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Fourth Amendment--Search Warrants and the Right to Free Press

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FOURTH AMENDMENT—SEARCH WARRANTS AND THE RIGHT TO FREE PRESS

Zurcher v. Stanford Daily, 98 S. Ct. 1970 (1978).

INTRODUCTION

In *Zurcher v. Stanford Daily,*[1] the Supreme Court attempted to resolve two troublesome issues in the law of search and seizure. The Court balanced first amendment[2] and fourth amendment[3] interests in determining the constitutionality of the search of a newspaper office for evidence of a crime not committed by members of the newspaper's staff. The Court held that the media enjoy no special first amendment exemption from "reasonable" searches and seizures.[4] However, first amendment implications were to trigger a more careful scrutiny of the reasonableness of a search warrant, which has been defined as a written order issued by a magistrate directing a peace officer to search a premises for personal property and directing that the property be brought before him.[5]

The Court also found that the fourth amendment permitted law enforcement authorities to obtain a search warrant when they believed that evidence pertaining to a crime was in the possession of some innocent third party. Those authorities were not required to demonstrate first the impracticability of gathering that evidence by subpoena duces tecum[6] (which is a court order requiring a witness to appear before the court and to bring with him whatever evidence is described in the order).[7] In *Zurcher,* a crucial fifth-vote concurring opinion concluded that press or third party status should play some role in determining the reasonableness of a warrant request. However, what that role is to be was left undefined.[8]

FACTS AND DISTRICT COURT INTERPRETATION

On Friday, April 9, 1971, officers of the Palo Alto Police Department and the Santa Clara County Sheriff's Office were called to the scene of a large demonstration at the Stanford University Hospital. The protestors had occupied the facility's administrative offices and had barricaded themselves inside. The police unsuccessfully attempted to persuade the demonstrators to leave. In an ensuing clash between protestors and police at the east side of the building, nine officers were injured, some seriously, and the hospital area was severely damaged. Most of the bystanders and reporters had been at the west side entrance. The injured policemen could identify only two of their assailants, although one officer did notice someone photographing the incident.

The following Sunday, the student-run Stanford Daily published a special edition on the protest, containing articles and photographs indicating that a staff member had been taking pictures at the scene. The next day, the Santa Clara County District Attorney's Office obtained a warrant from the municipal court to make an immediate search of the newspaper's offices for negatives, film and pictures depicting the occurrences at the hospital. The warrant was issued on a finding of probable cause that the film could lead to the identification

[1] 98 S. Ct. 1970 (1978).

[2] 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.

[3] U.S. CONST. amend. IV states 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.

[4] 98 S. Ct. at 1981–82.

The first such recorded search did not occur until 1971, and there had been only a total of six (in California) since that time (as of 1976). Note, *Search and Seizure of the Media: A Statutory, Fourth and First Amendment Analysis,* 28 STAN. L. REV. 957, 957, 962 (1976). Given the present trend of press resistance to subpoenas, *id.* at 958, however, the scarcity of media searches is likely to evaporate in the wake of the Court's decision.

[5] BALLANTINE'S LAW DICTIONARY 1175 (1930) (2d ed. 1948).

[6] 98 S. Ct. at 1975–76. This is also a subject heretofore largely unlitigated, as evidenced by the district court's admissions, Stanford Daily v. Zurcher, 353 F. Supp. 124, 127–28 (N.D. Cal. 1972), and lack of precedent. *Id.* at 128.

[7] BALLANTINE'S LAW DICTIONARY 1244 (2d ed. 1948).

[8] 98 S. Ct. at 1983–84 (Powell, J., concurring).

of the persons who had injured the police officers. The warrant affidavit did not allege that any member of the Daily's staff was implicated in the unlawful activities.

Pursuant to the warrant, four members of the Palo Alto Police Department conducted a search of the newspaper's offices later that same day. The search lasted approximately fifteen minutes, yet it was quite thorough. The Daily's photographic laboratories, filing cabinets, desks and wastebaskets were examined. Although locked drawers were not searched, the officers apparently did have the opportunity to read confidential notes and correspondence; whether or not they did so was disputed but was never resolved.[9] Apparently, only those photographs that had already been published in the April 11 issue were found and no materials were removed from the Daily's offices.

Approximately one month later, the Daily and members of its staff brought a civil action in the United States District Court for the Northern District of California, seeking both declaratory and injunctive relief under 42 U.S.C. § 1983.[10] The named defendants were the police officers who had conducted the search, the Chief of Police, the District Attorney and one of his deputies, and the judge who had issued the warrant. The suit alleged that the defendants, under the color of state law, had deprived the plantiffs of their rights under the first, fourth and fourteenth amendments to the United States Constitution.

