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Search Warrants in Newsrooms: Some Aspects of The Impact of *Zurcher v. The Stanford Daily*

BY DWIGHT L. TEETER, JR.*
and
S. GRIFFIN SINGER**

Speaking before a Congressional hearing in 1978, CBS News Vice President William J. Small summed up journalists' concerns about the Supreme Court ruling in *Zurcher v. The Stanford Daily*.¹ "In journalism," Small said, "we always assumed that the Bill of Rights protected us from an arm of the State intruding into our working atmosphere without subpoena, without our having the opportunity to seek legal means to fight off the intrusion. The Supreme Court says no."²

The *Zurcher* decision stemmed from a fact situation involving the search of a newsroom, but the implications of that 5-3 ruling extend far beyond the news media. Simply stated, the Court ruled that surprise searches of newsrooms are constitutional as long as the police have a valid warrant. Beyond that, the evident meaning of *Zurcher* is that all citizens, whether or not they are suspected of any crime, may be subjected to unannounced searches of their homes or offices, provided only that those searches are approved in advance by the issuance of a search warrant. The gravity of that decision's impact on the American press—and on the ordinary American citizen — was suggested by Jerry W. Friedheim, executive vice president of the American Newspaper Publishers Association,

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¹ 436 U.S. 547 (1978).

² Statement of William J. Small, in JUSTICE DEPARTMENT POLICY CONCERNING NEWS MEDIA SEARCH WARRANTS, *Hearing before a Subcommittee of the Committee on Government Operations, House of Representatives, 95th Cong., 2d Session 208 (1978)* p. 8. [Hereinafter cited as *Hearings*].

in a hearing before the Senate Judiciary Committee on the Constitution.³ He pointed to the contrast between those countries where neither the press nor the people are free⁴ and America, where it has been accepted historically that a free press is essential to a free people. Friedheim underscored the danger of the *Zurcher* decision: “[P]ress freedom here lives, but . . . it lives in peril and in constant need of defense by the press itself, the people and the peoples’ representatives in Congress.”⁵

News media reactions to *Zurcher* expressed outrage based on the fear that a “staggering blow to freedom of the press” had been struck.⁶ The consensus of press comments was that surprise searches of newsrooms are clearly unconstitutional under the first and fourth amendments. In addition to the fear that surprise searches of newsrooms would impede the gathering of information from confidential sources, the press displayed concern that the “right of the people to be secure in their persons, houses, papers and effects”⁷ had been eroded.

This article explores the *Zurcher* decision in terms of how the Court interpreted and applied the fourth amendment. It then analyzes press reaction to the rule enunciated in Justice Byron R. White’s majority opinion that unannounced searches of innocent third parties, including persons in newsrooms, are constitutional when a search warrant has been issued. Justice White suggested that such third parties could be protected from such surprise searches through “legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure.”⁸ Attempts to provide a legislative response to *Zurcher*, including more than a dozen bills introduced in the Ninety-Fifth Congress,⁹ generally

³ News Release, American Newspaper Publishers Ass’n, Reston, Va., July 13, 1978 (excerpting remarks of Mr. Friedheim before the Senate Judiciary Committee on the Constitution).

⁴ *Id.*

⁵ See text accompanying notes 36-49 *infra* for a discussion of the press reaction to *Zurcher*.

⁶ *The Right to Rummage*, The Washington Post, June 1, 1978, reproduced in *Hearings*, at 208.

⁷ U.S. CONST. amend. IV.

⁸ 436 U.S. at 567.

⁹ See, e.g., H.R. 12952, H.R. 13017, H.R. 13113, H.R. 13168, H.R. 13169, H.R. 13227, H.R. 13305, H.R. 13319, H.R. 13710, S. 3164, S. 3222, S. 3258, and S. 3261.

adopted District Court Judge Robert F. Peckham's position as stated in a 1972 ruling in that case. Peckham asserted that a subpoena duces tecum, as a "means less drastic" than a search warrant, "should always be preferred" in "obtaining materials from a third party."¹⁰ The news media, however, have not waited passively for legislative action to lift the threat of newsroom searches. As will be shown, the news gathering process has been altered as a consequence of the Supreme Court ruling in the *Zurcher* case.

