorney Paul Lindholm appeared. Mr. O'Connor stated the reasons why the warrant should not be executed. Mr. Lindholm showed cause on the other side. Judge Johnson requested written briefs the following day, and these were submitted. The box of records was left with Judge Johnson; the judge directed Mr. O'Connor to take his file back to the office with him pending his order.

Judge Johnson made his order on August 4, 1978, but was not able to advise the parties of its tenor until August 7, on which date they appeared in court. The order directs Mr. O'Connor (a) to turn over the box of records, and (b) to allow a representative of the County Attorney to go through his entire file and select therefrom those papers which he deems material. Since then, the County Attorney has sought and received a modification of the order to provide that the judge review the file and make the selection.

ARGUMENT

I. The Warrant is Invalid as a Matter of Statutory Criminal Procedure.

The warrant here fails on mere procedural grounds, before one ever reaches the question of its validity in the light of the attorney-client relationship. The only affidavit in the file is one containing a number of conclusory allegations about crimes that various people are suspected of having committed. It was submitted to the judge on July 20, 1978, and resulted in the issuance of a warrant for the search of Patrick's Lounge. Let it be conceded, *arguendo*, that the affidavit justified that search.

The warrant here in issue bears date July 25, 1978, and authorizes a search of David O'Connor's law office for certain described material. There is no affidavit anywhere in the file mentioning David O'Connor in any connection, nor describing his law office. Judge Johnson's court reporter's records have no reference to the taking of any testimony about David O'Connor or his law office. Judge Johnson has stated that he has no recollection of taking any such testimony.

M.S.A. §626.09 provides:

> "The court or justice of the peace may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and *must* take his affidavit or their affidavits in writing and cause same to be subscribed by party or parties making same." (Emphasis supplied.)

According to §626.08, the required affidavit must name or describe the person and particularly describe the property or thing to be seized, and the place to be searched.

If the court can find in the record any affidavit describing David O'Connor or his law office, or describing what is to be found there, then the warrant in this case is legal; otherwise it is not.

II. The Warrant Impermissibly Invades the Confidentiality of Attorney-Client Relationships.

A. The contentions of the parties.

Petitioner's view of the matter is quite simple. He believes that the confidential relationship between attorney and client, required by law (M.S.A. §481.06[5]), imposed by the Code of Professional Responsibility which has the force of law (Order of August 4, 1970, 286 Minn. ix), and protected by statute against compulsory violation by a court (M.S.A. §595.02[4]), is of such high and commanding social importance that it must be protected against this assault.

We say that the historic right of the citizens to seek legal advice, and in the process to lay matters frankly before his lawyer, free from fear of voluntary or compelled disclosure by that lawyer, is impermissibly invaded by a search warrant that necessarily requires examination of a lawyer's file.

The position of the county attorney is less easy to understand. He has not, and we suppose will not, challenge the proposition that there exists a right to confidentiality between lawyer and client. It is too long established and too important to be the subject of such a frontal attack.

He correctly points out that business records of a client are not privileged merely because they are in the hands of an attorney; any privilege they may have must be independent of that fact. But that does not advance the discussion, for the

problem in this case arises out of the fact that a search for those documents must involve the examination of all the files of the attorney, both for this client and others, and the examination of those files to determine what is merely business records and what is privileged material. That done, any confidentiality is already destroyed.

This paradox is implicitly recognized in Judge Johnson's first order, for instead of directing this warrant (which he holds to be valid) to be executed according to its terms, he proposes that the county attorney, instead of the police, go through the file to see what is privileged and what is not. How that cures the difficulty is not apparent to this writer.

The county attorney apparently sees the difficulty, too, for he (though vehemently maintaining the perfect validity of the warrant) recedes another step — he proposes that the *judge* look over the file and decide what is confidential.

What is troubling these people? If the warrant is entirely legal, why these contortions? We think the answer is obvious — they see, more or less clearly, that the whole procedure is completely subversive of confidentiality between attorney and client, just as we say, and are trying to find a solution that will pay lip service to the confidential relationship but in reality destroy it. Any way one tries to state their position, it comes down to this: The government has a right to look in lawyers' files to see if there is anything in them that will help it in an investigation.

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B. The specific problem with search warrants.

In order to think about the problem constructively, it is important to reflect for a moment on two things: (1) what a lawyer's file typically contains in a case where he is consulted about a possible piece of civil or criminal litigation; and (2) what really happens when a search warrant is executed.

In the first place, there will probably be found in the file notes of conversation with the client, reflecting the nature of the problem he has submitted and the facts he gave during the initial consultation. There may well be an outline by the lawyer of the legal points he believes may arise, and a program of work to be done both in gathering evidence and in checking the law. There will probably be memoranda of telephone or personal conferences with persons believed to be witnesses, and letters to and from such people. There will probably be one or more letters to or from the client, reporting progress. There will likely be research notes, reflecting the lawyer's judgment as to the probable issues, and shedding light on the strategy he intends to pursue if the matter ever becomes litigated. In addition to all that, if the anticipated litigation is one involving business, as here, there may well be business records of the client in the file. (Prosecutors are, quite rightly, protected against indiscriminate rummaging through their files. Rules of Criminal Procedure, 9.01, Subd. 3.)

In order to get at the business records, the policeman who searches has got to look at all the rest of the file, for the simple reason that he has to be sure that what he seizes responds to the warrant. In the process, of course, he must and will learn everything that he could learn under a warrant for the entire file.

Granted, then, that mere business records may be the legitimate object of a search warrant, does that justify going through a lawyer's entire file in order to find them? Or is not the policy of confidentiality so compelling that another means of obtaining papers, not otherwise privileged, which happen to be in a lawyer's hands, must be resorted to?

It will be claimed, instead, that the curse is taken off this procedure by the fact that the judge has intervened and, so far, prevented the police from going through the file. We expect to hear the argument that, after all, at some point a judge is going to have to pass upon any claim of privilege, so what harm has really happened? The difficulty with that is that there is no right whatever to such judicial intervention, but it rests solely in the discretion of the police.

Here is where it becomes important to think realistically about how a search warrant must be executed. Justice Jackson, speaking of a warrantless search, but in words just as applicable to a search unlawful for any reason, said in *Brinegar v. United States*, 338 U.S. 160, 182 (1949):

> "The citizen's choice is quietly to submit . . . or to resist at risk of arrest or immediate violence."

It happens in this case that (a) Mr. O'Connor was in his office when the police arrived with their warrant — he need not have been; (b) Sergeant Voita is an old personal friend of Mr. O'Connor, and did not care to take him to jail, which the other two officers wanted to do, and as they had a right to do, since they had a warrant authorizing them to search his office, and he was resisting its execution. Only because of those two facts did the matter even come before a judge. Had only the secretary been there, can it be imagined that she would have

resisted armed policemen carrying a warrant signed by a judge, or even have known what she might do other than surrender the files? Had the officers taken Mr. O'Connor to jail or handcuffed him to a radiator, and searched the files at their leisure, leaving him to protest to a judge later, what remedy would the law then afford for the breach of legally-protected confidentiality? Compare *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Or simply take a look at what happened to Attorney John Finley in the companion case to this one.

No, the problem must be faced — a search warrant authorizing the police to look through a lawyer's files for non-privileged matter *necessarily* involves a breach of the confidential relationship between attorney and client. Once that is clearly understood, the case at bar almost solves itself.

C. The Nature, Statutory Sanction, and Purpose of Attorney-Client Confidentiality.

The confidentiality of the attorney-client relationship is of course firmly estabished in our laws, to the degree that, as we said above, we do not anticipate a frontal challenge to it. It is not merely an ethical obligation of the attorney, subjecting him to discipline if he breaches it, although it is that. Code of Professional Responsibility, D.R. 4-101. It is a statutory obligation of the attorney, subjecting him to criminal prosecution for its breach. M.S.A. §481.06(5); see §609.03. The attorney is required to respect this confidentiality "at every peril to himself". *Struckmeyer v. Lamb*, 75 Minn. 366, 77 N.W. 987 (1899). Finally, the attorney cannot even be compelled by a court to disclose material found to be within the privilege. M.S.A. §595.02(4). Elaborate protections of confidentiality for both prosecution and defense are found in Rule 9, Rules of Criminal Procedure, especially Rule 9.03. It

should be noted, contrary to what the county attorney has said in his response to the petition, that the existence of the privilege does not depend upon the pendency of any litigation. 8 Wigmore, Evidence §2294 (McNaughton, 1961).

All of this is essentially beyond the possibility of successful dispute. Why do we have such a set of rules? Quite simply because our society has made a considered judgment that the right to the effective assistance of counsel is so important that it must be protected, even at the expense of the search for truth in some particular case.

Expressions of the fundamental importance of these rules to the administration of justice are not lacking. This court said in the *Struckmeyer* case, *supra*:

> "The origin of the rule grew out of the fact that, in the ordinary transactions of the world, people must resort for legal advice to legal advisers. . . . In order, therefore, to protect the interest of the client and encourage the employment of attorneys, this immunity . . . became an absolute necessity, and so well settled is this doctrine that no further discussion of the question is needed."

Again in *Channel 10, Inc. v. Independent School District No. 709*, 298 Minn. 306, 215 N.W.2d 814 (1974), the court said:

> "Obviously the machinery of justice would be adversely affected if clients were not free to discuss legal matters with their attorneys without fear of disclosure."

The principle was well stated in *Baird v. Koerner*, 279 F.2d 263, 95 A.L.R.2d 303 (9th Cir. 1960), a case where the IRS attempted to gain information from a lawyer by administrative subpoena. The Court of Appeals refused to allow the subpoena to be enforced, and said:

> "While it is the great purpose of law to ascertain truth, there is the countervailing necessity of insuring the right

> of every person to freely and fully confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure . . ."

Similarly, in *Ex Parte McDonough*, 170 Cal. 230, 149 Pac. 566 (1915), a leading case in the field, the court said:

> "However desirable it may be to obtain proofs sufficient to insure the conviction of all persons who commit crimes . . . such proofs may not be obtained from those who are forbidden by law to give them."

The New York Criminal Courts Bar Association, after a study of all reported cases and statutes, issued in 1941 its *Code of Ethics for the Prosecution and Defense of Criminal Cases*, a copy of which is in the State Law Library. It contains the best succinct summary of the applicable principles we have found:

> "An attorney has and should have the right to refuse to answer any question whether called upon by the public authorities or otherwise with respect to information which the attorney has acquired in professional confidence. Otherwise the confidential relationship between lawyer and client which exists to promote the ends of justice by encouraging persons to seek legal advice as to their constitutional and legal rights and upon which the client has a right to rely, may be seriously impaired."

Citations could be multiplied, if there were any need to do so on what can hardly be a contested point. See 8 Wigmore, Evidence §§2290-2329 (McNaughton 1961).

SUMMARY AND CONCLUSION

The failure to comply with the mandatory provisions of §§626.08, .09, is of course completely dispositive of this particular petition. But the same case, or another just like it, will have to be faced unless the court indicates its views on the broader problem.

Encroachments upon the privacy of client-counsel consultation seem to be a favorite tactic of the police. They bug conference rooms, they put informers into legal conferences, they refuse prisoners a private interview with their attorneys. When caught, they say, first, that there's nothing wrong with what they do; and, second, that they made no direct use at the trial of information so gained. The reaction of the United States Supreme Court, in the rare instances where such conduct has come to light, has been to order convictions set aside and all the issues retired. *Black v. United States,* 385 U.S. 26 (1966); *O'Brien v. United States,* 386 U.S. 345 (1967).

Now we have the most incredible assertion of power to date. Police say they can ransack a lawyer's office for evidence. To sustain their claim is to say to the public that one had better not seek legal advice unless one wants to share with the police everything he feels he ought to tell his lawyer. Who will feel free to talk frankly to a lawyer about anything, not just a criminal case, if he knows that the lawyer's files are open to inspection whenever the police think they may contain something useful?

Search warrants, unlike subpoenas and discovery proceedings, are inherently destructive of the privilege of confidentiality. Any discussion of what part of a file is privileged and what part not is merely laughable pedantry if the police have already gone through the file.

This practice had better be firmly halted now, if the court believes that a free and independent bar is important to the administration of justice.

Petitioner requests that a writ of prohibition issue, directing the respondent to desist from attempting to enforce his order of August 4, 1978.

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition of David O'Connor to Quash Search Warrant Being Sought by the Saint Paul Police Department in the Matter of Steven F. Conroy.

David O'Connor,

Petitioner,

-vs-

The Honorable Robert F. Johnson, Judge of County Court, County of Ramsey,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC., AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

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In Re Petition of David O'Connor to Quash Search Warrant Being Sought by the Saint Paul Police Department in the Matter of Steven F. Conroy.

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INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers, Inc. is a District of Columbia non-profit corporation with a membership of approximately 1900 lawyers who are citizens of every state and several foreign nations. All of its members are primarily engaged in positions which bring them into daily contact with the criminal justice system as advocates, professors, or judges of state and federal courts. Among its stated objectives are the promotion of the proper administration of criminal justice, the maintenance of the integrity of the defense lawyer, and the protection and improvement of criminal law. This brief is tendered in the discharge of those objectives. It is filed in compliance with Rule 129 of the Rules of Civil Appellate Procedure.

Amicus asks to be heard in order to raise certain issues not specifically briefed by the parties and other amici and not specifically asserted by the Petition which might, therefore, escape notice, but which might be pertinent to and

adversely affected by the Court's decision upon the Petition. State v. Finley, 242 Minn. 288, 64 N.W.2d 769 (1954), Rule 129, supra. In addition, amicus wishes to discuss certain matters briefed by the parties and amici but in light of different authority and with a different emphasis.

These issues are:

1) The protection of counsel's work product.

2) The protection of client secrets (as distinguished from privileged communications) as recognized under Canon 4 of the Code of Professional Responsibility, and the attorney-client relationship in its broadest sense.

3) The protections of the Minnesota Constitution (as distinguished from the United States Constitution).

STATEMENT OF THE CASE

Amicus need not submit a Statement of the Case different from that presented by the parties and amici other than to note that the last paragraph of Order of Respondent which is the subject of the Petition, has been amended to read as follows:

> The Court is of the opinion that the search warrant is valid in all respects and hereby orders that all documents in the box of records are to be turned over to the Saint Paul Police Department; further, that Mr. O'Connor's work product file be delivered to the Court, and the Court shall turn over to the St. Paul Police Department all documents therein within the scope of the search warrant and return all other documents to Mr. O'Connor.

REASONS WHY THE
WRIT SHOULD ISSUE

I. A Lawyer's Work Product is Not Subject to Disclosure or Discovery.

The work product doctrine recognized by the United States Supreme Court reflects the strong "public policy underlying the orderly prosecution and defense of legal claims." Hickman v. Taylor, 329 U.S. 495, 510 (1947). As formulated by the Court in Hickman, "the work product doctrine is distinct from and broader than the attorney-client privilege." The privilege protects certain materials prepared by an attorney "acting for his client in anticipation of litigation." p. 508 The importance of the attorney-client relationship and of its protection is at the core of the work product doctrine:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper presentation

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> of a client's case demands that he assenble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore, inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. Id., at 510-511.

The policy considerations supporting the protection of an attorney's work product are usually stated with reference to civil litigation, however, "they are even more strongly applicable in criminal proceeding." In re Grand Jury Proceedings (Duffy v. United States), 473 F.2d 840, 844 (8th Cir. 1973). In the relatively few criminal cases involving the work product doctrine, the courts have been solicitous

to protect defense lawyer's files. See, e.g., In re Grand Jury Subpoena, 438 F.Supp. 1176 (S.D.N.Y. 1977); In re Grand Jury (Rosenbaum), 401 F.Supp. 897 (S.D.N.Y. 1975); United States v. Mitchell, 372 F.Supp. 1239, 1244, 1245 (S.D.N.Y. 1973); In re Grand Jury Investigation (Sturgis), 412 F.Supp. 943 (E.D.P.A. 1976); In re Terkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1960).

Rule 9 of the Minnesota Rules of Criminal Procedure and Rule 16 of the Federal Rules of Criminal Procedure provide protection for a defense lawyer's work product. Rule 9.02 governing disclosure by defendant provides in Subd. 3 as follows:

> Information not subject to disclosure by defendant; work product. Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent they contain the opinions, theories or conclusions of the defendant or his counsel or persons participating in the defense are not subject to disclosure.

Recently the United States Supreme Court has recognized a work product privilege in criminal cases which provides even broader protection than these rules. See, United States v. Nobles, 422

U.S. 225 (1975). In Nobles the record revealed that the criminal defense lawyer sought to impeach the credibility of prosecution eyewitnesses by proffering the testimony of the defense lawyer's investigator regarding previous inconsistent statements of these witnesses. The Court held that the work product doctrine applies to criminal litigation as well as civil but found that the protection of the work product doctrine had been waived when the attorney called the investigator to the stand. Therefore, the investigator's report was subject to disclosure to the prosecution and if not disclosed by the defense, then the trial court could properly preclude the investigator from testifying. The Court essayed the applicability of the work product doctrine in the criminal case:

> Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring a proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case. 422 U.S. 225, 238.

Further, the Court noted that the work product doctrine shelters not only the mental processes of the attorney but also material prepared by agents for the attorney. 422 U.S. at 239. Even though the Court held that the defense lawyer had waived the privilege, it was carefully noted that the holding did not authorize a "general fishing expedition into the defense files or indeed even into the defense investigator's report." Id at 240. The Court observed that it only upheld the trial court's narrow ruling of the investigator's report relating to testimony of the investigator which would be offered to discredit the eyewitnesses' testimony and afforded the option of non-disclosure; Id. at 240.

It is axiomatic that Mr. O'Connor's work product, including memoranda of conversations with his client, a putative defendant, research notes of interviews and conferences with possible witnesses epitomizes the material afforded the protection of the work product doctrine. Hickman v. Taylor, supra, see generally, Annot.; 35 A.L.R. 3d, 412 (1971). The materials described by Respondent's Order represent

the archetype of materials designed to be protected by the work product doctrine since they were prepared by an attorney acting for his client in anticipation of litigation, and are designated by the Order as "work product file." It is beyond question that Mr. O'Connor was retained in his capacity as a lawyer by Mr. Conroy because of a pending investigation and possible criminal litigation instituted by the St. Paul City Attorney or the Ramsey County Attorney. It is equally obvious that to allow the compelled disclosure of notes taken by an attorney of his own client, a potential defendant in a criminal case, impinges on the fundamental values protected by the Fifth Amendment.

Although it is certainly true that the formal accusatory process of the criminal justice system had not been triggered at the time these materials were prepared by the attorney, nevertheless, these materials are a product:

> The test of whether the work product doctrine applies is not whether litigation has begun but whether documents were prepared or obtained in anticipation of litigation. In re Grand Jury Proceedings (Duffy v. United States), 473 F.2d (8th Cir. 1973).

The work product doctrine has been held to protect the attorney's file in the pre-indictment stage. See cases cited pp. 5 & 6, supra. This protection is given to the attorney even ghough the attorney himself may be thought to have violated a penal law. In re Terkeltoub, supra.

There are solid policy reasons for holding that the attorney's file is more in need of protection at the pre-indictment stage than afterwards. First of all, the return of an indictment or the filing of a complaint against the defendant presents a finding of probable cause by the grand jury and the court respectively that there is probable cause to believe that a crime has been committed and that the defendant has committed that crime. No such factual finding obtains in the pre-accusatory stage. Secondly, in the pre-accusatory stage, the opposing party can obtain "the substantial equivalent...by other means." Federal Rules of Civil Procedure 26(b)(3). That is, the police, or the prosecutor's investigators can interview the prospective witnesses without gaining access to the attorney's files. Similarly, they

presumably can do their own legal research and form their own legal opinions as to whether a criminal offense has occurred. In short, the police and prosecution's investigators are not being deprived of relevant material which they could not obtain through their own diligence.

Trial courts have repeatedly demonstrated solicitude for the defense attorney's plight when a lawyer is called before a grand jury which is investigating his client. See, In Re Stolar, 397 F.Supp. 520 (S.D.N.Y. 1975); Matter of Doe, 546 F.2d 498, 502 (2nd Cir. 1976); United States v. Colacurcio, 499 F.2d 1401, 1404 (9th Cir. 1974). Calling a defense lawyer before a grand jury or permitting the rummaging through his file is a pernicious practice which deserves condemnation. The deleterious result of this practice was succinctly summarized In re Grand Jury Investigation (Sturgis), supra.

> The practice permits the government by unilateral action to create the possibility of a conflict of interest between attorney and client, which may lead to a suspect being denied his choice of counsel by his qualification. The very presence of the attorney in the grand jury room, even if only to assert valid privileges can raise doubts

> in the client's mind as to his lawyer's unfettered devotion to the client's interest and thus impair or at least impinge upon the attorney-client relationship. pp. 945-46.

This Court should not support the intrusion into the function of the representation of those accused or potentially accusable of crime which is suggested by the Order which is the subject of the instant petition. The fact that the amended Order now provides for some in camera inspection does not alter the argument. The individual lawyers functioning as officers of the court in their role as legal representative, nurtured by centuries of legal tradition, are and must be, the sole arbiters of these matters. It should be beyond the power of any court to authorize the intrusion suggested by this Order.

II. Enforced Disclosure of a Lawyer's File Violates the Protection of Client Secrets and Egregariously Undermines the Attorney-Client Relationship.

It is sometimes overlooked that the effectiveness of the attorney-client relationship depends not only upon the sanctity of privileged communications, but the client's ability to place all his secrets before counsel. Canon 4 and Disciplinary Rule 4-101(B)(1) of the Code of Professional Responsibility require a lawyer to preserve the "confidences and secrets" of a client. These terms are defined, in Disciplinary Rule 4-101(A) as follows:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Thus, as Ethical Consideration 4-4 recognizes,

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

And EC 4-1 states more fully the rationale of the rule:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

Thus it has been held that despite the desirability of disclosure of all relevant facts in litigation, an "attorney's dealings with his client . . . should be immune to discovery proceedings." Ellis-Foster Co. v. Union Carbide, 159 F.Supp. 917, 919 (D.N.J. 1958) (quoted by the ABA under EC 4-1). And, to the same effect, is Baird v. Koerner, 279 F.2d 623, 629-630 (9th Cir. 1960):

> This assistance [of adequate counsel] can be made safely and readily available only where the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.

It is readily apparent to any practicing lawyer that clients, particularly in criminal cases, must disclose unfavorable and often incriminating information and documents to counsel if representation is to be effective, and this information often will not meet the strict definition of privileged communications. Yet if the warrant issued here is sustained, prosecutors will in effect be given carte blanche to obtain and search lawyers's files for damaging information to turn against the client. This will also often have the collateral consequence

of making the lawyer a party to the litigation and forcing a wedge between lawyer and client, indeed perhaps even of making the lawyer a witness against the client.

