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THE PRIVACY PROTECTION ACT
OF 1980: CURBING UNRESTRICTED
THIRD-PARTY SEARCHES IN THE
WAKE OF ZURCHER V. STANFORD
DAILY

Journalists historically have been the victims of abusive government search and seizure. As the Supreme Court has recognized, "[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is nothing new." Modern American journalists, however, had largely forgotten this historical experience until the Supreme Court's decision in Zurcher v. Stanford Daily. That decision, upholding the constitutionality of newsroom searches, once again raised the specter of policemen barging into newsrooms to search for journalists' materials. To assuage these

1 For more than 200 years after the practice was instituted in the 1500's, English monarchs used the state's search and seizure power to harass journalists and suppress objectionable publications. The practice finally ceased after Lord Camden in Entick v. Carrington, 19 How. St. Tr. 1029 (1765), declared it illegal. See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 23-51 (1937); F. Siebert, Freedom of the Press in England (1952).

2 Marcus v. Search Warrant, 367 U.S. 717, 724 (1961). The Supreme Court also has recognized that "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." Id. at 729. See also Frank v. Maryland, 359 U.S. 360, 363-65 (1959); Boyd v. United States, 116 U.S. 616, 624-30 (1886).

3 436 U.S. 547 (1978). For a discussion of the Zurcher holding, see pt. I A infra. As far as commentators have been able to determine, the newsroom search in Zurcher was unprecedented. See Citizen Privacy Protection Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 43 (1978) (prepared statement of Philip Heymann, Assistant to the U.S. Attorney General) [hereinafter cited as Senate Hearings].

4 Perhaps the best illustration of the vision Zurcher conjured in journalistic minds is the statement of Howard K. Smith of ABC News:

When I was a new young reporter at the United Press in Berlin . . . there was a knock on the door . . . and 15 Gestapo men barged past me, began opening every desk and studying every piece of paper they could find. Six hours later, they left. I remember thanking God this couldn't happen in America. Well, now it can. [Zurcher] is the worst, most dangerous ruling the Court has made in memory.

Senate Hearings, supra note 3, at 147-48 (appendix to testimony of the Reporter's Committee for Freedom of the Press). Editorial reaction to Zurcher from other journalists
fears, Congress passed the Privacy Protection Act of 1980 (the "Act").

Congress, however, did not go far enough. The Act protects primarily the press and others engaged in disseminating information to the public. Yet Zurcher permits the police to search persons suspected of possessing criminal evidence whether or not they are engaged in informing the public. All persons— not just journalists—are now subject to unannounced police searches. By limiting the Act's protections primarily to the press, Congress has failed to remedy Zurcher's impact on the privacy rights of the general public. This failure to protect all third parties adequately from unrestrained police searches is a major shortcoming of the congressional response to Zurcher.

This article analyzes the Privacy Protection Act as a response to Zurcher. Part I discusses the Zurcher decision and its effect on First and Fourth Amendment rights, as well as its impact on state testimonial privileges. Part II critically examines key features of the statute, focusing on the parties and materials protected, the police practices regulated, the remedies provided for violations, and the Act's constitutional underpinnings. Part II also offers suggestions for remedying the problems the Act currently presents. The article concludes that the Privacy Protection Act, while a necessary first step to minimizing the impact of Zurcher, is inadequate to address all the issues raised by un-


* See id. § 101.

* See pt. I A infra.

* It should be remembered that historically journalists were not the only ones who suffered as a result of abusive government search and seizure. For example, in the American colonies, the most oppressive instrument of state search and seizure power—the writs of assistance—were directed primarily at colonial merchants suspected of smuggling goods to avoid custom duties. See generally Frank v. Maryland, 359 U.S. 360, 364-66 (1959); Boyd v. United States, 116 U.S. 616, 625 (1886).


In addition, the Carter Administration sent several proposals to Congress for greater protection of personal privacy because of the potential threat posed by modern technology. See Hucker, Carter Sends Congress Sweeping Plan To Protect Individual Privacy Rights, 37 CONG. Q. WEEKLY REP. 641 (1979).
restricted third-party searches.

I. BACKGROUND

A. The Zurcher Decision

*Zurcher* was the first case in the federal courts to decide whether the police can search non-suspects using a warrant rather than a subpoena *duces tecum*. The case arose when Palo Alto police obtained a warrant to search the Stanford Daily, Stanford University's student newspaper, for photographs of a campus demonstration. The newspaper sued the police after the search, claiming that the search violated its First and Fourth Amendment rights because the police did not resort to a subpoena to obtain the desired evidence. The federal district court agreed, and adopted a "subpoena first" rule for searching non-suspects: police must use subpoenas *duces tecum* rather than warrants to search non-suspects unless the police can show that a subpoena would be "impractical." The court said that absent a showing of impracticality, searching non-suspects by means of a warrant is a *per se* violation of the Fourth Amendment. In addition, the court said that where the police plan to search a newsroom, the First Amendment requires an especially high showing of impracticality. The Ninth Circuit Court of Appeals affirmed.

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11 The police sought photographs taken by *Daily* staffers of a demonstration at the university's hospital at which demonstrators attacked several policemen. The *Daily* was a non-suspect; it was neither implicated in the demonstrations nor suspected of any criminal activity. The search, described by the district court as "quite thorough," lasted about 15 minutes. Police searched filing cabinets, baskets and desk drawers. According to plaintiff's affidavits, the "officers were in a position to see notes taken by reporters in the course of interviews which contained information given in confidence and on the understanding that the name of the source would not be disclosed." Only photographs and film already published were recovered. Zurcher v. Stanford Daily, 436 U.S. at 550-51.
12 *Id.* at 552.
13 The district court held that the police cannot obtain a warrant to search for materials held by a non-suspect unless the magistrate issuing the warrant has probable cause, supported by sworn affidavits, that the materials sought would be destroyed or removed. Stanford Daily v. Zurcher, 353 F. Supp. at 127.
14 *Id.*
15 The district court held that where a newsroom is to be searched, the First Amendment requires a clear showing that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order would be futile. *Id.* at 135.
On certiorari, the Supreme Court reversed.\textsuperscript{17} The Court held that the reasonableness clause of the Fourth Amendment\textsuperscript{18} — on which the District Court relied for its "subpoena first" rule — does not require the police to resort to a subpoena when searching non-suspects.\textsuperscript{19} The Court rejected the district court's conclusion that it is \textit{per se} unreasonable to employ a warrant when a subpoena could have been used. In effect, the Court said that the existence of probable cause automatically establishes the reasonableness of issuing the warrant, regardless of whether or not the party being searched is a suspect.\textsuperscript{20} The majority noted that probable cause is all that traditionally was required for issuance of a valid warrant;\textsuperscript{21} probable cause, in turn, only requires a reasonable belief that the evidence sought is located at the place to be searched. The criminal culpability of the property owner is irrelevant to the initial determination whether or not to issue a warrant.\textsuperscript{22} Therefore, said the Court, a warrant may issue to search both suspects and non-suspects as long as probable cause is established.\textsuperscript{28} The Court rejected any consideration of the privacy rights of non-suspects in determining whether a warrant should issue because it said "[t]he Fourth Amendment has itself struck the balance between privacy and

\textsuperscript{17} 436 U.S. at 553.
\textsuperscript{18} The first clause of the Fourth Amendment protects citizens against "unreasonable searches and seizures." See U.S. Const. amend. IV ("The right of the people to be secure . . . against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . ."). Commentators disagree on the relationship of this clause to the warrants clause which follows it. Three theories exist. The first is that the reasonableness of a search is determined solely by the existence of a warrant that satisfies the requirements of probable cause and specificity contained in the warrants clause. A second theory suggests that even if all the requirements of the warrant clause are met, a search pursuant to a warrant still may be unreasonable on independent grounds. The third theory holds that the requirements of the warrants clause only apply to warranted searches and that the reasonableness clause provides an additional search power for warrantless searches. See Comment, \textit{Third Party Searches in the Face of Zurcher v. Stanford Daily: Toward a Set of Reasonableness Requirements}, 11 Conn. L. Rev. 660, 661-62 (1979).
\textsuperscript{19} Zurcher v. Stanford Daily, 436 U.S. at 560.
\textsuperscript{20} The Court said that "valid warrants . . . may be issued when it is satisfactorily demonstrated . . . that fruits, instrumentalities, or evidence of crime is located on the premises." \textit{Id.} at 559. See also note 23 infra.
\textsuperscript{21} 436 U.S. at 554.
\textsuperscript{22} \textit{Id.} at 554-56. The Court noted that "search warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized." \textit{Id.} at 555.
\textsuperscript{28} The Court pointed out that "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." \textit{Id.} at 556.
public need.” Once probable cause is established, said the Court, privacy rights must yield to the “fundamental public interest” in law enforcement.

The Court also noted that a “subpoena first” rule would entail “hazards to criminal investigation much more serious than the District Court believed.” First, the alleged non-suspect actually may be involved in the crime under investigation. If the party to be searched is culpable, using a subpoena would warn him of the impending search, permitting him to dispose of the evidence sought. Second, even if the party to be searched is not culpable, he might be sympathetic to the actual criminal and notify him of the search. Third, the real culprits may have access to the premises where the evidence is located and can use the delay involved in securing evidence by subpoena to destroy the materials sought. In addition, because subpoenas are easier to obtain initially, the Court was skeptical of the contention that subpoenas provide significantly more privacy protection than a warrant.

Turning to the free speech challenge, the Court also dismissed the argument that the First Amendment requires a “subpoena first” rule for newsroom searches. The Court said nothing in the Fourth Amendment exempts the press from police searches as long as probable cause is established. Although it acknowledged that warrant requirements must be observed with “particular exactitude” when First Amendment interests are involved, the Court said that “no more than this is required.” Normal Fourth Amendment requirements — probable cause, specificity, and overall reasonableness — are, as the Court pointed out, sufficient to protect the press from abusive police searches. The Court also remained unconvinced that newsroom searches would affect adversely the ability of journalists to gather news from confidential sources.

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14 Id. at 559.
15 Id. at 554.
16 Id. at 551.
17 Id.
18 Id. at 562-63.
19 Id. at 565.
21 436 U.S. at 565.
22 Id.
23 Id. at 566. The Court cited Branzburg v. Hayes, 408 U.S. 665 (1972), where it had rejected similar claims by the press in holding that journalists could be compelled to reply to grand jury subpoenas even though this might threaten confidential sources. For a discussion of journalists’ confidential sources, see notes 58-59 and accompanying text infra.
B. The Impact of Zurcher: Subpoena v. Warrant

Zurcher dramatically expanded the permissible scope of unannounced police searches. In rejecting the district court's "subpoena first" rule, the Court said that the Fourth Amendment does not provide any greater protection for persons not suspected of criminal activity, and thus placed both suspects and non-suspects on an equal footing with respect to police searches. The Court also rejected the notion that the First Amendment requires greater safeguards when a newsroom is the object of a third-party search.

Reaction to Zurcher was swift and critical, both by legal commentators and by Congress. The criticism was directed primarily at the Court's failure to recognize that although a subpoena duces tecum is not as effective an investigatory tool as the warrant, it is far more protective of individual privacy because it provides notice and an opportunity to object, and because it is less intrusive. Because of this failure, critics pointed out that

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44 This expansion was made possible by the Court's decision in Warden v. Hayden, 387 U.S. 294 (1967), abandoning the so-called "mere evidence" rule. Before 1967, the Court distinguished between merely evidentiary materials, which could not be searched for by warrant even if possessed by a suspect, and contraband or the fruits and instrumentalities of crime, which could be seized by warrant. See Harris v. United States, 331 U.S. 145 (1947); Gouled v. United States, 255 U.S. 298 (1921). It was only after the Court abandoned this distinction in Warden that third party searches for evidentiary materials became an issue. See Zurcher v. Stanford Daily, 436 U.S. at 577-80 (Stevens, J., dissenting).

45 In fact, the Court noted that until recently, the Fourth Amendment was thought to be "more protective where the place to be searched was occupied by one suspected of crime . . . ." 436 U.S. at 555.