I. THE ZURCHER DECISION AND ITS SETTING

Zurcher arose during violent demonstrations at Stanford University on April 9, 1971. Students protesting the firing of a black janitor took control of the Stanford University Hospital administrative offices and an adjoining corridor. Demonstrators barricaded both ends of that corridor, but police forced their way through the barricade. A group of nine police officers stationed at one end of the hallway was overrun by students seeking to avoid arrest.¹¹

On Sunday, April 11, 1971, a special edition of *The Stanford Daily* carried articles and photographs depicting the clash between demonstrators and police. Based on the newspaper's coverage of the incident, authorities surmised that *Daily* photographer Bill Cook had been in a suitable position to take additional photos of the fighting between students and police. It was assumed that the *Daily* might have some pictures in its files which would allow police to identify some of the demonstrators in order to bring charges against them.¹²

Accordingly, the local district attorney secured a warrant on Monday, April 12, 1971, in which a municipal judge authorized the immediate search of the premises of *The Stanford Daily*. Later that day, the newspaper office was searched by four police officers, with some staffers present. *Daily* Editor Felicity Barringer tried to convince searching officers that if

¹⁰ 353 F. Supp. 124, 130 (N.D. Cal. 1972).

¹¹ 436 U.S. at 550. Part of the narrative which follows is adopted from H. NELSON & D. TEETER, *LAW OF MASS COMMUNICATIONS*, 642-43 (3d ed. 1978), and is used by permission of the Foundation Press, Mineola, N.Y.

¹² Address by Professor Marion Lewenstein, of the Dept. of Communication, Stanford University, to Auston Chapter of Stanford Alumni Ass'n, Oct. 26, 1978.

she had possessed any action photos which presented identifiable views of the demonstrators, those pictures would have been published in the newspaper. The search, which extended to photographic laboratories, filing cabinets, desks, and waste paper baskets, but not to locked rooms, failed to yield the photographic materials sought by the officers. Rather than producing photographs which would aid police in identifying participants in the riot, the search merely uncovered photographs previously published in the *Daily*.¹³

The Stanford Daily, shortly after the search, filed suit in federal court under 42 U.S.C. § 1983, alleging that the search violated the first, fourth, and fourteenth amendments. A district court, in ruling the search unconstitutional, declared that the fourth and the fourteenth amendments forbid the issuance of a warrant to search for materials in possession of a person not suspected of a crime unless there is probable cause to believe, based on a sworn affidavit, that a subpoena duces tecum would be impractical.¹⁴ A subpoena duces tecum "can be enforced by a judge only after a hearing in which the holder of the evidence has the opportunity to present arguments why the material should not be given to the government."¹⁵ If investigators have a search warrant, on the other hand, the holder of the documents "has no more warning than a knock on the door" or the actual arrival of police in a newsroom. District Judge Peckham was emphatic in ruling for the *Daily*. He stated that a subpoena duces tecum is always preferable to a search warrant in obtaining evidence from a "third party," one not suspected of involvement in criminal activity.¹⁶

A United States Court of Appeals affirmed the district court ruling¹⁷ that the search violated the fourth and fourteenth amendments, but the Supreme Court of the United States reversed by a vote of five to three.¹⁸ Justice White's majority opinion held that newspapers are subject to unannounced

¹³ 436 U.S. at 551-52.

¹⁴ *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972).

¹⁵ Weaver, *High Court Bars Newspaper Plea Against Search*, *The New York Times*, June 1, 1978, § A at 1; quote at § B at 1.

¹⁶ 353 F. Supp. at 130.

¹⁷ *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977).

¹⁸ *Zurcher v. The Stanford Daily*, 436 U.S. 547 (1978). Justice Brennan took no part in the consideration of this case.