If this were to be the law, the informed client would doubtless simply cease disclosing damaging information to his lawyer, which would emasculate the attorney-client relationship and impede the truth-finding process. No such internecine legal process should be recognized, certainly none going beyond the disclosures sanctioned by Rule 9 of the Minnesota Rules of Criminal Procedure, providing disclosure of evidence the defense intends to use at trial.

III. The Minnesota Constitution Forbids Invasion of the Attorney-Client Relationship by Search Warrant for Evidence to be Used Against the Client.

Amicus feels that the relevant provisions of the Minnesota Constitution are as follows:

1) Art. I, §6, the right to assistance of counsel.
2) Art. I, §7, the privilege not to be compelled in a criminal case to be a witness against oneself.
3) Art. I, §8, the right to a certain remedy for all wrongs or injuries, and to obtain justice freely and without purchase.
4) Art. I, §10, the right to be secure in ones person, house, papers and effects.
5) Art. I, §11, the protection against impairment of contracts.
6) Art. I, §13, the protection against taking of private property without just compensation first paid or secured.

7) Art. I, §16, the inherent right to privacy and any other rights not enumerated in the Constitution but retained by the people.

Some of these provisions parallel provisions of the Federal Constitution and others do not. It would not be appropriate here to explore each of these at length or in detail; our purpose is rather to emphasize that even though the United States Supreme Court may have given a narrow constuction to the attorney-client privilege in such cases as Couch v. U.S., 409 U.S. 322; Fischer v. U.S., 425 U.S. 391; and Andresen v. Maryland, 427 U.S. 463, cited by Judge Johnson in the order challenged here, those rulings are not binding upon this Court in construing Minnesota law, except as statements of minimum protections. This Court can, and (we believe) should, find in the Minnesota Constitution the source of a more plenary protection of the attorney-client relationship.

As early as Davis v. Pierse, 7 Minn. 13 (Gil. 1) (1862), this Court recognized the independence and

adequacy of the State Constitution to protect persons in this state even at a time of great national emergency and legal uncertainty. Recently a number of state courts have begun to rediscover their State Constitutions as repositories of rights and privileges more generous than those perceived by the U.S. Supreme Court on the Federal Constitution's minimal protections.

An excellent review of the role of the State Constitution may be found, for example, in People v. Brisendine, 531 P.2d 1099, 1111-1115 (Cal. Sup.Ct., In Bank, 1975), where the California court refused to draw the parameters of unreasonable search and seizure as constrictingly as had the U.S. Supreme Court under the Fourth Amendment. The Court said:

> The Federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials. Thus in determining that California citizens are entitled to greater protection under the California Constitution against unreasonable

> searches and seizures than that required by the United States Constitution, we are embarking on no revolutionary course. Rather we are simply reaffirming a basic principle of federalism - that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens.

And the U.S. Supreme Court itself has often recognized the states's rights to afford their citizens greater protection, as for example in Oregon v. Hass, 420 U.S. 714, 719 (1975) (recognizing that states may provide greater protection against self-incrimination than that embodied in the federal Fifth Amendment).

We submit that the present case is one of surpassing potential importance to innumerable future clients and lawyers, comprising significant issues central to the legal process about which this Court should not feel confined by such decisions as those referred to above, issues which arise under the Constitution and public policy of Minnesota.

We respectfully urge the Court, if the arguments of the Petitioner should not be found controlling, to issue the writ on these alternate bases, or at

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the very least to place the burden upon the state to demonstrate why these considerations should not overcome the validity of this warrant.

CONCLUSION

For these reasons, the undersigned amicus respectfully stand in support of the petition for the writ of prohibition.

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State of Minnesota
In Supreme Court

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DAVID O'CONNOR,

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vs.

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Respondent.

BRIEF OF
MINNESOTA STATE BAR ASSOCIATION
AS AMICUS CURIAE

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BRIEF OF MINNESOTA STATE BAR ASSOCIATION AS AMICUS CURIAE

I.

LEGAL ISSUE

Does a search warrant authorizing a general search of an attorney's offices, including personal client files, violate privileges of the attorney-client relationship and the Minnesota and United States Constitutions?

Respondent answered in the negative.

II.

STATEMENT OF THE CASE

This is an original proceeding in the Minnesota Supreme Court for a writ of prohibition directed to respondent, a judge, pursuant to Rule 120, Minnesota Rules of Civil Appellate Procedure. The application by petition was filed with the Court on August 9, 1978, and Answer thereto was filed August 15, 1978. The Minnesota State Bar Association (hereinafter "MSBA"), a non-profit corporation representing attorneys licensed and admitted to practice before the Minnesota Supreme Court. petitioned this Court for leave to appear in the matter as amicus curiae on October 20, 1978. By order of the Court dated November 17, 1978, MSBA was granted leave to so proceed.

III.

STATEMENT OF FACTS

This proceeding was begun to restrain actions taken by respondent, The Honorable Robert F. Johnson, Judge of County Court, County of Ramsey, in excess of his lawful jurisdiction and authority. This brief of MSBA accepts the statement of facts stated by petitioner, David O'Connor, in his addendum to the Petition for Writ of Prohibition filed herein. However, certain facts are of particular concern to MSBA and they are as follows:

On the afternoon of July 25, 1978, law enforcement officers arrived at the offices of petitioner, an attorney, to execute a search warrant issued by respondent judge. The warrant, reproduced at Appendix A-1 hereof, authorized

the law enforcement officers to search the "offices and record storage areas" of petitioner and to seize a broad spectrum of documents described in sweeping, general terms as follows:

> Business records, including but not limited to, contracts or agreements for the lease or purchase of property or liquor licenses, correspondence, accounting records, bookkeeping entries, ledgers, corporate certificates, articles of incorporation, partnership agreements, payroll records, cancelled checks, money orders, certiifed checks, cashiers checks, promissory notes, records of cash transactions, copies of liquor license applications and other liquor license transactions, real estate appraisals, inventory appraisals, profit and loss statements, income statements pertaining to: Stephen F. Conroy, John T. Finley, Patrick C. Igo, Patrick M. McGibbon, and Alden E. Landreville, and Knight Kap Inc., Knight & Day Inc. and Blackies Inc., doing business as Patrick's Lounge at 1318 W. Larpenter Ave. St. Paul, Minnesota.

Petitioner was present on the premises at the time, and voluntarily produced files which contained documents and materials generally described in the search warrant. Petitioner told the officers he would surrender certain files, but others he would not, claiming a privilege from disclosure for those files which were his personal work files. Petitioner and the officers immediately proceeded to respondent's chambers, at which time petitioner moved to quash the warrant with respect to the files claimed to be privileged.

On August 4, 1978, respondent judge issued his order directing that petitioner's personal work file be surrendered

for a search for relevant documents "*by a representative of the Ramsey County Attorney's Office meeting with petitioner.*" (Order, p. 5) (Emphasis added). In so ordering, respondent judge held that the search warrant issued was valid and properly executed. (Order, pp. 4, 5). Petitioner then applied for a Writ of Prohibition to restrain execution of the Order, contending that the Order is contrary to law and in excess of the judge's authority.[1]

IV.

ARGUMENT

A SEARCH WARRANT AUTHORIZING A GENERAL SEARCH OF AN ATTORNEY'S OFFICES, INCLUDING PERSONAL CLIENT FILES, VIOLATES THE PRIVILEGES OF THE ATTORNEY-CLIENT RELATIONSHIP AND THE MINNESOTA AND UNITED STATES CONSTITUTIONS.

Introduction

MSBA believes that this case involves the unlawful intrusion into matters of critical significance to the practice of law and rights of privacy accorded an attorney and his or her clients by statute, common law, and the Constitutions of the United States and the State of Minnesota. These rights, privileges of the attorney-client relationship, were carefully developed by courts and legislatures to ensure a full and effective resolution of disputes within our legal

[1]Subsequent to petitioner's application, counsel for respondent judge in the Answer conceded that the Order was deficient in at least some of its scope by agreeing to voluntarily amend the Order to provide that the court would determine the scope of the privilege. This belated concession in no way changes MSBA's position that the search warrant authorizing the general search of the attorney's offices and personal client files is impermissible.

system. To effectively protect the privileges, an attorney is required to withhold from anyone confidential matters within the attorney-client privilege, and is permitted to protect his or her own work product from disclosure.

A search warrant, designed as it is to procure evidence of crimes, is an inappropriate legal tool for the government to obtain documents from an attorney's office regarding the attorney's client, given the need recognized in our system to protect a client's confidential communications to his or her attorney. Execution of search warrants at an attorney's office permits a general search of the office and all the files located there when issued to seize certain specified documents. By definition, the scope of such a search affords police officers the first opportunity to determine the confidentiality of the materials or papers they see. Although police officers may, in good faith, intend to scrupulously observe the privileges, perusal of the attorney's papers, without doubt, constitutes a "seizure by sight" of their contents and an irrevocable breach of the privileges.

Enforcement of respondent judge's order in this case, permitting a search of an attorney's files, nullifies the privileges which now protect those files and their contents from disclosure without prior consent. Search warrants which authorize the violation of the attorney-client privilege, which is an absolute privilege, or the work product privilege, which is a strictly qualified privilege, are contrary to the reasonableness standard of the Fourth Amendment to the Constitution of the United States and Article I, Section 10 of the Minnesota Constitution. The Supreme Court now has the opportunity to rule on the propriety of a court or-

der enforcing such a search warrant.[2] At a minimum, opportunity to assert the privileges must be afforded prior to the search and seizure.

1. AN ATTORNEY'S PERSONAL CLIENT FILES ARE SUBJECT TO WELL RECOGNIZED PRIVILEGES WHICH MUST BE HONORED WHENEVER ANY PARTY SEEKS TO COMPEL THEIR DISCLOSURE.

Here respondent judge has authorized law enforcement officers to search an attorney's "offices and record storage areas" and conduct a general search through all of his files, including his personal work files, for certain specified documents set forth in the warrant. No restriction on execution of the warrant was imposed except that it had to be made "in the daytime. . . ." Upon the face of the warrant, there is no limitation as to the places within the offices or type of files or documents which may be searched

[2]In this particular case, the search warrant has not been executed in the manner authorized by its terms. Petitioner was allowed the opportunity to apply to the court for an order to quash the warrant before its complete execution by law enforcement officers. This search warrant nevertheless could be executed pursuant to its terms at any time in the future. Not until the officers have taken the opportunity to thoroughly search petitioner's office can they be certain the warrant is properly and effectively executed.

Furthermore, respondent ruled that petitioner has failed to show the client file in question is protected by a privilege, and that therefore protection from search is unavailable. This consideration is not pertinent to the pending proceeding. The issue here is whether law enforcement officers may be permitted to search through *any* file of an attorney in order to locate specific documents. It does not matter that particular files in the attorney's office may not contain privileged materials, for it is the alleged right of the officer to make the first determination of privilege which is at issue.

This Court must not take a narrow view of these proceedings before it. The issue raised is of such significant importance to our system of jurisprudence that it should be decided and settled now.

to obtain documents in the general categories set forth in the warrant.

The attorney-client privilege is well established in our legal system. As a policy consideration, communications between lawyer and client, made for the purposes of determining and protecting the client's legal rights, are confidential, and permanently protected from compelled disclosure to third parties.[3] *Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 33, 62 N.W.2d 688, 700 (1954); 8 Wigmore, *Evidence* §2291 (McNaughton rev. 1961). After a weighing of competing interests it has been determined that the administration of justice is best served by laws which encourage clients to reveal all facts of a matter to their attorney without fear that the confidence can be breached.

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

United States v. Louisville & N.R. Co., 236 U.S. 318, 336 (1915).

To the extent the privilege encourages attorney-client discourse, it helps to bring relevant information before the court, ensures that clients know and remain within the bounds of their legal autonomy, and serves as an instru-

[3]Obviously this privilege can be waived. However, there is no question that waiver has not occurred here.

ment through which substantive rights are satisfied. See 8 Wigmore, *Evidence*, §2291 (McNaughton rev. 1961). Accordingly, attorneys are consistently admonished by this Court to preserve "inviolate" matters between themselves and their clients.

> It is . . . the sworn duty of the attorney to maintain inviolate the confidence, and, at every peril to himself, to preserve secrets, of his clients.

Struckmeyer v. Lamb, 75 Minn. 366, 367, 77 N.W. 987, 988 (1899). See *State v. Lender*, 266 Minn. 561, 124 N.W.2d 355 (1963); *Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 62 N.W.2d 688 (1954).

In our state, the attorney-client privilege is important enough to be part of our statutes and court rules. As an evidence consideration,

> [a]n attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional duty. . . .

Minn. Stat. §595.02. Statutorily an attorney is charged with the duty to "[k]eep inviolate the confidences of his client. . . ." Minn. Stat. §481.06(5). Furthermore, the American Bar Association Code of Professional Responsibility, adopted by this Court to govern lawyers of this state, at 286 Minn. ix (August 4, 1970) preserves this duty. In relevant part, EC 4-1 of the Code of Professional Responsibility provides:

> The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his

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> client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

See also, DR 4-101(A), (B)(1), Code Prof. Resp. The attorney's absolute responsibility to resist public disclosure of confidential client communications is clear, historic, and worthy of substantial consideration whenever weighed against the needs of other parts of the legal process.

The absolute privilege for confidential client communications is not the only privilege accorded the attorney-client relationship. The privilege also protects the attorney's work product, such as is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. . . ." *Hickman v. Taylor,* 329 U.S. 495, 511 (1947). There is little question that an attorney's work product generally is immune to compelled disclosure. *United States v. Nobles,* 422 U.S. 225, 237-238 (1975); *In Re Grand Jury Proceedings,* 473 F.2d 840, 849 (8th Cir. 1973); *Brown v. St. Paul City Ry. Co.,* 241 Minn. 15, 33-34, 62 N.W.2d 688, 700-701 (1945). See also Rule 26.02(3), Minnesota Rules of Civil Procedure, and Rule 9, Minnesota Rules of Criminal Procedure.

Substantial need and justification for disclosure of the work product must be shown before the work product privilege may be abrogated. *Hickman v. Taylor, supra* at 511-512. Although *Hickman* was a civil case, the same considerations are present in criminal cases such as this. As explained by the United States Court of Appeals for the

Eighth Circuit in *In Re Grand Jury Proceedings*, 473 F.2d 840, 846 (8th Cir. 1973), when discussing the *Hickman* rule:

> Although . . . the policies supporting protection of an attorney's work product were stated with reference to civil litigation, *they are even more strongly applicable in criminal proceedings.* (Emphasis added.)

See also, Rule 9.02 Subd. 2, Minnesota Rules of Criminal procedure.

The purpose behind the work product privilege is to assure unfettered opportunity to the attorney to gather the facts of a case and to commit his theories and thought processes to writing, without fear that the opposing party may compel disclosure and thereby compromise his efforts to prepare the case. *Hickman v. Taylor, supra* at 511-512; *In Re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977).

The rationale behind the privilege accorded work product was fully articulated in *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947).

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

> That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. *The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.* (Emphasis added).

The Eighth Circuit succinctly set out the importance of the work product privilege in a criminal case by quoting Mr. Justice Jackson from his concurring opinion in *Hickman:*

> [I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice . . . The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of a practice impairing the lawyer's effective representation of his client.

In Re Grand Jury Proceedings, 473 F.2d 840, 843 (8th Cir. 1973).

The United States Supreme Court itself has recognized the usefulness of the work product privilege in preserving this principle:

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper function of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."

United States v. Nobles, 442 U.S. 225, 238 (1975).

Granted, protection against disclosure of attorney-client privileged communications and work product does, to some extent, preclude the government from obtaining certain information that may be useful to it in its criminal investigation. However, there are vital public policy considerations articulated in the privileges which dictate that the need for their protection "outweighs the public interest in the search for truth." *United States v. Bryan*, 339 U.S. 323, 331 (1950). In *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), the United States Supreme Court restated that philosophy by precluding the compelling of grand jury testimony from "those persons protected by a constitutional, common law or statutory privilege."

Besides the violations of the privileges themselves, allowing the search and seizure of an attorney's files and invasion of the attorney-client and work product privileges in a criminal case robs the client of his constitu-

tionally guaranteed right to effective assistance of counsel. U.S. Const. Amend. VI: Minn. Const. Art. 1, §6. This right is a guarantee of fair opportunity for full and adequate consultation between an accused and his or her attorney. See *Ryan v. State,* 285 Minn. 243, 172 N.W.2d 751 (1969); *State v. Fields,* 279 Minn. 374, 157 N.W.2d 61 (1968). If the attorney's files may be searched, this guarantee is effectively eliminated.

When the attorney-client or work product privileges are by-passed in the criminal process, the necessary constitutional safeguards are eliminated. It is not enough to say that an accused is not entitled to counsel until after initiation of a criminal prosecution. See *United States v. Ask,* 413 U.S. 300 (1973); *Kirby v. Illinois,* 406 U.S. 682 (1972). Once the attorney is consulted, even if too early in the criminal process to justify a right to consultation under the sixth amendment and the Minnesota Constitution, the lawyer's advice and labors on behalf of the client can not be jeopardized by the threat of forced disclosure.

The foregoing principles establish that special protection must be given an attorney's files, and his or her offices, whenever disclosure is demanded by third parties. The overriding social policies providing the privileges must be weighed against the alleged need for disclosure. 8 Wigmore, *Evidence* §2285 (McNaughton rev. 1961).

2. THE REASONABLENESS OF A SEARCH WARRANT AUTHORIZING SEIZURE OF DOCUMENTS FROM AN ATTORNEY'S OFFICE MUST BE VIEWED IN LIGHT OF THE PRIVILEGES WHICH PROTECT AN ATTORNEY'S PERSONAL CLIENT FILES FROM COMPELLED DISCLOSURE.

Pursuant to state statute, a search of a premises by law enforcement officers may be authorized upon a showing that it houses property or things used as a means of committing a crime or which constitute evidence of the fact or agency of a crime committed. Minn. Stat. §626.07(2), (5). Such property or things "may be taken pursuant to the warrant from any place, or from any person in whose possession they may be." Minn. Stat. §626.07. The court "must issue a search warrant" whenever the application therefor shows probable cause that specific property is subject to seizure and that it may be found at the place to be searched. Minn. Stat. §§626.08, 626.11. These statutory provisions substantially reiterate the minimum requirements for issuance of a search warrant set forth in the United States and Minnesota Constitutions. U.S. Const. Amend. IV; Minn. Const. Art. 1, §10. However, in addition to prescribing procedures for issuance of warrants, these constitutional provisions contain an overriding mandate protecting "persons, houses, papers, and effects against unreasonable searches and seizures. . . ." *Id.* Thus, there are more practical considerations to be made in determining the reasonableness of a search and seizure procedure than those required by the literal terms of statutory and constitutional provisions respecting warrants and probable cause.

The United States Supreme Court has held that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 17-18 (1968). Any such search "must be 'strictly tied to and justified by' the circumstances which render its initiation permissible." *Id.*, citing *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Mr. Justice Fortas, concurring). Thus, "[t]he test of reasonableness applies both to the decision to search and the scope of the search once initiated." *People v. Lawson*, 61 Ill. App. 3d 133, 18 Ill. Dec. 644, 377 N.E.2d 1280 (1978). Any notion that a search, once justified, may be conducted without limitation therefore must be rejected.

The constitutional and statutory provisions cited herein relating to search and seizure were intended to protect the people in their legitimate expectations of privacy from unreasonable intrusions by the government. The determination of the reasonableness of a search and seizure involves a balancing of the interest the public has in effective and efficient law enforcement against the rights and privileges of individuals. *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967); *State ex rel. Branchaud v. Hedman*, 269 Minn. 375, 378, 130 N.W.2d 628, 630 (1964). This balancing process usually results in a pronouncement of specific procedures which may or may not be followed under constitutional strictures. Thus, under *Terry v. Ohio*, *supra*, a pat-down search may be made in the course of an investigative stop, but it must be limited to the suspect's outer clothing as a means to discover concealed weapons. Similarly, it has been held that searches incident to ar-

rest may be conducted, but only to a limited extent and solely to protect the arresting officer or to preserve evidence. *Chimel v. California,* 395 U.S. 752 (1969). The government may establish fixed checkpoints along public highways for brief questioning of the occupants of motor vehicles as a means to enforce immigration laws, even in the absence of a reasonable belief that illegal aliens may be in the vehicle. *United States v. Martinez-Fuerte, supra.* However, establishment of such checkpoints to conduct random searches or investigations is an unreasonable intrusion into privacy. *United States v. Ortiz,* 422 U.S. 891 (1975). Courts have approved procedures whereby a suspect's blood is drawn for use as evidence, provided, however, that it is done at a proper medical facility by proper medical personnel. See *Schmerber v. State of California,* 384 U.S. 757 (1966); *Div. 241 Amalgamated Transit Union (AFL-CIO) v. Suscy,* 538 F.2d 1264 (7th Cir. 1976).

In certain cases, the scope and intensity of a search, lawful in its inception, may be so unreasonable as to bear a taint under due process considerations. For instance, a procedure whereby law enforcement officers may force a suspect to swallow an emetic solution to induce vomiting so as to extract evidence from his stomach is too severe to pass constitutional muster. *Rochin v. People of California,* 342 U.S. 165 (1952). See also, *People v. Sanders,* 268 Cal. App.2d 802, 74 Cal. Rptr. 350 (1969) (choking to prevent swallowing of evidence); *State v. Williams,* 16 Wash. App. 868, 560 P.2d 1160 (1977) (same).

The same considerations of reasonableness and respect for privacy have caused courts to declare that certain

premises subject to search must be accorded greater deference than others. A private residence, for instance, usually may not be searched in the same manner or with the same intensity as a business office or a motor vehicle upon the public highway. See *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (automobiles and offices were searched); *United States v. United States District Court*, 407 U.S. 297 (1972) (a home was entered); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (corporate offices were searched); *United States v. Alden*, 576 F.2d 772 (8th Cir. 1978) (an automobile was searched); *State v. Goodrich*, — Minn. —, 256 N. W. 2d 506 (1977) (an automobile was searched); *State v. Pietraszewski*, 285 Minn. 212, 172 N. W.2d 758 (1969) (a search was conducted in a public jail). Furthermore, the character of the articles to be seized may render unreasonable an otherwise valid search. See *Roaden v. Kentucky*, 413 U.S. 496 (1973) (seizure of film protected under the first amendment); *Stanford v. State of Texas*, 379 U.S. 476 (1965) (books and papers protected under the first amendment). See also *State v. Ryan*, 156 Minn. 186, 191, 194 N.W. 396, 398 (1923).