The District Court granted the plantiffs' motion for declaratory relief,[11] ruling that the issuance of a warrant against an innocent third party, and search pursuant thereto, without a prior demonstration that a subpoena duces tecum would be an impractical means of gathering the desired evidence, was "per se" unreasonable and hence a violation of the fourth and fourteenth amendments. The court added that failure to honor such a subpoena would not constitute sufficient grounds for a warrant; it would have to be demonstrated that the possessor of the sought-after objects intended to disregard a court order not to move or destroy them.[12] The court then held that because of first amendment considerations, whenever the innocent third party was a newspaper, searches would be tolerated "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."[13]

The district court's opinion established for the fourth amendment the "less drastic means" test for third party searches. This test required that, when there is a conflict between a fundamental individual right and some legitimate governmental interest, the government may further its interest by using only those means which would be least intrusive on the individual right. The "less drastic means" doctrine had been used in other areas of constitutional law, but had never been used in connection with the fourth amendment.[14] In this case, the threatened individual interest was the third person's right to privacy, or, cast in fourth amendment terms, to security from "unreasonable searches and seizures"; the legitimate governmental aim was the gathering of criminal evidence, to enforce the law and further justice. The least drastic means of harmonizing them was, according to the court, via the subpoena duces tecum; the state would receive its evidence, and the invasion of privacy would minimized.

The court advanced four reasons for incorporating the "less drastic means" test into the fourth amendment. First, it found that our society places tremendous value upon privacy, as evidenced by the fourth amendment itself. This, the court believed, was so well established that it needed little support.[15] Second, it noted that search warrants traditionally have been used only against those actually suspected of a crime.[16] Third, the court

[9] *Id.* at 1924 n.2.

[10] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

[11] Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972).

[12] *Id.* at 133.

[13] *Id.* at 135 (original emphasis).

[14] The doctrine has been used predominantly in the area of the first amendment, though it originated in applications of the commerce clause. It has also been used to support the right to privacy, and the right to travel. 86 HARV. L. REV. 1317, 1322, 1322 n.30 (1973), and cases cited therein; 78 YALE L. J. 464, 464 n.4 (1969), and cases cited therein.

[15] 353 F. Supp. at 130–31.

[16] *Id.* at 131. The authorities cited for this proposition, Henry v. United States, 361 U.S. 98, 100 (1959); United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930); and Kaplan, *Search and Seizure: A No-Man's Land in Criminal*

said that the subpoena requirement was necessary to protect the privacy of third parties, since the chief remedy for an unlawful search and seizure is suppression of the illegally gained evidence, and that remedy would not help a non-defendant. This would create the anomalous situation in which the accused would have far greater protection than an innocent party, and the police would have no deterrent to illegal searches of third persons.[17] The court's final line of reasoning was based on an analogy to *Bacon v. United States*.[18] In that case an arrest warrant for a material witness was invalidated because of a failure to show probable cause that the witness could not be secured by subpoena.[19] Though that ruling relied on statutory grounds,[20] the *Bacon* court concluded that it was ultimately based on fourth amendment dictates. Therefore, if an arrest warrant for an innocent third party required a prior showing of the impracticality of obtaining a subpoena, the search warrant directed at an innocent third party should demand the same showing.[21]

In considering the countervailing first amendment interest in a free press, the district court examined several obscenity cases demonstrating the special effect of the amendment on the government's general criminal process, and on searches and seizures in particular.[22] The court indicated that when the object of a warrant was possibly protected by the constitution, special safeguards were needed. In the obscenity cases, a prior adversarial hearing was found to be necessary; in this case, the subpoena-first requirement, with its possibility of motion to quash, was considered the appropriate safeguard.[23]

The lower court also cited the "less drastic means" test in the first amendment area. It noted that freedom of press is a fundamental right[24] and then outlined several ways in which indiscriminate searches of newspapers could hamper that freedom: 1) Police, in executing the warrant, would be in a position to see notes and photographs not mentioned in the warrant. This would render all confidential materials vulnerable, causing sources to dry up; 2) Unlike a subpoena, the issuance of a warrant would provide the newspaper with no judicial control over what happens and what information is discovered; 3) Searches would jeopardize the newspaper's credibility and create the risk of self-censorship.[25] Considering the fundamental right of freedom of the press and the threat thereto, the court then suggested the less drastic means—the subpoena requirement. According to its opinion, the chance to move that it be quashed

Law, 49 CALIF. L. REV. 474, 475–77 (1961), do not really support it. They do explain that the fourth amendment was aimed primarily at the practice of using general warrants to ransack a man's home in hopes of finding some evidence of criminal activity to use against him. But this is a long way from saying that third parties were not to be searched. The Court does find two of three state cases cited by the plaintiffs to be supportive of the principle, Commodity Mfg. Co. v. Moore, 198 N.Y.S. 45 (Sup. Ct. 1923); Owens v. Way, 141 Ga. 796, 82 S.E. 132 (1914), *but see* note 40 *infra* and accompanying text.

[17] 353 F. Supp. at 131–32.