“third party” searches such as the one involving the *Daily*. Terming the district court’s treatment of the case a “sweeping revision of the Fourth Amendment,” Justice White declared that “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 reason to believe that fruits, instrumentalities, or evidence of a crime will be found.”¹⁹ “The critical element in a reasonable search,” he continued, “is not that the owner of the property is suspected of a 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.”²⁰

Justice White’s analysis of first amendment implications of the *Zurcher* case yielded the conclusion that “the net gain to privacy interests by the District Court’s new rule would not be worth the candle.”²¹ The Court noted the “general submission . . . that searches of newspaper offices for evidence of crime reasonably believed to be on the premises would forbid use of search warrants and would permit only the subpoena *duces tecum*.” He enumerated the arguments against newsroom searches, including physical disruption which could impede timely publication, and the contention that confidential sources of information will dry up. Other contentions against searches included reporters’ fear of searches deterring them from recording and preserving their notes for future use and the possibility that the press may resort to self-censorship to conceal its possession of information from police.²² Justice

¹⁹ 436 U.S. at 554, 556 (footnotes and citations omitted).

²⁰ *Id.* at 556.

²¹ *Id.* at 562.

²² First, searches will be physically disruptive to such an extent that timely publication will be impeded. Second, confidential sources of information 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 to [sic] the police.

436 U.S. at 563-64.

White, with seeming casualness, brushed such arguments aside.

He then proceeded to consider the historical development of the fourth amendment,²³ conceding that "the struggle from which . . . [it] . . . emerged 'is largely a history of conflict between the Crown and the press.'" He wrote 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.'"²⁴ Justice White cautioned that "[w]here 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.'"²⁵ Such a standard was said to be sufficiently rigorous when "properly administered" to protect newspaper offices from the dangers imposed by search warrants. In actuality, however, that "scrupulous exactitude" standard requires only that the "preconditions for a warrant — probable cause, specificity with respect to the place to be searched and the things to be seized" be met.

Justice Potter Stewart, joined by Justice Thurgood Marshall, dissented from the majority opinion's view that properly issued search warrants were adequate to safeguard first amend-

²³ For an excellent study on that methodology, see C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969).

²⁴ 436 U.S. at 564 (citations omitted). The standard work on the development of the fourth amendment is N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1924); and Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 336, 336 (1978).

²⁵ Justice Lewis Powell concurred, he said, "simply to emphasize . . . the fundamental error of Mr. Justice Stewart's dissenting opinion." Like Justice White, he found no constitutional reason to entitle the press to a special procedure. He suggested, however, that the Court might, in the future, consider a somewhat different method for newspaper searches as opposed to searches of cars or apartments. Powell wrote, "[t]his is not to say that a warrant which would be sufficient to support the search of an apartment . . . would be reasonable in supporting the search of a newspaper office." 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." Application of the reasonableness and particularity requirements in issuing search warrants, wrote Justice Powell, should minimize dangers to the press. 436 U.S. at 568-70.

ment freedoms. In addition to the "physical disruption of the operation of the newspaper," Justice Stewart was concerned by a "more serious burden." He saw unannounced police searches of newsrooms as raising "the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves."²⁶

The majority of the Court was not convinced that newsroom searches would cause confidential sources to disappear or would impel the press to suppress news because of fears of searches.²⁷ Such a conclusion, Justice Stewart argued, ignores common experience and "will significantly burden the constitutionally protected function of the press to gather news and report it to the public."²⁸ Agreeing with District Judge Peckham's statement that a "subpoena should always be preferred to a search warrant,"²⁹ Justice Stewart contended that the Court should adopt the subpoena method and its "opportunity for an adversary hearing."³⁰ His goal was to provide a newspaper an opportunity for such a hearing, before the search has occurred and before "the constitutional protection of the newspaper has been irretrievably invaded."³¹

Justice John Paul Stevens, dissenting separately, rejected the majority approach and also turned away from Justice Stewart's emphasis on the press as opposed to the general public. Justice Stevens instead favored a broader emphasis on "whether the offensive intrusion on the privacy of the ordinary citizen is justified by the law enforcement interest it is intended to vindicate."³² He argued that the majority's holding that "mere possession of documentary evidence" is sufficient to satisfy the probable cause requirement of the fourth amendment "rests on a misconstruction of history and of the Fourth Amendment's purposely broad language."³³ Justice Stevens agreed with Justice Stewart that "[t]he standard of reasona-

²⁶ *Id.* at 571-73 (citations and footnotes omitted).

²⁷ *Id.*

²⁸ *Id.* at 574.

²⁹ 353 F. Supp. 124, 130 (N.D. Cal. 1972).

³⁰ 436 U.S. at 576.