48 The chief advantage of the warrant over the subpoena as an investigatory tool is that the warrant allows the police to act quickly without notice to the person whose property is to be searched. The lack of notice minimizes the risk of removal or destruction of the evidence sought before the police can seize it. See, e.g., FED. R. CRIM. P. 41;
the Court did not adequately consider the adverse consequences of unrestricted third-party searches. In particular, critics decried the decision because of its anticipated impact on (1) the privacy rights of non-suspects, (2) freedom of the press to gather and disseminate news, and (3) state testimonial privileges for attorneys and other professionals.

1. Zurcher and the right to privacy — Zurcher critics believe that search warrants pose dangers to individual privacy rights which subpoenas do not, and that subpoenas therefore should be preferred unless compelling law enforcement considerations outweigh the privacy interests involved. In Zurcher, however, the Supreme Court minimized the dangers to privacy posed by third-party searches. The Court said that because of the requirements of probable cause and specificity, and because of the involvement of neutral magistrates, warrant procedure provides safeguards adequate to insure that police searches do not unnecessarily infringe on privacy rights.

Theoretically, of course, warrant procedures are designed to protect privacy rights adequately. But these safeguards, however, are illusory. In many jurisdictions, for example, the “detached and neutral magistrate” required to issue a warrant does not have to be a lawyer. This lack of legal training is significant because nonlawyers are less able than lawyers to apply the high

see also Note, Newsroom Searches Held Valid, supra note 36, at 177; Note, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 STAN. L. REV. 957, 992 (1976); 13 SUFFOLK U.L. REV. 150, 153 n.22 (1979). By contrast, however, a subpoena is more protective of privacy rights. Subpoena procedure provides a mechanism for pre-seizure objection which provides notice to the party possessing the desired evidence. In addition, the subpoena is less intrusive because it does not permit the police to enter property to search for the evidence sought; instead, a subpoena only directs the person to whom it is issued to produce certain evidence before the issuing court at a specified time and place. See, e.g., FED. R. CRIM. P. 17(c). See also Note, Newsroom Searches Held Valid, supra note 36, at 174-78; 13 SUFFOLK U.L. REV. 150, 153 n.22 (1979).

See, e.g., Note, Newsroom Searches Held Valid, supra note 36, at 174-78.

The Fourth Amendment specifically states that “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.” U.S. CONST. amend. IV. See also Stanford v. Texas, 379 U.S. 476 (1965); Marron v. United States, 275 U.S. 192 (1927).

The Supreme Court has said that only “detached and neutral magistrates” may issue warrants. United States v. Chadwick, 433 U.S. 1 (1977); Chapman v. United States, 356 U.S. 610 (1961); Johnson v. United States, 333 U.S. 10 (1948). Searches conducted “outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.” Katz v. United States, 389 U.S. 347, 357 (1967). This requirement of prior judicial approval is subject only to a few “jealously and carefully drawn” exceptions. Jones v. United States, 357 U.S. 493, 499 (1958). For a discussion of some of these exceptions, see note 124 and accompanying text infra.

Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 3 (4th ed. 1974) [hereinafter cited as Y. KAMISAR et. al.].
ly technical requirements of probable cause and specificity. Even magistrates with legal training fail to scrutinize adequately the evidence presented by the police in determining whether probable cause to search exists. As a result, they often abdicate this responsibility to the police or prosecutors. In addition, the police often are under pressure to falsify or at least color facts to establish probable cause. These problems undermine two key safeguards — a neutral magistrate and probable cause — on which the Zurcher majority relied.

Even if the police scrupulously follow warrant procedures, the search warrant still involves a greater invasion of privacy than the subpoena. For one, the police must physically intrude onto the property being searched to execute the warrant. This subjects the property owner to the embarrassment of a police search even though he may not be a suspect. In addition, the warrant

48 See LaFave, Improving Police Performance Through the Exclusionary Rule, 30 Mo. L. Rev. 391 (1965); LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987 (1965). Both articles conclude that magistrates often grant police requests for warrants without an adequate inquiry into the grounds for issuance of the warrant.


50 These pressures exist because of the importance of a good arrest and conviction record, and because of the difficulty of achieving such a record after the exclusionary rule was extended to the states by Mapp v. Ohio, 367 U.S. 643 (1961). See Chevigny, Police Abuses in Connection With the Law of Search and Seizure, 5 CRIM. L. BULL. 3 (1969); Younger, The Perjury Routine, 204 NATION 596 (1967); Comment, Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap, 60 GEO. L.J. 507 (1971).

Police perjury is facilitated because the affidavits submitted by the police to show probable cause can be based on hearsay evidence. United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Jones v. United States, 362 U.S. 257 (1960). If these affidavits are valid on their face, a defendant attacking the accuracy of the information on which the police relied to establish probable cause must make a substantial showing that the false statement contained in the affidavits was knowingly or intentionally made before he is entitled to a hearing on the matter. Franks v. Delaware, 438 U.S. 154 (1978).

51 See, e.g., FED. R. CRIM. P. 41. See also L. TIFFANY, D. McINTYRE & D. ROTENBERG, DETECTION OF CRIME 99-120 (1967).

52 In his Zurcher dissent, Justice Stevens noted that: "The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the person
permits the police to "rummage" through personal effects not even named in the warrant. Even though the police may search only where the items described in the warrant reasonably could be concealed,48 many items of highly personal nature may be revealed unavoidably in the course of the necessary search.49 Finally, the warrant provides no possibility of pre-seizure objection.110 The party being searched has no opportunity to convince a judge or magistrate that the search is unnecessary or that it should be limited in some way.

The subpoena, of course, results in none of these hazards. The police never enter the property being searched, so no late night search of an innocent person with all the attendant embarrassment and disruption would occur. In addition, no rummaging takes place because the desired evidence is delivered to the court by the party in possession rather than by the police. Finally, the party being searched may contest the necessity for or scope of a subpoena, before the search takes place, thus insuring that the invasion of privacy occasioned by the need for criminal evidence is minimized.111 Therefore, the subpoena is more protective of privacy rights than the warrant.

The subpoena, however, is not without disadvantages. The Zurcher majority stressed that the subpoena entails "hazards to law enforcement,"112 making it an unsuitable substitute for the warrant as an investigatory device. First, the subpoena is not available to the police or prosecutors as an investigatory tool in most jurisdictions.118 A "subpoena first" rule in those jurisdic-

48 See Zurcher v. Stanford Daily, 436 U.S. at 573 n.7 (Stewart, J., dissenting):
[I]n order to find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one.

118 The party being searched is notified only after the police have arrived to search the premises. The party can object to the search only after it has been executed. See, e.g., FED. R. CRIM. P. 41(e)-(f).

119 See, e.g., FED. R. CRIM. P. 17(c).

436 U.S. at 561.

112 While several jurisdictions grant prosecutors the power to issue investigatory subpoenas, see, e.g., ARK. STAT. ANN. § 43-801 (1977); FLA. STAT. ANN. § 914.001 (1973), most jurisdictions deny prosecutors this power. See UNIFORM RULE OF CRIMINAL PROCEDURE 231, 432, Comment (Proposed Final Draft, 1974). The police also are denied the power to issue investigatory subpoenas. See Note, Search and Seizure of the Media, supra note 44.
tions would be unworkable. Second, the subpoena notifies the party being searched that an investigation is underway and that the party is in possession of evidence relating to that investigation. This provides the party being searched with an opportunity to remove or destroy the evidence before the police can seize it. Third, the availability of pre-seizure proceedings makes the subpoena unsuitable for quick action. Because of these drawbacks, the subpoena is not as effective an investigatory tool as the warrant. Since the public interest in the production of criminal evidence is substantial, the “subpoena first” rule should not apply to those situations where the efficacy of criminal investigations will be undermined to an extent not warranted by the public's countervailing interest in personal privacy.

2. Zurcher and freedom of the press—Newsroom searches threaten the constitutional rights of the press in two ways. First, police searches inhibit the ability of the press to gather information for the public. Second, newsroom searches endanger the ability of the press to disseminate the information gathered.

Reporters often rely on confidential sources when gathering much of the information they publish or broadcast. Police searches inhibit information gathering by making confidential sources reluctant to talk to reporters about sensitive matters. By creating a danger that the names of these informants will be

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38, at 965.

See, e.g., Fed. R. Crim. P. 17(c).

84 This possibility greatly concerned the Zurcher majority. See 436 U.S. at 561.

85 A number of objections are available, and these objections take time to litigate. For example, the Zurcher majority noted that the Fifth Amendment privilege against self-incrimination may be asserted by the recipient of a subpoena but not by an individual whose privacy is invaded by a police search. The prosecutor, said the Court, would rarely be able to overcome an assertion of this privilege in the early stages of an investigation when most warrants are issued. The Court said that the delay in overcoming the privilege would inhibit “the production of evidence with sufficient regularity to satisfy the public interest in law enforcement.” 436 U.S. at 561 n.8. Subpoenas also may be quashed on other grounds. See A. Amsterdam, Trial Manual for the Defense of Criminal Cases § 163 (3d ed. 1974). The Court pointed out that “time spent litigating such matters could seriously impede criminal investigations.” 436 U.S. at 561 n.8.

86 The Supreme Court has recognized that the First Amendment protects the rights of the press to both gather and disseminate information to the public. See Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (“... without some protection for seeking out the news, freedom of the press could be eviscerated); Grosjean v. Associated Press Co., 297 U.S. 233 (1936) (First Amendment protects the right of the press to publish).

exposed during the course of the search, newsroom searches threaten to dry up these sources of information. No matter how carefully the warrant is executed, the police necessarily must rummage through files and desks to locate the materials named in the warrant. This "rummaging" is likely to expose the names of confidential informants even when they have no connection with the investigation. Confidential sources, naturally sensitive to being uncovered, are likely to refuse to talk to reporters rather than run the risk that a newsroom search will expose them.⁶⁹

Newsroom searches also threaten the ability of the press to disseminate information. One way this occurs is through self-censorship by reporters. The threat of a police search may cause reporters to omit references in their stories to evidence possessed by their newspapers that may trigger a search, either to protect confidential sources from exposure or to save themselves the ordeal of a police search.⁷⁰ In either case, the effect may be to deny valuable information to the public.⁷¹

⁶⁹ See Zurcher v. Stanford Daily, 436 U.S. 547, 572 (1978) (Stewart, J., dissenting): “It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist’s assurances, his identity may in fact be disclosed.” For more on the effect of disclosure on confidential sources, see Note, Newsmen’s Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy, 49 Tul. L. Rev. 417 (1975); Comment, The Newsman’s Privilege: Protection of Confidential Associations and Private Communications, 4 U. Mich. J.L. Rev. 85 (1970); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 316 (1970); Note, The Newsman’s Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif. L. Rev. 1198 (1970).

⁷⁰ The comments of Gene Roberts, New York Times national news editor, illustrate the potential for self-censorship:

If reporters and photographers believe that the information they gather will be available to government officials, they will not be eager to get the sensitive story, or to track down the individual who will supply the critical information. And I, as an editor, will consider carefully before publishing facts or a photograph which might imply that there is more than appears.


⁷¹ The effect of newsroom searches on the First Amendment rights of the press is analogous to the “chilling effect” which the Supreme Court has in other contexts used as a basis for striking down laws which deter or discourage the exercise of First Amendment rights. This chilling effect occurs because of the possible applications of an overbroad statute or rule which, although directed at activities that may be regulated, is so broad as to possibly encompass protected activities. The Supreme Court has been particularly concerned with the chilling effect on First Amendment rights in the area of legislative investigations, a government activity closely analogous to the police search. See Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963). See also DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966) (attorney general investigation). For a discussion of “chilling effect,” see gen-
More significantly, police searches may result in the removal of information necessary for publication. Zurcher does not require the police to wait until publication before searching; once they learn that a newspaper possesses criminal evidence, the police may obtain a warrant and seize the evidence whether or not it has been published. By removing the information from the newsroom, the police, in effect, can block publication of any story that depends on that information. In addition, the search itself may disrupt normal newspaper operations. If the search occurs near deadlines, the disruption may be sufficient to prevent publication of an entire edition.

