

Journal of Legislation

Volume 6 | Issue 1

Article 1

1-1-1979

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Birch Bayh

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Recommended Citation

Bayh, Birch (1979) "Police Searches of Innocent Third Parties: A Congressional Response to *Zurcher v. Stanford Daily*," *Journal of Legislation*: Vol. 6: Iss. 1, Article 1.

Available at: <http://scholarship.law.nd.edu/jleg/vol6/iss1/1>

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POLICE SEARCHES OF INNOCENT THIRD PARTIES: A CONGRESSIONAL RESPONSE TO *ZURCHER v. STANFORD DAILY*

*Birch Bayh**

On Monday, April 12, 1971, four police officers of Santa Clara County, California executed a search warrant against the offices of the *Stanford Daily*, a student newspaper published at Stanford University.¹ In a very short time, that somewhat ordinary action would become the source of a raging constitutional battle.

The police were ordered to search for and seize any photographs or negatives of a demonstration which had occurred several days before at the Stanford University Hospital. The demonstration, covered by *Stanford Daily* reporters, had resulted in violence and several police officers had been attacked and injured by demonstrators. Subsequent articles and photographs in the newspaper convinced the local prosecutor's office that the *Daily* may have had additional photographs in its possession which could assist in identifying and prosecuting those who had assaulted the police officers. The Santa Clara County District Attorney's Office secured a warrant to search the newspaper offices. There was never any indication that the newspaper was involved with the criminal activity.

Late on Monday, April 12, 1971, Palo Alto police officers raided the *Stanford Daily* offices. The newspaper's filing cabinets, waste paper baskets, desks, and photographic laboratories were thoroughly examined. Although the police had an opportunity to read a number of notes and confidential memoranda during their search, they denied overstepping the bounds of their warrant. No additional evidence was found and the officers subsequently left.

Several *Stanford Daily* staff members subsequently filed suit under Title 42 U.S.C. § 1983 alleging violations of their civil rights. Both the United States District Court² and the Court of Appeals³ agreed with the plaintiffs that the fourth and fourteenth amendments to the Constitution barred issuing warrants to search nonsuspect third parties when no probable cause was shown that a subpoena duces tecum would be impractical.⁴ The United States Supreme Court, however, reversed the lower courts in a 5 to 3 decision, with Justice Brennan not participating.

Justice White, speaking for the majority, reasoned that neither the wording nor the history of the fourth amendment required a standard for searches of nonsuspects different from that of suspects. The majority held that all that the Constitution requires is a finding of probable cause that the items to be seized are in a particular location. If the search involves first amendment

*U.S. Senator from Indiana

1. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).
2. *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972).
3. *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977).
4. 353 F. Supp. at 132.

interests, the only further protection afforded is a properly issued warrant applied with particular exactitude. Insistence upon a subpoena, Justice White explained, would cause unnecessary delay and result in losing valuable evidence.

Responses to the *Zurcher* opinion by the news industry have been vehement. A move for congressional reform in response to the ruling has drawn support from both liberal and conservative groups.⁵ Since the decision applied to searches of the files of clergy, doctors, businessmen, lawyers, and many others, the reform movement has gathered increased support. Shortly after the decision, I introduced S. 3164, the Citizen's Privacy Protection Amendment of 1978, designed "to assure the rights of citizens under the Fourth and Fourteenth Amendments of the Constitution and to protect the freedom of the press under the First Amendment."⁶

Subsequent to the introduction of this bill, the Subcommittee on the Constitution, which I chair, held four days of hearings on the problems associated with the *Zurcher* decision and possible legislative responses to it. Throughout these hearings we have sought a broad range of opinions and have received testimony from the Department of Justice, the National District Attorneys Association, a variety of press organizations, the American Civil Liberties Union, and a panel of constitutional experts. In this comment, I will examine the policy considerations and constitutional questions which we have explored in our hearings concerning the *Zurcher v. Stanford Daily* decision.

A FREE AND INDEPENDENT PRESS?