³¹ *Id.*

³² *Id.* at 581.

³³ *Id.*

bleness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion."³⁴

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 a citizen's liberty are, therefore, the constitutionally mandated general rule. An exception to that rule can only be justified by strict compliance with the Fourth Amendment.³⁵

Justice Stevens added that the only possible justification for an unannounced search of an "innocent citizen is fear that, if notice were given, he would conceal or destroy the object of the search."^{35.1} In this case, he maintained, no such showing had been made. Therefore, the search of *The Stanford Daily*, in his opinion, violated the Warrant Clause of the fourth amendment.

II. REACTIONS TO ZURCHER: DID THE PRESS "CRY WOLF"?

The involvement of *The Stanford Daily* in the search warrant case did not escape the nation's media. Loudly, the press decried the action of the Court in editorials and columns and before Congressional subcommittees. While most of the initial outcry was based on threats to press freedom, the media also recognized that the rights of private citizens were being jeopardized. Some observers might feel that the press was "crying wolf" in its reactions, particularly in light of Justice White's reassurances about warrants being issued with care by neutral magistrates. The press did not evidence much faith in his contentions.

The Washington Post, while terming the decision a "staggering blow to freedom of the press," also noted the tremendous impact of the decision on the rights of all citizens. As *The Post* interpreted Justice White's majority opinion,

if the public can convince a judge there is probable cause to believe evidence of a crime is contained in your private files

³⁴ *Id.*

³⁵ *Id.*

^{35.1} *Id.* at 582.

— a crime not committed by you or by anyone, anytime, anywhere — they can rummage through your papers and premises until they find it, or choose to abandon the search.³⁶

The Post declared that such an assault runs counter to both the first and fourth amendments. Until recent years, private papers were considered immune from the prying eyes of government. To illustrate the dramatic consequences of the *Zurcher* decision, *the Post* said that “in a situation like Watergate . . . a newspaper (or its reporters) would be foolish to retain documentary evidence that might reveal the sources of its information.”³⁷

The Boston Globe, in an editorial column written by Executive Editor Robert Healy, pronounced the decision to be the most devastating first amendment case ever to come from the Supreme Court. Because the record clearly demonstrated that police authorities have little trouble in obtaining search warrants, Healy argued that the “press will then be perceived in certain quarters as an adjunct of any government agency which might be able to obtain a search warrant.”³⁸ Further, the decision was said to encourage a “lawless process where police agencies can go in and rifle through internal memoranda, unpublished articles and notes, and files of newspapers.”^{38.1}

The New York Times said the decision “strikes a double blow, at individual privacy and press freedom,” adding that privacy rights for law-abiding citizens were “shabbily treated.”³⁹ *The Times* contended that there was no precedent for *Zurcher* because the precise issue had never been before the Supreme Court.⁴⁰ This newspaper called for legislatures “to enact added protections for individual privacy and press freedom. . . . Considering the way this Court now interprets the Fourth Amendment, Congress and the state legislatures would

³⁶ *The Right to Rummage*, *The Washington Post*, June 1, 1978, reproduced in *Hearings*, *supra* note 2, at 208.

³⁷ *Id.*

³⁸ *Court ruling devastating to Press*, *The Boston Globe*, June 2, 1978, reproduced in *Hearings*, *supra* note 2, at 209.

^{38.1} *Id.*

³⁹ *A Double Blow by the Court*, *The New York Times*, June 6, 1978, reproduced in *Hearings*, *supra* note 2, at 210.

⁴⁰ *Id.*

be well advised to do so promptly."⁴¹

The Wall Street Journal was in complete agreement with Justice Stevens' rejection of a "press only" application of the first amendment, favoring a larger emphasis on the rights of ordinary citizens.⁴² *The Journal* said that "[n]ewspapers are on the firmest ground . . . when their rights are embodied in rights enjoyed by all the people."⁴³ It was conceded for argument's sake that in situations where materials could be destroyed easily, there could be merit in an unannounced search to protect valuable evidence. *The Journal*, however, was troubled by the spectre of "police bursting into private premises under any but the most compelling circumstances."⁴⁴