Use of subpoena would alleviate these concerns in several ways. First, a subpoena does not involve a physical intrusion into the newsroom. Thus the police would have no occasion to "rummage" through desks and files, which minimizes the risk of unnecessary exposure of confidential sources. The lack of physical intrusion also would obviate the risk of disruptions due to the search itself. Second, a subpoena provides an opportunity for pre-seizure objection. The newspaper may be able to quash the subpoena altogether, or at least modify it to release only a minimum of information. This reduces the risk that confidential sources will be compromised. The notice and opportunity to object provided by subpoena procedure also would allow enough time for the newspaper to copy the information sought, thereby eliminating the risk that the police will be able to block publication by removing materials from the newsroom. The subpoenas, generally Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808, 822-25 (1969).

Nothing in normal warrant procedure requires the police to wait to execute a search once they have established probable cause. See, e.g., Fed. R. Crim. P. 41. In Zurcher, however, this problem did not arise because the search occurred after publication.

For instance, police searched the offices of a Los Angeles radio station for eight hours before concluding that the evidence sought was not on the premises. See Note, Search and Seizure of the Media, supra note 38, at 957. See also Senate Hearings, supra note 3, at 285-86 (testimony of Tom Becherer, news director, WBAL-TV Baltimore, on the potential physical disruption caused by newsroom searches).


In Zurcher, however, the Court rejected the newspaper's prior restraint arguments. The Court found prior restraint cases inapplicable because it said newsroom searches carry "no realistic threat of prior restraint or of any direct restraint whatsoever . . . on . . . publication." 436 U.S. at 567.
therefore, is more protective of press freedom than the warrant.

However, neither the district court's "subpoena first" rule nor the Zurcher rule permitting unrestricted third-party searches is entirely satisfactory from a law enforcement standpoint. With respect to the "subpoena first" rule, the same "hazards to law enforcement" that are present whenever a third party is subpoenaed also are present when a reporter is subpoenaed. For example, reporters will be notified of the impending search and thus will have an opportunity to conceal or destroy the desired evidence. These legitimate law enforcement concerns caution against application of a "subpoena first" rule for all newsroom searches. On the other hand, Zurcher itself may work to thwart law enforcement in the press context. Police and prosecutors often use newspaper stories for leads when conducting investigations. These investigations naturally will suffer if the sources for these stories are discouraged from contacting the press for fear of exposure during the course of a newsroom search. In addition, reporters faced with the possibility of being searched may prefer to destroy notes and other evidence in their possession as soon as these materials are no longer necessary for their stories. Consequently, valuable criminal evidence may be lost.

3. Zurcher and state testimonial privileges— The broad search and seizure power authorized by Zurcher also could subvert state testimonial privileges. Almost all states recognize, by common law or statute, a number of privileges from the duty to testify. The oldest and most common is the attorney-client

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*For example, there were indications in Zurcher that the Stanford Daily had adopted a policy of destroying photographs of campus demonstrations if served with a subpoena. 436 U.S. at 575 n.1 (Stewart, J., dissenting).

*See statement of John Leonard, president of the National District Attorney's Association, 227 NATION 102 (1978): "Prosecutors . . . often depend heavily on the published stories of newsmen for leads into investigations of criminal activity, and much of the information is obtainable for such stories only if confidential sources are assured anonymity."

*The chief of the Lee Newspapers bureau in Helena, Montana wrote Congressman Robert Drinan that the day after Zurcher was announced, "my office began erasing all tapes and destroying or removing from the premises all confidential records . . . ." Id. Columnist Carl Rowan noted that reporters are now "committing notes and sources to memory, burying papers in tin cans or empty whiskey bottles. . . ." Id. And columnist James Kilpatrick has said he might have to place his files "six feet deep in a sanitary landfill." Id.

*At common law, "there is a duty to give what testimony one is capable of giving and . . . any exemptions which exist are distinctly exceptional." 8 WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961). Privileges from testifying were not favored at common law because they interfered with the search for truth and conflicted with the maxim that "the public . . . has a right to every man's evidence." Id. Nonetheless, privileges persist because certain values override the general duty to testify. In the case of most privileges, the value promoted is free communication between the protected parties. The theory is
privilege, but testimonial privileges also exist for doctors, psychologists, and priests. In half the states, "shield laws" protect a journalist's confidential sources from exposure. These privileges are designed to foster certain beneficial relationships by creating an atmosphere of complete confidentiality.

Zurcher, however, permits the police to circumvent these privileges. When third parties protected by a testimonial privilege are subpoenaed, they normally may quash the subpoena on the basis of the privilege. A subpoena maintains confidentiality because it allows the third party to object before seizure of the evidence. A warrant, however, makes an objection to the search based on the existence of a testimonial privilege impossible because it provides no mechanism for pre-seizure objections. The police, therefore, can sidestep the privilege by employing a warrant rather than a subpoena. Even if the third party later suc-

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71 A physician-patient privilege exists by common law or statute in two-thirds of American jurisdictions. 8 WIGMORE, supra note 68, at § 2380.


74 See generally Note, Newsman's Privileges Two Years After Branzburg v. Hayes, supra note 59, at 429.

75 Most of these statutes, however, only pertain to subpoenas directed at newsmen; they do not restrict the availability of search warrants. Nevertheless, these statutes evidence a state policy that the confidential relationship between reporters and their sources should be protected.

76 See A. AMSTERDAM, supra note 56, at § 163.

77 The potential for subverting state testimonial privileges is illustrated by the experience of one Minnesota lawyer whose offices were searched only two months after Zurcher. Similar problems have arisen in California and Oregon. See Lawscope — Criminal Justice, 65 A.B.A.J. 1777 (1979). See also Senate Hearings, supra note 3, at 223-78 (testimony of Jerome S. Beigler, Chairman, American Psychiatric Assoc. Comm. on Confidentiality, on the effects of Zurcher on the confidentiality of patient records).
ceeds in recovering the seized evidence, the search and seizure will have destroyed confidentiality. This will deter future confidential exchanges and undermine the relationships the privilege was meant to protect.

Here again, however, a "subpoena first" rule poses problems for law enforcement in certain situations. One concern raised by opponents of a "subpoena first" rule was that criminals would use the rule as a shield by placing potentially incriminating evidence in the hands of their supposedly innocent attorneys. Obviously, the policy behind the "subpoena first" rule stands opposed to such a result, and the rule should be limited so that such situations do not occur. Congress should consider the possible impact of a "subpoena first" rule intended to safeguard testimonial privileges on law enforcement interests, and tailor its legislation to minimize that impact.

II. THE CONGRESSIONAL RESPONSE

From the foregoing, it is apparent that the unrestricted third-party police searches Zurcher authorized have the potential for undermining important rights and liberties. On the other hand, a broad "subpoena first" rule applicable to all third-party searches may create intolerable burdens on law enforcement. In passing the Privacy Protection Act, Congress was well aware of these competing considerations. As a result, the Act repre-

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76 Under some circumstances, a third party can petition the court for the return of materials seized in a police search. See A. Amsterdam, supra note 56, at § 224.


78 In Zurcher, however, the Supreme Court dismissed the effect of unrestricted third-party searches on individual rights as insubstantial. For example, in rejecting journalists' fears of the "chilling effect" that newroom searches would cause, the Court said it was not convinced "that confidential sources will disappear and that the press will suppress news because of fears of warranted searches." 436 U.S. at 566. The Court pointed out that there have been "only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises." Id. See House Hearings, supra note 4, at 155-56 (Appendix B, statement of the Reporters Committee for Freedom of the Press) (detailing 14 newroom searches that have occurred since 1971); see also Time, Aug. 11, 1980, at 55 (describing two press searches occurring since the Zurcher decision). The key concern, however, is not with how many newroom or other third-party searches already have occurred but rather with how many will occur in the future now that the Supreme Court has declared such searches legal. See Bayh, Congressional Response to Zurcher v. Stanford Daily, 13 Indiana L. Rev. 835, 861-62 ("there is every reason to believe that the number of third party searches will increase").

79 Opponents of Zurcher legislation, however, have greatly exaggerated these "burdens" on law enforcement. See notes 97-102 and accompanying text infra.

80 See, e.g., the comments of Sen. Birch Bayh, one of the strongest supporters of Zurcher legislation:
sents an accommodation of the individual's rights and liberties with the public interest in effective law enforcement.\textsuperscript{61}

The Act is divided into two parts. Title I, "First Amendment Privacy Protection," defines unlawful acts, prohibiting searches and seizures of certain materials unless one of several broad exceptions apply. The number of applicable exceptions depends on the kind of materials sought by the police. If the police are searching for "work product," only two exceptions to the general no-search rule exist.\textsuperscript{62} If, however, the police are searching for "documentary materials," an additional two exceptions apply.\textsuperscript{63} Moreover, Title I stipulates that the Act does not apply to all third-party searches, limiting its scope to searches of persons who intend to disseminate a "form of public communication."\textsuperscript{64} Finally, Title I establishes remedies for violations of the statutory scheme, providing generally for a civil cause of action, under certain circumstances, against both the individual officer involved and the governmental entity responsible for the offender.\textsuperscript{65} It also provides for liquidated damages,\textsuperscript{66} and grants the federal district courts original jurisdiction of all civil actions arising under the Act.\textsuperscript{67}

Title II of the Act provides some protection for third parties not covered by Title I. This portion of the Act mandates that the United States Attorney General promulgate guidelines for the conduct of federal third-party searches not involving persons disseminating a "form of public communication."\textsuperscript{68} It also requires that the guidelines incorporate certain provisions.\textsuperscript{69}

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It is a very delicate . . . issue that we are dealing with. . . . It requires . . . a delicate balance. On one side, we have no desire . . . to tie the hands of law enforcement. . . . [On the other hand], if you are innocent . . . you shouldn't have a knock on the door in the middle of the night.

\textit{Senate Hearings, supra note 3, at 12-13.}


\textsuperscript{62} Privacy Protection Act, \textit{supra} note 5, at § 101(a). "Work product" and "documentary materials" are defined at § 107.

\textsuperscript{63} \textit{Id.} § 101(b).

\textsuperscript{64} \textit{Id.} § 101. The Act specifically includes newspapers, books, and broadcasts under the heading of "public communication."

\textsuperscript{65} \textit{Id.} § 106(a).

\textsuperscript{66} \textit{Id.} § 106(f).

\textsuperscript{67} \textit{Id.} § 106(b). The Act, however, does not apply to "searches and seizures at the borders of, or at international points of, entry into the United States in order to enforce the customs laws of the United States." \textit{Id.} § 105.

\textsuperscript{68} \textit{Id.} § 201(a).

\textsuperscript{69} \textit{Id.} § 201(a)(1)-(4).
The Act is designed to address the issues raised by Zurcher and to accommodate both the privacy and press interests involved, and the countervailing law enforcement interests. The Act, however, tips the balance too heavily in favor of law enforcement by (1) leaving large groups of third parties affected by Zurcher largely unprotected, (2) creating unnecessary loopholes for the police to circumvent the protections that are afforded, and (3) providing ineffective remedies for police violations.

A. Parties Protected

One of the key concerns of Zurcher critics was the decision's impact on privacy rights, a concern that provided a strong impetus for passage of the Privacy Protection Act. The title, however, is a misnomer because the Act does not protect the general public's right to privacy. The substantive provisions of the bill safeguard only those third parties involved in information dissemination. The key to the legislation is the concept of "public communication; the Act only protects persons who intend to disseminate to the public a "form of public communication." The Act does not attempt to protect any particular group but instead strives to safeguard the flow of information to the public. Thus, while reporters clearly come within the purview of the statute, the Act also protects academicians, authors, filmmakers, free lance writers and photographers. By focusing on the information involved rather than on specific groups, the Act avoids the thorny problem of defining "the press." However, because

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90 Except for the Department of Justice, "not a single witness in favor of the legislation testified that the protections of the bill should be limited to the press alone." House Report, supra note 81, at 4. Journalists, in fact, "were among the strongest proponents of expanding the legislation to protect all innocent third parties from arbitrary search and seizure." Id.

91 Section 101 of the Act, which deals with unlawful acts, prohibits searches of "a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." This language is intended to protect only those persons engaged in First Amendment activities of some kind. See House Report, supra note 81, at 5-6; Senate Report, supra note 81, at 9-10.

92 The drafters specifically rejected the idea of a "press only" bill. Instead, the statute was designed to "avoid the chilling effects of disruptive searches on the ability to obtain and publish information for all those who have a purpose to disseminate information." Senate Report, supra note 81, at 9. See also House Report, supra note 81, at 5.