Prior to *Zurcher*, the Supreme Court had never specifically dealt with the first and fourth amendment questions as posed in that case. Any discussion of fourth amendment protections of innocent third parties had largely been confined to problems of standing which those parties faced when challenging the legality of a search.⁷ Since 1971, however, unannounced searches of the media have been increasing.⁸ One search, conducted by police of the radio station, KPFK-FM in Los Angeles, lasted over eight hours and extended to all parts of the station.⁹

Prior to *Zurcher*, the Supreme Court in *Camara v. Municipal Court*,¹⁰ rejected the notion that an individual had fully protected fourth amendment rights only when suspected of a crime. In fact Justice White in *Camara* ironically said:

It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a

5. The *Boston Globe* called the decision "a first step toward a police state." 124 Cong. Rec. H5654 (daily ed. June 15, 1978). Howard K. Smith of ABC News, on June 2, 1978, called the decision "the worst, most dangerous ruling the Court has made in memory." On June 8, 1978, James L. Kilpatrick of the *Washington Star* condemned the opinion for its ignorance of the newgathering process. S. 3164, § 2, 95th Cong., 2d Sess. 124 Cong. Rec. S8557 (daily ed. June 5, 1978).
6. See, e.g., *Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165 (1973); *Jones v. United States*, 362 U.S. 257 (1960).
7. See, *The Press Censorship Newsletter ("PCN")*, published by The Reporter's Committee for Freedom of the Press, Legal Defense and Research Fund, Washington, D.C., which has documented fifteen subsequent searches similar to the one in *Zurcher*. See especially, 4 *PCN*, at 25 (1974); 6 *PCN*, at 30 (1975).
8. 6 *PCN*, at 30 (1975).
9. 387 U.S. 523 (1967).

very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal family and security.¹¹

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

Nonsuspect third parties, at a minimum, should be entitled to the same constitutional status in regard to unreasonable searches as criminal suspects.¹² When that third party is a newspaper, first and fourth amendment values converge. The fourth amendment commands that any search which is unreasonable violates constitutional protections.¹³ The first amendment prohibits any restrictions on the exercise of free speech. Given these considerations and the several Supreme Court opinions requiring a more restrictive standard for issuing search warrants when first amendment considerations arise,¹⁵ the precedential analysis of *Zurcher*, not to mention the policy considerations, are at best dubious.

The media's ability to gather, edit, and disseminate the news has been recognized by our courts.¹⁶ As Justice Stewart pointed out in his dissent in *Zurcher*, all three of these purposes will be impaired when a warrant is preferred to the less intrusive subpoena duces tecum. *Zurcher* also threatens to dry up the confidential sources that play an important role in assisting the media, who in turn, must inform the public. No file, desk drawer, or attic is insulated from a surprise police search under *Zurcher*.

Granted, the fourth amendment does not bar search warrants "simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement."¹⁷ But when the media is the party to be searched, special considerations should attach. A less intrusive method of gathering the same evidence is available to the prosecutor in the subpoena.¹⁸ But the *Zurcher* decision ignores considering such an alternative.

I should emphasize that I would not deny the police every legitimate means of prosecuting suspected wrongdoers. Yet *Zurcher* has left the printing and broadcasting industry with an imminent potential for unfettered governmental disruption of the newsgathering process. In the wake of a rash of *Zurcher*-type searches, it would only be a matter of time until a free and vigorous press found their constitutionally protected functions hampered by these limitations on newsgathering.

11. *Id.* at 530-31.

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

13. *U.S. Const.* amend. IV provides, "The right of the people to be secure in their person, 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."

14. *U.S. Const.* amend. I provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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

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

17. 436 U.S. at 571, n.1 (Stewart, J., dissenting opinion).

18. 353 F. Supp. at 132.

Presently, searches are tempered by the sole prerequisite that police first obtain a search warrant. Justice White emphasized that a neutral magistrate would review such requests.¹⁹ Such putative protections offer newsmen and newswomen little consolation when studies demonstrate that less than .3% of wiretap warrant applications since 1969 have been refused.²⁰ Moreover, the very basis of *Zurcher* is the permissibility of unannounced surprise searches of newsrooms. Confidential information which has no bearing on the investigation being conducted could very obviously be exposed during a police search. Confidential news sources will become a journalistic relic.