[18] 449 F.2d 933 (9th Cir. 1971).

[19] *Id.* at 943.

[20] FED. R. CRIM. P. 46(b); 18 U.S.C. § 3149 (1970).

[21] 353 F. Supp. at 128–29, 132.

[22] *Id.* at 134. The cases cited were A Quantity of Books v. Kansas, 378 U.S. 205, 210–11 (1964); Marcus v. Search Warrant, 367 U.S. 717, 729–32 (1961); Denich, Inc. v. Ferdon, 426 F.2d 643, 645–46 (9th Cir. 1970), *vacated and remanded on other grounds*, 401 U.S. 990 (1971); Bethview Amusement Corp. v. Cahn, 416 F.2d 410, 412 (2d. Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (all involving the seizure, per warrant, of allegedly obscene materials). *See also* NAACP v. Alabama, 357 U.S. 449, 460 (1958) (involving a state law requiring the disclosure of NAACP membership lists and freedom of association implications). Justice White, 98 S. Ct. at 1981–82, was quick to accept these cases, and even listed additional ones, Roaden v. Kentucky, 413 U.S. 496, 501–02 (1973) (disallowing a warrantless seizure of an allegedly pornographic film); Lee Art Theatre v. Virginia, 392 U.S. 636, 637 (1968) (another test of the constitutionality of the seizure, by warrant, of obscene material); Stanford v. Texas, 379 U.S. 476, 482, 485 (1965) (warrant seizure of communist material); but according to him they did not stand for the propositions attributed to them by the district court. *See* text at notes 30–31 *infra*.

[23] 353 F. Supp. at 134.

[24] *Id.* at 133. The district court is correct in its assumption. Freedom of the press is among the fundamental rights protected by the first amendment. Branzburg v. Hayes, 408 U.S. 665 (1973); West Virginia State Board of Education v. Barnette, 319 U.S. 62 (1943). The fundamentality of various aspects of press freedom have received specific recognition. Branzburg v. Hayes, 408 U.S. 665 (1972) (gathering information); New York Times Co. v. United States, 403 U.S. 713 (1971) (prior restraint of publication); Grosjean v. American Press Co., 297 U.S. 233 (1936) (distributing).

[25] 353 F. Supp. at 134–35. Justice White, in the Supreme Court opinion, listed other factors in addition to those listed by the district court: 1) Searches will be physically disruptive to the point of impeding timely publication; 2) The processing and dissemination of news will be chilled by the prospects that searches will disclose internal editorial deliberations and other information of potential interest to the police; 3) Reporters will be deterred from recording and preserving their recollections for future use. 98 S. Ct. at 1981. Justice Stewart's dissent lists the same factors again. *Id.* at 1984–85.

would somewhat accommodate the first amendment interests and the competing fundamental government concern in enforcing the criminal law.[26]

The defendants appealed the decision and the court of appeals affirmed, adopting the district court's opinion per curiam.[27] The United States Supreme Court accepted the petition for writ of certiorari,[28] and reversed on both issues. Mr. Justice White announced the judgment of the Court, and delivered an opinion joined by the Chief Justice and Justices Blackmun and Rehnquist. Justice Powell concurred for the fifth vote.

Supreme Court's Viewpoint

The effect of the first amendment on the reasonableness requirement for fourth amendment searches and seizures was perhaps the most important issue in *Zurcher*. Justice White's plurality opinion rejected the district court's reasoning. Newspapers, he said, did not qualify for an exemption from otherwise "reasonable" searches merely because they were newspapers.[29] White did recognize that the first amendment has some effect on determining the reasonableness of the search under the fourth.[30] But he found that when first amendment interests were involved, there must only be a careful appraisal of the situation by a check of the warrant requirements with "scrupulous exactitude." Nothing more was mandated.[31] White stated that the framers of the Bill of Rights did not create a ban on newspaper warrants and searches; nor did they require preliminary showings that subpoenas would be impractical or that some member of the press itself would be implicated before a news facility be searched. A warrant need only satisfy the following preconditions: probable cause, specificity with respect to the space to be searched and the things to be seized, and overall reasonablenees. According to White, as long as the warrant is properly carried into effect, is policed and observed, and leaves no area open to discretion, there will be little danger of abuse.[32]

The district court had found that, since the fundamental right of freedom of the press was jeopardized, the state had to secure its evidence in a manner that was less threatening to that right. This "less drastic means" argument was discounted by the Supreme Court on two levels. First, White rejected the contention that searches of newsrooms threaten media freedom, because he found no empirical evidence to support that conclusion.[33] Second, he found that even if the rights of the press were in jeopardy, the subpoena was not necessarily appropriate or less intrusive. This was so, he said, because if there was enough probable cause to support a warrant, then the subpoena would also be justified and would withstand any motion to quash.[34] Thus, since the newspaper would have to turn over the evidence in either event, neither method would protect press freedom any better than the other.