93 House Report, supra note 81, at 5.

94 The problems of defining "the press" prevented Congress from passing a federal shield law to protect reporters from investigatory subpoenas in the wake of Branzburg v. Hayes, 408 U.S. 665 (1972), which approved the use of such subpoenas directed at journalists. See Senate Hearings, supra note 3, at 352 (prepared statement of Philip Heymann, Assistant to the U.S. Attorney General). The Act's drafters were well aware of the
the Act only protects persons possessing information to be disseminated to the public, it excludes a large portion of non-suspects affected by Zurcher. In addition, the legislation does not specifically protect persons who may be covered by state testimonial privileges, another group threatened by Zurcher. 95

The main justification for not including all third parties within the scope of the Act was that it would increase the risk of impeding criminal investigations by requiring that the procedures established by the Act be applied to a greatly expanded class of persons. 96 These concerns, however, are greatly exaggerated. First, opponents of a broad third-party search bill overstated the importance of search warrants to criminal investigations. In fact the majority of searches are conducted without a warrant as an incident to arrest, 97 or under one of the other exceptions to the warrant requirement. 98 Search and seizure also is only one of a number of avenues open to the police to obtain criminal evidence. 99 Second and more importantly, a non-suspect in the vast majority of third-party search situations will relinquish the desired evidence voluntarily when served with a subpoena. A true non-suspect will have no connection with the crime or the criminal involved and thus have little motive for

95 "extreme difficulties of arriving at a workable definition of the press." House Report, supra note 81, at 5.
96 Like all other third parties not involved in information dissemination, persons covered by state testimonial privileges are to be protected at the federal level by Justice Department guidelines governing the issuance of warrants to search third parties. Privacy Protection Act, supra note 5, at § 201(a)(3). At the state level, however, third parties not involved in information dissemination are left to the mercy of state legislatures.
97 See Senate Report, supra note 81, at 8. See generally House Hearings, supra note 4, at 164-79; and Senate Hearings, supra note 3, at 296-325, for a discussion of law enforcement concerns.
98 See Y. KAMISAR, et. al., supra note 42, at 5, 266; L. TIFFANY, D. McINTYRE & D. ROTENBERG, supra note 46, at 108.
99 Of course, one may question why there is such great concern with third-party searches when the police do not depend heavily on search warrants. There are two reasons why the concerns are still valid. First, it is likely that third-party searches will increase now that the police know they are authorized to conduct such searches. Second, although third-party searches may not occur often, their impact on privacy rights is substantial in those cases where they do occur. For these reasons, third-party searches should be restricted even though they are not now widely used.
100 Y. KAMISAR, et. al., supra note 42, at 266. For a discussion of exceptions to the warrant requirement, see note 124 and accompanying text infra.
101 For example, the police gather much information through direct observation or surveillance, "tips" from the public or informants, access to public records, and interrogations of victims. See Note, Search and Seizure of the Media, supra note 38, at 993-94. In fact, it has only been since 1967 that the police could search for evidentiary materials by means of a warrant, even from suspects. See note 34 supra. This further undermines the police contention that extending the "subpoena first" rule to all third parties would create intolerable burdens on law enforcement.
withholding evidence from the police.100 Where the police have reasonable grounds to believe that the non-suspect will not voluntarily cooperate, carefully defined exceptions to the “subpoena first” rule will protect law enforcement interests adequately.101 Finally, the risk to criminal investigations posed by a broad third-party search rule can be minimized by requiring a lesser burden of proof to show that a subpoena would be impractical in the case of persons not involved in information dissemination.102 No reason exists, therefore, for a blanket exclusion of the great majority of persons affected by Zurcher.103

100 As pointed out by the Zurcher dissenters, “[c]ountless law-abiding citizens — doctors, lawyers, merchants, customers, bystanders — may have documents that relate to an ongoing criminal investigation.” Zurcher v. Stanford Daily, 436 U.S. at 579 (Stevens, J., dissenting). There is no justification for assuming, as opponents of a broad third-party search rule do, that these normally law-abiding citizens will ignore a subpoena and proceed to conceal or destroy evidence.

101 For example, the Act excludes from the “subpoena first” requirement those situations where the police have a reasonable belief that the third party being searched will remove or destroy the evidence sought if notified of the impending search. Privacy Protection Act, supra note 5, at § 101(b)(3). For other exceptions to the “subpoena first” rule, see notes 134-154 and accompanying text infra.

Where reasonable doubts arise about the willingness of a non-suspect to cooperate, these doubts probably will be resolved in the police’s favor because warrants are obtained ex parte before sympathetic magistrates. See Note, Search and Seizure of the Media, supra note 38, at 986. This provides additional assurance that law enforcement interests will be adequately safeguarded.

102 For example, while the statute currently requires that the police establish by “probable cause” that the person possessing information to be disseminated to the public is a suspect, § 101(a)(1), the Act could require only “reason to believe” as the standard for a third party not involved in disseminating information. But see note 161 and accompanying text infra for a discussion of problems with this standard.

103 In fact, there are administrative reasons for including all third parties within the purview of the Act. As law enforcement officials themselves have pointed out, most warrants are sought in the early stages of an investigation when there is little information available about the person being searched. See, e.g., Senate Hearings, supra note 3, at 319 (statement of the National District Attorney Association). The Act as it stands now, however, requires that the police determine whether or not a person possesses information to be disseminated to the public because the Act only protects information disseminators. Privacy Protection Act, supra note 5, at § 101(a)-(b). This determination must be made at the warrant proceeding, precisely when the police have the least information...
The Act does attempt to protect those third parties not involved in informing the public by mandating that the Justice Department develop guidelines for third-party searches not covered by the Act.\textsuperscript{104} The guidelines, which apply to any federal officer or employee who seeks documentary materials possessed by a non-suspect in connection with a criminal investigation,\textsuperscript{106} must recognize "the personal privacy interests of the person in possession of such documentary materials,"\textsuperscript{106} particularly those of third parties such as lawyers and clients or doctors and patients who are involved in a "known confidential relationship."\textsuperscript{107} The guidelines also must call for use of the least intrusive means of obtaining the information sought.\textsuperscript{108} Except in emergencies, a United States Attorney must approve an application for a warrant under the guidelines.\textsuperscript{109} When adopted, the

available to them. This would delay and in some cases totally frustrate the warrant proceeding. See note 168 and accompanying text infra. By eliminating the distinction between third parties who are disseminating information and those who are not, a determination of whether or not the Act applies would be unnecessary—it always would apply unless the party being searched is a suspect. This would streamline the warrant proceedings by eliminating one step and thus minimize the risk of delay.

\textsuperscript{104} Section 201 of the Act provides that:

The Attorney General shall . . . issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of an offense, to obtain documentary materials in the private possession of a person when the person is not reasonably believed to be a suspect in such offense or related by blood or marriage to such a suspect, and when the materials sought are not contraband or the fruits or instrumentalities of an offense.

The Justice Department has proposed guidelines to comply with § 201. Department of Justice Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties, 46 Fed. Reg. 1302 (1981) (to be codified in 28 C.F.R. pt. 59). The guidelines establish procedures to be used by "any federal officer or employee, in connection with the investigation or prosecution of a criminal offense, to obtain documentary materials in the private possession of a disinterested third party." Id. § 59.3(a). The guidelines require the use of a "subpoena, summons or other less intrusive alternative means" rather than a warrant unless this would "substantially jeopardize the availability or usefulness of the materials sought." Id. § 59.4(a)(1). They also require that any application for a warrant to search third parties be approved by a United States Attorney. Id. § 59.4(a)(2). The guidelines also provide for additional protections where the use of a warrant "may intrude upon professional, confidential relationships." Id. § 59.4(b). For violations, the guidelines provide that the violator "shall be subject to disciplinary action by the agency or department by which he is employed." Id. § 59.5(a). They do not, however, specify what form this disciplinary action shall take.

\textsuperscript{106} Privacy Protection Act, supra note 5, at § 201(a).
\textsuperscript{106} Id. § 201(a)(1).
\textsuperscript{107} Id. § 201(a)(3).
\textsuperscript{108} Id. § 201(a)(2). The drafters expected that the guidelines would require an informal request or a subpoena whenever these present an effective alternative to search by warrant, subject to exceptions paralleling those contained in the statute for searches of persons involved in information dissemination. Senate Report, supra note 81, at 19.
\textsuperscript{109} Privacy Protection Act, supra note 5, at § 201(a)(4). In emergencies, another "ap-
guidelines will have the full force and effect of Justice Depart­
ment regulations, and any employee or officer violating the

guidelines is to be subject to disciplinary action.\footnote{110}

The guidelines are unlikely, however, to protect the privacy

rights of a majority of non-suspects adequately. First, the guide­

delines are only binding on the federal government, yet the Justice

Department and the statute's drafters recognized that most

third-party searches occur at the state and local level.\footnote{111}

Second, violations of the guidelines cannot be litigated.\footnote{112}
The only sanction provided for noncompliance is disciplinary action by the

Justice Department itself,\footnote{113} and this is inadequate because law

enforcement officials are reluctant to discipline themselves.\footnote{114}
The Act, therefore, should have covered all third parties in its

substantive provisions.

Extending the Act's protections to all non-suspects, however,

will not adequately protect all the interests at stake. Although

such a change will safeguard the public's general right to pri­

vacy, it will not protect the special interest in confidentiality

that third parties such as journalists and professionals covered

by state testimonial privileges possess. These third parties de­

serve additional protection from police searches because of the

societal interest in protecting the confidentiality of these rela­

tionships, an interest not present with most other third parties.

This interest in confidentiality will not be adequately protected

by merely extending the Act's protections to all third parties be­

cause circumstances justifying an invasion of the public's general

propriate supervisory official” may approve the application for a warrant, but a U.S.

Attorney must be notified within 24 hours.

\footnote{110} Section 202 of the Act states that “any violation of these guidelines shall make the

employee or officer involved subject to appropriate disciplinary action.” Privacy Protec­

tion Act, supra note 5, at § 202.

\footnote{111} See note 199 and accompanying text infra.

\footnote{112} Section 202 provides that “an issue relating to the compliance, or the failure to

comply, with guidelines issued pursuant to this title may not be litigated.” Privacy

Protection Act, supra note 5, at § 202. In addition, evidence obtained in violation of the

guidelines cannot be suppressed or excluded solely because of such violation. Id.

§ 106(e). The drafters apparently agreed with the Justice Department that litigability

would be “both burdensome and unnecessary to achieve the purposes of the guidelines.”

\textit{Senate Report, supra} note 81, at 20. The drafters, however, said they expected “good

faith” compliance with the guidelines. \textit{Id.}

\footnote{113} See note 110 supra.

\footnote{114} Police departments are notoriously lax in punishing officers for search and seizure

violations. \textit{See} Gelles, \textit{Enforcing the Fourth Amendment: The Exclusionary Rule and

Its Alternatives}, 1976 \textit{Wash. U. L.Q.} 621, 718. In addition, municipal leaders responsible

for overseeing police departments rarely pressure the police to abide by search and

seizure requirements. \textit{See} Project, \textit{Suing the Police in Federal Court}, 88 \textit{Yale L.J.} 781,

right to privacy may not justify intruding on this greater interest in confidentiality. To protect this interest, the Act should provide that where the police intend to search a party involved in a known confidential relationship, the materials seized must be sealed without examination and placed in the court’s custody until the court determines that the need for the materials outweighs the special interest in confidentiality enjoyed by these parties. If the court determines that the interest in confidentiality is outweighed, the police are assured that the materials will be immediately available; if the court decides that this interest is not outweighed, the materials can be returned with confidentiality still intact.

B. Protection Afforded

1. The general “no search” rule— The portion of the Act defining unlawful acts tracks in substance the district court’s “subpoena first” rule rejected in Zurcher. Congress clearly intended that subpoenas would be the customary means of searching third parties unless one of several exceptions applied. This portion of the Act, however, contains two significant drafting errors that should be corrected to insure that the Act is not misinterpreted: (1) the operative sections seem to prohibit even searches conducted by means of a subpoena unless one of the several exceptions apply, and (2) these sections also seem to outlaw warrantless searches altogether. Congress intended neither of these results when it passed the Act.