Imagine the scenario following a search of the offices of the *New York Times* in 1971. The Pentagon Papers would never have been published. If the *Washington Post* had its files searched after Woodward and Bernstein had made their initial findings public, the Watergate story might never have been released. There can be little doubt that *Zurcher* intimidates confidential sources. If confidential sources are reluctant to expose corruption, the government itself will suffer.

The *Zurcher* holding also puts pressure on the news media to adopt procedures for self-censorship. Gene Roberts, the National News Editor for the *New York Times* has noted that:

All reporters have taken written notes of factual disclosures received in confidence. If such notes are subject to police seizure, it is likely that reporters will stop bringing them back to their offices and using them as aids in preparing their stories. I am obviously concerned for the quality and character of journalism if reporters refrain from taking notes or taping interviews for fear that this raw stuff might easily be available to government officials through the device of the search warrant.²¹

Some newspeople may hold on to articles until law enforcement agencies have gathered the same information independently. Some articles may simply go unpublished to avoid likely searches by police. *Zurcher* says that such a chilling effect on the media's exercise of first amendment rights, in itself, is not sufficiently dispositive to declare a search an unreasonable state action.²² Given these policy considerations, and given the "less drastic means"²³ analysis, which requires the least intrusive state action when reasonableness is at issue, a subpoena-first rule is preferred. Judge Peckham in his District Court opinion in *Zurcher* applied that very analysis.²⁴ The Citizen's Privacy Protection Act,²⁵ S. 3164, seeks to codify that preference for a subpoena duces tecum.

A final danger *Zurcher* poses is that the public may cease to perceive the press as independent. A newspaper may become an unwilling ally to the prosecution in a criminal investigation. There would no longer be a separation

19. 436 U.S. at 566.

20. Of 5,563 applications for wiretap warrants from 1969 to 1976 under the Omnibus Crime Control and Safe Streets Act of 1968, magistrates denied only 15. In 1977, none of the 526 applications were refused. *Reports of the Administrative Office of the United States Court*, (1978).

21. Brief for Respondents at 24, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (Affidavit of Gene Roberts).

22. *Zurcher v. Stanford Daily*, 436 U.S. at 566 citing *Branzburg v. Hayes*, 408 U.S. 665 (1972).

23. See *Shelton v. Tucker*, 364 U.S. 479, 488, 493 (1966). See also, Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).

24. 353 F. Supp. at 135.

25. S. 3164, § 2, *supra* note 6.

of press and government. These fearful consequences foreshadowed by *Zurcher* have led twenty-six states to have codified "shield laws" designed to protect reporters.²⁶ S. 3164 would provide the federal counterpart necessary to augment additional protections.

**"THE RIGHT OF THE PEOPLE TO BE SECURE . . .
AGAINST UNREASONABLE SEARCHES . . .
SHALL NOT BE VIOLATED . . ."**

Zurcher also poses equally poignant problems for non-media third parties. At present, every home and office is open to surprise searches by government authorities seeking evidence of someone else's crime. A serious potential exists for the government to abuse our right to privacy—the most fundamental and comprehensive of all constitutional rights.²⁷ As Justice Stevens' dissent points out, just as the witnesses who participate in an investigation of a trial far outnumber the defendants, so the innocent persons who may possess some type of evidence of a crime far outnumber those who are actually involved in the crime.²⁸ Every innocent person is now subject to a surprise search of his or her home. I do not believe that the proper enforcement of our criminal laws requires that innocent Americans surrender their right to privacy to unannounced governmental searches of their homes or businesses.

The right to privacy is the foundation of our civil liberties. Privacy is the one concept, more than any other, which separates our society from those authoritarian systems which do not recognize the rights of the individual. A person's privacy rights are thus controlling factors when discussing fourth amendment questions.²⁹ Although the Supreme Court in *Zurcher* allegedly followed *Warden v Hayden*³⁰, there are those who assert that *Zurcher* goes far beyond *Warden* and revives the atmosphere surrounding the oppressive general warrants the fourth amendment was designed to prevent. In the words of William Pitt,

The poorest man in his cottage may bid defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England cannot enter.