The Court also rejected the claim that the search of the Daily constituted an unconstitutional prior restraint of publication.[35] Justice White, citing *Heller v. New York*,[36] stated that not every search or seizure—in fact not even most of them—constituted a prior restraint. He went on to conclude that the facts surrounding the search of the Daily were within the no restraint category.[37]

The plurality similarly rejected the contention that the fourth amendment required an application of the "less drastic means" test to third party searches. Justice White found that this formulation would constitute a "sweeping revision of the Fourth Amendment,"[38] with no justification from either a facial reading of the amendment or precedent.[39] The state cases cited by the district court were dismissed in a footnote as not supportive of the

[26] 353 F. Supp. at 133–34.
[27] 550 F.2d 464 (9th Cir. 1977).
[28] 434 U.S. 816 (1977).
[29] 98 S. Ct. at 1981–82.
[30] *See* text at notes 22–23 *supra*.
[31] 98 S. Ct. at 1981 (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965)).
[32] 98 S. Ct. at 1982.
[33] *Id.* at 1982. The Court cited Branzburg v. Hayes, 408 U.S. 665 (1972), which held that a reporter's claim of a privilege to protect news source confidentiality was not included in the first or fourteenth amendments. In *Branzburg*, Justice White, in writing for another plurality (Justice Powell again concurring for the needed fifth vote), recognized the possibility that news sources might dry up, but refused to base his decision upon that possibility absent concrete proof. He believed instead that publicity-starved informants, lenient prosecutors, and police protection would keep the system intact. 408 U.S. at 693–95.
[34] 98 S. Ct. at 1982.
[35] Prior restraints are unconstitutional, except in very limited circumstances. Carroll v. Princess Anne, 393 U.S. 175 (1968). The prior restraint argument was not mentioned in the district court opinion.
[36] 413 U.S. 483 (1973) (involving a warrant seizure of obscene material).
[37] 98 S. Ct. at 1982.
[38] *Id.* at 1975.
[39] *Id.* at 1975–76.

court's position,[40] and the analogy to *Bacon v. United States*[41] was characterized as "unpersuasive with respect to the search for criminal evidence."[42] Rejecting any notion of special treatment for third parties, White further disagreed with the apparent view of the district court that the reasonableness, and hence the constitutionality, of a search warrant depended partly on the culpability of the person against whom it was directed. White found that the critical element in a search reasonable under the fourth amendment was not the guilt or innocence of the owner or possessor of what was being sought, since that had no bearing on the state's interest in recovering evidence. Rather, White found the crucial consideration to be the presence or absence of probable cause to believe that the objects sought were on the premises named in the warrant. Thus, innocent parties were accorded no special position under the fourth amendment. This the Court saw as the mandate of the applicable case law.[43]

Justice White was not even convinced that the subpoena requirement would be an appropriate "less drastic means." He found that this doctrine requires that the alternative governmental course serve its purposes (in this case, the effective enforcement of the criminal law) at least as well as the challenged "intrusive means." But, according to White, it was by no means obvious that appearance pursuant to a subpoena could adequately substitute for actual searches. White reasoned that a general subpoena-first requirement would make it more difficult to secure authorization for a search in those instances where one was really needed. By making the search warrant a last resort measure, many judges might fail to issue one even when it was clearly necessary, *e.g.*, when it was obvious the materials would be destroyed if not seized. Subpoenas might also be delayed by motions to quash or by fifth amendment claims, further increasing the likelihood that the evidence would be moved or destroyed.

White also found a problem in defining an innocent third party. He noted that someone may be believed to be innocent, but actually may be implicated in the crime or may be close to someone who is implicated in the crime; a subpoena-first requirement would give such a person the time to destroy the evidence.[44] Moreover, most searches were said to take place so early in an investigation that few individuals involved would be conclusively believed to be innocent.[45] Finally, White found that even if innocent third parties were left unprotected from illegal searches by the exclusionary rule, the "less drastic means" test was not necessary since search warrants are difficult to obtain and would only be used when absolutely necessary.[46]

Justice Powell's brief concurring opinion provided the fifth vote to constitute a majority.[47] His opinion seemed at first to reject Justice Stewart's dissenting theory of first amendment protections for the press. Powell appeared to join fully in the Court's decision and rationale,[48] stating that the framers did not intend to create any special media exception to the fourth amendment. He endorsed the careful scrutiny which the plurality had ordered for press warrants.[49] However, Powell went further. Whereas the plurality had read the first amendment as mandating a careful approach and

[40] *Id.* at 1975–76 n.5, (citing Commodity Mfg. Co. v. Moore, 198 N.Y.S. 45 (Sup. Ct. 1923) (disallowing the seizure of evidence as it did not belong to the person indicted, regardless of warrant); Owens v. Way, 141 Ga. 796, 82 S.E. 132 (1914) (disallowing seizure of another's property when the only authority was an arrest warrant for a suspect); Newberry v. Carpenter, 107 Mich. 567, 65 N.W. 530 (1895) (disallowing police custody of property to be used as evidence when it belonged to a third party); and a fourth case, not cited in the district court's opinion, People v. Carver, 172 Misc. 820, 16 N.Y.S.2d 268 (County Ct. 1939) (which disallowed a seizure of evidence from third parties, saying the subpoena duces tecum was the proper method)).