The statute’s language flatly prohibits searches and seizures of

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118 This would include all journalists and any professionals who are protected by that state’s testimonial privileges. The Act, in fact, already requires that the Attorney General, in promulgating guidelines for searching third parties not covered by the Act, must recognize the “special concern for privacy interests in cases in which a search or seizure . . . would intrude upon a known confidential relationship such as that which may exist between a clergyman and parishioner; lawyer and client; or doctor and patient.” Privacy Protection Act, supra note 5, at § 201(a)(3).

119 See, e.g., H.R. 3837, 96th Cong., 1st Sess. (1979), which provides that search warrants “shall prescribe appropriate provisions to protect all privileged matters, and such protection shall include . . . sealing or guarding such objects without examination until such non-suspect can be heard by the magistrate or judge.” The American Law Institute has suggested a similar provision in another context. See Model Code of Pre-Arraignment Procedure § 220.5 (Official Draft No. 1, 1972). While this procedure may be unworkable in certain cases where the police must examine documents to determine whether or not they are encompassed by the warrant, see note 49 and accompanying text supra, it at least will minimize the intrusion into confidential matters in the majority of cases.
certain materials unless one of several exceptions apply.\textsuperscript{117} This language, however, is misleading because Congress meant to restrict only surprise police searches conducted by means of a warrant.\textsuperscript{118} Subpoena searches are outside the scope of the Act's prohibitions; the police may \textit{always} resort to a subpoena to obtain desired evidence regardless of whether or not they would be entitled to use a warrant under the Act. The Act, therefore, should specifically state that it applies only to warrants, and that subpoena searches are outside its ambit. The Act should not, however, use the term "subpoena" to refer to alternatives to warrants. Many jurisdictions do not permit the police to use subpoenas as an investigatory device.\textsuperscript{119} In some jurisdictions, for example, investigatory subpoenas are available only through grand jury proceedings and these proceedings may not be in session at the time of the search.\textsuperscript{120} Consequently, the police in these jurisdictions would be forced always to rely on warrants to conduct third-party searches, and they would have no recourse if they could not satisfy one of the exceptions to the "subpoena first" rule in the Act. Congress, however, did not intend to force the police always to rely on warrants to search third parties.

The Act, therefore, should make clear that only warrants are subject to the restrictions on searches and seizures stated in the statute. It also should indicate that any mechanism by which the party to be searched is notified of the impending search and allowed to object, including but not limited to subpoenas \textit{duces tecum}, suffices to escape the Act's requirements for warrants.\textsuperscript{121}

\begin{footnotesize}
\textsuperscript{117} Under the section detailing "unlawful acts," for example, the Act states that "it shall be unlawful for a government officer or employee . . . to search for or seize any . . . materials possessed by a person reasonably believed to have a purpose to disseminate to the public a . . . form of public communication." Privacy Protection Act, \textit{supra} note 5, at § 101. Because the Supreme Court has said that subpoenas of evidentiary materials are "searches" subject to Fourth Amendment requirements, Hale v. Henkel, 201 U.S. 43 (1906), the phrase "search for or seize" in § 101 could be misinterpreted as prohibiting even searches conducted by means of a subpoena.

\textsuperscript{118} It is clear that the drafters distinguished warrants from subpoenas and only intended to subject warrants to the restrictions of the statute. \textit{See, e.g., House Report, supra} note 81, at 4 ("It [the Act] does not prohibit lawful searches of third parties. It simply requires the use of a subpoena first to obtain documentary materials unless any one of five exceptions . . . apply."). \textit{See also Senate Report, supra} note 81, at 11 ("only two exceptional circumstances will allow a search warrant procedure \textit{instead of} a subpoena") (emphasis added).

\textsuperscript{119} \textit{See note 53 and accompanying text supra}.

\textsuperscript{120} \textit{See Bayh, supra} note 78, at 856.

\textsuperscript{121} The statute provides a one-year grace period from the date of enactment "so that state and local governments will have sufficient time to make any necessary procedural changes in their laws to comply" with the Act. \textit{Senate Report, supra} note 81, at 17-18. Such changes, however, would be unnecessary if the statute simply recognized that searches conducted after notice and an adversary hearing are not within its ambit. \textit{See},
As long as notice and an opportunity to be heard — the essential features of a subpoena — are provided, the statute's restrictions should not apply.122

The statute's language also seems to prohibit warrantless third-party searches.123 There are many situations, however, where the police do not need a warrant to execute a search. In these situations, the normal warrant requirement is excused because there is a need to move quickly and circumstances make it impractical to obtain a timely warrant.124 Requiring the police to resort to a subpoena when the circumstances excuse the use of a warrant is illogical, and would upset an established body of law regarding warrantless searches. The Act should explicitly state that it is not meant to affect the law regarding searches without a warrant, and that the police do not have to comply with its provisions where a warrantless search would be justified.

2. Materials protected: “work product” and “documentary materials” — The Act only protects certain kinds of materials,125

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122 Although the statute should avoid use of the term “subpoena,” this article will continue to use the phrase “subpoena first” for convenience.

123 This was a major concern of law enforcement officials in testimony before Congress. See Senate Hearings, supra note 3, at 303 (testimony of James Zagel, Counsel for the National District Attorneys Association).

124 Although searches conducted without a warrant normally are per se unreasonable, see note 41 supra, the Supreme Court has recognized several exceptions to the warrant requirement. The most important exception is the search incident to arrest. The Court has allowed warrantless searches of the person of a validly arrested person, United States v. Edwards, 415 U.S. 800 (1974); United States v. Robinson, 414 U.S. 218 (1973), and of the immediate area under the control of the arrested person, Hill v. California, 401 U.S. 797 (1971); Chimel v. California, 395 U.S. 752 (1969). Warrantless searches also have been upheld in exceptional circumstances where “seizure is impossible except without a warrant.” Carroll v. United States, 267 U.S. 132, 153-56 (1925) (upholding a warrantless automobile search “because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought”). Other exceptional circumstances may arise in the course of an emergency where entry is needed to protect property or to save lives. See generally Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 BUFFALO L. REV. 419 (1972).


125 The Act only protects materials intended for dissemination to the public in a “form of public communication.” Privacy Protection Act, supra note 5, at § 101. This term, however, is meant to have a broad meaning. It includes not only materials to be disseminated to the public or which contain information to be incorporated in a public communication, but also materials gathered for the purpose of disseminating them to the public but which at some point are determined to be unsuitable for publication. For example, a reporter may write a story which is not published; the reporter’s notes and drafts of the article are nevertheless protected. However, there must be an intent to disseminate in-
distinguishing between materials defined as "work product" and those defined as "documentary materials." This distinction, however, does not make sense in terms of the First Amendment values the Act is intended to protect. Moreover, the distinction creates administrative headaches for the police at a time in the investigatory process where delays can be critical. Work product is defined as materials "prepared, produced, authored or created . . . for the purposes of communicating such materials to the public." It includes the "mental impressions, conclusions, opinions, or theories" of the author. The term is patterned after the definition of work product in the Federal Rules of Civil Procedure. Documentary materials, on the other hand, are simply "materials upon which information is recorded." It includes "written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically [sic] or electronically recorded cards, tapes or discs." Neither term includes the fruits or instrumentalities of crime, or contraband. Possession of such materials makes the third party sufficiently culpable to justify a surprise search.

formation to the public; where such intent is lacking, the materials are not protected. Thus, the internal records of a business, for example, would not constitute a "form of public communication" because they are not intended for public disclosure. See Senate Report, supra note 81, at 10.

Privacy Protection Act, supra note 5, at § 107(b). The definition is intended to cover "materials whose very creation arises out of a purpose to convey information to the public." Senate Report, supra note 81, at 17. Such materials may be created by the person in possession of the materials or by another person in anticipation of public communication. For example, financial records of a business obtained by a member of the press are not work product because they were not originally created "to communicate to the public." But a report prepared by a reporter based on those records would constitute work product, as would a report prepared by a "whistle-blower" in government who intends that the contents be disclosed to the public. Id.

The photographs which were the subject of the search in Zurcher would be "work product" under the Act. House Report, supra note 81, at 12.

Privacy Protection Act, supra note 5, at § 107(b)(3).

Senate Report, supra note 81, at 17; see Fed. R. Civ. P. 26(b)(3), governing discovery of attorneys' work product.

Privacy Protection Act, supra note 5, at § 107(a).

Id.

The fruits of crime are the ends or objects that a criminal intends to obtain from his criminal activity. An example is stolen property. The instrumentalities of crime are those things, such as burglar tools, that facilitate the commission of a crime. Contraband is goods or things, such as narcotics, the possession of which is a crime. See Senate Report, supra note 81, at 16-17.

See Zurcher v. Stanford Daily, 436 U.S. at 581 (Stevens, J., dissenting) (possession of such materials "gives rise to two inferences: that the custodian is involved in the criminal activity, and that, if given notice of an intended search, he will conceal or destroy what is being sought"). See also note 100 supra.
a. The "work product" exceptions—The drafters of the statute apparently felt that work product is more worthy of protection than documentary materials because work product involves a creative mental process. Accordingly, the Act permits the police to search for work product by means of a warrant in only two exceptional circumstances. The first is where the party in possession of the evidence sought is suspected of involvement in the crime under investigation. This exception is obvious; the notice provided by a subpoena gives suspects the opportunity to conceal or destroy evidence. The exception, however, is qualified by a proviso that if the only crime of which the party being searched is suspected is the receipt or possession of the materials sought, the suspect exception does not apply. This proviso prevents police, who may actually be seeking to uncover confidential sources or to block publication, from searching newsrooms on the pretense that the reporter possesses "stolen property."

The proviso is subject to a qualification, however. The suspect exception to the "subpoena first" rule is retained where the crime under investigation concerns the receipt, possession or communication of secret or restricted data. The gravity of these crimes led the drafters to retain the search power in these circumstances. This exception, however, provides a potential loophole for government officials to plug embarrassing leaks of information to the press. For example, the qualification could have authorized the police to search for and seize the documents used to publish the Pentagon Papers, because many of these materials were classified at the time. As a result, public debate

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188 Senate Report, supra note 81, at 10.
184 The statute permits surprise searches where there is "probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." Privacy Protection Act, supra note 5, at § 101(a)(1).
188 See note 27 and accompanying text supra.
186 Privacy Protection Act, supra note 5, at § 101(a)(1).
187 For example, if a reporter knowingly received a stolen report, the suspect exception would apply because the reporter would be guilty of receiving stolen property. The drafters felt that this would unduly broaden the suspect exception because the police could charge journalists with receipt of stolen property in many cases. Senate Report, supra note 81, at 11.
188 Privacy Protection Act, supra note 5, at § 101(a)(1).
188 Senate Report, supra note 81, at 11.
186 See N. Sheehan, H. Smith, E. Kenworthy & F. Butterfield, The Pentagon Papers (1971). See also New York Times v. United States, 403 U.S. 713 (1971) (government attempts to restrain publication of the Pentagon Papers rejected on First Amendment grounds). Several journalists testifying before Congress expressed the fear that the suspect exception could be used to justify surprise searches for purloined government
on issues of extreme importance could be squelched. This qualification, therefore, should be limited to situations where the *national security* — not merely the "secret" or "restricted" status of the documents sought — is genuinely threatened by disclosure.141

The second exception to the "subpoena first" rule for work product is where the materials sought are necessary to prevent death or serious bodily injury.142 This exception seems warranted because society's interest in preserving the lives of its citizens justifies the search under *any* circumstances.148

No other exceptions are provided for obtaining work product by search warrant. Even if the police believe that the third party will conceal or destroy the evidence sought if notified of the impending search, they still must resort to a subpoena.144 The drafters apparently felt that the creative processes represented by work product are so central to the First Amendment that the proper penalty for failure to produce the evidence when subpoenaed should be contempt of court.149

b. The "documentary materials" exceptions—Documentary materials, however, may be sought by warrant under any of four circumstances. In addition to the two exceptions applicable to work product,146 there are two situations where the police may search for documentary materials without resort to a subpoena. First, such materials may be seized by warrant where there is reason to believe that the notice provided by a subpoena would result in the destruction, alteration, or concealment of the evidence sought.147 This exception is justified because the "subpoena first" rule is not designed to remove evidence perma-

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documents. See, e.g., Senate Hearings, supra note 3, at 75 (testimony of William Small, CBS News Director).