It is apparent in these cases that upon consideration of the prevailing circumstances in any case courts have not hesitated to prescribe or proscribe certain procedures in execution of a warrant to meet constitutional limitations. This same type of consideration should be made to protect the legitimate expectations of privacy which an attorney and an attorney's clients have in personal files located in the attorney's offices, expectations which are recognized and enforced under statute and the common law. Protection of these files from sweeping, broadly authorized

searches is critical to the continued efficiency of our system of jurisprudence. This end may be accomplished by rules of law which permit preservation of the attorney's privileges, prescribed by this Court under the rule of reasonableness.

3. EXECUTION OF THE SEARCH WARRANT ISSUED IN THIS CASE WOULD BE AN UNJUSTIFIED AND UNREASONABLE INTRUSION INTO THE LEGITIMATE EXPECTATIONS OF PRIVACY ARISING FROM THE ATTORNEY-CLIENT RELATIONSHIP.

The significance of the instant case is that here a broadly worded search warrant has issued authorizing police to conduct an unannounced and unchallenged inspection of an attorney's offices and files for evidence of crime. The attorney involved is in no way implicated in the criminal activity under investigation. The warrant itself directs seizure of a wide spectrum of documents, from correspondence to accounting ledgers. In this respect it very closely resembles the "general warrant" found constitutionally impermissible by the United States Supreme Court in *Stanford v. State of Texas*, 379 U.S. 476, 479-480 (1965).[4] It au-

[4]In *Stanford* the Court considered a warrant issued describing the property subject to seizure as follows:

> books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas . . . .

Stanford v. State of Texas, 379 U.S. 476, 478-479 (1965). The Court specifically held that this description was impermissibly broad under the fourth amendment requirement that a warrant particularly describe the things to be seized. The warrant thus constituted a "general warrant," one of the principle targets of the fourth amendment. The particularity requirement received added impetus in this case because first amendment rights were implicated. The conclusion of the Court nevertheless remains that such general language in a warrant will not be tolerated.

thorizes "a general, exploratory rummaging" through the personal and confidential files of an attorney without regard for their nature or source. *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971). Furthermore, just as words spoken were considered subject to seizure in *Katz v. United States,* 389 U.S. 347 (1967), so too are the words written on documents inspected in an attorney's offices, though the documents themselves be replaced immediately in their file and returned to the attorney. The mere fact the documents are read destroys unconditionally any confidentiality to which they are entitled.

It cannot be claimed that an attorney's office *per se* is immune to criminal processes. However, the Minnesota legislature and this Court have established a clear public policy, based upon the needs of our judicial system, of protecting the privacy of the attorney-client relationship in its many facets. Any warrant authorizing the inspection and seizure of documents, because of their very nature, necessarily entails a wholesale disclosure of confidential information in the execution of the warrant, leaving no prior opportunity for the assertion of privilege. Unlike more readily identifiable items such as weapons or specific corporate minute books, any document must be read before it can be determined whether it is within the scope of the warrant. Execution of search warrants for documents therefore permits unchallenged perusal of all documents on the premises being searched.

The only possible public interest in preserving this summary warrant procedure when the items to be seized are an attorney's files and papers is to prevent the attorney from destroying or concealing evidence or from broadly claim-

ing privilege in matters not entitled to it. These fears are not justified within our judicial system. As recognized by the United States Supreme Court,

> [A] lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients.

Hickman v. Taylor, 329 U.S. 495, 510 (1947). See *In Re Grand Jury Proceedings*, 473 F.2d 840, 843 (8th Cir. 1973).

The attorney's privileges established by statute and common law in this state reflect a presumption that an attorney, an officer of the court bound by strict canons of ethics, will not attempt to circumvent judicial processes or the enforcement of the criminal law. The attorney therefore is usually given the opportunity to voluntarily produce documents pursuant to a subpoena duces tecum, or similar legal process, and to withhold other documents upon showing they are immune to disclosure under a privilege. These considerations are wholly repudiated whenever a warrant procedure such as that authorized in this case is followed. Indeed, such a procedure renders the law of privileges a nullity, for an attorney who cannot be compelled to testify or to produce documents himself because of the privileges, could have them taken from him under a search warrant.

When a search warrant is issued authorizing the search of an attorney's office, substantial consideration should be given the applicability of the plain view doctrine in the law of search and seizure. Under that doctrine, law enforcement officers executing a warrant may seize any article or thing they have probable cause to believe may be

evidence of crime, even though not specified in the warrant or pertinent to the particular investigation. *Coolidge v. New Hampshire, supra* at 464-473; *Harris v. United States,* 390 U.S. 234, 239 (1968); *Johnson v. State,* — Minn. —, 256 N.W.2d 78, 79 (1977); *State v. Severtson,* 304 Minn. 487, 489-490, 232 N.W.2d 95, 97 (1975). Execution of such a warrant in the offices of a criminal defense attorney presents obvious questions of legality under the fifth and sixth amendments of the United States Constitution and Article I, §§6 and 7 of the Minnesota Constitution.

Furthermore, the United States Supreme Court has acknowledged that a search warrant is a much more effective means of procuring evidence of crime than a subpoena duces tecum because the warrant, unlike a subpoena, cannot usually be challenged on fifth amendment grounds. *Zurcher v. Stanford Daily, supra* at —, 98 S. Ct. at 1979-1980 n. 8. See also *Andresen v. Maryland,* 427 U.S. 463 (1976). Thus, there is every reason to believe that the warrant procedure authorized in this case will become a settled practice of law enforcement in the future. The circumstances here, whereby petitioner was permitted to apply to the court without first answering to the search warrant, cannot be expected to recur in future cases. The danger that the impressive array of statutory and case law evidencing the confidentiality of attorneys' files will be subverted therefore is real and immediate.

It is unreasonable in *any* case to permit law enforcement officers to peruse miscellaneous documents in an attorney's offices while attempting to locate documents listed in the search warrant. As a matter of constitutional law,

some reasonable limitation on the manner in which a criminal investigation may be conducted, or the type of property which may be inspected pursuant to a search warrant, must be established. It will not unreasonably burden effective law enforcement, for instance, to require that the officers proceed by subpoena duces tecum in seeking documents held by an attorney. Under law, the attorney presumably will respond faithfully and promptly, while still being allowed the opportunity to assert applicable privileges by a motion to quash. The paucity of case authority addressing the issue of searches conducted at an attorney's offices indicates that the subpoena procedure is used more often, with satisfactory results. In the alternative, a procedure in execution of a warrant whereby the attorney is given a prior opportunity to voluntarily produce the documents and assert these privileges, allowing a reasonable amount of time to formulate supporting arguments and offers of proof, also may be reasonable under the circumstances.

Presumably, each of these procedures would require resolution by a neutral judicial officer, as the authority of last resort, of any dispute arising as to the assertion of a privilege. Ultimately, this could include an *in camera* inspection of documents by the court. The objective is to prevent the determination of privilege by a law enforcement officer in the first instance in execution of the warrant. To achieve this objective, and alternatively to the procedures described above, it may be reasonable to require some neutral judicial officer, such as a special master or referee with knowledge of lawful privileges, to accompany the officers and actually execute the warrant by examining the

attorney's files. This would preserve the right of the attorney to a type of *in camera* inspection and analysis by a neutral authority. In the event a question arose as to application of the privilege to a particular document or file, however, the attorney nevertheless should be allowed a reasonable opportunity to make an offer of proof, first to the judicial officer executing the warrant and ultimately to the court itself. This would assure that the determination of privilege is made with full knowledge of the facts.

MSBA is aware the United States Supreme Court has ruled that search procedures complying with the literal terms of the fourth amendment relating to probable cause are not easily subject to standardization by the courts. *Zurcher v. Stanford Daily*, — U.S. —, 98 S. Ct. 1970 (1978). In that case, involving the search of a newsroom, the Court considered it to be the function of the issuing authority in the first instance to limit the scope and execution of a warrant under the test of reasonableness. *Id.* at —, 98 S. Ct. at 1982.

In the instant case, the search warrant was issued upon a form modified to fit the particular needs of the applicant and did not even state that an attorney's office was the subject of the search. See Appendix A-1 hereof. The only condition upon its execution was that it be done in the daytime, and there is no space available for insertion of additional restrictions. On its face, this warrant is not designed or intended to allow the exercise of any discretion by the issuing authority. The fact that the warrant issued on this general form, and now may possibly be enforced pursuant to court order, indicates that the discretion authorized in *Zurcher* is not generally applied.

Zurcher nevertheless may be distinguished on its facts from the instant case. Unlike a newsroom, which generally does not house documents or things subject to a recognized privilege, an attorney's office is the repository for the confidences and secrets of clients which are protected from public disclosure under law. Furthermore, unlike a newsroom staff, an attorney is an officer of the court, carefully restricted in his or her activities by statute and canons of ethics. Attorneys are required, pursuant to the oath taken at bar, to preserve and protect the judicial processes. The fear of the Court in *Zurcher*, that requiring a subpoena duces tecum rather than allowing a search warrant could lead to destruction of evidence or avoidance of the legal process, does not bear the weight in this instance that it may have with respect to a newsroom staff. The conclusion may be otherwise if the attorney whose office is going to be searched is shown to be implicated in the criminal investigation. This is not the case generally, and MSBA believes that some requirement of reasonableness limiting the scope of such warrants as they pertain to attorneys' offices therefore is justified here as it may not have been in *Zurcher*.

The Court in *Zurcher* still did recognize that the requirements of the fourth amendment must be applied with " 'scrupulous exactitude' " in consideration of the type of material subject to seizure in any case. *Zurcher v. Stanford Daily, supra* at —, 98 S. Ct. at 1981.

> Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

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Id. Furthermore, the Court stated that the fourth amendment "does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure. . . ." *Id.* at —, 98 S. Ct. at 1983. These statements evidence the Supreme Court's approval of statutory and common law privileges designed to protect materials and communications from public disclosure.[5] Such laws, as noted previously, are a part of the Minnesota legal framework. Thus, read in its entirety, *Zurcher* supports the position that a search warrant authorizing inspection and seizure of privileged materials is *per se* unreasonable.

V.

CONCLUSION

The statutes of the State of Minnesota, as well as decisions of this Court, have accorded the attorney-client relationship certain privileges which preserve and protect its confidences and secrets for reasons of public policy. The law of search and seizure requires that the scope and execution of a search warrant comply with standards of reasonableness in consideration of prevailing circumstances, including the nature of the places to be searched and things to be seized. Here, the government may have shown probable cause to believe that the documents sought are subject to seizure. However, the manner of execution of

[5]That these privileges are respected by the Supreme Court is further support by *Fisher v. United States*, 425 U.S. 391, 401 (1976), wherein the Court stated:

> Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources—the Fourth Amendment's protection against seizures without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described,' " . . . the First Amendment . . . *or evidentiary privileges such as the attorney-client privilege.* (Emphasis added)

the search warrant will destroy the benefits which are derived from observance of the privileges. Whether the lawyer has one client or a thousand, a hundred partners or none, keeps or does not keep notes, memoranda, and other personal records regarding some or all of his clients, all papers and files in the attorney's office will be subject to careful scrutiny in the search for the designated documents. This circumstance alone is inconsistent with the foundational social concepts of the attorney-client and work product privileges, and indeed, the orderly administration of justice.

Any search warrant authorizing the seizure of miscellaneous documents in an attorney's office permits unrestrained inspection of every personal and confidential client file in the office irrespective of their nature or relevance to the investigation. Such a warrant permits an unreasonable intrusion into the privacy of the attorney-client relationship, and is *per se* violative of constitutional principles. Ample means exist for obtaining relevant and unprivileged materials without violating these privileges which are basic to our system of justice. None were employed here. MSBA therefore respectfully submits that the search warrant in this case must be quashed and the Writ of Prohibition issued.

Respectfully submitted,

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Attorneys for Minnesota State Bar Association

A-1

STATE OF MINNESOTA — MUNICIPAL 4 COURT

COUNTY OF RAMSEY — CITY OF SAINT PAUL

SEARCH WARRANT

TO: Sgt. John R. Voita

(A) PEACE OFFICER(S) OF THE STATE OF MINNESOTA.

WHEREAS, Sgt. John R. Voita has this day on oath, made application to the said Court applying for issuance of a search warrant to search the following described (premises) (motor vehicle) (person): Offices and record storage areas of David O'Connor, located at 1200 N. Federal Building, St. Paul, Minnesota.

for the following described property and things: Business records, including but not limited to, contracts or agreements for the lease or purchase of property or liquor licenses, correspondence, accounting records, bookkeeping entries, ledgers, corporate certificates, articles of incorporation, partnership agreements, payroll records, cancelled checks, money orders, certified checks, cashiers checks, promissory notes, records of cash transactions, copies of liquor license applications and other liquor license transactions, real estate appraisals, inventory appraisals, profit and loss statements, income statements pertaining to: Stephen F. Conroy, John T. Finley, Patrick C. Igo, Patrick M. McGibbon, and Alden F. Landgraville and Knight Kap Inc., Knight & Day Inc. and Blackie

WHEREAS, the application and supporting affidavit of Sgt. Voita (was) (were) duly presented and read by the Court, and being fully advised in the premises, Inc., doing business as Patrick's Lounge at 1318 W. Larpenteur Ave. St. Paul, Minnesota.

NOW, THEREFORE, the Court finds that probable cause exists for the issuance of a search warrant upon the following grounds: (Strike inapplicable paragraphs)

1. ~~The property above described was stolen or embezzled~~
2. The property above-described was used as a means of committing a crime.
3. ~~The possession of the property above described constitutes a crime~~
4. ~~The property above described is in the possession of a person with intent to use such property as a means of committing a crime~~
5. The property above-described constitutes evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime.

The Court further finds that probable cause exists to believe that the above-described property and things are) (will be) (at the above-described premises) (in the above described motor vehicle) (on the person of ~~xxxxxxxxxxxx~~)

~~The Court further finds that a nighttime search is necessary to prevent the loss, destruction or removal of the objects of said search~~

~~The Court further finds that an unannounced entry without authority or purpose is necessary to prevent the loss, destruction or removal of the objects of said search and to protect the safety of the peace officers~~

NOW, THEREFORE, YOU Sgt. John R. Voita, James Peckey, Warren Bostrom, Ray Perron, and other officers under his control THE PEACE OFFICER(S) AFORESAID, ARE HEREBY COMMANDED (TO ENTER WITHOUT ANNOUNCEMENT OF AUTHORITY AND PURPOSE) (IN THE DAYTIME ONLY) (IN THE DAYTIME OR NIGHTTIME) TO SEARCH (THE DESCRIBED PREMISES) (THE DESCRIBED MOTOR VEHICLE) (THE PERSON OF _____) FOR THE ABOVE-DESCRIBED PROPERTY AND THINGS. AND TO SEIZE SAID PROPERTY AND THINGS AND (TO RETAIN THEM IN CUSTODY SUBJECT TO COURT ORDER AND ACCORDING TO LAW) (DELIVER CUSTODY OF SAID PROPERTY AND THINGS TO) _____.

BY THE COURT:

Dated July 25, 1978

JUDGE OF COURT

COURT
APPENDIX

APPENDIX 2 A

96TH CONGRESS
1ST SESSION

H. R. 3486

To limit governmental search and seizure of materials possessed by persons involved in first amendment activities, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 5, 1979

Mr. KASTENMEIER (for himself and Mr. RAILSBACK) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To limit governmental search and seizure of materials possessed by persons involved in first amendment activities, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "First Amendment Privacy Protection Act of 1979".

UNLAWFUL ACTS

SEC. 2. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection

with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought: *Provided, however,* That a government officer or employee may not search for or seize materials described in subsection 2(a) under the provisions of this paragraph if the offense for which the materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797,

18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42 U.S.C. 2277, or 50 U.S.C. 783); or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being.

(b) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought: *Provided, however,* That a government officer or employee may not search for or seize materials described in subsection 2(b) under the provisions of this paragraph if the offense for which the materials are sought consists of the receipt, possession, communication, or withholding of such materials or the informa-

tion contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797, 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42 U.S.C. 2277, or 50 U.S.C. 783); or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

(3) there is reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of the materials; or

(4) the materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice.

In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

INAPPLICABILITY OF THIS ACT TO SEARCHES AND SEIZURES CONDUCTED TO ENFORCE THE CUSTOMS LAWS OF THE UNITED STATES

SEC. 3. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of or at international points of entry into the United States in order to enforce the customs laws of the United States.

REMEDIES

SEC. 4. (a) A person aggrieved by a search for or seizure of materials in violation of this Act shall have a civil cause of action for damages for such search or seizure—

(1) against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this Act, or against any other governmental unit, all of which shall be liable for violations of this Act by their officers or employees while acting within the scope or under color of their office or employment;

(2) against an officer or employee of a State who has violated this Act while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1). It shall be a complete defense to a civil action brought under this paragraph that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct.

(b) The United States, a State, or any other governmental unit, liable for violations of this Act under paragraph 4(a)(1), may not assert as a defense to a claim arising under this Act the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(c) The remedy provided by paragraph 4(a)(1) against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this Act, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(d) A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000, such punitive damages as may

be warranted, and such reasonable attorney's fee and other litigation costs reasonably incurred as the court, in its discretion, may award: *Provided, however,* That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment.

(e) The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee if warranted.

(f) The district courts shall have original jurisdiction of all civil actions arising under this section.

DEFINITIONS

SEC. 5. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, tapes, videotapes, negatives, films, outtakes, and interview files.

(b) "Work product", as used in this Act, means any documentary materials created by or for a person in connection with his plans, or the plans of the person creating such materials, to communicate to the public, except such work

product as constitutes contraband or the fruits or instrumentalities of a crime.

(c) "Any other governmental unit", as used in this Act, includes the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of State government.

APPENDIX 2 B

96TH CONGRESS
1ST SESSION

H. R. 4181

To establish procedures for the issuance and enforcement of search warrants and other legal processes to provide a remedy for persons injured by a failure to comply with such procedures, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 22, 1979

Mr. RAILSBACK introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To establish procedures for the issuance and enforcement of search warrants and other legal processes to provide a remedy for persons injured by a failure to comply with such procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Third Party Privacy Act of 1979".

ISSUANCE OF WARRANT OR OTHER LEGAL PROCESS

SEC. 2. (a) Except as provided in section 3, no warrant shall be issued to search for and seize any matter in the possession or control of a third party.

(b) Except as provided in section 3, no court or magistrate shall issue any order or legal process which directs a third party to produce any matter in such party's possession or control unless—

(1) the law of the jurisdiction in which such order or legal process is issued permits the party to whom the order is directed to obtain an adversary hearing before a court prior to the enforcement of the order; and

(2) at such adversary hearing, the order or legal process will be quashed unless the court determines (i) that the issuance and enforcement of such order or legal process is authorized by law; and (ii) that no privilege or legal grounds exist that justify the refusal to produce the matter.

(c) Nothing in this section shall prohibit the party in possession or control of such matter from voluntarily complying with an order or legal process pursuant to subsection (b) of section 2 if such party is adequately informed by the language of the order or legal process or other written means at the time of the service of the order or legal process, of the

party's right to notice and hearing under subsection (b) and such party knowingly and voluntarily waives any right to such notice and hearing.

GROUNDS FOR EX PARTE ISSUANCE

SEC. 3. The provisions of this Act do not prevent a judge or magistrate from issuing ex parte a warrant or other legal process to search for and seize or compel the production of any matter in the possession or control of a third party in any case in which the applicant for the warrant or other legal process shows—

(a) upon his personal knowledge or that of another present before the judge or magistrate that there is probable cause to believe that if an order or legal process is issued in accordance with subsection (b) of section 2 such matter will be destroyed, altered, or put beyond the control or the jurisdiction of the court; or

(b) that there is probable cause to believe that the matter is contraband.

REMEDIES AND DEFENSES

SEC. 4. (a) Any unit of Federal, State, or local government which, and every person who, under color of any statute, ordinance, regulation, custom, or usage of the United States, any State or territory, or of the District of Columbia, subjects or causes to be subjected, any person within the jurisdiction thereof the deprivation of any right under this Act

shall be liable to such person in an action for legal or equitable relief, or other proper proceeding for redress.

(b) Each unit of Federal, State, or local government shall be jointly and severally liable with any officer, employee, agent, or other person clothed with the authority of such unit for any violation of this Act.

(c) It shall not be a defense for such unit that the officer, employee, agent, or other person clothed with the authority of such unit is personally immune from liability under this Act by virtue of a common law or statutory immunity or defense attached to such officer, employee, agent, or other person clothed with the authority of such unit.

(d) In any action brought under this Act, the court shall award such special or general damages as may be appropriate, as well as punitive damages not to exceed $1,000 for each violation, and may award a reasonable attorney's fee and other actual and reasonable expenses incurred in connection with such action.

DEFINITIONS

SEC. 5. (a) For purposes of sections 2 and 3, a "third party" is a person whom there is no probable cause to believe has committed the crime to which the matter sought relates.

(b) For purposes of section 3, "contraband" means goods or merchandise the importation, exportation, or posses-

sion of which is prohibited under the laws of the State in which the warrant or order is issued or of the United States.

(c) For purposes of section 4—

(1) "person" means any natural person, or any partnership, corporation, association, or other legal entity organized under the laws of the United States, of any State, or of the District of Columbia;

(2) "unit of Federal, State, or local government" means the United States or any agency, department, or instrumentality thereof other than the Congress; any State or territory; or any agency, department, or instrumentality thereof, other than the legislature; any municipality, county, parish, or other State, territorial, or local governmental subdivision, or agency, department, or instrumentality thereof; or the District of Columbia or any agency, department, or instrumentality thereof.

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APPENDIX 3-A

[California Law Review, August 1961]

SEARCH AND SEIZURE: A NO-MAN'S LAND IN THE CRIMINAL LAW

(By *John Kaplan*)*

"The very strength of our common law," Benjamin Cardozo has written, "its cautious advance and retreat a few steps at a time is turned into a weakness unless bearings are taken at frequent intervals so that we may know the relation of the step to the movements as a whole." [1] As the past few volumes of the United States Reports indicate, the Supreme Court has, after some ten years of relative inattention, once again directed its concern to the problems of search and seizure.[2]

Although these problems are among the most frequently litigated in the criminal law, their scope and impact are not fully revealed in the reported opinions. Where an accused is apprehended in possession of contraband such as narcotics or bootleg liquor, his sole defense will usually turn on the legality of the search and seizure. If the district judge determines that they were proper, the accused will often plead guilty,[3] hoping for a lighter sentence, rather than gamble on the chance that the district judge might be reversed.[4] Similarly, where the search and seizure are held illegal, the Government, having no fight of appeal,[5] will often be obliged to dismiss the prosecution.

The basic right asserted in most cases involving search and seizure is, of course, protected by the fourth amendment, which provides that:

> 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.