[41] 449 F.2d 933 (9th Cir. 1971).

[42] 98 S. Ct. at 1975–76 n.5. The rejection of an analogy to an arrest warrant case is sounder than this short treatment might suggest. The *Bacon* rationale was based primarily on a statutory analysis. 449 F.2d at 937–41. And even if it is accepted that the matter ultimately rests on fourth amendment considerations, *id.* at 942; *Stanford Daily*, 353 F. Supp. at 129, the divergence in the values protected and the requirements for an arrest warrant versus a search warrant compel rejection of the corollary. Note, *Searches and Seizures: Warranted Search of Party Not Suspected of Criminal Behavior is Unreasonable When Subpoena Not Shown to Be Impractical*, 86 HARV. L. REV. 1317, 1320–21 (1973).

[43] 98 S. Ct. at 1976–78. Whatever the soundness of the rule of law, the cases that Justice White relied on are, at best, of questionable support. *See* text at notes 64–81 *supra*.

[44] 98 S. Ct. at 1979–80.

[45] *Id.* 1980.

[46] *Id.* at 1980. These statements are questionable in light of the facts of the search in *Zurcher*: the Daily staff was in no way suspected, nor was there any indication that whatever photographs had been taken were about to be destroyed.

[47] Only eight votes were cast. Justice Brennan did not take part in the case.

[48] 98 S. Ct. at 1983–84 (Powell, J., concurring).

[49] *Id.* at 1983–84.

"scrupulous exactitude" in granting warrants to search media facilities, Powell indicated that the first amendment required something more. As he noted: "While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate can and should take cognizance of the independant values protected by the First Amendment—such as those highlighted by Mr. Justice Stewart—when he weighs such factors."[50]

Unlike the plurality, Powell seemed to say that the magistrate should specifically consider the possible ramifications for freedom of press when deciding whether to issue a warrant. He wanted those ramifications to be an independant factor in weighing the reasonableness of a proposed search, instead of merely a trigger to more careful scrutiny of the other factors. This suggested a balance test; under Powell's formula, there would be instances where warrants would not issue, even if the probable cause standard was met, because of the adverse affect it would have on freedom of the press. This would not be possible under the plurality's "scrupulous exactitude" test.

Though his main concern regarded the issuance of warrants authorizing searches of media facilities, Powell expressed similar reservations concerning the practice of third party searches in general. In a footnote, he said:

> 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 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.[51]

This was a far cry from the district court's subpoena-first requirement. But it is equally clear that here, as well as in the press search area, Powell did not adopt the plurality's approach. He again opted for a balancing test. When the party to be searched is not suspected of involvement in the crime, the probable cause requirement is affected. The extent to which the requirement is affected is a question left unanswered.

Justice Stewart, joined by Justice Marshall, dissented on the first amendment question.[52] Stewart maintained that his comments were based on the first amendment alone, without consideration of the fourth amendment.[53] His dissent advocated use of the "less drastic means" analysis rejected by the plurality. Stewart listed in some detail the ways, discussed previously, in which a search warrant may disrupt the freedom to publish.[54] He therefore reasoned that some other means of gathering information, besides the search, should be used. Noting that the first amendment required an adversary procedure to judge the challenge to free expression,[55] Stewart concluded that the subpoena-first requirement devised by the district court would be an appropriate measure. The legitimate interests of the state would be served, and the infringement on freedom of the press would be minimized.[56]

The dissent of Justice Stevens addressed neither the question of search warrants for innocent third parties, nor the first amendment problem directly. Unlike his fellow Justices, Stevens believed that the real issue concerned the nature of the evidence seized, as opposed to the identity of the person from whom it was taken.[57] Concluding that the nature of the evidence in the possession of the Daily prevented its legal seizure, as it was not contraband, criminal plunder, a weapon, or some other instrumentality of a crime, he dissented.

Stevens stressed the historical interpretation of the fourth amendment protections against "unreasonable searches and seizures," and regulations of the procedure for issuance of warrants. According to his dissent, the framers of the amendment were influenced by the famous English case of *Entick v. Carrington*,[58] which had held that a warrant authorizing seizure of private papers was illegal and beyond the power of a magistrate to issue.[59] Thus, such seizures were considered "per se" unreasonable and the warrant could not apply to them. The personal papers prohibition eventually developed in American law to include anything that would be considered "mere evidence." Only stolen goods, contraband, weapons, or other actual instrumentalities of a crime were to be seized by warrant. Any other type of evidence was obtained by methods which sought at least a degree of cooperation

[50] *Id.* at 1984.