The heart of the problem, to *The Wall Street Journal*, was the 1967 Supreme Court ruling in *Warden v. Hayden*⁴⁵ that "mere evidence can reasonably be the object of such a search."^{45.1} *The Journal* was referring to Justice Stevens' framing of the issue in *Zurcher* as 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*."⁴⁶ *The Journal* thus approved Justice Stevens' assertion that when an "innocent citizen's interest in the privacy of his papers and possessions" is at stake, "[n]otice and an opportunity to object to the deprivation . . . are, therefore, the constitutionally mandated general rule."⁴⁷ *The Journal* said that the Court's ruling in *Zurcher*, instead of announcing a

⁴¹ *Id.*

⁴² See notes 32-34 *supra* and accompanying text for an analysis of Justice Steven's dissenting opinion.

⁴³ *Search and Seizure*, *The Wall Street Journal*, June 13, 1978, reproduced in *Hearings*, *supra* note 2, at 215.

⁴⁴ *Id.*

⁴⁵ *Id.* The Supreme Court case that expands the scope of search warrants to include more evidence is *Warden v. Hayden*, 387 U.S. 294 (1967). Justice White made the point in his dissent that "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.'" 436 U.S. at 579, n. 5 (citation omitted).

^{45.1} *Search and Seizure*, the *Wall Street Journal*, June 13, 1978, reproduced in *Hearings*, *supra* note 2, at 215.

⁴⁶ 436 U.S. at 578.

⁴⁷ *Id.* at 581.

strict standard of compliance with the fourth amendment when the privacy of an innocent citizen is threatened, "serves as an open invitation to skirmishes between the state and the press."⁴⁸ *The Journal* added:

If the Stanford case does lead to a rash of newspaper searches, we suspect the court will have to look at the Fourth Amendment again. It could strengthen the privacy rights of everyone against evidence-gathering raids without having to do newspapers a special favor.⁴⁹

Did the media overreact? As noted in the following section, as of late 1978, at least fourteen other searches had been conducted in offices of newspapers and broadcast stations since *The Stanford Daily* search in 1971.

III. PROFILING THE "NEUTRAL MAGISTRATE"

If Justice White's majority opinion in *Zurcher* were to be taken at face value, any journalist who sees search warrants as a threat to press freedom is worrying needlessly. After all, "neutral magistrates" will protect the news media from harassment, and will require reasonable searches, specifically spelled out as to what places will be searched and what things will be sought.⁵⁰ That majority holding, however, as viewed by the press and by Justices Stewart and Stevens, imperils "the right of the people to be secure in their persons, houses, papers, and effects."⁵¹

Justice White stated that when "[p]roperly administered, the preconditions for a warrant . . . should afford sufficient protection against the harms that are assertedly threatened by warrants for newspaper offices."⁵² Those preconditions have to do with neutral magistrates issuing warrants on the basis of probable cause for believing that the fruits or evidence of criminal activity will be found on the premises to be searched.

⁴⁸ *Search and Seizure*, *The Wall Street Journal*, June 13, 1978, reproduced in *Hearings*, *supra* note 2, at 215.

⁴⁹ *Id.*

⁵⁰ 436 U.S. at 581.

⁵¹ U.S. CONST. amend IV.

⁵² 436 U.S. at 565.

Journalists should perhaps be forgiven if they regard the protection of "neutral magistrates" as illusory. First, most, if not all, journalists tend to believe the folklore item about police walking around with fill-in-the-blank search warrants already signed by a complacent magistrate. Even if that is rankest slander of the judiciary, statistics on the issuance of search warrants compel the belief that the preconditions for warrant issuance are often improperly administered. "From 1969 through 1976, police sought 5,563 applications for search warrants under the 1968 Omnibus Crime Control Act. Only 15 of these applications were denied. In 1977, none of the 626 applications was denied."⁵³ Bluntly, the general rule seems to be that a search warrant sought equals a search warrant granted.