If the fourth amendment is to have any meaning at all, these privacy rights of innocent Americans must be vindicated.

Every professional person is also vulnerable to a surprise search by the police. An attorney's files may contain information essential to a police investigation.³¹ A search authorized by *Zurcher* could destroy that attorney's confidential relationship with his client. Similarly, a patient's confidence in his psychiatrist, essential to that person's recovery, could be impaired. The spectre of similar scenarios for any profession lurks ominously in the aftermath of the *Zurcher* decision.

26. Note, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. Rev. 160, 167, n.41 (1976).

27. See generally, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

28. 436 U.S. at 579 (Stevens, J., dissenting opinion).

29. See *Camera v. Municipal Court*, 387 U.S. 523, 528 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967).

30. 387 U.S. 294 (1966).

31. See *Fisher v. United States*, 425 U.S. 391 (1976); *Couch v. United States*, 409 U.S. 322 (1973).

The implications for our privacy rights are even more serious when one considers that warrants are issued at *ex parte* proceedings. Simply put, search warrants are executed before an innocent third party can contest their validity. Impeachment of the affidavits upon which a warrant is based is barred in most states and some federal courts.³² Such a bar increases the chance for error. But the most frightening problem lies ahead for the wrongfully-searched citizen—he has no possible redress for his privacy infringement. Since a nonsuspect is not a defendant in the criminal proceeding, the exclusionary rule³³ is unavailable to suppress illegally obtained evidence. He simply has no standing in a majority of cases to object to the use of illegally obtained evidence in the trial of another person.³⁴ Police are thus not deterred from unlawful searches because the incentives inherent in the exclusionary rule are absent.

Damage actions are also a relatively fruitless effort since a good faith defense must first be overcome. As Judge Peckham noted in his lower court decision: "If law enforcement agencies were not required to first explore the subpoena alternative in third party situations, . . . there would be the rather incongruous result that one suspected of a crime would receive *greater* protection against unlawful searches than a third party."³⁵ Without damage actions or an exclusionary rule, innocent Americans are in the very position Judge Peckham feared most.

CONSTITUTIONAL AUTHORIZATION FOR CONGRESSIONAL RESPONSE

Congressional legislation overturning *Zurcher* raises a major constitutional question: may Congress overturn a Supreme Court decision and expand constitutional protection by imposing legislative restraints on state and local police? The easy answer is that Congress has reversed Supreme Court decisions in the past.³⁶ Congress may do so in the future subject to certain restrictions. The major constraint involves the constitutional source of laws which limit the power of the states in an attempt to expand individual liberties. Since the Citizen's Privacy Protection Act limits searches by "anyone acting under color of law",³⁷ state-rights objections could be made. But such objections are valid only when there are no constitutional provisions providing a basis for the law.³⁸ S. 3164, the Citizen's Privacy Protection Act, has such a constitutional basis.

The primary constitutional provision empowering Congress to enact S. 3164 is section 5 of the fourteenth amendment.³⁹ That section grants Congress the power to enforce the fourteenth amendment's due process protections through

32. See *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

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

34. *Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165 (1969); *Jones v. United States*, 362 U.S. 257 (1960).

35. 353 F. Supp. at 131 (emphasis in original).

36. The Voting Rights Act of 1965, § 10, 42 U.S.C. § 1973(h) (1965) (poll tax as prerequisite to voting violates the constitutional rights of citizens to vote), overruled *Breedlove v. Suttles*, 302 U.S. 277 (1937); *Butler v. Thompson*, 341 U.S. 937 (1951).

37. S. 3164, § 2, *supra* note 6.

38. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603 (1974-75).