[51] *Id.* at 1984 n.2.

[52] He agreed with the court that third parties in general should not be treated differently. *Id* at 1984 n.1 (Stewart, J., dissenting).

[53] *Id.*

[54] *Id.* at 1984–85. *See* note 25 *supra.*

[55] Justice Stewart makes reference to several cases. 98 S. Ct. at 1987 n.10.

[56] *Id.* at 1987.

[57] *Id.* at 1989–90 (Stevens, J., dissenting).

[58] 19 How. St. Tr. 1029 (1765).

[59] 98 S. Ct. at 1988 n.1, citing *Entick*, 19 How. St. Tr. at 1066.

from the possessor, *e.g.*, the subpoena duces tecum.[60]

That policy was abruptly changed in 1967 by the United States Supreme Court in *Warden v. Hayden*,[61] which permitted searches for any type of evidence. Stevens indicated that, in opening the range of permissible searches to anyone who might possess something relevant to the case at hand, as opposed to just those who might have weapons, contraband, plunder, or any other instrumentality of the crime, the number of people subject to police intrusion was greatly increased. This made possible serious invasions of privacy. According to Stevens, the prior limit on items subject to search had also served to limit the "category of persons and the character of privacy" that could be affected thereby. If there was probable cause that a person possessed plunder, weapons, contraband, or some other instrumentality of a crime, he was probably implicated and likely to dispose of the evidence. Thus, a warrant and search were justified. But, according to Stevens, with the evidence distinction gone, the privacy of innocent people would be invaded unnecessarily, for, unlike the possession of the instruments of a crime, possession of mere documentary evidence does not necessarily indicate either complicity in the crime or a readiness to dispose of such evidence.[62] Innocent parties would be subjected to a search when a subpoena would have been sufficient to serve the goverment's interests.

Stevens thus appeared to find that *Warden* was wrongly decided. But he indicated that even if he were to accept the decision, a violation of the fourth amendment still occurred here. He said that in broadening the scope of items subject to search, *Warden* had also changed the requirements of probable cause, so that a showing of the necessity of an unannounced search was mandated. Stevens found such a showing lacking, and so condemned the search of the Stanford Daily as unreasonable.[63]

[60] 98 S. Ct. at 1988–89. The ban on searches for evidence of a "documentary" nature is well supported by precedent. *See, e.g.*, Harriss v. United States, 331 U.S. 145, 154 (1947); Davis v. United States, 328 U.S. 582, 587 (1946); United States v. Lefkowitz, 285 U.S. 452, 464–65 (1932); Gouled v. United States, 255 U.S. 298 (1921); Boyd v. United States, 116 U.S. 616, 617–24 (1886). Indeed, the rule has even been mentioned positively in dicta in cases since Warden v. Hayden, 387 U.S. 294 (1967). *Warden* abolished the documentary evidence rule. *See* text at notes 61–63 *infra*. Bellis v. United States, 417 U.S. 85, 87 (1974); United States v. Calandra, 414 U.S. 338, 346 (1974); Couch v. United States, 409 U.S. 322, 330 (1973).

[61] 387 U.S. 294 (1967).

[62] 98 S. Ct. at 1989–90.

Analysis

Writing for the *Zurcher* plurality, White relied primarily on his view of precedent in rejecting the subpoena-first requirement for third party search cases.[64] The district court, in admitting the paucity of case law on the subject, was actually far closer to the truth;[65] the correctness of White's reading of the fourth amendment aside, the particular cases he cited are not dispositive of the constitutionality of innocent party search. White interpreted the decisions as creating a general rule of search reasonableness focusing on the object of the search, rather than on the person subjected to it. But the cases, *United States v. Biswell*,[66] *Colonnade Catering Corporation v. United States*,[67] *See v. City of Seattle*,[68] *Camera v. Municipal Court of the City and County of San Francisco*,[69] *Frank v. Maryland*,[70] *Husty v. United States*,[71] and *Carroll v. United States*,[72] although they did place primary emphasis on the object of the search, were all exceptions to the normal requirements of probable cause for warrants. Each of the opinions justified the use of unusual procedures by stressing special circumstances, be it in the nature of the item being regulated, as in *Biswell*,[73] *Colonnade*,[74] *Husty*,[75] and *Carroll*;[76] in some requirement of administrative necessity, as in *Camera*,[77] *See*,[78]

[63] *Id.* at 1990–91. Stevens' arguments went unanswered in any of the other opinions. For a rebuttal of sorts, see Warden v. Hayden itself, 387 U.S. 294 (1967).

[64] 98 S. Ct. at 1975–78..

[65] *See* note 6 *supra*, and accompanying text.

[66] 406 U.S. 311 (1972) (dealing with the legality of a warrantless search for certain types of firearms, authorized by § 923 (g) of the Gun Control Act of 1968).