Although the amendment encompasses arrest as well as search, its history shows that the founders of the Republic were much more concerned with freedom from arbitrary search than from arrest.[6]

In this day there is little to choose between the indignity of returning home to find police officers ransacking one's belongings and papers, and that of being arrested, possibly in late afternoon, and required to spend a night in jail before bail can be taken and an arraignment hearing held. Nonetheless, the events of the mid-18th century had focused the attention of the Framers primarily on the search for and seizure of evidence.

At early common law the search warrant was unknown and any unconsented entry onto the land of another was a trespass. The first use of the search warrant was confined to cases where the owner of chattels was willing to swear—with a suit for trespass certain to follow were he mistaken—that property stolen from him was lodged on the land of another. As Lord Camden stated,

> The owner must swear that the goods are lodged in such a place.—He must attend the execution of the warrant to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.[7]

From these beginnings the use of the search warrant gradually developed to allow search, not only for stolen property, but for any property which the private citizen was not permitted to possess. This included two main types of contraband which were subject to forfeiture to the Crown—goods upon which the proper tax had not been paid, and the means or instrumentalities of a crime.[8] In

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*Member, California, New York, and District of Columbia Bars.

[1] Cardozo, The Growth of the Law 5-6 (1924).

[2] During the past four terms, the Court has handed down eleven cases involving federal search and seizure, whereas in the seven terms before that, the Court considered only five.

[3] This fact explains in part why so many cases are terminated without trial by pleas of guilty. See Wood-Informed Relations in the Practice of Criminal Law, 62 Am. J. Sociology 48 (1956).

[4] Where facts are found on the basis of conflicting testimony, reversal is especially rare. See *Nichols* v. *United States*, 176 F. 2d 431 (8th Cir. 1949).

[5] *United States* v. *Mattingly*, 285 Fed. 922 (D.C. Cir. 1922). A right of appeal, however, is granted the government in narcotics cases. See 18 U.S.C. § 1404 (1958). In *United States* v. *Bush*, 283 F. 2d 51 (6th Cir. 1960), the court considered a government appeal in a bootlegging case. There, however, no one appears to have noticed the jurisdictional defect.

[6] The fourth amendment has also been applied to allow quashing of government subpoenas which are unreasonably broad in scope. See *Boyd* v. *United States*, 116 U.S. 616 (1886). This use of the fourth amendment occurs very rarely, however, See Petition of *Borden Co.*, 75 F. Supp. 857 (N.D. Ill. 1948).

[7] *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1067 (1765).

[8] A modern outgrowth of this principle can be found in Int. Rev. Code of 1954, § 7032.

each of these cases the property seized might also be used as evidence, but a necessary condition of the seizure was the fact that the citzien was for some reason not entitled to possess the property.

The attempt of Lord Hamilton, the Secretary of State, to broaden this right of search led to the landmark case of *Entick v. Carrington.*[9] There the Secretary had issued administrative search warrants presuming to authorize search of private homes and papers for defamatory material usable as evidence to convict for criminal and seditious libel. Armed with these, officers searched the home of one of the Secretary's political enemies.[10] In the subsequent suit for trespass the court held the administrative warrants to be illegal and affirmed the award of substantial damages stating,

> Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. . . .
>
> In the criminal law such a proceeding was never heard of; and yet there are some crimes, such as for instance murder, rape, robbery and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.[11]

In the Colonies, however, judicial intervention against such general searches was unavailable. During the French and Indian War, the British, to suppress smuggling, to secure revenue for the conduct of the war, and to prevent trade with the French West Indies, had issued writs of assistance in the nature of general search warrants permitting officers to search where they pleased for smuggled goods. James Otis resigned his post as attorney general of Massachusetts to carry on a legal battle against the offensive searches, but despite his efforts the courts sustained their power to issue the writs.[12]

That these searches and Otis's legal struggle against them had a significant impact on colonial thinking was emphasized by John Adams long after the Revolution: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the Child Independence was born." [13]

The behavior of the colonial legislatures provides other proof of just how galling the general warrants were to the framers of the Constitution. In 1776 no less than four of the Colonies enacted declarations of rights specifically providing against general search warrants.[14] These provisions provided the basis of the fourth amendment.

The preoccupation of the founders with search by government officials as distinguished from arrest is also shown by the behavior of the early Congresses. Although no provision was made for any federal law of arrest,[15] first the volume of Statutes at Large contains four acts [16] authorizing search warrants on oath before justices of the peace for daytime searches for various types of contraband, such as tax-unpaid liquors. Subsequent statutes permitted search warrants for books and papers relating to customs fraud,[17] counterfeit money,[18] and obscene literature.[19] It was not until 1917 that a general search warrant provision was enacted allowing search for stolen goods or property used in the commission of any felony.[20]

The present grounds for issuance of a search warrant, with certain exceptions scattered through the statutes,[21] are stated in rule 41 of the Federal Rules of

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[9] 19 Howell's State Trials 1029 (1765). See also *Money* v. *Leach*, 3 Burr. 1742 (1765); *Huckle* v. *Money*, 2 Wilson 205 (1763).
[10] See 3 Churchill, A History of the English Speaking Peoples 164–69 (1957).
[11] *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1073 (1765).
[12] See Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 364 (1921).
[13] Quoted in *Fraenkel*, id. at 365.
[14] See *Henry* v. *United States*, 361 U.S. 98, 100–01 (1959).
[15] See Orfield, Warrant of Arrest and Summons Upon Complaint in Federal Criminal Prodecure, 27 U. Cinc. L. Rev. 1, 20 (1958).
[16] Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43; Act of August 4, 1790, ch. 35, § 48, 1 Stat. 170; Act of March 3, 1791, ch. 15, § 32, 1 Stat. 207; Act of March 2, 1799, ch. 22, § 68, 1 Stat. 677.
[17] Act of March 3, 1863, ch. 76, § 7, 12 Stat. 740.
[18] Act of March 3, 1901, ch. 854, § 911, 31 Stat. 1337.
[19] Act of August 27, 1894, ch. 349, § 12, 28 Stat. 549.
[20] Act of June 15, 1917, ch. 30, tit. XI, 40 Stat. 228.
[21] 46 Stat. 752 (1930), 19 U.S.C. § 1595 (1958) (smuggled goods); 18 U.S.C. § 1405 (1958) (narcotics).

Criminal Procedure.[22] These rules, reflecting the common law development of the search warrant, provide that warrants may be issued to authorize search (1) for stolen or embezzled property, and property intended for use or which has been used as the means or instrumentality of committing a crime (2) where probable cause appears (3) from an affidavit made before a magistrate or United States Commissioner to believe that (4) at described primeses (5) the specifically identified property can be found.

Of these five restrictions it would appear that only the first cannot be justified by any desire to protect the privacy of the citizen. In effect, this requirement provides that no search warrant may be secured to discover evidence of a crime unless the evidence happens to fall into certain restricted categories, by far the most common of which is the instrumentality of the crime. For instance, a knife used in a stabbing is a legitimate object of search, since it is an instrumentality of a crime.[23] A blood-spattered garment, however, would in all probability not be a proper subject of search, although it might be equally persuasive of guilt.[24] A letter containing admissions of guilt would not be a proper object of search[25] unless it also conveyed information necessary or useful in the commission of the offense.[26]

A recent case provides an example of the application of the means and instrumentalities rule at its worst.[27] Petitioner, apparently a wholesale interstate dealer in obscene materials, moved to suppress certain obscene materials. The materials had been seized pursuant to a search warrant which alleged that they were intended for use in a conspiracy to transport obscene materials by common carrier in interstate commerce.[28] The court, however, drew a distinction between materials being used *as a means* of committing the conspiracy and being used *in* the conspiracy. "The difference," the court stated, "changes the character of the property for which the warrant is sought from that properly the subject of a warrant to merely evidentiary material." The court went on to hold—as is technically correct—that "the obscene materials cannot be said to be the means or instrumentality of depositing itself for an interstate shipment with any carrier." [29] Therefore, the evidence was ordered suppressed.

The requirement that the object seized be an instrumentality of crime owes its existence to the principle that such articles are forfeit to the government which in turn seems to be derived from the deodand of the early common law.[30] In the 13th century a metaphysical fault was imputed to an inanimate object such as a wagon or sword which had caused an injury. This fault made the object a deodand which could be seized, condemned, and after purification sold by the Crown. It is difficult to believe, as has been suggested,[31] that this metaphysical principle has been frozen into our Constitution. Rather it would seem that such a restriction on search, completely unrelated to protecting any legitimate interest in the privacy of the individual, would have been jettisoned years ago. Judge Learned Hand acknowledged this anomaly, but considered that the rule had value despite its irrationality, since any restriction on the right of search by government officials protected *pro tanto* the privacy of the individual.[32] The privacy of the individual,

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[22] "Rule 41. search and seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States Commissioner within the district where the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States or;

(2) Designed or intended for use or which is or has been used as the means of commiting a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., Sec. 957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

[23] See *Gouled* v. *United States*, 255 U.S. 298, 308 (1921).

[24] *Morrison* v. *United States*, 262 F. 2d 449 (D.C. Cir. 1958); but see *Morton* v. *United States*, 147 F. 2d 28 (D.C. Cir. 1945).

[25] *Woo Lai Chun* v. *United States*, 274 F. 2d 708 (9th Cir. 1960).

[26] Cf. *United States* v. *Clancy*, 276 F. 2d 617 (7th Cir. 1960), revised on other grounds, 365 U.S. 312 (1961).

[27] *United States* v. *Loft on 6th Floor Building*, 182 F. Supp. 322 (S.D.N.Y. 1960).

[28] 18 U.S.C. § 1462 (1958).

[29] *United States* v. *Loft on 6th Floor of Building*, 182 F. Supp. 322, 324-25 (S.D.N.Y. 1960).

[30] See 2 Pollock & Maitland, The H istory of English Law, 473 (2d ed. 1898).

[31] Schwartz, On Current Proposals to Legalize Wiretapping, 103 U. Pa. L. Rev. 157, 163 (1954).

[32] *United States* v. *Poller*, 43 F. 2d 911, 914 (2d Cir. 1930) ("Limitations on the fruit to be gathered tend to limit the quest itself").

however, would be just as well served by a restriction on search to the even-numbered days of the month. Presumably this would have an equal restrictive effect. And it would have the extra advantage of avoiding hair-splitting questions such as whether a passbook indicating the deposit of bank robbery loot was a fruit or instrumentality of the crime or merely evidence thereof.[33]

The four other requirements for a search warrant are more directly related to the purposes of the fourth amendment. The requirement that before the citizen's privacy can be invaded there must be sufficient reason or probable cause to believe that the search will be fruitful is, of course, an outgrowth of the principle that the rights of society to secure evidence against lawbreakers must be balanced against the right of the private citizen to be let alone. At least the right of search should be confined to situations where there is some objective reason to believe that the benefit to society will outweigh the invasion of the citizen's privacy.[34]

The third requirement—that the probable cause must be determined by a magistrate or a United States Commissioner before the search is undertaken—is basic to the entire concept of the search warrant. The policy determination made in the fourth amendment demands that, except in certain very restricted circumstances, the police officers engaged in the "relatively competitive enterprise of ferreting out crimes" [35] cannot themselves be the judge of when there exists probable cause to believe that a legitimate object of a search may be found. No matter how obviously a search may be in order, they must, in general,[36] present their evidence of probable cause to a dispassionate magistrate who himself must then make that determination, and specify the area and objects of the search.[37] A necessary corollary of this rule is that the doctrine of harmless error cannot apply. The entire purpose of the fourth amendment would be frustrated if officers could defend a search without warrant on the ground that since a search warrant clearly could have been procured the defendant had not been prejudiced by the failure to present evidence to the magistrate.

On the other hand, it should be realized that this requirement of resort to a warrant in cases where no magistrate would conceivably deny one can lead to difficult law enforcement problems. For example, let us say that an officer selling tickets to the policmen's ball glances through a window and observes a large pile of white powder, together with the typical paraphernalia of the narcotics peddler—hypodermic syringes, balances, and bindle paper. He is then in a most unenviable position. If he leaves to procure a search warrant, the narcotics may not be there when he returns. If he shouts to bystanders to fetch help he may alert an occupant of the house who could dispose of the narcotics down the toilet without a trace before the officer could enter the house. Lastly, if he enters the house without a warrant to seize the narcotics he will violate the fourth amendment. It is perhaps expecting too much of him to ask that he merely shrug his shoulders and philosophically conclude that his Hobson's choice is the price we must pay for the great guarantees of the fourth amendment.

The next requirement—that the warrant describe the premises to be searched—forces the police officers to do more than merely connect the objects of search with a prospective defendant. They must, in the usual case, produce before the magistrate probable cause to believe that the property subject to search and seizure is being kept at the specific place mentioned in the warrant. In the commission of certain offenses, such as the operation of stills, distinctive ordors emanate, relatively bulky products are produced, and large amounts of raw material are required. Therefore, the problem of locating the offending property is usually no more difficult than the problem of identifying and locating the offenders. However, the instrumentalities of other crimes such as narcotics and wagering tax violations are relatively small and easy to conceal. Should the "pusher" or runner" operate out of his home and one or more places of business it may be impossible for the

[33] *United States* v. *Howard*, 138 F. Supp. 376, 381 (D.C. Md. 1956).
Despite the large number of cases treating seizure of betting slips and other gambling paraphernalia no reported case has considered the question of what are the instrumentalities of evasion of the tax on wagers. See Int. Rev. Code of 1954, § 7201.

[34] See *Brinegar* v. *United States*, 338 U.S. 160, 183 (1949) (dissenting opinion) wherein Justice Jackson suggests that a lesser degree of probable cause should be necessary in searches involving more serious crimes. This suggestion has not been followed overtly in any reported federal case.

[35] *Johnson* v. *United States*, 333 U.S. 10, 14 (1948).

[36] The rule is usually stated to have an exception where circumstances such as the imminent destruction of evidence make resort to a magistrate impracticable. See *Johnson* v. *United States*, supra note 35, at 14. No case, however, has allowed the search of a dwelling on this ground. See *Eng Fung Jem* v. *United States*, 281 F. 2d 803 (9th Cir. 1960).

[37] *Marron* v. *United States*, 275 U.S. 192 (1927); *Woo Lai Chun* v. *United States*, 274 F. 2d 708 (9th Cir. 1960).

police officers to produce probable cause, regardless of their suspicions, that the offending property is at any given place. In such a case no search warrant will be procurable, despite the evidence connecting the individual with the crime.

A recent case out of the Court of Appeals for the District of Columbia provides an unusual example of the problems caused by this requirement.[38] Police officers had for some time kept one of a row of houses, 1106 18th Street NE., under surveillance. From the movements of well-known gamblers in and out of the house, together with deliveries being made to the house, they had ample probable cause to believe that 1106 18th Street NE., was being used as the center of a large illegal gambling operation. The officers procured a search warrant for 1106 18th Street NE. from the United States Commissioner, but upon executing the warrant they were surprised to find neither gambling paraphernalia nor gamblers in the house. This was especially baffling because the police had seen two known gamblers carrying large brown envelopes enter 1106 and from their surveillance of all the exits they knew that no one had left. The mystery was unravelled when on an upper floor of 1106 the police discovered that the wall between 1106 and 1108, the next house in the row, had been cut through. It was 1108 rather than 1106 that was the nerve center of the gambling operation and the members of the conspiracy had merely entered and left 1106 as a ruse to mislead the police. The ruse was successful; the search warrant for 1106 was held not to cover any entry into 1108. The evidence found on 1108 was therefore ordered suppressed.

The last requirement—that the warrant particularly describe the goods to be seized—serves to allow the magistrate control over the seizure as well as the search. In practical effect it is most often invoked to prevent the seizure of unlisted and usually unexpected items which are found in an otherwise legitimate search pursuant to warrant.[39] Here again the application of the harmless error concept to the seized evidence would defeat the application of the rule. Police officers, having legitimately discovered these extra objects could always place them under guard and then procure a search warrant for their seizure. On the other hand, since the primary evil aimed at by the fourth amendment is the invasion of privacy by means of the search as distinguished from the seizure, the courts have been reluctant to require the police to take this purely formal step. The lower federal courts, despite the flat statement to the contrary from the Supreme Court,[40] have evolved a rule that officers acting under a valid warrant may seize unspecified property reasonably related to the purpose of the search.[41]

Although the origins of the search warrant are deeply rooted in the common-law concepts of ownership and trespass, the scope of the fourth amendment has in the main been tailored to protect privacy, the primary concern of its Framers. The reference in the amendment to houses, papers, and effects makes it clear that not every intrusion upon private property[42] without a search warrant is prohibited even though at common law the simple entry onto the open field of another required a warrant.[43] Government officers today may be guilty of a technical trespass if they enter upon the open land of another, but none of the sanctions enforcing the fourth amendment will be invoked. It is not clear whether land within the curtilage, or fence surrounding the home,[44] is within the purview of the fourth amendment, and although the problem has been vigorously debated,[45] cases presenting the question have occurred only rarely. The most common rule extends the protection of the fourth amendment to all structures used in relation to a home or business,[46] whether or not within the curtilage,[47] and whether owned, leased, or merely occupied.[48]

Indeed, the fourth amendment has in some cases extended protection to the right of privacy in areas entirely unprotected by the common law. For example, even though mail may be in the custody and possession of the government, a search warrant is necessary before government officials may open any sealed first-class letter.[49] Automobiles, too, are protected from unreasonable search,

[38] *Keimingham* v. *United States*, 287 F. 2d 126 (D.C. Cir. 1960).
[39] See *United States* v. *Lester*, 21 F.R.D. 376, 382 (W.D. Pa. 1957).
[40] See *Marron* v. *United States*, 275 U.S. 192, 196 (1927).
[41] *United States* v. *Joseph*, 174 F. Supp. 539, 545 (E.D. Pa. 1959) and cases cited therein.
[42] *Hester* v. *United States*, 265 U.S. 57, 59 (1924).
[43] See *Walker* v. *United States*, 225 F.2d 447 (5th Cir. 1955).
[44] In *Polk* v. *United States*, No. 17,017, 9th Cir., May 23, 1961, the 9th Circuit remanded a case for further evidence on the "degree of privacy" the defendant enjoyed in his back yard.
[45] *Janney* v. *United States*, 206 F.2d 601, 603 (4th Cir. 1953).
[46] *Martin* v. *United States*, 155 F.2d 503, 505 (4th Cir. 1946).
[47] *United States* v. *Jeffers*, 342 U.S. 48 (1951).
[48] *Oliver* v. *United States*, 239 F.2d 818 (8th Cir. 1957). See Annot., 61 A.L.R.2d 1282 (1958).
[49] See *Carroll* v. *United States*, 267 U.S. 132, 156 (1925).

although in view of their great mobility the concept of reasonability is somewhat extended. Search without a warrant is allowed when police officers have probable cause to believe that objects subject to search will be found and no time is available to procure a search warrant.[50]

In one major area, however, the common-law concepts of trespass have been vigorously applied with little consideration for the privacy of the individual. Eavesdropping and "bugging" by electronic detecting and amplifying devices would seem to represent the ultimate invasion of privacy. These practices intrude on conversations so private they would never be reduced to writing. And since the victim is generally unaware of their occurrence, he cannot protest against them.[51] Because of these factors the courts, realizing the basic purposes of the fourth amendment, have had no trouble holding that in certain circumstances eavesdropping can amount to a search and seizure.[52] They have, however, imported the technical concepts of trespass into this field and have held that only where a physical invasion of the citizen's dwelling or office has occurred will any conversations overhead be treated as illegally obtained.[53] Thus, the police seem to be free to eavesdrop and "bug" at will, provided that they neither set foot on nor allow any physical part of their apparatus to project into the area protected by the fourth amendment.

It can be argued that hidden microphones or electronic devices are an essential tool of legitimate police investigation[54] and, contrariwise, that these modern devices provide the most reliable present threat of a 1984 model police state.[55] In neither of these cases are the technical requirements of trespass relevant. Although we must make some adjustment between the rights of society to apprehend lawbreakers and the rights of the individual to privacy, the rules of trespass do not provide any meaningful guides. Furthermore, in view of the rapidity of development in techniques of electronic detection and amplification of sound, it would seem that before very long almost every significant invasion of privacy in this area may be just as effectively made without a trespass as with.[56]

Since the Supreme Court has in more than one case attempted to free the fourth amendment from the shackles of the common law of trespass[57] it is not too much to hope that when the Court again turns to this problem it will, perhaps through the use of its rule-making power, fashion a more satisfactory rule. In deciding what shape this rule should take we encounter many problems. We must first distinguish conversations listened to with the consent and aid of one of the parties.[58] In this situation it is difficult to make out any invasion of privacy whether the conversation has taken place at the home of the non-consenting party or over the telephone. All that has happened is that the government has secured a mechanical means of guaranteeing the credibility of its informant who presumably would himself be available to testify as to the conversations.

Where neither of the parties consents, it has been argued that listening with an electronic device is different only in degree from the minimal invasion of privacy that results from carrying on a conversation in a public place or in such loud tones that the passers-by might overhear it. If such an analogy is valid it merely illuminates one more instance where a difference in degree sufficiently great becomes a difference in kind.

It is possible that a workable solution can be developed whereby a warrant showing probable cause would be required before any mechanical device—with or without a trespass—could be used to eavesdrop on a private conversation.[59] However, since the rapid advance in our technology has prevented satisfactory guides from being evolved over the years, any specific balancing would have to be based in great part upon a visceral reaction to eavesdropping.[60] It might well

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[50] *Brinegar* v. *United States*, 338 U.S. 160 (1949); *United States* v. *Roberts*, 90 F. Supp. 718 (E.D. Tenn. 1950).

[51] Wiretapping, which might logically be included here, has been held not covered by the protection of the fourth amendment. The citizen, however, is given even greater protections against the intrusion. See Kamisar, The Wiretapping-Evesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891 (1960).

[52] Compare *Goldman* v. *United States*, 316 U.S. 129, 134–135 (1942), with *Irvin* v. *California*, 347 U.S. 128, 132 (1954).

[53] *United States* v. *Silverman*, 166 F. Supp. 838 (D.D.C. 1958), *aff'd*, 275 F.2d 173 (D.C. Cir. 1960), *rev'd*, 365 U.S. 505 (1961).

[54] See Silver, The Wiretapping-evesdropping Problem: A Prosecutor's View, 44 Minn. L. Rev. 835 (1960); Statement of Herbert J. Miller, Jr., Assistant Attorney General in Charge of the Criminal Division, Department of Justice, on S. 1086, S. 1221, S. 1495 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, May 11, 1961, summarized in N.Y. Times, May 12, 1961, p. 16, col. 3.

[55] See Paulsen, Safeguards in the Law of Search and Seizure, 53 Nw. U.L. Rev. 65 (1957).

[56] See Dash, Schwartz & Knowlton, The Eavesdroppers 350 (1959).