39. U.S. Const. amend. XIV, § 5.

any necessary legislation. In *Katzenbach v. Morgan*,⁴⁰ the Supreme Court clarified the scope of this "Enabling Clause." *Katzenbach* signaled the Supreme Court's affirmation of the constitutionality of § 4(e) of the Voting Rights Act of 1965.⁴¹ The Supreme Court upheld this legislation as a proper exercise of Congress' right to enact whatever legislation it deemed necessary to secure the fourteenth amendment's guarantees.⁴² As long as the legislation bears a rationale relationship to the purposes of the fourteenth amendment, that legislation is appropriate.⁴³ S. 3164 marks an exercise of Congressional power similar to that in the Voting Rights Act since section 5 is also the constitutional grounding for S. 3164. In fact, section 2 of the bill expressly states that its purpose is "to assure the rights of citizens under the Fourth and Fourteenth Amendments of the Constitution and to protect the freedom of the press under the First Amendment."⁴⁴

THE CITIZEN'S PRIVACY PROTECTION AMENDMENT

That Congress carries the burden to respond to *Zurcher* is further evidenced by Justice White's closing invitation to Congress that: "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 . . ." ⁴⁵ Philip B. Heymann, speaking for the Attorney General of the United States, appeared before my Subcommittee on the Constitution and emphasized that the Justice Department recognizes the government's duty to reassure the press and public of their concern for protecting first and fourth amendment rights.⁴⁶ The Citizen's Privacy Protection Amendment seeks to fulfill that need.

S. 3164, unlike some of the bills introduced by my colleagues last term,⁴⁷ is not restricted to protecting only the press from future *Zurcher* searches. Any innocent person not suspected of a crime but allegedly possessing incriminating evidence would be protected from unannounced searches. A subpoena duces tecum would be used in all but a few circumstances.

Subpoenas are preferred for several reasons. Not only would they satisfy the least drastic method of obtaining the desired evidence, but they would also tend to pose the smallest disruption to newsgathering and our privacy. If for some reason the subpoena is defective, a challenge can be made before confidential information is disclosed. Using a subpoena also avoids the dangers attendant to police searches of large numbers of unrelated documents in an unannounced search. Those who have legally-recognized privileges of confidentiality can, through a subpoena process, object to searches of privileged materials.

40. 384 U.S. 641 (1966).

41. 42 U.S.C. § 1973(6)(e) (1970).

42. 384 U.S. at 651.

43. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

44. S. 3164, § 2, *supra* note 6.

45. 436 U.S. at 567.

46. *Hearings on S. 3164 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (June 22, 1978) (statement of Philip B. Heymann).

47. Among those restricted are S. 3222, S. 3225, S. 3258, H.R. 12,952, H.R. 13,145, H.R. 13,146, H.R. 13,169, H.R. 13,227, H.R. 13,284, H.R. 13,285, H.R. 13,305, H.R. 13,319, H.R. 13,166, H.R. 13,710, 95th Cong., 2d Sess. (1978).

The Citizen's Privacy Protection Amendment also provides for civil remedies by the parties wrongfully searched and permits general punitive damages.⁴⁸ Two exceptions to the preference toward subpoenas are also established. One exception codifies a warrant requirement in cases where the person possessing the evidence is a suspect.⁴⁹ The second exception removes the subpoena requirement when there are indications that the evidence might be hidden or destroyed.⁵⁰ These exceptions, coupled with the general rule favoring subpoenas, strike a favorable balance between the legitimate needs of law enforcement and the legitimate rights of privacy of the press and public.

CONCLUSION

The Citizen's Privacy Protection Amendment or some facsimile will be reintroduced shortly in the 96th Congress. I strongly believe that legislation is imperative if the first and fourth amendment rights of every American are to be protected.

The government's ability to search our homes for evidence of someone else's crimes must be carefully limited if the first and fourth amendments are to have any meaning. I believe that Congress has the constitutional authority, under section 5 of the fourteenth amendment, and the expertise necessary, to adopt S. 3164 or a similar measure. Congress also has the mandate from the press and public to act. All that is needed now is for Congress to act.

48. S. 3164, § 2, *supra* note 6.

49. *Id.*

50. *Id.*