[67] 397 U.S. 72 (1970) (concerning 26 U.S.C. § 7342, making it an offense for a liquor licensee to refuse admission to a federal inspector, and in effect authorizing warrantless searches in this area).

[68] 387 U.S. 541 (1967) (involving administrative searches for health and safety violations).

[69] 387 U.S. 523 (1967) (dealing with administrative inspections).

[70] 359 U.S. 360 (1959) (again, concerning administrative searches).

[71] 282 U.S. 694 (1931) (involving the warrantless search of an automobile pursuant to the National Prohibition Act).

[72] 267 U.S. 132 (1925) (also involving automobile searches).

[73] 406 U.S. at 311 (a special congressional regulation of certain types of firearms thought likely to be used for illicit purposes).

[74] 397 U.S. at 73–74 (recognizing that liquor is a special item and so may be carefully regulated).

[75] 282 U.S. at 700, 702 (also dealing with liquor's special qualities).

[76] 267 U.S. at 155 (also concerning liquor).

[77] 387 U.S. at 534–35 (recognizing that lower reason-

and *Frank*;[79] or in the lack of time to secure a warrant, as in *Husty*[80] and *Carroll*.[81] As such, they presented rules limited to particular fact situations not present in *Zurcher v. Stanford Daily*. Similarly, none of these decisions specifically stated that the possessor's status was irrelevant in every instance.

In refusing to require use of a "less drastic means" analysis to determine the reasonableness, and hence the constitutionality under the fourth amendment of third party searches, White's analysis was more convincing. "Less drastic means" succeeds only when the substitute procedure is as effective in fulfilling the state's goal. According to White, it was by no means obvious that the subpoena could do the job of the warrant. Indeed, the opposite seemed to be the case. White argued that because there is no real guarantee of the ultimate innocence of anyone originally thought to be uninvolved, and because of the possible delays and countering actions inherent in the subpoena process, a protective class that encompassed everyone not immediately suspected of a crime would lead to the frustration of justice.[82] The logic of this argument seems persuasive.

Somewhat less persuasive was White's logic in the first amendment portion of his opinion. The questions raised by the district court and by Justice Stewart's dissent remained effectively unanswered. White found relevance in the fact that even though the framers were aware of the possibilities of abuse, they neither prohibited press searches nor mandated any subpoena-first process.[83] But this argument is specious. When something is not specifically mentioned in the constitution this does not mean that it is sanctioned in all its particulars. The framers themselves recognized that as conditions change, so must the law. It is doubtful that they foresaw the rise in importance of confidential news sources, or the damage of chilling effects, but they left the first amendment open enough to encompass them.[84]

Nor did White provide satisfactory answers to the issues raised concerning use of the "less drastic means" test where first amendment implications were present. The ways in which the freedom of the press could be endangered, as outlined above,[85] were discounted by White as either unproved or controllable by a strict adherence to procedural safeguards.[86] Stewart, in dissent, provided an appropriate reply to White's request for proof:

> This . . . 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 the 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 files, cabinets, desks and wastebaskets of a newsroom. 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 access to information, and thus the public's will thereby be impaired.[87]

Furthermore, if adherence to procedure was supposed to minimize the dangers to a free press, it was either not being enforced or was failing in that goal, for both the district court and Stewart cited numerous affidavits of newsmen, including staff

ableness standards were needed to preserve public health and safety standards).

[78] 387 U.S. at 542 (also concerning reduced standards for administrative searches).

[79] 359 U.S. at 366–67 (also dealing with public necessity).

[80] 282 U.S. at 700 (where an auto thought to contain then-considered dangerous contraband was about to escape).

[81] 267 U.S. at 153 (also dealing with the problems inherent in automobile searches).

[82] 98 S. Ct. at 1979–80.

[83] *Id.* at 1981–82.

[84] Judge J. Skelly Wright has written:

> Of course, the constitution is written in broad majestic language. How else should it have been written? The framers were not so dim-witted as to believe that times would not change, that unforseen problems would not arise. The reason for framing the constitution is to guarantee a general sort of relation between government and its citizens. To achieve that end the constitution must have a purposive permanence. It must serve as a "living" safeguard against certain sorts of excesses on the part of elected officials misled . . . by inflamed emotions and calculations of immediate consequences. It must, in short, be written in "vague" language. If the framers had intended only to forbid coups d'etat and clearly totalitarian measures, they could have been far more specific.

Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 784–85 (1971). For a more detailed analysis of the "living constitution" theory, see Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 727–50 (1969). For an explication of the same theory in a first amendment context, see Frantz, *Is the First Amendment Law?*, 51 CAL. L. REV. 729, 738–44 (1963).

[85] *See* n.25 and accompanying text *supra*.

[86] 98 S. Ct. at 1982.