[57] On *Lee* v. *United States*, 343 U.S. 747 (1952); *McGuire* v. *United States*, 273 U.S. 95 (1927).

[58] See *Rathbun* v. *United States*, 355 U.S. 107 (1957). See also *On Lee* v. *United States*, 343 U.S. 747 (1952).

[59] Cf. *Goldman* v. *United States*, 316 U.S. 129, 140 n.6 (1942) (dissenting opinion).

[60] See Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891 928 n.197 (1960). The professor suggests that this be done on a case-by-case basis without reference to the fourth amendment by means of the "supervisory power" of the Supreme Court.

be decided, as a result of this balancing, that the physical invasion of a private home for the purpose of eavesdropping should not be countenanced no matter how strong the showing of probable cause. On the other hand, it might be that certain crimes, such as kidnaping, require such immediate and decisive police action that they should be treated differently from the usual narcotics, bookmaking, and bootlegging offenses, and that in such cases a warrant should be permitted.

As if the practical problems involved were not enough, various writers have raised a conceptual one—that a conversation is mere evidence as distinguished from the instrumentality of a crime, and hence no warrant can constitutionally be issued directing its seizure "by eavesdropping." [61] Even if the means and instrumentalities test were of constitutional dimension there is no sensible reason to apply it to other than tangible evidence. To restrict government action unduly in the name of metaphysics is no better than to sacrifice the privacy of the individual to the common-law technicalities of tort law.

The Supreme Court this term considered a case presenting an admirable opportunity to shed some light on the problems of eavesdropping. In *Silverman* v. *United States*,[62] District of Columbia police had driven a spike approximately halfway through a party wall and using this as a pickup for their microphone were able to listen to conversations in the defendant's house. The District Court, possibly finding that the spike had not gone halfway through the wall and therefore had not trespassed on the defendant's property, held that there was no illegality in the eavesdropping. The Court of Appeals affirmed and the Supreme Court on certiorari reversed. In the short majority opinion by Justice Stewart the Court made it clear that the essential values involved are the rights of privacy under the fourth amendment, not the technicalities of property law. Nonetheless, the opinion distinguished previous cases permitting eavesdroping stating, that here there had been an "unauthorized encroachment," "physical invasion," and "actual intrusion," since one the spike microphone had touched the heating duct of the defendant's house it "became in effect a giant microphone running through the entire house." [63] The Court refused to reexamine *Goldman* v. *United States*,[64] where police had been permitted to eavesdrop, using a detectaphone attached to the wall of the office adjoining that of the defendant. As a matter of either logic or physics it is very difficult to see how the heating duct in *Silverman* "became in effect" any more a microphone than the walls in *Goldman*. Justice Douglas, in his concurrence, took the view that "the privacy of the home was invaded" and "no search warrant was obtained as required . . . Rule 41 of the Federal Rules of Criminal Procedure." [65] This view, however, is less than candid since at least under the present wording of rule 41 the means and instrumentalities test would bar any warrant for eavesdropping. In other words, it is safe to say that the problems of eavesdropping after the *Silverman* case are even more confused than before.

Although the fourth amendment was aimed primarily at protecting the citizen against the invasion of his privacy by police searching for evidence, its guarantees are somewhat broader. The fourth amendment applies to seizure as well as search and though the validity of a seizure will usually stand or fall with that of the search which preceded it, this is not always so. The most obvious example where a legal search may lead to an illegal seizure occurs when police, executing a search warrant, seize evidence not related to items described in the search warrant or not falling within the categories set out in rule 41.[66] Moreover, on one case where government agents rightfully searched a cabin, their seizure of all its contents and subsequent transportation of them some two hundred miles was held to be so unreasonable as to render all the contents—not merely the excess over a reasonable amount—illegally seized.[67] On its facts this decision is subject to much criticism, since the government agents had good reason to believe that there might be extremely small and well-concealed instruments of espionage in the cabin.[68] The general principle enunciated, however, remains valid; the reason-

[61] See Williams, The Wiretapping-Eavesdropping Problem: A Defense Counsel's View, 44 Minn. L. Rev. 855, 867 (1960).
[62] 365 U.S. 505 (1961).
[63] Id., at 509.
[64] 316 U.S. 129 (1942).
[65] *Silverman* v. *United States*, 365 U.S. 505, 513 (1961).
[66] *United States* v. *Lester*, 21 F.R.D. 376 (W.D. Pa. 1957).
[67] *Kremen* v. *United States*, 353 U.S. 346 (1957).
[68] See *Abel* v. *United States*, 362 U.S. 217 (1960).

ability of the seizure will be somewhat more narrowly limited than that of a search. Thus, where officers having legitimate business in a home or office see contraband in plain view, they cannot seize it without a warrant, but must guard it until a warrant can be procured.[69]

A questionable application of the distinction between search and seizure appears in one recent case [70] where an automobile was rightfully taken into custody by government officials. It was necessary to search the automobile so that its contents could be inventoried for eventual return to the defendant. Narcotics were found during the search. Despite the fact that these narcotics had rightfully come into possession of the government, the court held that the evidence was inadmissable. Apparently the only proper way that the agents could have proceeded was to secure a search warrant directed to the rightful custodian of all property checked with the police.[71] Only after the police had made this transfer from one department to another could the evidence have properly been introduced. It is difficult to see what legitimate interest of the defendant is protected by this procedure.

The remedies of the citizen against officials transcending the limits of the fourth amendment are three-fold. First, he can attempt to have criminal prosecution instituted against the offending officers under a federal statute providing criminal penalties for a wilfully illegal search by government officials.[72] The ineffectiveness of this means of redress is demonstrated by the fact that the annotations to this statute reveal no case where a prosecution for this crime has ever been instituted. A second and more likely remedy is by way of civil suit for trespass either under state law[73] or possibly under a right implied directly from the fourth amendment.[74] The difficulties inherent in this course have been catalogued elsewhere at length.[75] They include the notorious lack of sympathy on the part of juries toward the most usual victims of illegal search and the inability of many police officers to respond in damages. Furthermore, the broad language in several recent Supreme Court decisions denying recovery even for malicious torts by federal officials acting within the general scope of their authority can easily be interpreted to apply to the area of search and seizure.[76] At least until the Supreme Court chooses to qualify its recent language it would seem that yet another stumbling block has been placed in the path of the citizen seeking redress for an illegal search.

The third and, of course, the most common remedy for an illegal search or seizure is the suppression of any evidence so discovered or obtained. This sanction is at best an indirect one based on the theory that by removing the incentive to lawless criminal law enforcement, the lawlessness will cease [77] and further, that the most effective punishment for the offending policeman will be the reprimand he receives from his superiors for having provoked the Court into allowing the criminal to escape.[78]

This is a rather drastic sanction to be applied by a society strongly interested in the apprehension of criminals. On the other hand, if the use of such a severe sanction provides the only vindication of what we regard as a fundamental liberty we have no choice but to protect the liberty. In this decision, however, it is implicit that not every illegality by police officers will call for the suppression sanction.[79] With but two exceptions, the courts have insisted that only a constitutional guarantee is important enough to protect by invoking suppression.[80] It might be thought, also, that the suppression sanction would be applied only in those areas where it might be thought effective—willful, or at least negligent, violation by police officers of the fourth amendment. Such is not the case. Even though the requirements of the fourth amendment are sufficiently technical to have baffled many courts, the equivalent of absolute liability has been applied to police officers in these areas.[81]

It is not our purpose here to discuss further the pros and cons of this exclusionary rule. The rule has come under vigorous attack by both courts and commentators and has been vigorously defended as well.[82] In any event, for the foreseeable future it appears that the rule is firmly ingrained in the federal criminal law.

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[69] *United States* v. *Scott*, 149 F. Supp. 837, 841 (D.D.C. 1957).
[70] *Rent* v. *United States*, 209 F.2d 893 (5th Cir. 1954).
[71] Cf. *Travers* v. *United States*, 144 A.2d 889 (D.C. Mun. Ct. App. 1958).
[72] 18 U.S.C. § 2236 (1958).
[73] See Foote, Tort Remedies for Police Violations of Individual Rights, 39 MINN. L. REV. 493 (1955).
[74] See *Bell* v. *Hood*, 327 U.S. 678 (1946).
[75] See dissenting opinion of Justice Murphy in *Wolf* v. *Colorado*, 338 U.S. 25, 41-44 (1949).
[76] *Barr* v. *Matteo*, 360 U.S 564 (1959); *Howard* v. *Lyons*, 360 U.S. 593 (1959).
[77] Compare *Irvine* v. *California*, 347 U.S. 128 (1954) with *Elkins* v. *United States*, 364 U.S. 206 (1960).
[78] See *Burdeau* v. *McDowell*, 256 U.S. 465 (1921).
[79] See *Hart* v. *United States*, 130 F.2d 456 (D.C. Cir. 1942).
[80] See text following note 171 infra.
[81] See *Jones* v. *United States*, 337 U.S. 493 (1958).
[82] See Waite, The Legal Approach to Crime and Correction, 23 Law & Contempt. Prob. 594, 600-03 (1958).

This exclusionary rule is not only applied to the physical evidence gained by illegal seizure, but also to any testimony by government officials as to facts observed during the course of an illegal search.[83] Except in one area, the federal courts have almost uniformly applied the principle that it is necessary to deprive the prosecution of all evidence, testimonial or physical, obtained in violation of the fourth amendment, to prevent the police from gaining any improper advantage. This has even been carried to the extreme of reversing a conviction because of the admission of fingerprints taken from the defendant while under illegal arrest, although the prosecution could equally well have used copies of the same prints from the Federal Bureau of Investigation files.[84] As to statements of the accused however, the courts have somewhat inconsistently tended to admit in evidence admissions made under illegal arrest or during an illegal search so long as the statements were not coerced and so long as no unreasonable delay occurred between the arrest and arraignment.[85] The zealous enforcement of the suppression sanction here has had the anomalous result of giving police the impression that the rules governing search and seizure applied only when the material to be seized was intended for use as evidence. Since even illegally seized contraband is not returnable, officers have often felt free to ignore various legal requirements merely to get contraband, such as narcotics, out of circulation. Thus, if the defendant is arrested in possession of some narcotics, officers may subsequently search his home for more, realizing, however, that any narcotics discovered may not be used as evidence.

Although any search and seizure of private property without a search warrant is prima facie unlawful,[86] courts have been somewhat reluctant to apply the relatively severe sanction of letting the known criminal go free. As a result they have established various exceptions to palliate the effect of the suppression rule. Not only do trivial defects in the search warrant [87] or in the search [88] not call for the invocation of the suppression sanction, but even where serious violations of the fourth amendment have occurred the defendant must show his standing to invoke them.[89] It is true that the ultimate means of discouraging illegal searches would be to render all evidence illegally seized inadmissible in all proceedings. But since the suppression sanction is in great part a vindication of the individual's rights it is reasonable to restrict it to the use of only those individuals whose rights of privacy have been violated, even though others may have a very direct and important interest in showing the illegality of the search and seizure. Accordingly, until very recently the courts have insisted that before a defendant could move to suppress evidence he had to show that the evidence seized belonged to him or was taken from his possession or property. Though on its surface this requirement seems quite reasonable, it placed many defendants in a practical dilemma. To secure standing to ask the court for the suppression of evidence, the defendant would often have to show his possession or ownership of that evidence. Unfortunately for him, if he then failed in his suppression motion he would in many common situations have proved the case against himself, since mere possession of contraband such as narcotics or bootlegging equipment is sufficient to constitute a crime.[90] The Supreme Court last term finally freed the defendant from his quandry by holding that at least in cases where possession itself is the crime charged, the defendant need not prove his possession in order to ask that the evidence be suppressed.[91] Where possession is not the crime charged, but is merely persuasive evidence of guilt, it is not clear whether the defendant must still prove an important practical element in the prosecution's case before he can invoke his rights under the fourth amendment.[92] In any event, where evidence is illegally seized from the possession of one not on trial, the rule denying standing to the defendant is still in force.

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[83] *Williams* v. *United States*, 263 F.2d 487, 489 (D.C. Cir. 1959).
[84] *Bynum* v. *United States*, 262 F.2d 465 (D.C. Cir. 1958).
[85] *Smith* v. *United States*, 254 F.2d 751, 758 (D.C. Cir. 1958).
[86] *United States* v. *Roberts*, 197 F. Supp. 478 (D.D.C. 1959).
[87] See *Pera* v. *United States* 11 F.2d 772 (9th Cir. 1926). But see *United States* v. *Hinton*, 219 F.2d 324, 326 (7th Cir. 1955).
[88] *McGuire* v. *United States*, 273 U.S. 95, 98 (1927).
[89] *Reisgo* v. *United States*, 285 Fed. 740 (5th Cir. 1923).
[90] This dilemma has been aptly described by Judge Learned Hand: "Men may wince at admitting that they were the owners of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question." *Connolly* v. *Medalie*, 58 F.2d 629, 630 (2d Cir. 1932).
[91] *Jones* v. *United States*, 362 U.S. 257 (1960).
[92] Id. at 265.

Another relaxation of the suppression sanction is based on the truism that the citizen cannot complain of any search to which he has consented. Although this principle in the abstract is obvious, it is often very difficult to apply in practice. The average person opening his door will rarely object when burly police officers appear and ask whether they may search his house. And although it may be argued that these hard-won rights belong only to those who will at least speak up for them, the law does not demand such courage.[93] On the other hand, there are cases where genuine consent will for some reason be freely and voluntarily given.[94] The most difficult cases arise where the owner of the premises to be searched is himself under arrest. And it is here that the widest divergence of opinion among various courts appears. In one case a court of appeals held that genuine consent to a search had been given by the defendant who was under arrest, even though the consent had been extracted as a condition of his being allowed to visit his family before arraignment.[95] Another court of appeals held that even though the defendant had stated, "I have nothing to hide. You can go there and see for yourself," the officers had no right to presume consent since the words might have been, "but the false bravado of the small-time criminal." [96]

By far the most important relaxation of the suppression sanction, however is the search incident to arrest, a judicially created exception to the requirement of the search warrant. The exception today is so broad that in great part it swallows up the rule and it is safe to say that the number of searches which are upheld under this exception far exceeds the number where a search warrant has been procured.

The present law concerning the search incident to arrest is the product of an unusually tortuous development by the Supreme Court, overlapping, in part, the time during which the Court was formalizing the rigid requirements of the Federal Rules of Criminal Procedure as to the search warrant. At common law police officers might, without a search warrant, lawfully search the person and clothing of someone under lawful arrest.[97] This right was said to be founded in necessity since a search would have to be made in any event for concealed weapons or other means of making escape. The first mention by the Supreme Court of this narrow exception to the requirement of a search warrant occurred in *Weeks* v. *United States*,[98] where the Court stated in a dictum that it was not concerned there with "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested." [99] The first expansion of this doctrine occurred in 1925 when the Court commented that search is allowed of "whatever is found upon [the] . . . person or in [the] . . . control" of the individual arrested.[100] The next term, again in dictum, the Court wrote that the exception covered "the right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made . . . ." [101] The gradually expanding dicta of the Supreme Court—from person to control to place of arrest—were first embodied in the holding in *Marron* v. *United States* [102] two years later. There, agents armed with a search warrant to search for and seize liquor arrested the proprietor of a saloon and in making their search came upon certain records of the illegal business. The Court, after holding that the search warrant did not authorize the agents to seize the records, held that the records were nonetheless properly subject to seizure as the instrumentalities of a crime uncovered in the search incident to the arrest of the proprietor.

Two subsequent cases [103] greatly restricted the *Marron* case by holding the incident to arrest exception inapplicable in searches not essentially different from the search in *Marron*. One of these cases distinguished *Marron* on grounds that the evidence seized there was picked up without a search because it was in the plain view of the arresting officials.[104] Since the record in *Marron* shows that the

[93] See *Higgins* v. *United States*, 209 F.2d 819 (D.C. Cir. 1954).
[94] See *United States* v. *Mitchell*, 322 U.S. 65 (1944); *United States* v. *Martin*, 176 F. Supp. 262, 268 (S.D.N.Y. 1959).
[95] *United States* v. *Perez*, 242 F.2d 867, 870 (2d Cir. 1957).
[96] *Judd* v. *United States*, 190 F.2d 649, 651 (D.C. Cir. 1951).
[97] See *Dillon* v. *O'Brien*, 16 Cox Cr. Cas. 245 (1887).
[98] 232 U.S. 383 (1914).
[99] Id. at 392.
[100] *Carroll* v. *United States*, 267 U.S. 132, 158 (1925).
[101] *Agnello* v. *United States*, 269 U.S. 20, 30 (1925).
[102] 275 U.S. 192 (1927).
[103] *Go-Bart Co.* v. *United States*, 282 U.S. 344 (1931); *United States* v. *Lefkowitz*, 285 U.S. 452 (1932).
[104] *United States* v. *Lefkowitz*, supra note 103, at 465.

evidence was in plain view only because the prohibition agents happened to be looking in a closet,[105] most courts considered the *Marron* case as at least partially overruled.[106] The law remained in this state until *Harris* v. *United States*,[107] where the Court reaffirmed *Marron* and upheld a search where officers, armed only with a warrant of arrest for a crime involving a forged check, arrested the defendant in his living room and proceeded to search his entire apartment. They found in the bedroom a number of forged selective service registration cards and Harris was successfully prosecuted for the entirely different crime of possession of these cards.

The *Harris* case did not remain unchallenged for long. Two years later it was emasculated by *Trupiano* v. *United States*,[108] where the Court enunciated the rule that no search could be justified as incident to arrest if it were "practicable" to obtain a search warrant. Acquisition of a search warrant was practicable, the Court stated, where sufficient time existed to obtain one. Were the *Trupiano* ruling merely a statement that officers must consult a magistrate before searching after an arrest it would have been a time-consuming but not a serious change in the law. However, the swearing out of a search warrant requires some probable cause to believe that the search at a given place will be successful, and the mere fact that the defendant was arrested there is not enough. Thus, since it is more lack of grounds than lack of time which prevents the officers from swearing out a search warrant, the *Trupiano* ruling for all practical purposes eliminated the incident to arrest exception. *Harris* was distinguished on two grounds, neither of which appears to be substantial, the Court stating that "we do not take occasion here to re-examine the situation involved in *Harris* v. *United States*." [109]

Two years later, in *United States* v. *Rabinowitz*,[110] the Court was confronted by a situation considerably more favorable to the Government than that in *Harris*. In *Rabinowitz*, federal agents armed with an arrest warrant based upon a complaint charging possession of forged stamps had arrested the defendant in his office, and after a search found the very stamps which supported the charge in the arrest warrant. The Second Circuit, however, held the search invalid [111] on the basis of *Trupiano*. On appeal, the Supreme Court faced the issue and agreed that *Trupiano* and *Harris* could not stand together. It, however, overruled *Trupiano*, leading Justice Frankfurter to remark bitterly, "especially ought the Court not reinforce needlessly the instability of our day." [112] The *Rabinowitz* case has gone unchallenged since, and no Supreme Court case since has struck down a search accompanying a lawful arrest.[113]

Furthermore, although *Rabinowitz* merely held that the practicability of obtaining a search warrant did not alone vitiate a search incident to arrest, the lower courts have greatly extended this holding. In *Rabinowitz* the Court relied heavily on certain other factors in support of the search. First, the search was limited in scope to a small room; second, the room was entirely under the control of the defendant; third, it was a business office to which the public was invited; and lastly, the objects of the search were specific articles, the possession of which was a crime. Subsequent lower court cases, however, have expanded the *Rabinowtiz* rule to permit the search of an entire house as incident to a lawful arrest within the home.[114] In addition, whether or not the possession of the property searched for was a crime has been held immaterial, providing the property was subject to seizure on some other ground.[115] Finally, most lower courts have treated the practicability of securing a search warrant as completely irrelevant where the search was made incident to a lawful arrest.[116]

With the full flowering of the search incident to arrest doctrine the protections set up by the rules concerning search warrants become much less of an impediment to police officers. In many cases an arrest warrant—issued under much more lax conditions—would serve not only as well, but better.

Officers making a search incident to arrest are not required to give an inventory of seized evidence.[117] Not only will they not be required to state in advance

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[105] *Marron* v. *United States*, 275 U.S. 192, 199 (1927).
[106] See In re *Phoenix Cereal Beverage Co.*, 58 F. 2d 953 (2d Cir. 1932).
[107] 331 U.S. 145 (1947).
[108] 334 U.S. 699 (1948).
[109] Id. at 708.
[110] 339 U.S. 56 (1950).
[111] *Rabinowitz* v. *United States*, 176 F. 2d 732 (2d Cir. 1949) (per L. Hand).
[112] *United States* v. *Rabinowitz*, 339 U.S. 56 (1950).
[113] This issue, among others, was presented in *Leahy* v. *United States*, cert. granted, 363 U.S. 810 (1960), petition for cert. dismissed on motion of petitioner, 364 U.S. 945 (1961).
[114] *Williams* v. *United States*, 273 F. 2d 781 (9th Cir. 1959).
[115] *Townsend* v. *United States*, 271 F. 2d 445 (4th Cir. 1959) (obscene literature).
[116] See *Kernick* v. *United States*, 242 F. 2d 818 (8th Cir. 1957).
[117] *Smith* v. *United States*, 254 F. 2d 751, 768 (D.C. Cir. 1958).

exactly what they intend to seize, but the search incident to arrest, as in *Harris*, may turn up evidence of crimes entirely different from those specified in the arrest warrant. This is not to suggest that federal officers under the pretext of serving an arrest warrant for one crime can search the home of a defendant to discover evidence of an entirely different crime.[118] On the other hand, the Supreme Court has recently held that cooperation between investigative branches of government enforcing different statutes does not invalidate an arrest by one branch which turns up evidence useful in a prosecution initiated by the other.[119] To be sure, the Court stated that no bad faith on the part of the government officials can appear, but it will remain for subsequent decisions to determine just what is meant by bad faith. Where an arrest by one branch of the government is legal and the subsequent search also legal, it seems difficult to hold that the officers' hope of finding proof of other crimes would render a search invalid.[120]

In practical effect by far the most important relaxation of the requirement of a search warrant is that police officers making a search incident to arrest do not have to establish, in advance, probable cause to believe that the objects to be seized are at the place of arrest. If the arrest takes place, the search can then be made incident thereto. Although a District of Columbia case held that the officers could not deliberately arrange the place of arrest so as to be able to make a search incident thereto, the Government there was unable to justify the place of arrest on any other grounds.[121] In most cases, however, where police officers do not avoid obvious and safe opportunities to arrest a defendant and where they make their arrest before beginning any search,[122] the courts have not questioned their judgment and have held the search proper as one incident to an arrest.[123] This state of the law has been ironically summarized by Judge Learned Hand: "it is a small consolation to know that one's papers are safe only as one is not at home." [124]

Since the validity of a search incident to arrest will depend in great part on the validity of the underlying arrest, the arrest warrant becomes of basic importance in the problems of search and seizure.