Beyond that, the term "neutral magistrate" puts an all too flattering gloss on some persons who are empowered to issue search warrants. The House Committee on Government Operations has noted that the Court's implications that "magistrates . . . have at least a working knowledge of constitutional law" is in error. "By one estimate of the National Center for State Courts, 8,800 of the 14,900 judges and comparable officials in states are not attorneys, and "a number of states appear not to require that warrant issuers be lawyers."⁵⁴

There are situations when judges may not be neutral on the subject of whether, when presented with the relevant information, a search warrant should issue. NBC News Correspondent Bill Monroe has expressed doubts that there is "dependable protection in the restraint of judges and law enforcement officials." This restraint may be lacking particularly when the judges "are . . . the subjects of journalistic inquiry, and sometimes the political allies of others being investigated."⁵⁵ Monroe articulated fears that "the Court has now delivered to [judges and officials] a tool they can use against their investigators."⁵⁶ Similar apprehensions were expressed by Jack C. Landau of the Reporters Committee for Freedom of the

⁵³ HOUSE COMM. ON GOVERNMENT OPERATIONS, SEARCH WARRANTS AND THE EFFECTS OF THE STANFORD DAILY DECISION, H.R. REP. NO. 1521, 95TH CONG., 2D SESS. 4 (1978).

⁵⁴ *Id.* at n.8.

⁵⁵ Quoted in *Congress Moves on 13 Bills to Limit Searches, News Media & The Law*, Oct., 1978, at 19.

⁵⁶ *Id.*

Press. In an eloquent and alarming account of some weaknesses in warrant issuance procedure, Landau testified before the Senate Committee on the Judiciary:

We regret 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. 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.

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 subpoenas. 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 authority — is going to serve as an effective guardian of the privacy of the newsroom.⁵⁷

IV. LEGISLATIVE REACTION TO ZURCHER

Subpoenas of reporters, variously seeking the identity of their sources, their notes, tape recordings, or videotape “out-takes,” emerged as a palpable threat to the newsgathering process back in 1972 with the Supreme Court decision in *Branzburg v. Hayes*.⁵⁸ In that case, the Supreme Court held for the first time that reporters do not have a first amendment protection against answering questions put to them by grand juries. In a large number of cases since *Branzburg*, the issue has been whether journalists can live up to a pledge of confidentiality to protect the identity of a source.⁵⁹ Without the ability to keep sources’ identities secret — or to protect materials which might reveal a source’s identity or other information which was

⁵⁷ Landau, Statement before a subcommittee of the Senate Committee on the Judiciary, July 13, 1978, quoted in *COLUMBIA JOURNALISM REV.* Nov./Dec., at 45.

⁵⁸ 408 U.S. 665 (1972).

⁵⁹ For a valuable summary of subpoena cases, see J. GOODALE, *COMMUNICATIONS LAW* 297-490 (1978). Note particularly cases cited at 306-13.

a condition of gaining the confidence in the first place — many reporters assert that they will be hampered significantly in gathering news.⁶⁰

Search warrants are quite another matter. A warranted search can be made of a newsroom without prior warning. To a journalist, the difference between a subpoena and a search warrant is analogous to the difference between a rattlesnake and a cobra. One at least gives some warning. Many journalists believe that the lack of security of notes and materials will frighten off some important sources for news stories.⁶¹ A striking example was presented in a memorandum from *The Boston Globe's* religion editor to Executive Editor Robert L. Healy. The religion editor had been working on a story about "how a so-called religious organization is raising funds and using young people and how parents of some of these young people are trying to get them to return home."⁶² The memo was dated June 21, 1978, just three weeks after the *Zurcher* decision by the Supreme Court:

Yesterday morning . . . I received a call in response to a story published recently under my by-line in the *Globe*. The caller, who did not identify himself and who was calling from a pay phone, was seeking further information on the subject of my story.

In the course of our conversation, it became clear that this person had information about a significant aspect of my first story and while trying to answer his questions in a general way, I pressed him about meeting with me to discuss the matter further and to establish his credibility. The caller said he needed to protect his anonymity and I assured him I would do my best to preserve it if we met. The caller said he would discuss the possibility with his superiors.

This morning, the same person called, again from a pay phone . . . The caller said his superiors had told him that I could not protect his anonymity because of the new law, which it became clear, referred to the recent Supreme Court ruling that permits issuance of search warrants on newspaper offices. Again I told him we would do our best to preserve his

⁶⁰ See Section II *supra* at notes 32-34, 40-41 for statements by journalists.