[87] *Id.* at 1985 (Stewart, J., dissenting) (footnotes omitted).

members of the Stanford Daily, who stated that their sources had dried up because of an inability to guarantee anonymity. In fact, in some cases, these journalists were physically prevented from covering stories for fear that the information could end up in police hands.[88] In light of those facts, it is unclear just what White would accept as proof of impingement on the freedom to gather and disseminate the news.

White also refused to acknowledge that a subpoena could be less intrusive than a search. He reasoned that if the probable cause requirement for the warrant was satisfied, a subpoena duces tecum would surely be justified and would withstand any motion to quash.[89] But, this analysis ignored the fact that the warrant and search are *ex parte,* harsh, relatively unselective and unretractable once executed. The subpoena, on the other hand, is far less intrusive because it is more limited, giving the state the right to demand materials, but not to ransack the premises in search of them. Also, the subpoena may be challenged before the infringement.[90]

Despite the questionable aspects of White's opinion, certain of its conclusions may prove to be well-founded. A special position for the media under the fourth amendment was recognized, and "scrupulous exactitude" was ordered before any warrant against them could issue.[91] But the standards for "scrupulous exactitude" were at best unclarified, and, to the extent that they are defined, they do not seem to provide adequate safeguards for the first amendment interest.

Powell's deciding vote for the majority provided greater deference to the special position of the press, and effectively modified the stand taken by the plurality. Powell would have required more than the "scrupulous exactitude" ordered by the plurality in weighing the reasonableness of a warrant to search a press office.[92] The problem with his opinion, and the ultimate question of the case is, however, *how much more?* A comparison with Powell's concurrence in *Branzburg v. Hayes*[93] may help explain his position somewhat.

In that case, involving the right of a newsman to refuse to testify before a grand jury concerning his confidential sources of information, the same four justices as in *Zurcher* (Burger, White, Blackmun and Rehnquist) ruled, again in an opinion written by White, that the first amendment does not afford testimonial privileges for reporters called upon to identify confidential news sources. Justice Powell concurred for the fifth vote, but asserted that such claims of privilege must be weighed on a case by case basis, so that "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct" would be assured.[94] His preference for a balancing test, in *Zurcher* and in *Branzburg,* was at least consistent. But what does it specifically mean, and what are its limits? In the two instances in which he has recognized the special place for the media in law enforcement matters, Powell has found first amendment considerations insufficient to overcome the governmental interest. Perhaps he is only paying lip service to the first amendment while actually agreeing with the plurality. Or perhaps his special position is real, and will eventually tip the other way to halt some state action.

Stewart's dissent presented a fairly clear and cogent argument for the adoption of the subpoena-first requirement in proposed media search cases. Stewart denied creating any unwarranted exceptions to fourth amendment doctrine, maintaining instead that his conclusion was the incontrovertible result of first amendment "less drastic means" analysis.[95] It is the opinion of this writer that his findings were never effectively rebutted.

The dissent of Stevens was an attempt to return the Court to a prior line of precedent that he believed represented the proper interpretation of the scope of protection required by the fourth amendment. The Court may yet return to Stevens' "mere evidence" rule, but his failure to gain a single adherent indicates that such a result is doubtful, at least for the forseeable future. His opinion might best be read for its historical value.

Conclusion

In *Zurcher,* The Supreme Court clarified, but did not ultimately resolve, two of the many sub-issues in the vast area of fourth amendment search and

[88] *Id.* at 1986; 353 F. Supp. at 135. For a more detailed account and further examples of the source drying-up phenomenon, see Note, *Newsmen's Privileges Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy,* 49 Tulane L. Rev. 417, 420–21 (1975).

[89] 98 S. Ct. at 1982.

[90] *See* Note, *Search and Seizures of the Media: A Statutory, Fourth and First Amendment Analysis,* 28 Stan. L. Rev. 957, 981–82, 985–86, 989; *contra,* 86 Harv. L. Rev. 1317, 1324–25 (1973).

[91] 98 S. Ct. at 1981.

[92] *Id.* at 1984 (Powell, J., concurring). *See also* text at notes 50–51 *supra.*

[93] 408 U.S. 665 (1972).

[94] *Id.* at 710.

[95] 98 S. Ct. at 1984–87 (Stewart, J., dissenting).

seizure law. It can now be safely said that neither third party status nor press status is enough to exempt an individual from a search pursuant to warrant. Also, the authorities are not required to demonstrate the inefficacy of a subpoena duces tecum before resorting to a warrant allowing search in each of the above instances.

But beyond that, the case provides no clear answers. Justice Powell, in his decisive opinion, refused to allow the third party or media to be insulated from the state's power of warrant. Yet, at the same time, neither has been relegated to the position of the criminal suspect. Powell instead has chosen some undefined intermediate ground, ruling that the fact that a third party or the press is the subject of a potential search should bear on the reasonableness of issuing a warrant. How those factors are to come into play, and what weight they are to carry, are questions that await answers in further decisions of the Court.