Although the origins of the arrest warrant are obscure, it probably developed out of the hue and cry of early common law.[125] In any event, from the founding of the Republic [126] until 1945, when the Federal Rules of Criminal Procedure became effective, the grounds for and the effects of an arrest warrant were governed entirely by state law.[127] The Federal Rules of Criminal Procedure, which in this respect codified the most common state practice, provided for a warrant of arrest in three situations, (1) after an indictment; [128] (2) after an information filed in court under oath; [129] and (3) pursuant to a complaint sworn to before a United States Commissioner.[130] The last of these is, of course, the usual arrest warrant prior to formal criminal charge.

The arrest warrant based on the complaint is provided for in rules 3 and 4 of the Federal Rules of Criminal Procedure. Rule 3 provides:

> The complaint is a written statement of the essential facts constituting the offense charged. It should be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4 allows the issuance of a warrant of arrest by the Commissioner where the complaint indicates "there is probable cause to believe that an offense has been committed" by the defendant. The words of rule 4 would appear to indicate that, as in the case of the search warrant, the Commissioner must act on the basis of facts set out in affidavit form on the face of the complaint. Since a court reporter

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[118] But see *Wilson* v. *State*, 161 N.E. 2d 484 (Ind. 1959) (arrest for parking violation—search turned up narcotics).

[119] *Abel* v. *United States*, 362 U.S. 217 (1960).

[120] See *Charles* v. *United States*, 278 F. 2d 386, 388 (9th Cir. 1960). But see *Taglavore* v. *United States*, No. 17,214, 9th Cir., June 13, 1961 (arrest warrant for minor traffic violation did not authorize seizure of narcotics where arrest warrant was not procured in good faith).

[121] *McNight* v. *United States*, 183 F. 2d 977 (D.C. Cir. 1950). No other court of appeals has followed the lead of the District of Columbia Circuit in this matter.

[122] See *Lee* v. *United States*, 232 F. 2d 354 (D.C. Cir. 1956).

[123] There appears to be a trend toward examining more closely the search incident to arrest. See *Gilbert* v. *United States*, decided March 30, 1961 (9th Cir.).

[124] *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203 (2d Cir. 1926).

[125] See *People* v. *Chiagles*, 237 N.Y. 193, 196, 142 N.E. 583, 584 (1923).

[126] 1 Ops. Att'y Gen. 85, 86 (1798); *United States* v. *Ewing*, 140 U.S. 142, 143 (1891).

[127] See Orfield, Warrant of Arrest and Summons Upon Complaint in Federal Criminal Procedure, 27 U. Cinc. L. Rev. 1 (1958).

[128] Fed. R. Crim. p. 9(a).

[129] Ibid.

[130] Fed. R. Crim. p. 4.

is not usually present before the Commissioner this requirement would facilitate review. Nonetheless, until very recently it was generally assumed that the taking of oral testimony by the Commissioner would be sufficient to supplement a written complaint which merely in general terms charged the accused with the commission of a crime.[131]

In only one Supreme Court case has the validity of such a Commissioner's complaint been challenged.[132] In that case the arrest warrant was founded upon a complaint which recited the violation merely in the words of the statute. Furthermore, nothing on the face of the complaint indicated that the Commissioner had even taken testimony bearing upon the issue of probable cause. The Court, without deciding whether the complaint itself had to contain facts showing probable cause, held that at least the complaint should show that the Commissioner had considered evidence on the issue.

Since the Supreme Court has this term sustained a deportation arrest warrant issued by an executive official [133] it would seem irrational to demand more stringent protections where the determination is made by an independent semi-judicial officer. On the other hand, the upholding of the executive arrest warrant was based in great part on the fact that deportation was "civil" rather than "criminal" in nature. Furthermore, the question of what kind of a showing was required to authorize the executive warrant was neither raised nor considered by the Court. When this issue arises it may be that a high degree of probable cause set out in affidavit form will also be required for issuance of executive warrants.

Although the adherence to rigid requirements for obtaining an arrest warrant would appear to have a salutary effect in view of the diminished necessity for a search warrant, a statutory development extending over the past fifteen years has made even an arrest warrant unnecessary in the great majority of cases.[134] To understand this development, it must be remembered that the right of the federal officer to arrest without a warrant (or with a defective warrant) is, in the absence of some governing congressional enactment, controlled by state law.[135] Since until relatively recently there were very few such enactments the powers of federal officials would vary greatly from state to state. In some states the common law of arrest is still in force.[136] Under it a peace officer is entitled to arrest for a felony without a warrant where he has reasonable grounds to believe that the person arrested has committed or is committing a felony.[137] The private citizen under the common law can arrest for a felony under exactly the same conditions as could the peace officer with one minor restriction. The felony must indeed have been committed.[138] As to misdemeanors, the powers of the private citizen and the peace officer are, at common law, exactly the same.[139] Both can arrest without a warrant only for misdemeanors amounting to breaches of the peace committed in their presence. A further qualification to this misdemeanor rule is that, unlike the arrest for a felony, the arrest for a misdemeanor must be made immediately or as soon as practicable after the commission of a crime.[140] In all other cases an arrest warrant is necessary to arrest for a misdemeanor.

Were the common-law rules of arrest in force in all states the primary argument for a federal law of arrest would be only that the common-law rules are relatively unsatisfactory. Certainly it is difficult to assert that these rules have any particular rational basis today. Although they may have been a satisfactory adjustment between the right of the citizen to sue for invasion of his privacy by trespass or false imprisonment and the interest of the government in apprehending criminals, it is not so clear that the same technical standards of legal arrest should apply where the sole question concerns the application of the exclusionary rule.

First of all, the rigid rules as to misdemeanors, though they have had little effect on federal officials, have made local law enforcement in many areas ineffectual. It is not coincidence that many of the greatest local law enforcement problems—gambling, prostitution, and serious traffic offenses, such as drunken and hit-and-run driving—are misdemeanors.

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[131] See Administrative Office of the United States Courts, Manual for United States Commissioners 27–30 (1948).
[132] *Giordenello* v. *United States*, 357 U.S. 480 (1958).
[133] *Abel* v. *United States*, 362 U.S. 217 (1960).
[134] See Warner, *Investigating the Law of Arrest*, 26 A.B.A.J. 151, 152 (1940) ("the vast majority of arrests are made without a warrant . . . .").
[135] *United States* v. *Di Re*, 332 U.S. 581, 589 (1948).
[136] *E.g.*, Minn. Stat. Ann. §§ 629.34, 629.37 (1947).
[137] *Bell* v. *United States*, 254 F.2d 82 (D.C. Cir. 1958).
[138] See Minn. Stat. Ann. § 629.37 (1947).
[139] 9 Halsbury's Laws of England para. 117 (2d ed. 1933).
[140] See *Smith* v. *State*, 228 Miss. 476, 87 So. 2d 917 (1956) (one-half hour delay too great). See Annot., 58 A.L.R.2d 1052 (1958).

On the other hand, the broad powers of arrest without a warrant for felonies may have been quite reasonable when there were only six common-law felonies, all of which involved either violence or some great threat to the state. These powers are more difficult to justify today when the great bulk of non-regulatory federal crimes—ranging from false statements to govenrment officials [141] through almost all narcotics and bootlegging offences to the mailing of obscene photographs [142]—are felonies. Moreover, the great distinctions made between the powers arrest for felonies and for misdemeanors are not matched by any clarity in the differences between the types of crime themselves. In most states the difference between misdemeanor and felony theft depends upon the exact value of the material stolen.[143] In gambling offenses the difference often depends upon whether the defendant has been previously convicted.[144]

Dissatisfaction with the common-law rules of arrest has created another problem—lack of uniformity. Many states have attempted to improve them in varying ways. Typical of these modifications is the rule which allows the private citizen to arrest only for an offense—felony or misdemeanor—committed in his presence.[145] In other jurisdictions, the right to arrest without a warrant for a felony has been contracted to cases where for some reason, such as the imminent escape of the defendant, it is impractical to secure an arrest warrant.[146] A factor further complicating this lack of uniformity is the differing characterizations of the federal officer in different states. In most the federal officer is merely a private person with no greater power of arrest than the ordinary private citizen,[147] while in some he is a peace officer with powers similar to those of the deputy sheriff.[148]

In view of the many hyperfine distinctions drawn in the state laws of arrest and the wide variations from jurisdiction to jurisdiction, it was not at all unreasonable for Congress to relieve federal officers from subjugation to state law and to create instead a rational modern federal law of arrest. Unfortunately, as the statutory development shows, Congress had no coherent plan to accomplish this. In 1935 United States Marshals, whose powers had previously been determined by state law, were given federal power to make an arrest without warrant for a felony where that felony had indeed been committed.[149] In 1948 this power was expanded by eliminating the requirement that the felony must have actually been committed.[150] Since there are only approximately 800 Marshals and Deputy Marshals, most of whose duties are confined to serving civil complaints and subponeas, keeping records, and transporting federal prisoners, their right to arrest without a warrant has had little practical impact and has rarely been litigated.[151] The right of arrest of the some 6,000 Federal Bureau of Investigation agents is somewhat more important. In 1934 FBI agents were given federal power to arrest for a felony actually committed where it reasonably appeared that the person arrested was likely to escape before a warrant could be obtained.[152] In the ensuing years this power was expanded in three directions. First, in 1948 the restriction that the felony must indeed have been committed was removed.[153] Second, in 1951, as a result of two cases in which the Second [154] and District of Columbia [155] Circuits came to opposite conclusions as to the legality of the same arrest, the requirement that the person arrested be likely to escape was removed.[156] Third, the right of arrest without a warrant was extended even to misdemeanors not amounting to breaches of the peace.[157] Since 1951 the authority of almost all federal law enforcement agencies—with the notable exception of the Postal Inspection Service [158]—has been broadened by statute to be as great or greater than the already broad common law of arrest without a warrant.[159]

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[141] 18 U.S.C. § 1001 (1958).
[142] 18 U.S.C. § 1461 (1958).
[143] *E.g.*, Ill. Rev. Stat. ch. 38, §§ 389, 585 (1959) (larcency of less than $300 is misdemeanor).
[144] See Ill. Rev. Stat. ch. 38, §§ 346, 585 (1959) (3d gambling offense is felony).
[145] *E.g.*, Ill. Rev. Stat. ch. 38, § 657 (1959).
[146] See Texas Code Crim. Proc. art. 215 (1948).
[147] See, *e.g.*, Cal. Pen. Code § 817; N.Y. Code Crim. Proc. § 154.
[148] Wis. Stat. § 939.22 (1957).
[149] Act of June 15, 1935, ch. 259, § 2, 49 Stat. 378 (now U.S.C. § 3053 (1958)).
[150] 18 U.S.C. § 3053 (1958).
[151] Needless to say this situation may change drastically if Deputy U.S. Marshals are used to keep order during desegregation disputes. See N.Y. Times, May 23, 1961, p. 1, col. 6.
[152] Act of June 18, 1934, ch. 595, 48 Stat. 1008 (now 18 U.S.C. § 3052 (1958)).
[153] Act of June 25, 1948, ch. 645, 62 Stat. 817 (enacting 18 U.S.C. § 3052).
[154] *United States* v. *Coplon*, 185 F.2d 629 (2d Cir. 1950).
[155] *Coplon* v. *United States*, 191 F.2d 739 (D.C. Cir. 1951).
[156] 18 U.S.C. § 3052 (1958).
[157] 18 U.S.C. § 3052 (1958).
[158] See Macris, The Silent Investigators (1959).
[159] 18 U.S.C. § 3056 (1958), as amended, 18 U.S.C. § 3056 (Supp. I, 1959) (Secret Service).

We may then ask just what good is an arrest warrant—or more precisely, when will a police officer have greater power with an arrest warrant than without one. The answer, strangely enough, is almost never. True, no federal officer can arrest for a misdemeanor committed outside of his presence and for officers other than Federal Bureau of Investigation agents, an arrest warrant is necessary for almost all misdemeanors not amounting to breaches of the peace. In the usual cases of arrest for a felony, however, the only advantage of an arrest warrant is that the officer armed with it need not himself know the facts constituting probable cause to believe that the person to be arrested had committed the crime. However, since two recent Supreme Court decisions [160] have held that hearsay information from a reliable informant is sufficient to constitute probable cause, the investigative officer making the arrest needs only to have had the probable cause informally communicated to him by another agent—presumably reliable—or have examined his own agency's files in the matter. Since in the usual case the agent would not be making the arrest under any other circumstances, the arrest warrant can be seen to have almost no value.[161]

As a practical matter an arrest warrant in some cases may even prove a disadvantage to arresting officers. Where officers have both an arrest warrant for a misdemeanor and probable cause to arrest for a felony, the arrest may be held illegal if the warrant is technically defective. Although the officers without any warrant may arrest for a felony, the presence of the misdemeanor warrant may be held to bar them from claiming a felony arrest.[162] Furthermore, according to a recent court of appeals decision, federal officers may be prevented from testifying in a state prosecution concerning illegally seized evidence only if they have seized the evidence while armed with a warrant.[163] In cases where an illegal search and seizure are made with no warrant at all, according to this decision, the defendant cannot enjoin the use of the evidence in the state court.

It is no means clear that this anomalous condition of the law will be allowed to continue much longer,[164] although an attempt to provide District of Columbia police with an incentive to get an arrest warrant has apparently been abandoned. In *Accarino v. United States* [165] the Court of Appeals for the District of Columbia Circuit held that police officers without a warrant may not enter a dwelling—either violently or peacefully—to make an arrest, unless there are some circumstances necessitating quick action so that resort to a magistrate is impracticable. In *Morrison v. United States* [166] this rule was watered down by the implication that officers might indeed enter the dwelling without a warrant if they were positive that their quarry was within. More recently the District of Columbia Circuit has allowed officers without a warrant to enter a dwelling to make an arrest even though they could not be sure the defendant was within and even though no circumstances necessitated quick action.[167] Several courts, however, have recently hinted that any arrest without a warrant, whether or not in a dwelling, will be held to require a higher degree of probable cause in those cases where a resort to a magistrate would have been practicable.[168] Moreover, in an effort to encourage police to procure a warrant, two courts of appeals have recently revived a rule giving a type of presumptive validity to a Commissioner's finding of probable cause. In one the court stated that the decision of the Commissioner as to probable cause can be the decisive factor where that question is close.[169] Another court of appeals has gone further and stated that the judgment of the Commissioner as to probable cause is conclusive unless arbitrarily exercised.[170] In view of the fact that most courts have heretofore regarded the question of probable cause as a legal one within their purview, it is difficult to say how this effort to encourage police to obtain warrants will fare.[171]

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[160] *Draper* v. *United States*, 358 U.S. 307 (1959); *Jones* v. *United States*, 362 U.S. 257, 270 (1960).

[161] In the common case where the agent after such communication still did not have probable cause no arrest could be made without a warrant. Presumably in such a case no arrest warrant could be procured either.

[162] Cf. *Clay* v. *United States*, 239 F.2d 196 (5th Cir. 1956); but cf. *Donahue* v. *United States*, 56 F.2d 94 (9th Cir. 1932).

[163] *Wilson* v. *Schnettler*, 275 F.2d 932 (7th Cir. 1960), aff'd on other grounds, 365 U.S. 381 (1961).

[164] The court in *Bolger* v. *United States*, 189 F. Supp. 237 (S.D.N.Y.1960) expressly refused to follow the view of the 7th Circuit in Wilson v. Schnettler, supra note 163.

[165] 179 F.2d 456 (D.C. Cir. 1949).

[166] 262 F.2d 449 (D.C. Cir. 1958).

[167] *Washington* v. *United States*, 263 F.2d 742 (D.C. Cir. 1959). See also *Smith* v. *United States*, 254 F.2d 751 D.C. Cir. 1958).

[168] *Clay* v. *United States*, 239 F.2d 196 (5th Cir. 1956); *Hopper* v. *United States*, 267 F.2d 904 (9th Cir. 1959). See also *Smith* v. *United States*, 254 F.2d 751, 754 (D.C. Cir. 1958); *United States* v. *Volkell*, 251 F.2d 333 (2d Cir. 1958).

[169] *United States* v. *Ramirez*, 279 F.2d 712, 716 (2d Cir. 1960).

[170] *Evans* v. *United States*, 242 F.2d 534, 536 (6th Cir. 1957).

[171] See *Steele* v. *United States* No. 2, 267 U.S. 505 (1925); *United States* v. *Office No. 508 Ricou Brewster Bldg.*, 119 F. Supp. 24 (W.D. La. 1954); but see *Gracie* v. *United States*, 15 F.2d 644 (1st Cir. 1926).

Until very recently the fourth amendment was the only ground for suppressing probative and relevant evidence. The suppression sanction, however, has been applied lately in two non-constitutional areas. The first of these involves rule 5(a) of the Federal Rules of Criminal Procedure which requires that a person arrested be brought before a United States Commissioner and arraigned without unreasonable delay. The suppression sanction here was originally invoked in *McNabb v. United States* [172] to exclude a confession made during a long period of detention without arraignment. This exclusionary rule resulted primarily from the feeling of the Court that any uncontrolled period of custody in police officers' care was replete with such dangers of coercion, both physical and psychological, that no statements made by the accused under illegal detention before arraignment should be admissible.

The use of suppression here can be defended on two grounds. First, although rule 5(a) is not of constitutional dimension it has strong constitutional overtones. The interest of society in preventing the use of any type of coerced confession is so great that even where coercion is only a possibility, we must make completely certain that the confession not be used. Secondly, it is not unreasonable to deny to the prosecution the use of a statement which would not have existed had rule 5(a) been complied with.[173] This is somewhat different from denying to the prosecution evidence which merely might not have been found at that time had the illegal search and seizure not taken place.

Although the suppression sanction here has been applied almost exclusively to confessional evidence, a recent Second Circuit case has held that even physical evidence procured from the accused during a period of illegal delay should be suppressed.[174] This rule has been criticized as an irrational extension of the *McNabb* doctrine, contributing in no way to the purposes of that rule, since obviously the physical evidence would not be subject to the unreliability of a coerced confession.[175] This criticism, however, is not completely valid since a subsidiary purpose of the *McNabb* rule was to discourage illegal arrests without probable cause by officials who might thereafter attempt to get the necessary evidence either from the lips of the accused or otherwise, before it was necessary to begin the judicial proceedings by arraignment.[176] It is too early to tell whether other courts will follow the lead of the Second Circuit in this matter or whether they will hold that the disadvantages of applying the suppression sanction will in this case outweigh the more indirect effects of its application.

The second non-constitutional ground for invoking the suppression sanction is the relatively little known section 3109 of title 18, United States Code, which provides, "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance. . . ."

Although on its face this statute merely grants certain powers to an officer executing a search warrant, the venerable common-law history of this enactment and its predecessor[177] is much broader. At common law after *Semayne's Case*[178] in 1603, no officer executing a search warrant or an arrest warrant, or arresting without a warrant,[179] could force his way into a private dwelling without first knocking and giving notice of his authority. The reason for this rule was originally said to be grounded on the fear of unnecessary damage to private property caused by officers breaking into houses where they might, had they asked, have been admitted freely.[180] In discussing this principle, therefore, we must note carefully that it applies only in those cases where the officers, acting under a warrant or otherwise lawfully, have a right to be on the premises and to invade the privacy of the citizen. Hence the application of this rule must be carefully distinguished from the problems arising under the fourth amendment.

It is interesting to note that the first recorded application of this statute to suppress the results of a search occurred in *Woods* v. *United States*,[181] decided in

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[172] 318 U.S. 332 (1943).
[173] See *United States* v. *Mitchell*, 322 U.S. 65 (1944).
[174] *United States* v. *Klapholz*, 230 F. 2d 494 (2d Cir. 1956).
[175] See Note, Suppressions of Non-Confessional Evidence Under Rule 5(a) of Federal Rules of Criminal Procedure, 66 Yale. L.J. 270 (1956).
[176] *McNabb* v. *United States*, 318 U.S. 332, 344 (1943).
[177] Act of June 15, 1917, ch. 30, tit. XI, §§ 8, 9, 40 Stat. 229.
[178] 77 Eng. Rep. 194 (1603).
[179] See Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 806 (1924).
[180] 77 Eng. Rep. 194, 196 (1603), "for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it. . . ."
[181] 240 F.2d 37 (D.C. Cir. 1956). There are portents of the result in *Accarino* v. *United States*, 179 F.2d 456 (D.C. Cir. 1949), but the court in *Accarino* makes no mention of § 3109.

1956. In that case officers possessing a search warrant knocked at the door of a suspected bookie parlor. Receiving no response to their knock they pushed open the door and found four men surrounded by the usual gambling paraphernalia. In view of the background of the statute the District of Columbia Circuit held that by a negative pregnant it forbade officers armed with a search warrant from breaking into a dwelling without announcing their purpose. The court then, without discussion, assumed that any violation of this statute would call for the suppression of any evidence thereby discovered. It is not at all obvious that the failure of the officers to do more than knock before opening the door is such a serious violation of individual rights as to call for the invocation of the suppression sanction. On the other hand, the *Woods* case can be defended on the ground that the procedure for obtention and service of search warrants is carefully spelled out, and that any non-trivial departure from these will invalidate the warrant and hence the search. Two years later, however, the statute's application was extended by the Supreme Court to cover a much larger class of cases—the searches incident to arrest. In *Miller* v. *United States*,[182] the officers had probable cause to arrest the defendant but gave insufficient notice of their purpose before breaking in. The Supreme Court comprehensively reviewed the background of section 3109 and concluded that the statute required notice by police officers before any breaking into a home whether pursuant to a search warrant or not. The Court, again without discussion, assumed that a violation of this statute would require suppression of any evidence so discovered. This result can be defended only on the conceptual ground that the breaking invalidates the arrest and that the lack of a lawful arrest makes the search unconstitutional. It is hard to see, however, that section 3109 is so fundamental that it must be protected by the suppression sanction.

Perhaps the main problem under section 3109 is not whether the statute is a fundamental guarantee, but whether despite its ancient origins it has any place in modern law.[183] The Court in the *Miller* case was dealing with a narcotics peddler in a situation where the contraband was small and could be easily destroyed before police officers could enter. Nonetheless the Government expressly disclaimed any attempt to support the entry on the ground that section 3109 contained an implied exception where evidence might be destroyed or violence might be expected. The Supreme Court therefore specifically refused to rule on this question.

Admittedly, such an exception would almost swallow up the rule. But it would seem that the perfection of small firearms and the development of indoor plumbing through which evidence can quickly be destroyed, have made section 3109 a dangerous anachronism. In many situations today where bandits are captured only after long gun battles with police, a rule requiring officers to forfeit the valuable element of surprise seems senseless and dangerous.