141 The government should be required to show more than that the materials are classified or restricted; it should also carry a "heavy burden" of showing that disclosure of the material would involve "a direct, immediate and irreparable injury to the national security." House Hearings, supra note 4, at 105 (prepared statement of Robert Lewis, Chairman, Freedom of Information Committee, Society of Professional Journalists).

142 Privacy Protection Act, supra note 5, at § 101(a)(2).

143 In fact, Fourth Amendment jurisprudence recognizes an exception to the warrant requirement for entries necessitated by life-threatening situations. See generally Mascolo, supra note 124. Since a warrant is not even required in these situations, it would be illogical to require resort to a subpoena.


145 Senate Report, supra note 81, at 12.

146 Privacy Protection Act, supra note 5, at § 101(b)(1)-(2).

147 Id. § 101(b)(3). For examples of such situations, see House Report, supra note 81, at 9.
nently from the reach of the police, but only to provide the party being searched with notice and an opportunity to object. If the notice provided would make the evidence unavailable, then the public interest in effective criminal investigations becomes overriding, and a search is justified. The drafters listed three factors which a magistrate should consider in evaluating the likelihood that the evidence will be destroyed or concealed: whether there exists a close personal, family, or business relationship between the party in possession and the suspected criminal; whether the party in possession has concealed or destroyed evidence in the past; or whether the party in possession has evidenced an intent to conceal or destroy the evidence.

Second, documentary materials may be searched for by warrant when the party in possession fails to comply with a subpoena, and either all appellate remedies have been exhausted or "there is reason to believe that the delay . . . occasioned by further proceedings . . . would threaten the interests of justice." Among the factors which the drafters felt a magistrate should consider to decide whether such a threat exists are: the immediacy of the need for the materials; the importance of the materials to the investigation; and the severity of the crime under investigation. This "interests of justice" exception is troubling. Failure to respond to a subpoena after all appellate remedies have been exhausted justifies a search because the party being searched has been afforded an opportunity to object to the police request, and the objections have been overruled. The party has been afforded his day in court; further refusal to turn over the materials is unjustified. But the "interests of justice" provision allows the police to search before the third party has had a full day in court. The standard is exceedingly vague and subverts both the

148 See Bayh, supra note 78, at 860. As Senator Bayh put it, "[t]he issue of Stanford Daily is not whether police may obtain relevant evidence, but how they may obtain it." Id. at 852.

149 Senate Report, supra note 81, at 13. This could cause problems for news organizations that routinely destroy notes after publication. For example, there was evidence in Zurcher that the Stanford Daily had adopted a policy of destroying photographs of demonstrators if served with a subpoena. See note 65 supra. Such evidence, of course, would satisfy the statute's "destruction of evidence" exception.

150 Privacy Protection Act, supra note 5, at § 101(b)(4).

151 Senate Report, supra note 81, at 13. The drafters also indicated that the judge or magistrate should consider both the privacy interests protected by the Act and the interest in full appellate review. Id.

152 It has been suggested that this exception could be invoked anytime a subpoena is contested "[s]ince any delay in a judicial proceeding may, in some sense, be threatening to the interests of justice." House Hearings, supra note 4, at 31 (testimony of Paul
"subpoena first" rule and the policy favoring full appellate review. Moreover, most of the situations where the "interests of justice" demand an immediate search are covered by the other exceptions to the "subpoena first" rule provided in the statute. The legislation should not have been weakened by inclusion of this vague standard as a further exception to the rule. Instead, the court should be required to make a specific finding that the severity of the crime and the immediacy of the need for the materials sought, coupled with the societal importance of the case, outweighs the privacy and due process interests involved.

The statute, however, fails to include an important exception to the "subpoena first" rule. Because warrants typically are sought in the early stages of an investigation, the police do not always know who is the occupant or owner of the premises to be searched. In such cases, a subpoena would be inappropriate because the police would not know on whom to serve the subpoena. Even if that person is known, he may try to evade being served with the subpoena. The statute, therefore, should provide specifically that resort to a subpoena is excused where the occupant or owner of the premises to be searched cannot be located.

c. Burdens of proof—For both work product and document-
tary materials, the statute provides different burdens of proof to show that an exception applies, depending on the exception being invoked. If the suspect exception is relied on, the police must establish its applicability by "probable cause."\[^{158}\] For all other exceptions, the police need only establish "reason to believe" that an exception applied.\[^{159}\] There is no reason to provide different standards, however. The probable cause standard for invoking the suspect exception is not very exacting; the courts have interpreted probable cause in other contexts merely to mean reasonable suspicion.\[^{159}\] The "reason to believe" standard would lower even this minimal requirement further, authorizing searches by warrant where the police merely suspect that one of the exceptions applies.\[^{160}\] Although it is not the statute's purpose to place insurmountable obstacles before the police, the Act should require more than mere suspicion. Because probable cause is easily established and because it has an established meaning,\[^{161}\] the police should be required to satisfy this burden whenever they invoke one of the exceptions to the "subpoena first" rule.

3. A suggested reform: abolish the distinction between "work product" and "documentary materials"—Many of the problems with the specific exceptions in the Act could be alleviated by relatively minor amendments. One problem with the

\[^{158}\] Privacy Protection Act, supra note 5, at § 101(a)(1).

\[^{159}\] Id. § 101(b)(2)-(3).

\[^{160}\] With respect to arrest warrants, all that is required is that a "reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged" and that the person named in the warrant committed the offense. Dumba v. United States, 268 U.S. 435, 441 (1925). Evidence that would justify conviction is not required; all that is needed is a "reasonable ground for belief of guilt." Brinegar v. United States, 338 U.S. 160, 175 (1949). A similar standard applies to search warrants.

\[^{161}\] Several persons testifying before Congress said that the term "reason to believe" means simply "mere suspicion on the part of law enforcement officers." See, e.g., House Hearings, supra note 4, at 94 (testimony of Jerry Friedheim, Executive Vice-President, American Newspaper Publishers Association). The term, however, is undefined by the case law. See House Report, supra note 81, at 24-25 (supplemental views of Reps. Hyde, Lungren, Sensenbrenner and Volkmer).

The problem with using "reason to believe" as a standard is illustrated by the disagreement between House members over the meaning of the term. Supporters of Zurcher legislation stated that the "reason to believe" standard "is higher than mere suspicion, but . . . is considerably less demanding than 'probable cause.' " Id. at 8. However, opponents of the legislation stated that the Act would raise the normal "probable cause" standard "to require an additional 'reason to believe.' " Id. at 24. Because of this confusion, it is preferable to employ a standard such as "probable cause" which already enjoys an established meaning. See note 160 and accompanying text supra.

\[^{160}\] See note 160 supra. This established meaning would provide "definitive legal guidelines." House Hearings, supra note 4, at 90 (testimony of Charles Bailey, Editor, Minneapolis Tribune, and Chairman, Freedom of Information Committee of the American Society of Newspaper Editors).
statute, however, would require major revision: the distinction between work product and documentary materials. This distinction is troubling for two reasons. First, the distinction does not further the First Amendment interests which Zurcher legislation was designed to protect, the rights of the press to gather and disseminate information to the public. To safeguard these interests, supporters of Zurcher legislation sought to protect a reporter's confidential sources and to prevent the police from blocking publication by removing materials from the newsroom. The distinction between work product and documentary materials does nothing to meet this goal. Documentary materials are as likely as work product to contain information that may compromise confidential sources if revealed to the police. Likewise, documentary materials may be as essential as work product to publication. Therefore, no justification exists based on the importance of these materials to First Amendment processes for favoring work product over documentary materials.

Second, the distinction is likely to cause severe problems of proof for the police. Whether or not certain items are work product or documentary materials depends entirely on the subjective intention of the party in possession to disclose the information to the public. As a practical matter, obtaining evidence of such intent is impossible in the earlier stages of investigations when warrants normally are sought. A final determination of the nature of the items sought, therefore, could not be made un-

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164 For example, an internal newspaper memorandum detailing the identity of confidential sources for the purpose of determining their reliability, although a "documentary material," see Privacy Protection Act, supra note 5, at § 107(a), would not be considered "work product" because the information was not created for public communication. See id. § 107(b)(2). Such a memorandum, however, would be highly damaging to the persons named if the police saw it.
165 For example, the documents used as the basis for the Pentagon Papers case, although "documentary materials," would not have been considered "work product" because they were secret and therefore were not created for public disclosure. See id. If these materials were removed before journalists had a chance to take notes on them, the Pentagon Papers story could never have been published.
166 There was no suggestion from journalists testifying before Congress that they feared searches for work product more than those for documentary materials. In fact, some commentators point out that newsrooms are unlikely to separate work product from documentary materials, and that "any search that is conducted under the . . . statute is likely to uncover both." House Hearings, supra note 4, at 45 (prepared statement of John H. F. Shattuck, Director, American Civil Liberties Union, Washington Office).
167 See notes 126-30 and accompanying text supra.
168 See House Hearings, supra note 4, at 349 (prepared statement of Robert W. Johnson, County Attorney of Anoka County, Minnesota).
til after the search was executed and the party searched litigated the question in court. To avoid this confusion, the distinction should be abandoned and all items sought from third parties should be subject to the same exceptions. Because the exceptions provided by the statute for documentary materials are reasonable accommodations of legitimate law enforcement interests, these exceptions should also apply to work product rather than limiting the exceptions for searches of documentary materials to the two limited exceptions provided for work product.

C. Remedies for Violations

To enforce its provisions, Congress provided a civil cause of action for damages stemming from violations of the Act. The drafters hoped to accomplish the dual purpose of compensating victims of illegal searches for their injuries, and of deterring future police illegality. But a civil damage remedy, standing alone, is unlikely to achieve either goal because such remedies traditionally have proved ineffective in the search and seizure context.

The statute provides that any person aggrieved by a violation of the Act may institute a civil action for damages. The Act specifically grants the federal district courts subject matter jurisdiction without the usual $10,000 amount-in-controversy requirement of the Federal Rules of Civil Procedure. This waiver of the jurisdictional amount is desirable because of the problems civil litigants encounter in trying to show more than...
nominal damages for violations of civil rights laws. The statute also provides that the aggrieved party may recover actual damages sustained as a result of a violation. Where only nominal damages can be shown, the plaintiff is entitled to recover liquidated damages of not less than $1,000. In addition, the court in its discretion may award reasonable attorney's fees and other litigation costs.

The problem with this remedial scheme is that civil litigants in search and seizure cases often encounter considerable difficulty in identifying the extent of their injuries in money terms. There often is little direct injury to the person or property of the victim as a result of the search, and injury to reputation is difficult to quantify. Although the statute does provide for liquidated damages of not less than $1,000, this is unlikely to provide sufficient incentive for plaintiffs to sue. Violations of the Act, therefore, are likely to go unremedied.

Even if the plaintiff is able to show substantial damages, other obstacles remain to recovery. The statute permits the plaintiff to proceed directly against the individual officer involved in the illegal search. However, plaintiffs in search and seizure cases are often unable to obtain favorable verdicts against individual officers. The Act specifically provides the individual officer with a "good faith" defense which is difficult to overcome because it requires a showing that the officer did not act reasonably in carrying out the search. In addition, plaintiffs in police mis-

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174 See note 177 and accompanying text infra.
175 Privacy Protection Act, supra note 5, at § 106(f).
176 Id. The statute, however, prohibits the court from holding a governmental unit liable for interest prior to judgment. Id.
177 See Gelles, supra note 114, at 693.
178 Privacy Protection Act, supra note 5, at § 106(a)(2).
179 Id. § 106(b) ("It shall be a complete defense . . . that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct.").
180 See Project, supra note 114, at 803. See also Senate Hearings, supra note 3, at 108-09 (testimony of John H.F. Shattuck, Director, American Civil Liberties Union, Washington Office) ("good faith" defense requires plaintiff to show that the officer acted with actual malice).