⁶¹ *Id.*

⁶² *Hearings, supra* note 2, at 4.

anonymity and after some more conversation about the subject of my first story and his involvement, the caller said he might call again sometime.⁶³

As Healy's anecdote indicates, the "chilling effect" of *Zurcher* on news sources is not an illusion. The majority opinion by Justice White, after denying that search warrants would be disruptive of newsrooms, offered the comfort that legislative remedies might be provided: "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. . . ."⁶⁴

But the legislative process is often a painfully slow remedy, whether through the state legislatures or the Congress. At the state level, California has enacted a statute to prevent searches of news media offices for materials protected under the state's shield law. In Assembly Bill 512, signed into law September 23, 1978, by Governor Edmund G. Brown, Jr., physical evidence is not exempted. However, reporters' notes, sources, photos, and file out-takes are to be protected. In parallel action, the assembly also passed a bill placing a constitutional amendment on California's 1980 ballot. That measure, if passed, would incorporate protections granted under the California shield law into the state constitution.⁶⁵

In Oklahoma, a new shield law went into effect October 1, 1978. It provides that reporters may not be required to divulge either the source of any:

published or unpublished information, or the information itself, unless "the court finds that the party seeking the information or identity has established by clear and convincing evidence that such information or identity is relevant to a significant issue in the action and could not with due diligence be obtained by alternate means."⁶⁶

Information from the Reporters Committee for Freedom of the Press indicates that Ohio, one of 26 states with shield laws,

⁶³ *Id.*

⁶⁴ 436 U.S. at 567.

⁶⁵ 47 U.S.L.W. 2228; *Report of the Advancement of Freedom of Information Committee*, THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI (1978) pp. 7-8.

⁶⁶ *Id.*

is seeking to amend its statute to protect not only journalists' sources but also documents and papers in a newsroom.⁶⁷ A bill pending in Pennsylvania would protect journalists' papers from searches, and Texas has adopted a statute which requires that only those courts in which judges are required to be attorneys may issue search warrants. In addition, another new Texas statute protects newsrooms from searches.⁶⁸

At the federal level, thirteen bills restricting search warrants were introduced in the Ninety-fifth Congress.⁶⁹ Basically, the federal bills fall into two categories: the first forbids "third party" searches when no crime is suspected without first taking alternate measures such as subpoenas to secure the desired evidence. This kind of bill states specifically that news organizations are protected from such searches under the first amendment.⁷⁰ The second category prohibits such searches only for news organizations. All but two of the proposed laws would apply to both federal and state jurisdictions.⁷¹ The bills embrace the "subpoena first" rule articulated by Judge Peckham, and limit searches of innocent third parties to circumstances where there is reason to believe the evidence will be destroyed. As expected, search warrant legislation to protect the press has been introduced in the Ninety-sixth Congress.

CONCLUSION

It is to be hoped that Congress will pass legislation to abrogate the menace to press freedom represented by *Zurcher*. Meanwhile, the newspaper, broadcast station, or news service must cope with the possibility — or probability — of unannounced newsroom searches by police. Several news media organizations have adopted procedures for employees to follow in the event that such searches occur.

⁶⁷ Telephone interview with Brona Pinnolis, Reporters Committee on Freedom of the Press, Nov. 29, 1978; 47 U.S.L.W. 2228.

⁶⁸ *Id.* Texas measures amending §§ 18.01 and 18.02 of the Code of Criminal Procedure [Senate Bills 1202 and 2091] were signed into law in June, 1979, by Governor William Clements.

⁶⁹ H.R. 12952, H.R. 13017, H.R. 13113, H.R. 13168, H.R. 13169, H.R. 13227, H.R. 13305, H.R. 13319, H.R. 13710, S. 3164, S. 3222, S. 3258, and S.3261.

⁷⁰ *Id.*; telephone interview with Barbara Ruud, legislative aide, office of the Hon. J.J. Pickle, M.C.

⁷¹ See citations in note 69 *supra*.