Certainly this is not to say that officers arresting for income tax evasion or anti-trust violations are privileged to batter down doors before asking admission. Presumably, in this type of situation sanctions other than suppression would be more appropriate anyway.

A recent court of appeals case involved a most interesting application of section 3109. In *Leahy* v. *United States*,[184] government agents armed with an arrest warrant had secured entry into the defendant's home by fraud. The defendant moved to suppress the results of the search incident to his arrest on the ground that the entry was in violation of section 3109. The court, however, held that the statute merely prevents breaking in without notice; here, where the officers had not broken in, the statute was inapplicable. On first glance this appears to be an overly technical ruling, especially in view of the many cases equating fraud with force under the fourth amendment.[185] It should be noted, however, that the court's reasoning is completely in keeping with the common-law history and purposes of the statute to protect property from the unnecessary injury of a forcible entry rather than to guard the rights of privacy involved in the fourth amendment.

It is possible that many of the niceties in the law of search and seizure result because the suppression sanction, while the most effective method of preventing illegal invasions of privacy, is also more drastic than many courts are willing to accept. To avoid freeing the criminal in the concrete case before them, courts will often strain to make exceptions to the fourth amendment so that relatively minor errors by police officers do not lead to the escape of much more serious offenders.

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[182] 357 U.S. 301 (1958).

[183] There have been suggestions in two cases, *Hopper* v. *United States*, 267 F.2d 904 (9th Cir. 1959), and *United States* v. *Macri*, 185 F. Supp. 144 (D. Conn. 1960), that the interpretation of § 3109 is determined by reference to state law. It is difficult to defend this proposition as applied to a federal statute.

[184] F. 2d 487 (9th Cir. 1959), *cert. granted*, 363 U.S. 810 (1960), petition for cert. dismissed on motion of petitioner, 364 U.S. 945 (1961).

[185] See, *e.g.*, *Gouled* v. *United States*, 255 U.S. 298 (1921); Fraternal Order of the *Eagles* v. *United States*, 57 F. 2d 93 (1932).

One unfortunate result of this process is the relaxation of protections of individual rights in certain areas, such as eavesdropping, where they are most needed. Another result is the anomaly of the courts' erecting strict requirements for search and arrest warrants and then allowing police officers almost equal freedom without these documents.

On the other hand, in various situations the unquestioned application of the suppression sanction has placed too great a restriction on legitimate law enforcement activities. The preservation of the means and instrumentalities test, the implementation of title 18, section 3109, and the general application of the fourth amendment to cases where the basis of the alleged deprivation of constitutional right lies not in the search itself, but in the failure to observe some technical preliminary and often statutory distinction are the clearest examples.

In such a complex field as search and seizure, it is impossible to suggest one great principle which, if applied, would automatically lead to a perfect and rational balance between the rights of the individual to privacy and the interest of law enforcement agencies, and society itself, in discovering evidence against and apprehending criminals. One thing, however, is clear: the working out of the guarantees and content of the fourth amendment is by no means complete. Before a satisfactory solution is achieved, a great deal more experimentation will be required. In this respect, it is regrettable that the Supreme Court, in overruling *Wolf* v. *Colorado*,[186] spoke in such broad terms [187] and apparently applied the full body of federal search and seizure law to the states.[188] It is difficult to believe that the many minor as well as major irrationalities in the law of search and seizure have suddenly achieved constitutional dimension. It is possible that in future cases the Supreme Court will more explicity recognize the great virtue of federalism in approaching these problems and apply the exclusionary rules to the states only when a serious or intentional breach of the right of privacy occurs.[189] It remains, however, for future litigation to resolve this point.

Appendix 3-B

Communications Media Center,
New York Law School,
New York, N.Y.

Re Constitutionality of Proposed Federal Legislation Overruling *Zurcher* v. *Stanford Daily*.

Memorandum to: Bruce Lehman, Esq., Chief Counsel, U.S. House Judiciary Subcommittee on Courts Civil Liberties and the Administration of Justice.

From: Mr. Mitchell Arnold, Communications Law Clinic, New York Law School.

Date: July 11, 1979.

I. BACKGROUND

In *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), [hereinafter *Stanford Daily*] the Court upheld the authority of police to search the offices of a newspaper, without notice, pursuant to a search warrant, although no member of the newspaper's staff was suspected of criminal activity. 436 U.S. at 559. The Court determined that the fourth and fourteenth amendments require neither that the owner or possessor of the place searched be suspected of a crime, nor a determination by a magistrate that seeking to obtain the evidence by subpoena after an adversary proceeding would result in its destruction or concealment. 436 U.S. at 553–560. Furthermore, the Court held that the exactitude with which search warrant requirements are to be applied when the place to be searched is a newspaper office ensures adequate protection to first amendment interests. 436 U.S at 566–567. The Court did, however, invite legislative and executive action: "Of course, the Fourth Amendment, does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant . . ." 436 U.S. at 567. In response thereto, Representatives Kastenmeier and Railsback have introduced H.R. 3486, the "First Amendment Privacy Protection Act of 1979" [hereinafter the "bill"], a copy of which is annexed as Appendix A hereto.

[186] 338 U.S. 25 (1949).
[187] See *Mapp* v. *Ohio*, 81 Sup. Ct. 1684, 1693–94 (1961).
[188] See *Elkins* v. *United States*, 364 U.S. 206, 223–24 (1960).
[189] Such a breach was involved in *Mapp* v. *Ohio*, 81 Sup. Ct. 1684, 1698 (1961).

Section 2(a) of the bill would make it unlawful for any "government officer" to search for or seize "work product" materials possessed by one "in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or similar form of communication." That section would also protect "work product" materials from subpoena duces tecum. "[W]ork product" is defined broadly by Section 4(a) as "any documentary materials created for or by a person in connection with his plans" to communicate to the public. Although "government officer" is not defined in the bill, Section 3 provides for a civil cause of action against "[T]he United States, a State, or any other governmental unit"; this suggests that the term "government officer" includes both Federal and State officers. If the materials are not "work product", they are protected from search and seizure by any "government officer" under Section 2(b), but not from subpoena duces tecum.

II. QUESTION PRESENTED

Are the provisions of the bill within the scope of congressional authority?

III. BRIEF ANSWER

Congressional authority to restrain Federal action exists and Congress has substantial authority to restrain State action. Congressional authority at the State level may be premised upon: the commerce clause, or the first amendment, the fourth amendment, and the due process and enforcement clauses of the fourteenth amendment.

IV. DISCUSSION

A. Federal Officials

Sections 2(a) and 2(b) provide that the bill applies to "any government officer or employee". The necessary and proper clause provides that Congress has the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. From the inception of constitutional adjudication, the necessary and proper clause has been broadly construed. E.g., *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Thus, there is congressional authority to impose controls on federal officers enforcing laws enacted by Congress, on the theory that it is "necessary and proper" for Congress to ensure the free dissemination of information to the public. In addition, it is unquestionably within congressional jurisdiction to regulate Federal criminal procedure. E.g., 18 U.S.C. §§ 3001–3771 (1976).

Indeed, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the Court extended an invitation to legislative action similar to that in *Stanford Daily*, 436, U.S. at 567. After denying a journalist's claim of privilege to withhold a source's identity from a grand jury, the Court noted that:

"At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." 408 U.S. at 707. [emphasis added]

Although the *Branzburg* and *Stanford Daily* dicta arose in two different contexts, they affirm the same proposition: that ensuring protective standards for those engaged in gathering, analyzing and disseminating information to the public is a matter of legislative, rather than judicial, competence.

B. State Officials

Sections 2(a) and (2b) provide that the bill applies to "any government officer or employee", including state officers and employees. Federal regulation of State criminal procedure is not unprecedented. In *Adams* v. *Maryland*, 347 U.S. 179 (1954), the Court held that Congress had the authority to immunize congressional witnesses from State prosecution. There is preemptive Federal legislation prohibiting the use of intercepted wire and oral communications as evidence in State proceedings where the interception is inconsistent with Federal prescription. Omnibus Crime Control Act of 1968, 18 U.S.C. §§ 2510–2520 (1976).

The extent of the bill's regulation of State as well as Federal criminal procedure is contingent upon the nature of the materials sought. If the materials are "work product" as defined in Section 4(a), they are protected from both search and seizure and subpoena duces tecum under Section 2(a). If the materials are not "work product", there is protection from search and seizure under Section 2(b), but not

from a subpoena duces tecum under Section 2(b)(2). The dicta in *Stanford Daily* and *Branzburg* suggesting remedial legislation arose in different contexts. *Stanford Daily* involved a search and seizure, and invited Federal remedial legislation for both the Federal and State levels. 436 U.S. at 567. The *Branzburg* dictum arose in the context of a subpoena, however, and was prefaced by "at the Federal level . . .". 408 U.S. at 707. The *Branzburg* Court then went on to suggest State remedial legislation:

"There is also merit in leaving State legislatures free, within first amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar State courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." 408 U.S. at 707.

At least one commentator has interpreted the dictum as suggesting Federal regulation of federal but not State subpoenas. See Dixon, "Newsmen's Privilege by Federal Legislation: Within Congressional Power?," 1 HASTINGS CONST. L.Q. 39 (1974). Another interpretation might be that the Court suggested State legislation only because there was the absence of preemptive Federal legislation, since ensuring protective standards is a matter of legislative competence.

Under the doctrine of preemption and the supremacy clause, the bill would supersede State legislation on the same subject matter if the Court determined the bill to be sufficiently comprehensive to evidence congressional intent to "occupy the field." In *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), the Court held that a State could not make sedition against the United States illegal, since the Congress, in enacting the Smith Act, has intended to occupy the field. The Court presumed such intent to exist because of the "national" nature of the subject matter and the comprehensiveness of the act. 350 U.S. at 504–505. The operation of the preemption doctrine can be peculiarly subject to judicial discretion and "occupation of the field" standard can be difficult to meet.

It might be that the bill would conform to that standard. There is a substantial Federal interest in protecting the free dissemination of information to the public. Congress can find, *inter alia*, that surprise searches of the media: (1) physically disrupt their operations; (2) threaten disclosure of information received from confidential sources; (3) are not subject to adequate procedural safeguards; and (4) will increasingly impede the Federal interest in maintaining the free dissemination of information to the public, since *Stanford Daily* will promote the use of warrants to search media offices. The bill would comprehensively remedy those findings. It would absolutely restrain Federal, State and local officials from engaging in such searches. Since section 4(a) of the bill defines "work product" broadly, most materials would also be protected from subpoena duces tecum. The Federal interest involved and Congress' pervasive action to safeguard it would certainly evidence congressional intent to "occupy the field." However, the preemption doctrine and the supremacy clause should not be the sole basis of congressional authority to regulate State criminal procedure.

Federal regulation of state criminal procedure as in the bill may be more viably premised upon the commerce clause, the first amendment, the fourth amendment, and the due process as well as enforcement clauses of the fourteenth amendment.

1. *The Commerce Clause.*—Sections 2(a) and 2(b) of the bill provide that it shall be unlawful to search for or seize materials "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, *in or affecting interstate or foreign commerce*" [emphasis added]. The commerce power traditionally has received a broad construction. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In defining the commerce power, Justice Marshall wrote:

"It is the power to regulate, that is to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." 22 U.S. (9 Wheat.) at 195–196.

The commerce clause has been a copious source of congressional authority to enact diverse legislation. E.g., National Labor Relations Act, 29 U.S.C. §§ 151–156 (1976); Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (1976); Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975(a)–(d) (1976).

The news media have been long held to be instrumentalities of commerce. E.g., *Associated Press* v. *NLRB*, 301 U.S. 103 (1937). In determining the Associated Press to be in interstate commerce, the Court held in *Associated Press* v. *NLRB*, 301 U.S. 103, 128–129 (1937):

"Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution. This conclusion is unaffected by the fact that petitioner does not sell news and does not operate for profit, or that technically the title to the news remains in the petitioner during interstate transmission. Petitioner is so engaged in interstate commerce, that Congress may adopt appropriate regulations of its activities for the protection and advancement, and for the insurance of the safety of, such commerce."

Perhaps the bill would apply to materials possessed by those engaged solely in intrastate activity. But Congress may regulate intrastate activity when necessary to protect interstate commerce. *United States* v. *Darby*, 312 U.S. 100 (1941); *Heart of Atlanta Motel*, v. *United States*, 379 U.S. 241 (1964). Indeed, Congress is empowered to regulate intrastate communications per se. *Weiss* v. *United States*, 308 U.S. 321, 327 (1939).

The Congress' motive in enacting the bill might be not only to regulate commerce, but also be to regulate State courts or law enforcement agencies. Congressional motive need not be commercially oriented, however, as the nature of the commerce power is plenary. *Heart of Atlanta Motel, Inc.* v. *United States, supra.* Recognizing the deference due Congress under the commerce power, *Heart of Atlanta Motel* articulated a two-pronged standard for judicial review. First, Congress need have only a rational basis for determining that the object of regulation affects commerce. Second, if a rational basis exists, the means of regulation need only be reasonable and appropriate. 379 U.S. at 258–259.

Under the Heart of Atlanta Motel standard, the provisions of the bill would regulate an instrumentality of commerce—the materials of those engaged in disseminating information to the public. Congress rationally could determine that the security of those materials affects the dissemination of information to the public. Congress also could find, *inter alia*, that surprise searches of newspapers and other media: (1) physically disrupt the operations of the media; (2) threaten possible disclosure of information received from confidential sources as well as the identity of the sources themselves; (3) may be employed abusively by law enforcement officials under investigation by news media; (4) are not subject to adequate procedural safeguards, since judges rarely refuse requests for warrants; and (5) will increasingly burden commerce, since *Stanford Daily* will promote the use of warrants to search media offices. The mode of regulation would be reasonable and appropriate. If the materials were "work product" as defined in section 4(a) of the bill, they would be protected from search and seizure and subpoena duces tecum; if not "work product", they would be protected from search and seizure. The regulatory means chosen would be reasonable and appropriate, notwithstanding the existence of alternative means; the choice among alternatives is peculiarly within congressional discretion, to which courts defer. 379 U.S. at 258–259.

The commerce clause is not without competing considerations, however, one of which is the tenth amendment's reservation of powers to the States. In *United States* v. *Darby*, 312 U.S. 100, 124 (1941), the Court refused to apply the tenth amendment as a limit on congressional power: "The amendment states but a truism that all is retained which has not been surrendered."

The Court there upheld the constitutionality of the Fair Labor Standards Act of 1938, 52 Stat. 1060, (codified at 29 U.S.C. § 201 *et esq.* (1976)); the Act regulated maximum hours and minimum wages for employees directly engaged in the production of goods for interstate commerce. In *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court upheld the constitutionality of an amendment to the FLSA extending Federal wage and hour protection to all workers in places producing goods for interstate commerce, whether or not a worker's goods were themselves destined for interstate commerce. It noted that "[t]here is basis in logic and experience for the conclusion that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise." 392 U.S. at 192.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court for the first time in four decades held a congressional regulation of commerce to be an unconstitutional intrusion upon State sovereignty. The Court invalidated the 1974 amendments to the Fair Labor Standards Act, 88 Stat. 58 (1974), which extended Federal maximum hour and minimum wage requirements to State and municipal employees. The import of the decision is unclear. It may be interpreted as infusing

vitality into the tenth amendment or as reaffirming State automony only to the extent necessary to ensure individual rights. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1064 (1977); Michaelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities* v. *Usery*, 86 Yale L. J. 1165 (1977).

The Court found that the extension of minimum wage requirements to state governments would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. *These activities are typical of those performed by State and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens.* If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their system for performance of these functions must rest, we think there would be little left of the States' separate and independent existence." [emphasis added] *National League of Cities, supra*, 426 U.S. at 851.

Although the scope of *National League of Cities* is unclear, it probably does not preclude premising congressional authority to enact the bill upon the commerce clause. Indeed, the Court conceded that the Federal regulations at issue there were "undoubtedly" within the scope of the commerce clause. 426 U.S. at 841. In making that concession, the Court was taking care not to alter the authority of past decisions establishing Congress' breadth of authority under the commerce power. *National League of Cities* might be reconciled with past decisions on the theory that implicit in the Court's decision is the recognition of an unarticulated constitutional right to basic governmental services—a right that cannot be contracted by congressional exercise of the commerce power. If that proposition is valid, then the federal regulations at issue in *National League of Cities* and those prescribed by the bill are wholly distinguishable.

It may be argued that a State's interest in law enforcement is so fundamental that it cannot be preempted by commerce clause regulation. But *National League of Cities* addresses itself to the individual's interest, not the State's. The decision will probably be read narrowly to obviate not all commerce regulation affecting the State's police power in providing services, but rather regulation which diminishes the individual's right to those services.

2. *Section Five of the Fourteenth Amendment.*—Alternatively, congressional authority for the bill might be premised upon the first amendment, the fourth amendment, and the due process as well as the enforcement clauses of the fourteenth amendment. Notwithstanding *Stanford Daily*, Congress perhaps can determine under Section 5 of the fourteenth amendment that the first and fourth amendment considerations embodied in the due process clause accomodate Federal legislative protection for the free dissemination of information to the public.

Such a congressional determination might run afoul of the Court/Congress relationship expressed in *Marbury* v. *Madison*, 1 Cranch 137 (1803), where Chief Justice Marshall established judicial supremacy in the interpretation and application of the Constitution. A congressional determination vis-a-vis Section 5 that the first amendment and due process clause accommodate legislation in the nature of the bill would be a congressional interpretation of the Constitution. Even if such congressional action is irreconcilable with *Marbury* v. *Madison*, Congress may interpret substantive provisions of the fourteenth amendment to some extent. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

Section 5 of the fourteenth amendment provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Soon after the fourteenth amendment's ratification, the Court recognized Section 5 as an affirmative grant of congressional authority: "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." *Ex Parte Virginia*, 100 U.S. 339, 345 (1880).

The fifteenth amendment guarantees a racially nondiscriminatory right to vote. U.S. CONST. amend. XV. Section 2 of the fifteenth amendment has an enforcement provision with language identical to that of Section 5 of the fourteenth amendment. U.S. CONST. amend. XV, § 2. Congress traditionally has confined legislation enforcing the fifteenth amendment to that facilitating judicial enforcement of the constitutional right to the franchise. However, Congress recently

enacted the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 (1976) *et seq.*, which provides for qualified Federal regulation of State election machinery. One commentator has termed the Act "the most radical piece of civil rights legislation since Reconstruction." L. Tribe, *American Constitutional Law* 263 (1978). In *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), the Court upheld the constitutionality of the Act as an exercise of congressional authority under Section 2 of the fifteenth amendment. The Court found the scope of congressional authority under Section 2 limited only by the standard articulated by Chief Justice Marshall in *McCulloch* v. *Maryland:* "Let the end be legitimate, let it be within the scope of the constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." 383 U.S. at 326, quoting 17 U.S. (4 Wheat.) 316, 421 (1819). Although *South Carolina* v. *Katzenbach* arose in the context of the fifteenth amendment, where the constitutionally protected right is more explicit than the broader guarantees of the fourteenth amendment, the case marks a shift in the Court/Congress relationship. Congress may do more than forbid violations of a constitutionally protected right; it may fashion specific remedies to protect that right.

Katzenbach v. *Morgan*, 384 U.S. 641 (1966), is the leading case construing Section 5 of the fourteenth amendment. The issue before the Court was the constitutionality of Section 4(e) of the Voting Rights Act of 1965. Section 4(e) prohibits disenfranchising a person illiterate in English, if he or she has completed the sixth grade in an accredited Spanish-speaking school. 42 U.S.C. § 1973b(e)(1)–(2) (1976). The Court upheld Section 4(e) as a valid congressional enforcement of the fourteenth amendment, viewing Section 5 as 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." 384 U.S. at 651. In determining the legislation to be "appropriate" under Section 5, the Court applied the rationality standard of *McCulloch* v. *Maryland* previously applied in *South Carolina* v. *Katzenbach*, *supra*, at 326.

The rationale of the *Morgan* holding is significant, since the Court previously had held that literacy tests were not violative of equal protection if nondiscriminatorily administered. *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959). The *Morgan* Court recognized that, to some extent, Section 5 empowers Congress to interpret the substantive provisions of the fourteenth amendment, even though the interpretation may vary with that of the Court:

"A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefullness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." 384 U.S. at 648–649.

Under the logic of *Morgan*, Section 5 of the fourteenth amendment would empower Congress to enact the bill. Congress in its superior fact-finding capacity might determine, *inter alia*, that surprise searches of newspapers and other media have several undesirable aspects such as: (1) physically disrupting the operations of the media; (2) presenting possible disclosure of information received from confidential sources as well as the identity of the sources themselves; (3) being employed abusively by law enforcement officials under investigation by news media; (4) not being subject to adequate procedural safeguards, as magistrates rarely refuse requests for warrants; and (5) increasing in frequency, as *Stanford Daily* promotes the perception of authority to use warrants to search media offices.

Congress could determine that such realities impede the free dissemination of information to the public, and may enact "appropriate" legislation to remedy such violations of first and fourth amendment guarantees incorporated in the due process clause of the fourteenth amendment. The provisions of the bill would be "appropriate," since they would conform to the broad "rationality" standard of *McCulloch* v. *Maryland*, *supra*. (The extent of the protection afforded by the bill would be contingent upon the nature of the materials sought. If the materials were "work product" as defined in Section 4(a) of the bill, they would be protected from search and seizure or subpoena duces tecum under § 2(a). If the materials were not "work product", there would be protection from search and seizure under Section 2(b), but not from subpoena duces tecum under Section 2(b)(2).)

The enactment of such protection would be "plainly adapted" to the "end" of enforcing the due process clause, since the legislation would enhance the free dissemination of information to the public. 17 U.S. (4 Wheat.) at 421.

In enacting the bill, of course, Congress would be determining that the due process clause embodies first and fourth amendment guarantees which the Court found to be nonexistent in *Stanford Daily*. The Court's interpretation of the due process clause would not preclude a different interpretation by Congress. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 648–649. Indeed, the situation would be analogous to the *Morgan* Court's deference to Congress' interpretation of the equal protection clause, although the Court had interpreted it differently in *Lassiter* v. *Northampton County Bd. of Elections, supra.* The *Morgan* holding includes a caveat, however, which has led most commentators to characterize the rationale of the decision as a "ratchet theory." Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 Sup. Ct. Rev. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 Stan. L. Rev. 603 (1975).

"Contrary to the suggestion of the dissent, § 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the states to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws." *Katzenbach* v. *Morgan, supra,* 384 U.S. at 651 n. 10.

It is arguable that the guarantee of a fair trial secured by the Bill of Rights would be "diluted" by the bill. Congress would consider that right when balancing it against the competing right to the free dissemination of information. The resolution of the conflict between the two considerations would be a matter of congressional discretion to which the Court would defer. "It is enough that we be able to perceive a basis upon which Congress might resolve the conflict as it did." 384 U.S. at 653.