This is not to suggest, however, that the "good faith" defense be abandoned. If officers do indeed have a reasonable "good faith" belief in the lawfulness of their conduct, they should be protected because otherwise the police might hesitate to act in critical situations, thereby crippling effective law enforcement. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 429 (1971) (Black, J., dissenting). The problem is that many juries misapply the defense by focusing on the subjective good faith of the officer and ignoring the objective standard of reasonableness which the defense requires. See Project, supra note 114, at 802-03. The defense thus makes it doubly difficult for civil litigants to obtain a favorable judgment, which diminishes the compensatory and deterrent function of the civil damage remedy. Because the "good faith" defense makes sense, however, a different, complementary remedy to civil damage
conduct cases face considerable hostility from juries traditionally sympathetic to law enforcement.\textsuperscript{181} Finally, even if the plaintiff succeeds in obtaining a favorable verdict, actual recovery is unlikely. Most policemen and other civil servants are "judgment proof" because they are not paid enough to satisfy large damage awards.\textsuperscript{182} These problems make the civil damage action against individual officers ineffective to accomplish either the compensation or deterrence goal of the remedy.

The Act also provides that the plaintiff may proceed against the governmental unit responsible for the offending officer. Where a federal officer violates the statute, the aggrieved party may sue the United States directly.\textsuperscript{183} Where the action is against a state officer or employee, however, the state can be held responsible for damages resulting from the violation only if it has waived its sovereign immunity.\textsuperscript{184} If the state has not waived its immunity, the plaintiff must proceed against the individual officer involved.\textsuperscript{185} By enabling litigants to sue the governmental entity involved, Congress sought to provide a "deep pocket" of funds to pay for any actual damages sustained. Where the governmental unit is the United States government, this "deep pocket" is readily available because the litigant can sue the federal government without regard to whether or not it has waived its sovereign immunity.\textsuperscript{186} When the plaintiff attempts to hold a state or local government responsible, however, the statute only permits suits when the governmental unit has waived its sovereign immunity. Few states have waived their im-

relief should be employed.

\textsuperscript{181} Juries generally are biased against plaintiffs in police misconduct suits because of the image of authority and respectability projected by policemen, the “good faith” defense available to the defendant, and the plaintiff’s reputation, race or lifestyle. See Project, supra note 114, at 783-84. See also Gelles, supra note 114, at 692-93; Note, “Damages or Nothing”—The Efficacy of the Bivens-Type Remedy, 64 CORNELL L. REV. 667, 692 (1979); Note, Reviewing Civilian Complaints of Police Misconduct—Some Answers and More Questions, 48 TEMPLE L.Q. 89, 93 (1974).

\textsuperscript{182} See Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. REV. 785, 787 (1970); Gelles, supra note 114, at 694.

In many cases, of course, either the individual officer is insured or is indemnified by the police department for any damages incurred as a result of an illegal search. See Project, supra note 114, at 810-12. While this provides a source of funds for potential litigants, it decreases the deterrent value of the civil damage remedy by insulating the offending officer from personal liability for the misconduct. Id. at 814-15.

\textsuperscript{183} Privacy Protection Act, supra note 5, at § 106(a)(1). The Act permits the Attorney General to settle a claim for damages brought against the federal government. It also requires that the Attorney General promulgate regulations for imposing administrative sanctions against the offending officer. Id. § 106(g).

\textsuperscript{184} Id. § 106(a)(1). See also SENATE REPORT, supra note 81, at 14.

\textsuperscript{185} Privacy Protection Act, supra note 5, at § 106(a)(2).

\textsuperscript{186} Id. § 106(a)(1).
munity from liability for the acts of their officials in other contexts, and are unlikely to do so in the situation presented here. The plaintiff, therefore, will in most cases have to look to the individual officer for relief.

Several solutions to these problems are possible. First, to increase the likelihood that litigants will be able to reach an adequate source of funds to pay for damages, Congress should amend the statute to permit direct suits against the state or local government responsible for the offending officer, regardless of whether or not it has waived its sovereign immunity. This will insur that the officer's lack of resources will not deter potential plaintiffs from suing; it also will have the salutary effect of encouraging state and local governments to exercise greater supervision of police practices to minimize the risk of lawsuits. Second, Congress should at least double the amount of liquidated damages that a successful plaintiff is sure to receive. The current amount is slightly more than nominal, and increasing the amount of liquidated damages would provide greater incentive for plaintiffs to sue. An increase would also make proof of actual damages less significant. Finally, Congress should enhance the deterrent effect of the remedy. Because of the difficulties that civil litigants have in proving actual damages beyond the liquidated amount, the police may find that it is worth paying a few thousand dollars to obtain crucial evidence from a third party. Under the present scheme the police can "buy out" the privacy rights protected by the Act if they think that the benefits of obtaining the evidence outweigh the cost. To prevent this, Congress should first provide for punitive damages assessable against the individual officer in cases of particularly egregious conduct. Punitive damages supplement compensatory

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187 For example, while some jurisdictions permit suits directly against the state for the acts of state officials, see Herman v. State, 78 Misc. 2d 1025, 357 N.Y.S.2d 811 (Cl. Cl. 1974), most jurisdictions do not. See W. Ringel, Searches & Seizures, Arrests and Confessions § 167.03 (Supp. 1978).

188 Congress may, under § 5 of the Fourteenth Amendment, authorize direct suits against the state for search and seizure violations. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976): "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States . . . ." For a discussion of constitutional issues raised by the Privacy Protection Act, see pt. II D infra.

189 See Project, supra note 114, at 817-18.

190 In the Senate version of the Act, violators were subject to "such punitive damages as may be warranted." S. 1790, § 106(f), 96th Cong., 2d Sess. (1980), reprinted in Senate Report, supra note 81, at 3. The aggrieved party under this version was entitled to collect such damages either from the individual officer or the governmental unit responsible for the officer. Senate Report, supra note 81, at 14-15. However, municipalities should
damages and insure that the police will not be able to “buy their way out” of violations of the Act for less than substantial sums.\textsuperscript{191} In addition, Congress should provide that evidence obtained in violation of the statute cannot be used in any subsequent criminal proceeding.\textsuperscript{192} This third-party exclusionary rule—similar to the one now available in some circumstances to criminal suspects—\textsuperscript{193} could be invoked by the aggrieved party where there is a substantial, intentional violation of the Act.\textsuperscript{194} This would remove the temptation to risk a minimal damage award to obtain crucial evidence while at the same time insuring that merely technical or “good faith” violations of the statute do not result in the exclusion of valuable evidence.\textsuperscript{195} By supple-

\textsuperscript{191} Punitive damages ordinarily should be reserved for those occasions where the officer’s conduct was intentional or malicious. Cf. Gelles, supra note 114, at 686 n.261 (discussing proposals to limit the exclusionary rule to “substantial violations”).

\textsuperscript{192} The statute currently provides that “[e]vidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this Act.” Privacy Protection Act, supra note 5, at § 106(e). The drafters recognized that the failure to provide for the exclusion of illegally seized evidence could permit the government to deliberately violate the Act so it can obtain evidence to be used against another party, but they said they expected “that the Department of Justice and state and local law enforcement authorities will not allow the provisions regarding exclusion of evidence . . . to be manipulated in bad faith by their officers and agents.” Senate Report, supra note 81, at 15.

\textsuperscript{193} The exclusionary rule prohibits the introduction of evidence at the trial of a criminal suspect which was seized in violation of the defendant’s Fourth Amendment rights. Mapp v. Ohio, 367 U.S. 643 (1961).

\textsuperscript{194} Third parties currently lack standing to invoke the exclusionary rule to exclude evidence obtained in violation of their rights because the evidence is not being used against them. Stanford Daily v. Zurcher, 353 F. Supp. at 130-32. Moreover, the suspected criminal also may lack standing to invoke the rule for evidence seized in an illegal third-party search because normally his Fourth Amendment rights were not violated. Cf. Alderman v. United States, 394 U.S. 165 (1969) (co-defendants and co-conspirators cannot prevent evidence seized illegally from another defendant from being introduced against them). Absent a specific provision in the statute, therefore, evidence seized illegally from third parties could rarely be excluded by reliance on the exclusionary rule. Although they specifically rejected a third-party exclusionary rule for the statute, see note 192 supra, the drafters were concerned that standing requirements for assertion of the exclusionary rule could become “a sword to be used by the government to permit it deliberately to invade one person’s Fourth Amendment right in order to obtain evidence against another person.” Senate Report, supra note 81, at 15, (quoting United States v. Payner, 447 U.S. 727, 738 (1980) (Marshall, J., dissenting)).

\textsuperscript{195} This is the same standard as that suggested for deciding whether or not to award punitive damages, except that the judge or magistrate should consider the public interest in obtaining evidence for the prosecution of serious crimes when deciding whether the rule should apply. See note 190 supra. See also S. 861, 93rd Cong., 1st Sess. (1973) (“Evidence shall not be excluded . . . unless the court finds, as a matter of law, that such violation was substantial”).
menting the civil damage remedy in these ways, Congress can provide greater assurance that the statute will not be violated and that victims of illegal searches will be compensated for their injuries.\textsuperscript{196}

The reason for limiting the third-party exclusionary rule to those situations where the violation was "substantial" is that commentators have questioned the continued application of the exclusionary rule to all illegal searches. See Oaks, \textit{Studying the Exclusionary Rule in Search and Seizure}, 37 U. CHI. L. REV. 665 (1970); Spiotto, \textit{The Search and Seizure Problem—The Canadian Tort Remedy and the U.S. Exclusionary Rule}, 1 J. POLICE Sci. & Ad. 36 (1973). Several Supreme Court justices also have criticized the rule when applied to situations involving "good faith" violations. See California v. Minjarez, 443 U.S. 916 (1979) (mem.) (Rehnquist, J., dissenting from the denial of certiorari); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 415-18 (1971) (Burger, C.J., dissenting). Despite these criticisms, many commentators believe that effective alternatives to the rule do not exist. See Canon, \textit{Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion}, 68 KY. L.J. 681 (1974); Gelles, \textit{supra} note 114, at 689-720. See also Mapp v. Ohio, 367 U.S. 643, 651-52 (1961) ("other remedies have been worthless and futile" in deterring illegal police searches).

Because the exclusionary rule ordinarily is not available to third parties, see note 194 and accompanying text \textit{supra}, a statutory third-party exclusionary rule would greatly expand the situations where the rule would apply. This extension of the rule should not occur at a time when its continued efficacy is increasingly questioned without some limitations. A "substantial violation" test, while not wholly satisfactory because it is somewhat subjective, see Gelles, \textit{supra} note 114, at 706-09, would provide some limits while at the same time insuring that the rule is available for extreme violations of the Act.

For the same reasons, only the third party whose rights were violated should be permitted to invoke the statutory exclusionary rule. To permit the party to whom the materials relate—that is, the suspected criminal—to invoke the rule would unjustifiably broaden its scope and would provide the criminal with a "windfall" when the criminal's Fourth Amendment rights were not violated by the search.

Aside from the civil damage remedy and the exclusionary rule discussed \textit{supra}, three other possible remedies exist. The first is a criminal sanction. See, e.g., S. 3222, 95th Cong., 2d Sess. (1978) (up to one year imprisonment for violations). The problem with this remedy is that it requires prosecutors to institute a criminal action against persons with whom they work closely every day. See Gelles, \textit{supra} note 114, at 713-14; Note, \textit{Reviewing Civilian Complaints}, \textit{supra} note 181, at 93-94.

The two other possibilities are injunctive and declaratory relief. See, e.g., H.R. 322, 96th Cong., 1st Sess. (1979) (court shall award "such relief as may be appropriate, including . . . equitable or declaratory relief"). These remedies, however, generally are regarded as ineffective to correct or prevent illegal police searches. See Gelles, \textit{supra} note 114, at 715-17; Note, \textit{Reviewing Civilian Complaints}, \textit{supra} note 181, at 94-97. But see Note, \textit{The Federal Injunction as a Remedy for Unconstitutional Police Conduct}, 78 YALE L.J. 143 (1968) (federal injunction effective in certain circumstances).

Of course, the ineffectiveness of such remedies does not mean they should not be provided for in the statute. The more avenues a potential litigant has open, the more likely the statute will be enforced. See, e.g., H.R. 368, 96th Cong., 1st Sess. (1979), which provides a combination of remedies, including general damages, equitable and declaratory relief, punitive damages up to $100,000, costs and attorney's fees, plus a third-party exclusionary rule.