Within two weeks after the *Zurcher* decision, attorney Douglas H. McCorkindale of The Gannett Co., Inc. circulated a memorandum to editors and publishers within the group's seventy-eight newspapers. McCorkindale, senior vice president for finance and law for Gannett, recommended that should police arrive unannounced, full cooperation should be extended, so long as the warrant appears reasonable and proper. Such cooperation should include the immediate production of desired material, or the informing of police that the material is not present in the newsroom. Why so much cooperation after all the cries from the press? The idea, although difficult for many journalists to swallow, is to get the officers in and out of the newsroom as quickly as possible to prevent rummaging in what could be confidential and private files.⁷²

McCorkindale wrote that warranted searches should not be resisted physically for fear of arrest or a contempt citation. He noted that while cooperating, journalists should do everything possible to challenge the warrant through appropriate legal process:

We recommend that each newspaper, in cooperation with its local counsel, develop a plan which would permit the newspaper to seek quick reversal of a warrant. The plan would identify those judges with power to reverse a warrant along with their office and home telephone numbers. You can probably decide in advance which judges would be most likely to rule in your favor on the validity of a warrant. When a warrant is served, you should immediately contact local counsel and the corporate legal department. Your local counsel can then telephone an appropriate judge and request a verbal order reversing the warrant, or staying its execution until a hearing can be held. At the hearing you can attempt to persuade the court that the warrant was not legally proper.

Due to time constraints or the unavailability of local counsel, it may be necessary for editors to talk directly with judges. As part of your contingency planning, you and your local counsel should decide what you should say in that event.⁷³

⁷² McCorkindale memo, *Warranted Searches of Newspaper Offices*, Gannett Co., Inc., Rochester, N.Y. June 13, 1978. (Used by permission.)

⁷³ *Id.*

United Press International and *The Minneapolis Star and Tribune*, as examples, also have guidelines set out for employees. Both call for editors and counsel to examine warrants. UPI directed that personnel who are capable of evaluating the merits of a specific search request with "common sense, good judgment, knowledgeability and an appreciation of local conditions and laws" be previously designated.⁷⁴ *The Star and Tribune* guidelines spell out in detail what questions should be asked by editors and counsel and how police should be accompanied by an appropriate editor and an attorney from *The Star and Tribune* legal office, assuming that the searchers can be persuaded to wait for the appropriate editor and lawyer to arrive.⁷⁵ Other newspapers call for photographers to accompany police during the search in order to get a pictorial record of what files and desks are being searched.⁷⁶

So far, courts and law officers seem to have overlooked a major problem of access to materials other than those on film, tape or paper — even if police have a valid search warrant. In other words, do they know — in the parlance of newsroom "new technology" — how to "access information" stored in a newspaper or wire service computer?

In the modern world of newspapers and news services, reporters and editors often never deal in words on paper once crude notes are transcribed. All of the information, most likely in memo or story form, is then stored in a computer system and is visible on the screen of a video display terminal (cathode ray tube). If a reporter, for example, is not specifically named in a warrant and directed to produce the notes or unpublished story, it might prove impossible for the information to be retrieved except by specially trained editors or technicians.

Computer systems demand that before access is allowed to secured files, a password must be given. When an unpublished story or other information is of an extremely sensitive nature, a cautious reporter may devise a password which is known to no one else, thus thwarting tampering with the information. In such a case even if an editor were willing to cooperate, that

⁷⁴ UPI Reporter, Nov. 2, 1968.

⁷⁵ *Search Warrant Procedure Guide Issued*, EDITOR & PUBLISHER, Aug. 19, 1978, at 18.

⁷⁶ *Id.*

editor would be unable to help police "frisk" the computer.

Will the news media be intimidated and thus made less effective in reporting information the public needs to know? Only time can provide an answer, and it remains to be seen whether *Zurcher v. The Stanford Daily* will spawn an epidemic of newsroom searches. After the Stanford search, a certain amount of uneasiness was generated, and the Supreme Court's 1978 decision has resulted in what seemed unthinkable a few years ago: contingency plans for dealing with search warrant-authorized police intrusion into newsrooms.

It can be speculated, however, that newsroom practices in dealing with sensitive stories and the keeping of notes and other materials have now been altered. Saving notes for future reference or for use in developing continuing stories is no longer a routine matter, and will not be unless the Supreme Court reverses *Zurcher* or unless specific legislation insures once again the newsroom privacy which, like oxygen, used to be taken for granted. For the present, the widely republished photograph of a police officer pawing through a desk at *The Stanford Daily* back in 1971 haunts journalists. What couldn't happen here . . . happened here.