Oregon v. *Mitchell,* 400 U.S. 112 (1970), raised questions about the status of *Morgan.* Congress enacted the Voting Rights Act Amendments of 1970, granting 18-year olds the franchise in State and Federal elections. The legislation ostensibly rested on the theory that denying the franchise to those between 18 and 21 years of age violated the equal protection clause of the fourteenth amendment. In a 5 to 4 decision, the Court upheld the legislation with respect to Federal elections, but invalidated it as applied to State elections. 400 U.S. at 117–118. No one opinion commanded a majority. Four Justices adopted the rationale of *Katzenbach* v. *Morgan* and stated the legislation to be valid as to State and Federal elections. Four Justices decided the legislation to be totally invalid. Justice Black upheld the legislation with respect to Federal, but not with respect to State elections. One commentator has characterized the decision as a "constitutional law disaster area." Cohen, *supra,* at 609.

Oregon v. *Mitchell* probably does not diminish the status of *Katzenbach* v. *Morgan* to the degree of obviating the bill's premise of authority upon Section 5 of the fourteenth amendment. Although the decisions are not easily reconciled, the denial of the franchise to those literate in a foreign language, probably presents a substantially greater equal protection issue than using 21 rather than 18 as the dividing line for voter qualification. The equal protection issue in *Katzenbach* v. *Morgan* was substantial, while in *Oregon* v. *Mitchell* it was tenuous. In the context of due process, surprise searches of the media present a substantial, not a tenuous, impediment to the free dissemination of information to the public. One commentator has suggested that "if anything remains of the rationale of *Katzenbach* v. *Morgan,* Congress should have the power to create a newsman's privilege binding against the states." Cohen, *supra,* at 619.

V. CONCLUSION

The bill would constitutionally impose restraints on both federal and state action. The bill's restraint on Federal officers would conform to the broad mandate of the necessary and proper clause. Restraint on State action would be supported by: (1) the doctrine of preemption, since Congress would be enacting comprehensive regulation to ensure the Federal interest in the free dissemination of information to the public; (2) the commerce clause, since the media are instrumentalities of commerce requiring Federal legislative protection; and (3) the

enforcement clause of the fourteenth amendment, as Congress would be "appropriately" enforcing the first and fourth amendment guarantees embodied in the fourteenth amendment's due process clause. Both Congress and the Court can find that the provisions of the bill are within the scope of congressional authority.

Respectfully Submitted,

MITCHELL K. ARNOLD,
Research Associate.

APPENDIX A

[H.R. 3486, 96th Congress, 1st Session]

A BILL To limit governmental search and seizure of materials possessed by persons involved in first amendment activities, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "First Amendment Privacy Protection Act of 1979".

UNLAWFUL ACTS

SEC. 2. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person in connection with a purpose to disseminate to the public a newspaper book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impare or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought: *Provided however,* That a government officer or employee may not search for or seize materials described in subsection 2(a) under the provisions of this paragraph if the offense for which the materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797, 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42 U.S.C. 2277, or 50 U.S.C. 783); or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being;

(b) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought: *Provided, however,* That a government officer or employee may not search for or seize materials described in subsection 2(b) under the provisions of this paragraph if the offense for which the materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797, 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42 U.S.C. 2277, or 50 U.S.C. 783); or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

(3) there is reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of the materials; or

(4) the materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and

(A) all appellate remedies have been exhaused; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interest of justice. In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

INAPPLICABILITY OF THIS ACT TO SEARCHES AND SEIZURES CONDUCTED TO ENFORCE THE CUSTOMS LAWS OF THE UNITED STATES

SEC. 3. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of or at international points of entry into the United States in order to enforce the customs laws of the United States.

REMEDIES

SEC. 4. (a) A person aggrieved by a search for or seizure of materials in violation of this Act shall have a civil cause of action for damages for such search or seizure—

(1) against the United States, against a state which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this Act, or against any other governmental unit, all of which shall be liable for violations of this Act by their officers or employees while acting within the scope or under color of their office or employment;

(2) against an officer or employee of a State who has violated this Act while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1). It shall be a complete defense to a civil action brought under this paragraph that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct.

(b) The United States, a State, or any other governmental unit, liable for violations of this Act under paragraph 4(a)(1), may not assert as a defense to a claim arising under this Act the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(c) The remedy provided by paragraph 4(a)(1) against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this Act, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(d) A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000, such punitive damages as may be warranted, and such resaonable attorney's fee and other litigation costs reasonably incurred as the court, in its discretion, may award: *Provided, however,* That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment.

(e) The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee if warranted.

(f) The district courts shall have original jurisdiction of all civil actions arising under this section.

DEFINITIONS

SEC. 5. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, tapes, videotapes, negatives, films, outtakes, and interview files.

(b) "Work product", as used in this Act, means any documentary materials created by or for a person in connection with his plans, or the plans of the person creating such materials, to communicate to the public, except such work product as constitutes contraband or the fruits or instrumentalities of a crime.

(c) "Any other governmental unit", as used in this Act, includes the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of State government.

Appendix 4–A

Statement of R. Michael Cole, Director of Legislative Activities, Common Cause on The First Amendment Privacy Protection Act of 1979

Common Cause appreciates this opportunity to present our views in support of pending legislation to reverse the Supreme Court's ruling in *Zurcher* v. *Stanford Daily*. The holding of the case allows police armed with a warrant to search without notice for evidence in the house or business of a person not suspected of criminal conduct. The serious threat to our First and Fourth Amendment freedoms represented by the *Stanford Daily* decision warrants prompt action. We commend the Chairman and members of the Subcommittee for holding hearings on this important issue.

Common Cause strongly supports legislation which would overturn the *Stanford Daily* decision. This effort to protect materials prepared for publication fits within Common Cause's longstanding interest in promoting the free flow of information to ensure the diversity of informed opinions in the market-place of political ideas. We believe that the *Stanford Daily* decision, unless corrected by legislation, will inhibit the ability of the press to gather, analyze, and disseminate news and allegations of government wrongdoing. It is not unreasonable to fear that confidential sources will dry up, that the press will be restrained from recording and preserving notes, that press operations will be disrupted by police searches that the press will resort to self-censorship to conceal sources, and that materials on subjects unrelated to the wrongdoing under investigation will be exposed to police scrutiny. In the end, the public's right to know will suffer from the chilling effect of the *Stanford Daily* ruling on news and other communications.

We support H.R. 3486, legislation sponsored by the Chairman with the backing of the Administration, to limit police searches of the files of the news media and others who are preparing materials for publication. It has several significant strengths. First, rather than designating specific areas that cannot be searched, it defines a category of materials—"work product"—to be shielded. Second, it avoids establishing special legal rights for the press by protecting all people engaged in public communications. Third, it protects against surprise searches by state and local as well as federal authorities. Under this proposal, virtually all modern day communications are protected against unannounced searches. It strikes an appropriate balance between the need to secure the confidentiality of sources and information gathering activities with the need to accumulate evidence basic to law enforcement.

In addition to the implications for the freedom of expression in a free society, the *Stanford Daily* ruling seriously infringes on the individual privacy of all Americans. The "countless law abiding citizens," referred to by Mr. Justice Stevens in his dissenting opinion, are subject to random searches for evidence of crimes which they are not suspected of committing. Public trust in the privacy of information individuals reveal to doctors, lawyers, clergymen, teachers and other "third parties" has been undermined. Common Cause supports continuing efforts to ensure that the privacy of all Americans is protected from surprise search warrant raids.

We urge the Subcommittee to report H.R. 3486, a bill which has gained wide support, to correct the immediate danger resulting from the unfortunate *Stanford Daily* ruling. The goals of good government are buttressed by a strong free press actively monitoring the performance of and improving access to our democratic institutions. The press and other writers cannot operate freely to encourage the diversity of viewpoints that we believe is essential to a responsive political system unless they are confident that their files and offices are safe from indiscriminate searches. Common Cause looks forward to working with the Subcommittee to gain enactment of H.R. 3486.

APPENDIX 4–B

STATE OF WISCONSIN, 1979 SENATE BILL 221

AN ACT To renumber 968.13 (intro.), (1) and (2); to amend 968.13(1)(b), as renumbered; and to create 968.13 (1)(c) and (d) and (2) and 968.135 of the statutes, relating to search warrants and subpenas

ANALYSIS BY THE LEGISLATIVE REFERENCE BUREAU

Under present law, property specified in a search warrant as subject to seizure is limited to contraband, fruits of a crime, things used in the commission of a crime or anything which may constitute evidence of a crime. Under this proposal, if the search warrant authorizes seizure of documents which may constitute evidence of a crime, probable cause must be shown that the documents are under the control of a person reasonably suspected to be concerned with the commission of a crime. This proposal also requires a court, upon a request of the attorney general or a district attorney and a showing of probable cause, to issue a subpoena to require production of documents which may constitute evidence of any crime.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 968.13 (intro.), (1) and (2) of the statutes are renumbered 968.13 (1) (intro.), (a) and (b), respectively, and 968.13 (1) (b), as renumbered, is amended to read:

968.13 (1) (b) Anything which is the fruit of, or has been used in the commission of, any crime.

SECTION 2. 968.13 (1) (c) and (d) and (2) of the statutes are created to read:

968.13 (1) (c) Anything other than documents which may constitute evidence of any crime.

(d) Documents which may constitute evidence of any crime, if probable cause is shown that the documents are under the control of a person who is reasonably suspected to be concerned in the commission of that crime under S. 939.05 (2).

(2) In this section, "documents" includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films or computer or electronic data.

SECTION 3. 968.135 of the statutes is created to read:

968.135 Subpoena for Documents.—Upon the request of the attorney general or a district attorney and upon a showing of probable cause under S. 968.12 (1), a court shall issue a subpeona requiring the production of documents, as specified in S. 968.13 (2). Motions to the court, including, but not limited to, motions to quash or limit the subpena, shall be addressed to the court which issued the subpoena. Any person who unlawfully refuses to produce the documents may be compelled to do so as provided in S. 885.12. This section does not affect any other subpoena authority provided by law.

STATE OF WISCONSIN, 1979 ASSEMBLY BILL 94

AN ACT to create 968.12 (3) to (5) of the statutes, relating to obtaining a search warrant to search for evidence

ANALYSIS BY THE LEGISLATIVE REFERENCE BUREAU

The United States Supreme Court, in the case of *Zurcher* v. *Stanford Daily* (1978), 46 U.S.L.W. 4546, held that a state is not prevented by the 4th or 14th amendment to the U.S. Constitution from issuing a search warrant because the possessor or owner of the place to be searched is not suspected of criminal involvement. This bill creates a new provision relating to search warrants for things possessed by a member of the news media or any other person. In such a case, in addition to ordinary probable cause requirements for a search warrant, there would have to be a showing that probable cause exists to believe the person committed or is committing a crime or that the things sought by the warrant would be destroyed or removed if the warrant is not issued. If these additional requirements are not met, the evidence may be sought by a subpoena duces tecum (a subpena to command the production of evidence).

A person who is the subject of an unlawful search pursuant to a search warrant may bring a civil action in circuit court. In such a case, punitive damages up to $10,000 may be awarded.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 968.12 (3) to (5) of the statutes are created to read:

968.12 (3) If the search warrant is for things to be seized that are in the possession of a person engaged in the gathering or dissemination of news for the print or broadcast media or any other person, no judge may issue the warrant unless sub. (1) is complied with and there is probable cause to believe that:

(a) The person has committed or is committing a crime; or

(b) The things to be seized will be destroyed or removed from the state if the search warrant is not issued.

(4) If there is probable cause to believe that evidence of crime is located in the possession of a person specified in sub. (3) but neither of the requirements of sub. (3) (a) or (b) are met, the law enforcement officer may seek a subpoena duces tecum under ss. 885.01 to 885.03.

(5) Any person aggrieved by a violation of this section may commence a civil action in circuit court. In such an action, punitive damages, not to exceed $10,000, may be awarded.

APPENDIX 4C

STATEMENT OF ROBERT W. JOHNSON, TO MINNESOTA COUNTY ATTORNEYS ASSOCIATION MEETING

HR-3486 and similar pending bills were generated by the decision of the United States Supreme Court in *Zurcher* v. *The Stanford Daily*. *436* U.S. *547*. 56 L Ed 525, 98 S Ct —, in which the United States Supreme Court re-stated a long standing principle of Constitutional law in the area of search and seizure, that a search warrant should only issue upon a showing of probable cause, before an impartial magistrate or judge, that items are sought which are evidence of a crime or the fruits or instrumentalities of a crime and are located in a particular place at a particular time. The issue of whether or not the owner or possessor of the premises is or is not a suspect with regard to the crime had never been considered a determining factor on whether a search warrant should issue. The Supreme Court in restating accepted Constitutional law held that a state was not prevented by the Fourth and Fourteenth Amendments from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched was not reasonably suspected of criminal involvement. Because the offices of a newspaper were involved in *Zurcher,* the Supreme Court considered competing claims under the First, Fourth and Fourteenth Amendments. The Court recognized that issuance of a search warrant is not a mere ministerial act but rather an objective decision made by a judicial officer requiring substantial pre-conditions, among which are probable cause and specificity with regard to the time and place to be searched and the items to be seized. (Standards significantly higher than those required for the issuance of a subpoena duces tecum.) In reaching its decision, the Supreme Court weighed the competing claims and chose that course which would allow for a full and fair investigation to ascertain the truth.

We, as prosecutors, recognize the importance of values of the First Amendment as well as those of the Fourth. It is significant to note that prosecutors have traditionally exercised great restraint in order to avoid creating situations of confrontation between these values. Neither the interests of a free press nor effective prosecution are furthered by forcing such confrontations through pushing matters to the extreme. (It is interesting to note in the *Zurcher* case itself that the prosecution was forced to resort to a search warrant because of the expressed policy of the Stanford Daily that it would destroy any evidence that might aid in prosecution.) Based on informal surveys conducted by the NDAA as well as material compiled by the Reporters Committee for the Freedom of the Press, the restraint shown by prosecutors is clearly demonstrated.

We, as prosecutors, strongly believe in the importance of a free and independent press. We do not view our relationship with the press as an adversarial one. Our adversaries are those who tear at the fabric of society through the commission of crimes, not reporters, editors and publishers. Our opposition to HR-3486 and similar bills should not be taken as opposition to the fundamental need for a free press. Rather, it must be understood in the context of support for time-honored Constitutional values, as interpreted by the United States Supreme Court, which will maintain the criminal justice process as a search for truth and justice.

The concept of placing federal legislative limitations on third party searches is a dangerous one which will have serious effects on reasonable law enforcement activities in the area of investigation and prosecution. I would first like to discuss the problems which arise from the general concept of restricting third party searches and then deal specifically with certain problems generated by HR-3486.

Proposals to limit the use of search warrants against non-target third parties are based on the assumptions that: (1) investigation can effectively proceed making use of alternative legal resources such as the subpeona duces tecum and; (2) that whatever delay may be caused by resort to such other resources will not impede the investigation. These assumptions are erroneous.

Prosecutors traditionally have resorted to use of investigative tools other than the search warrant where such resort would not unnecessarily delay or compromise an investigation. The practice cannot be followed in every instance, however,

and the fact that prosecutors have exercised restraint where possible should not justify the extreme action of restricting the use of such warrants where restraint is not possible.

The notion that the use of a subpoena duces tecum could somehow substitute for a search warrant, of course, is a fallacy. Those of us in the business understand that, at the outset, it assumes the person who is served is willing to cooperate. It assumes the person will not destroy the evidence if he finds it or knows where it is or, shall we say, if he even has the inclination to search for it. Can't you just imagine the games that could be played with us in the whole field of drugs, records, and contraband if such legislation became a reality. Let me just suggest a few possibilities:

Four people are involved in a business, one of whom has a job with some measure of respectability and owns a farmhouse 50 miles away from his home. The other three see fit to use that farmhouse to store some kind of contraband. When a subpoena duces tecum is served on the owner, he appears in court and says he has no knowledge of such matters. He has no responsibility to make any kind of search which might reveal the presence of such contraband.

When you play with this idea, you might see how foolish it would be if you had five people occupying one house. Who really has possession of all or part of the house under this kind of communal relationship which we run into all the time? The subpoena duces tecum, being simply to notify not only the person but the defendant of the fact that we are seeking the contraband, would open up no end of ways in which the evidence would never appear.

The use of the subpoena duces tecum can never guarantee that the evidence will ultimately be available for whatever clarity it may shed on the criminal transaction under investigation or even when the evidence is ultimately obtained by the prosecutor, the delay in obtaining such may have destroyed its usefulness. When an item of critical evidence is obtained quickly, it may often provide leads and clues which are required for the progress of the investigation. Early leads and clues to other items of physical evidence and witnesses are essential to the search for truth. Where such do not occur, the prosecutor faces the risk of loss or destruction of the physical evidence as well as the hazards of fading memories and intimidation or corruption of witnesses.

Substantial problems may also be caused by reason of a fundamental difference between a search warrant and a subpoena duces tecum. A search warrant is directed against a place, while a subpoena is directed to a person. A law enforcement officer may know the location of critical evidence but may not know the identity of the person who is in possession of the evidence. Or, where he does know such identity, if the person to whom the subpoena is directed is not present within the local or state jurisdiction, service of the subpoena and compelling the production of evidence may be difficult or even impossible.

In addition to the potentially fatal problems of delay, there is also serious danger of the risk of destruction or loss of evidence. Proposals to limit search warrants do not take into account the possibility that the person to whom the subpoena is directed may be a friend, relative or associate of the person under investigation. Where such occurs, common sense says there is a strong likelihood that such person would be motivated to destroy the evidence or at the least put the defendant on notice and thereby facilitate its destruction. In addition to possible destruction of the subpoenaed evidence itself, such notice can also result in destruction of related evidence to which the subpoenaed evidence would lead. Even where the person in possession of the evidence is not a sympathetic party to the criminal target, the security of the evidence in that person's hands will be uncertain and the risk of its ultimate destruction still great. As stated by the Supreme Court, "It is likely that the real culprit will have access to the property, and the delay involved in employing the subpoena . . . could easily result in the disappearance of the evidence, whatever the good faith of the third party." Further, resort to the subpoena does not ensure that even where some evidence is produced, that the evidence will be complete, or that where statements are made that the person does not possess the evidence, that in fact such statements can be verified.

The assumption that law enforcement officials can accomplish with the subpoena the same things which can be accomplished with a search warrant is erroneous in another respect. A person served with a subpoena may be entitled to defeat the subpoena on a self-incrimination claim. Use of a search warrant, however,

does not require the person served to take potentially incriminating actions and his rights are therefore not violated. The ability of a prosecutor to cut through even a spurious objection to a subpoena is minimal as the Supreme Court recognized in *Zurcher* where it observed that, "the burden of overcoming an assertion of Fifth Amendment privilege, even if prompted by a desire not to cooperate rather than any real fear of self-incrimination, is one which prosecutors would rarely be able to meet in the early stages of an investigation despite the fact that they did not regard the witness as suspect. Even the time spent litigating such matters could seriously impede criminal investigations."

The difficulty of distinguishing between suspects and nonsuspects in early stages of an investigation is a further complication of an already difficult situation. The very purpose for conducting the search pursuant to a judicially issued warrant may be for obtaining evidence which will lead to identification of the criminal suspect.

While the stated purpose behind HR–3486 is to provide greater protection for the press, the legislation actually goes considerably beyond that purpose through the use of terminology which is admittedly broad and imprecise. Use of the concept of "work product" places an impossible burden on investigating law enforcement officials. Whether evidence is subject to the protections of this statute, depends not so much on objective circumstances as it does upon the state of mind of the person possessing the evidence. Thus, before a law enforcement official may execute any third party search warrant, this legislation, in effect, requires that he know the identity of the possessor of the evidence and the intent and the purpose for which the person possesses the evidence. As a practical matter, ascertaining such facts in the early stages of an investigation may be impossible. If the purpose of the legislation is to protect the press, then it would be preferable to limit such legislation to representatives of the press rather than using the vague and overbroad concept of "work product." While a precise definition of the press may cause some difficulties, such would not be nearly as great as the difficulties caused by reason of the breadth and imprecision of the use of the term "work product." By limiting such legislation to the press, law enforcement officials would at least have some reasonably objective standard upon which they could govern the conduct of their investigations. A determination as to whether evidence is possessed by a representative of the press is one which can in most instances be made in advance of the search. A determination as to whether materials are possessed as "work product" is a determination which in many instances cannot be made until after a search and the resulting litgation in court. Use of the concept "work product" therefore not only causes law enforcement officials difficulty but may actually provide less protection for the press than would be the case were this legislation to contain a limitation specifically oriented to the press.

Difficulties with the concept of "work product" may also be understood when one considers the situation where investigating officers are lawfully upon the premises of one possessing "work product," looking for other evidence pursuant to a valid search warrant. The decision which must be made by the officer as to which evidence he may lawfully seize and which evidence he may not seize is one which may be difficult if not impossible and one which certainly places him at his peril when the sanction provisions of this legislation are considered.

It is my understanding that the third party search legislation is what we presently have for consideration. Some of the back-up positions suggested have been the work product approach; the requirement that we use a subpoena duces tecum for law offices, engineers, architects, doctors, and other professonal people. These are subject to some of the same objections which I have raised above. To be a little more explicit, they fail to define what it is that one cannot search for, what constitutes a lawyer's office. We all know of instances where lawyers represent people in the organized crime business. It is very simple for a defendent to leave the damaging files and records with his lawyer or in his premise in such a way as to subvert the process to prevent us from getting the records. What is so particularly ironic about this effort is that the same Congress that is seriously considering this legislation is funding major efforts to get at what they call the career criminal and/or organized crime. The irony, obviously, is that the career criminals and people in organized crime are the ones who conduct themselves in such a way so as to necessitate the need for search warrants to have successful prosecution. The two-bit crook who we run into on a daily basis is usually not sophisticated enough to necessitate the use of a search warrant. In the main, search warrants are used to break up burglary rings and, if you will, the career criminal.

I believe it is our role and responsibility to the public to be able to articulate with clarity the fact that the police do not have the right nor do they break into innocent people's homes, tear up their belongings, look into their drawers, etc., but rather the search process is controlled by the judiciary. Should legislation prevail such as being considered, we are giving a blank check to the career criminal. We are inviting him to continue his activity and to accelerate it. We all know that even under the present circumstances, our ability to preserve the peace and protect the public has been greatly eroded in the past ten years. To impose this additional restriction on us would simply open the flood gates to an acceleration of crime. The people who allegedly are being protected by this legislation so the police, prosecutor and courts cannot intrude into their homes, would have the career criminals invading their homes and taking off with their worldly possessions in the nightly clandestine kinds of activities that we would be powerless to prevent.