Regardless of what additional remedies Congress provides, it should include a specific provision establishing a statute of limitations for actions under the Act. The Act currently is silent on the time limit for bringing suit against violators, and this could prove to be a problem. In general, where a federal statute is silent on the question, the statute
D. Constitutional Basis for the Act

The Privacy Protection Act imposes a federal "subpoena first" rule on all levels of government — federal, state and local. This uniform application of the statute is desirable because otherwise residents of a state that has enacted Zurcher legislation would be protected from unrestricted third-party searches while residents of a neighboring state that has failed to enact such legislation would not. Such disparity of treatment is intolerable where federal constitutional rights are at stake, particularly when most third-party searches are likely to occur at the state and local level. A key concern of supporters of a uniform federal response, however, has been whether Congress has exceeded its constitutional authority by restricting search and seizure at the state and local level. The statute relies on Congress' power to regulate interstate commerce as authority for imposing a federal "subpoena first" rule on the states. Under the commerce

of limitations of the particular state where the violation occurred applies. Runyon v. McCrory, 427 U.S. 160, 180-82 (1976) (§ 1981 suits); Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975) (§ 1981); Auto Workers v. Hoosier Corp., 383 U.S. 696, 704-05 (1960) (§ 301 of the Labor Management Relations Act); Cope v. Anderson, 331 U.S. 461, 463-64 (1947); McClaine v. Rankin, 197 U.S. 154, 158 (1905). Having different statutes of limitations apply in different states, however, is undesirable because the purpose of the Privacy Protection Act is to provide a uniform federal rule applicable equally in all states; it also may create problems when searches are conducted by police from different jurisdictions. To avoid this result, Congress should specifically provide a statute of limitations in the Act. See, e.g., H.R. 322, 96th Cong., 1st Sess. (1979) ("A person aggrieved by a violation . . . may bring an action . . . no later than three years after such violation is committed, or one year after such violation is discovered, whichever is later.").

At least eight states have passed legislation restricting third-party searches. See CAL. PENAL CODE § 1524 (West Supp. 1980); CONN. GEN. STAT. § 54-33a (1979); ILL. REV. STAT. ch. 38, § 108-3 (1979); NEB. REV. STAT. §§ 20-144 to -147 (1977); N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1979-80); OR. REV. STAT. § 44.520 (Supp. 1979); TEX. CRIM. PROC. STAT. ANN. § 18.01(e) (Vernon Supp. 1980); WIS. STAT. § 968.13 (1979). The great majority, however, have not.

For example, all instances of newsroom searches since 1970 have occurred at the state or local level. Senate Hearings, supra note 3, at 43-46 (prepared statement of Philip Heymann, Assistant to the U.S. Attorney General). See also the testimony of Anthony Day, Chairman, Freedom of Information Committee, American Society of Newspaper Editors, id. at 128 ("It is the States and not the Federal Government from which we expect most of our problems").

See House Hearings, supra note 4, at 335-42 (memorandum from Mitchell Arnold, Communications Law Clinic of New York Law School). The only real dispute is whether Congress can impose a federal criminal procedure rule on state officials; Congress clearly has jurisdiction to regulate federal criminal procedure under 18 U.S.C. §§ 3001-3771 (1976). Id. at 336.

The statute's protections are limited to persons involved in activities "in or affecting interstate or foreign commerce." Privacy Protection Act, supra note 5, at § 101. The drafters relied on the commerce clause "because disseminating information regularly af-
clause, Congress has wide latitude in defining when certain intrastate activities unnecessarily burden interstate commerce, and in fashioning an appropriate remedy to remove the burden. However, there are two problems with relying on the commerce clause. First, the Supreme Court recently has attempted to cut back on Congress' power to regulate purely intrastate activities through the commerce power by interposing an independent state autonomy barrier to federal legislation that operates "to directly displace the States' freedom to structure integral operations in areas of traditional government functions." The extent of this limitation is unclear, but it casts doubt on the authority of Congress by virtue of its commerce power to impose a federal "subpoena first" rule on the states. More importantly, the commerce clause only reaches those subjects that can arguably be characterized as affecting interstate commerce. This includes "even activity that is purely intrastate in character . . . where that activity, combined with like conduct by others similarly situated, affects commerce among the states." But the reach of this power is not unlimited; certain purely intrastate matters are insulated from Congress' commerce power. The statute as it reads now only affects persons involved in the dissemination of information "in or affecting interstate or foreign commerce." Because most forms of public communication are considered interstate commerce, reliance
on the commerce power is justified. If, however, the statute is expanded to cover all third parties, whether or not they are involved in information dissemination, a then reliance on the commerce clause would be inadequate. Because of the potentially large class of people affected by the statute, it is unlikely that all of them are involved in activities "affecting commerce among the states." It would unduly complicate warrant proceedings to require a case-by-case determination that a particular third party is involved in interstate commerce, and therefore an alternative source of congressional power should be relied on if the statute is amended to encompass all third parties.

Although commentators have suggested other sources, the Fourteenth Amendment is the source of congressional power which is best suited to insuring that all third parties can be protected by the statute. Section 5 of the Fourteenth Amendment is a grant of federal power over the states equal to that of the necessary and proper clause. The Supreme Court, however, has been more willing to sanction direct congressional incursions into areas of state autonomy under section 5 than under other grants of federal power such as the commerce clause because the Fourteenth Amendment is expressly directed at the states.

As...
a result, the Court has permitted Congress to adopt broad remedial measures under section 5 to effectuate the objectives of the Fourteenth Amendment. 216

In the context of third-party searches, a strong argument exists that Congress can restrict state and local police under its section 5 remedial powers. As previously noted, 217 unrestricted third-party searches pose significant dangers to both First and Fourth Amendment rights even when those searches are lawful. In addition, these dangers are most likely to arise at the state level. 218 Because both First and Fourth Amendment rights are protected by the Fourteenth Amendment from state encroachment, 219 Congress is empowered to employ broad remedial measures to protect these rights from infringement. Congress, therefore, could determine that unrestricted third-party searches at the state level threaten First and Fourth Amendment rights, 220 and that a federal "subpoena first" rule is necessary to minimize that threat. In effect, Congress would be using the federal "subpoena first" rule as a prophylactic device to mitigate the dangers posed by third-party searches. 221 Most commentators agree that

(power of Congress under Fourteenth Amendment not limited by reserved powers of the states). See also Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (Fifteenth Amendment); Ex parte Virginia, 100 U.S. 339, 345-48 (1879).

216 See, e.g., Katzenbach v. Morgan, 384 U.S. 641 (1966), where the Court upheld a congressional ban on state literacy tests as a prophylactic device to insure that a certain segment of the population was not denied the right to vote. See also South Carolina v. Katzenbach, 383 U.S. 301 (1966), where the Court construed the enforcement clause of the Fifteenth Amendment, which is essentially identical to § 5 of the Fourteenth Amendment, as permitting Congress to fashion specific remedies for enforcing the prohibitions of that amendment.

217 See pts. I B 1-2 supra.

218 See note 199 and accompanying text supra.

219 Both the First and Fourth Amendments are among the "fundamental personal rights and liberties" protected by the Fourteenth Amendment. See Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment); Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment); Lovell v. City of Griffin, 303 U.S. 444 (1938) (First Amendment); Gitlow v. New York, 268 U.S. 652 (1925) (First Amendment).

220 The courts are unlikely to question such a finding. Traditionally, the courts have accorded Congress a presumption that facts necessary to support the constitutionality of legislation exist. See Munn v. Illinois, 94 U.S. 113, 132 (1876) ("if a state of facts could exist that would justify such legislation, it actually did exist when the statute under consideration was passed"). The reason for this presumption is the legislature's superior factfinding abilities. See generally Cox, The Role of Congress in Constitutional Determinations, 40 CINN. L. REV. 199, 208-09 (1971).

221 See note 216 and accompanying text supra. Of course, Zurcher specifically held that the Constitution does not require a "subpoena first" rule. This should not, however, prove an obstacle to congressional action because the Court in other contexts has permitted Congress under § 5 to restrict or outlaw state practices which the Court previously had found constitutional. For example, in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court upheld the constitutionality of a congressional ban on literacy tests for voting
Congress has ample authority under section 5 to impose a federal "subpoena first" rule on both state and federal law enforcement officials.\footnote{222}

**Conclusion**

In *Zurcher*, the Supreme Court invited legislative action to provide nonconstitutional protections against unrestricted third-party searches.\footnote{228} Congress responded to this invitation with the Privacy Protection Act. This response is an admirable first step

even though the Court previously had declared such tests constitutional. The Court said that

a construction of § 5 that would require a judicial determination that enforcement of a state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. \footnote{Id. at 648.} Congress can therefore restrict third-party searches even though the Court has declared such searches constitutional.

\footnote{228 See House Hearings, supra note 4, at 339-42 (memorandum of Mitchell Arnold, Communications Law Clinic, New York Law School); Senate Hearings, supra note 3, at 365-79 (testimony of Paul Bender, law professor, University of Pennsylvania Law School, and William Cohen, law professor, Stanford University Law School).} The Court recently has attempted to set limits on congressional power under § 5, but the extent of these limitations is unclear. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), a sharply divided Court (five Justices wrote separate opinions) invalidated that portion of the Voting Rights Act Amendmends of 1970 which lowered the minimum voting age in state elections from 21 to 18 as an unconstitutional assertion of congressional power under § 5. The fragmented nature of the opinion, however, negates much of its force as precedent. \footnote{See Cox, supra note 220, at 223-39 (Mitchell an "eclectic" ruling that does not signal a significant restriction on congressional power under § 5). See also Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 STAN. L. REV. 603, 617-18 (1974).} The Justices in *Mitchell* were unanimous in upholding the power of Congress to suspend otherwise lawful literacy tests as a means of eliminating the threat of racial discrimination in voting. This is further support for the theory that Congress could adopt a "subpoena first" role as a prophylactic device designed to prevent police abuses in the context of third-party searches. \footnote{See Senate Hearings, supra note 3, at 376-77 (testimony of William Cohen, law professor, Stanford University Law School).}

More importantly, *Zurcher* is distinguishable from *Mitchell*. In *Mitchell*, the congressional legislation conflicted with a specific constitutional provision, art. I, § 2, which gives the states the power to set qualifications for voting in state elections. In *Zurcher*, however, only the more nebulous reserved powers of the states under the Tenth Amendment block the assertion of congressional authority, and it was these reserved powers that were significantly reduced by the Fourteenth Amendment. \footnote{See note 215 and accompanying text supra. See also Senate Hearings, supra note 3, at 112 (testimony of John H.F. Shattuck, Director, American Civil Liberties Union, Washington Office).} In addition, the Justices in *Mitchell* were unanimous in upholding the power of Congress to suspend otherwise lawful literacy tests as a means of eliminating the threat of racial discrimination in voting. This is further support for the theory that Congress could adopt a "subpoena first" role as a prophylactic device designed to prevent police abuses in the context of third-party searches. \footnote{The Court said, "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 procedures. . . ." Zurcher v. Stanford Daily, 436 U.S. at 567.}

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in dealing with the concerns Zurcher raised. Although the governmental interest in effective law enforcement is fundamental and must be preserved, that interest should be effectuated by the least intrusive means possible to insure against inadvertent infringement of important personal rights and liberties. The federal "subpoena first" rule adopted by Congress represents a reasonable accommodation of law enforcement interests and individual rights. It should be lauded for its attempt to balance these two important but sometimes conflicting interests.

The congressional response to Zurcher, however, is incomplete. Although the Act safeguards the First Amendment rights of the press and others involved in information dissemination, it leaves the general public's right to privacy virtually unprotected. This right to privacy is a fundamental right of equal stature with the First Amendment rights of the press; as such, it must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Congress should re-examine the issue of third-party searches and complete the task it began with passage of the Privacy Protection Act.

—Jose M. Sariego

11 In fact, the Supreme Court has recognized a "less drastic means" doctrine in First Amendment cases. See Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."). See also United States v. Robel, 389 U.S. 258 (1967); NAACP v. Alabama, 377 U.S. 288 (1964); see generally Note, Less Drastic Means and the First Amendment, 78 YALE L.J. 464 (1969).
